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October 30, 2024

Kicking Off Coverage College!

Patti Santelle
Chair Emeritus / Dean of College

Tim Davis
Managing Partner

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Tips for a Successful and Ethical Mediation

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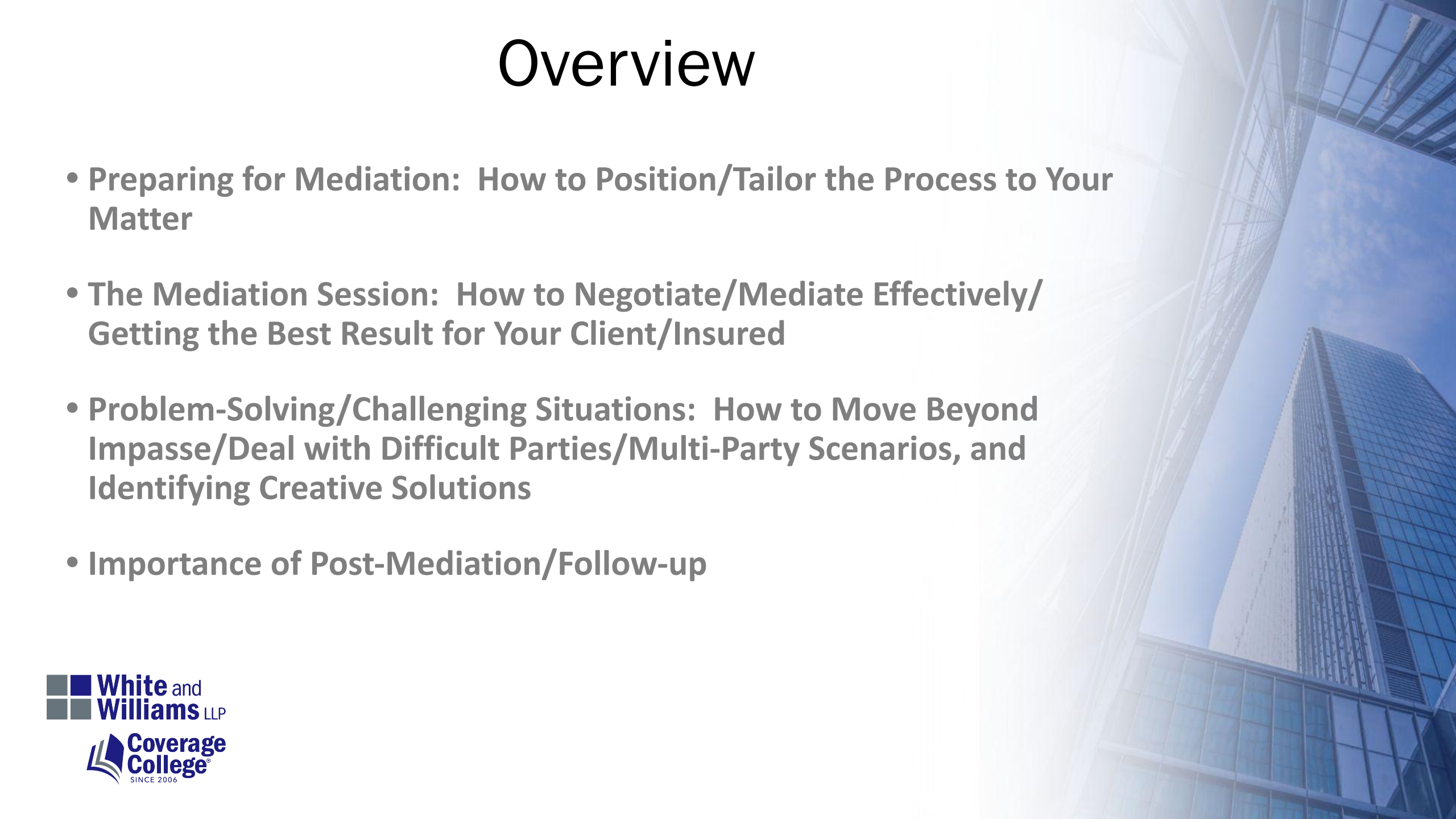
Overview

- Preparing for Mediation: How to Position/Tailor the Process to Your Matter
- The Mediation Session: How to Negotiate/Mediate Effectively/ Getting the Best Result for Your Client/Insured
- Problem-Solving/Challenging Situations: How to Move Beyond Impasse/Deal with Difficult Parties/Multi-Party Scenarios, and Identifying Creative Solutions
- Importance of Post-Mediation/Follow-up



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Preparing for Mediation: How to Position/ Tailor the Process to Your Matter

- Selecting a Neutral
- Timing/When to Mediate
- Pre-Mediation Calls
- What Information Should be Provided and to Whom
- How to Identify/Determine Key Issues/Goals

Preparing for Mediation: Ethical Implications

1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

1.4 Communication

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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Preparing for Mediation: Ethical Implications

1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer.

(a) . . . a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter . . ..

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The Mediation Session: How to Negotiate/Mediate Effectively/Getting the Best Result for Your Client/Insured

- In-Person versus Remote/Hybrid
- Opening Statements
- Joint vs. Individual Sessions
- Maintaining Engagement

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The Mediation Session: Ethical Implications

4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person . . .

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Problem-Solving/Challenging Situations: How to Move Beyond Impasse, Dealing with Difficult Parties/Multi-Party Scenarios, and Identifying Creative Solutions

- **Importance of Understanding the Coverage (as well as Liability) Implications**
- **Challenges of Multi-Party Litigation**
- **Dealing with Difficult Parties**
- **What to Do When You Can't Get Finality**
- **Whether/When to Get a Mediator's Number/ Recommendation**

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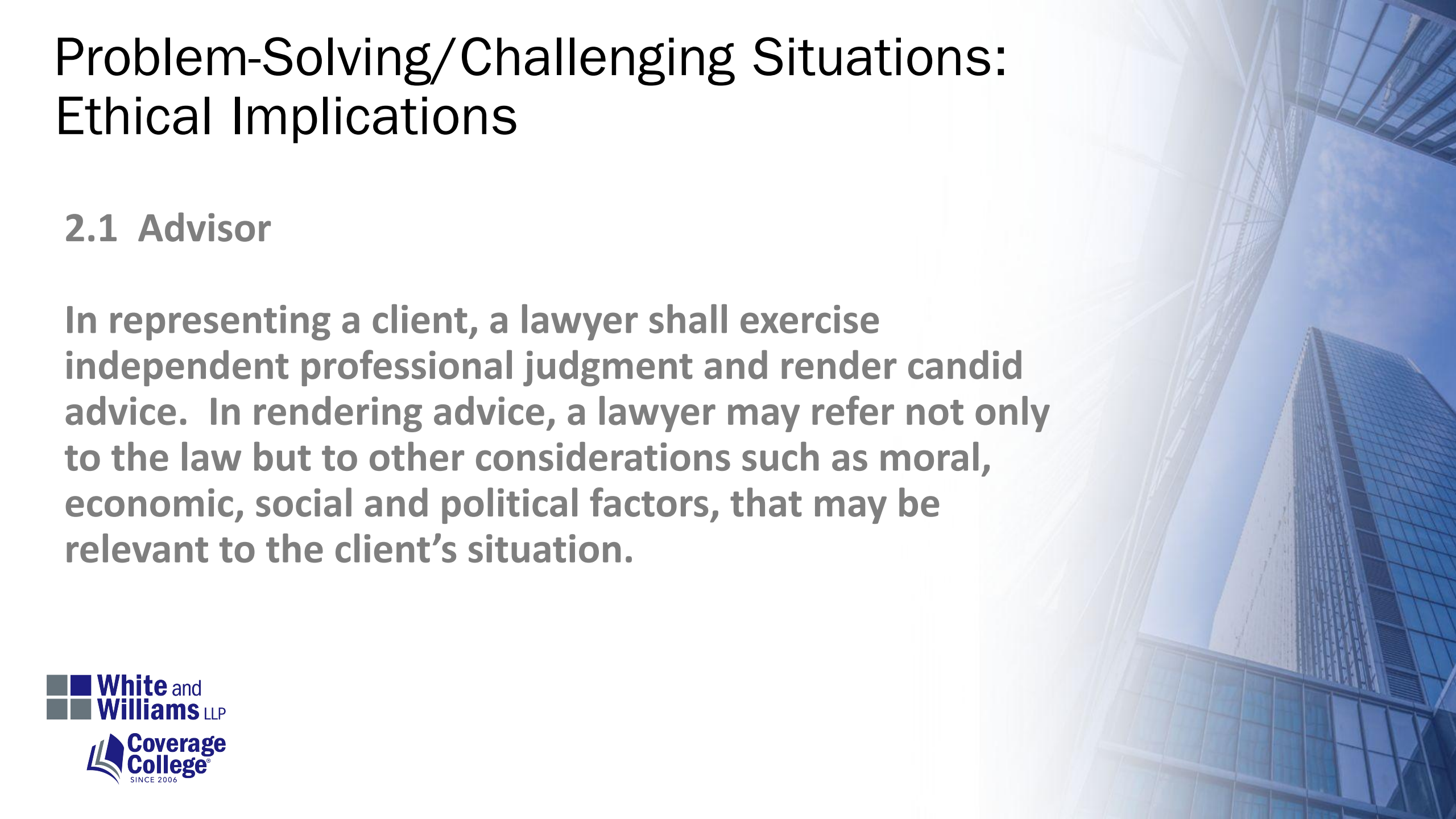
Problem-Solving/Challenging Situations: Ethical Implications

2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.



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Importance of Post-Mediation/Follow-up

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Resources

- Five Tips for Making Better Use of Outside Counsel and Mediators
- Beyond the Courtroom: Embracing Mediation Advocacy
- Early Mediation of Insurance Coverage Disputes
- Mediation of Insurance Coverage Cases

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Thank you!

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Up next… A View from The First State

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A View from The First State: Overview of Delaware Courts and Key Developments in Coverage and Underlying Litigation

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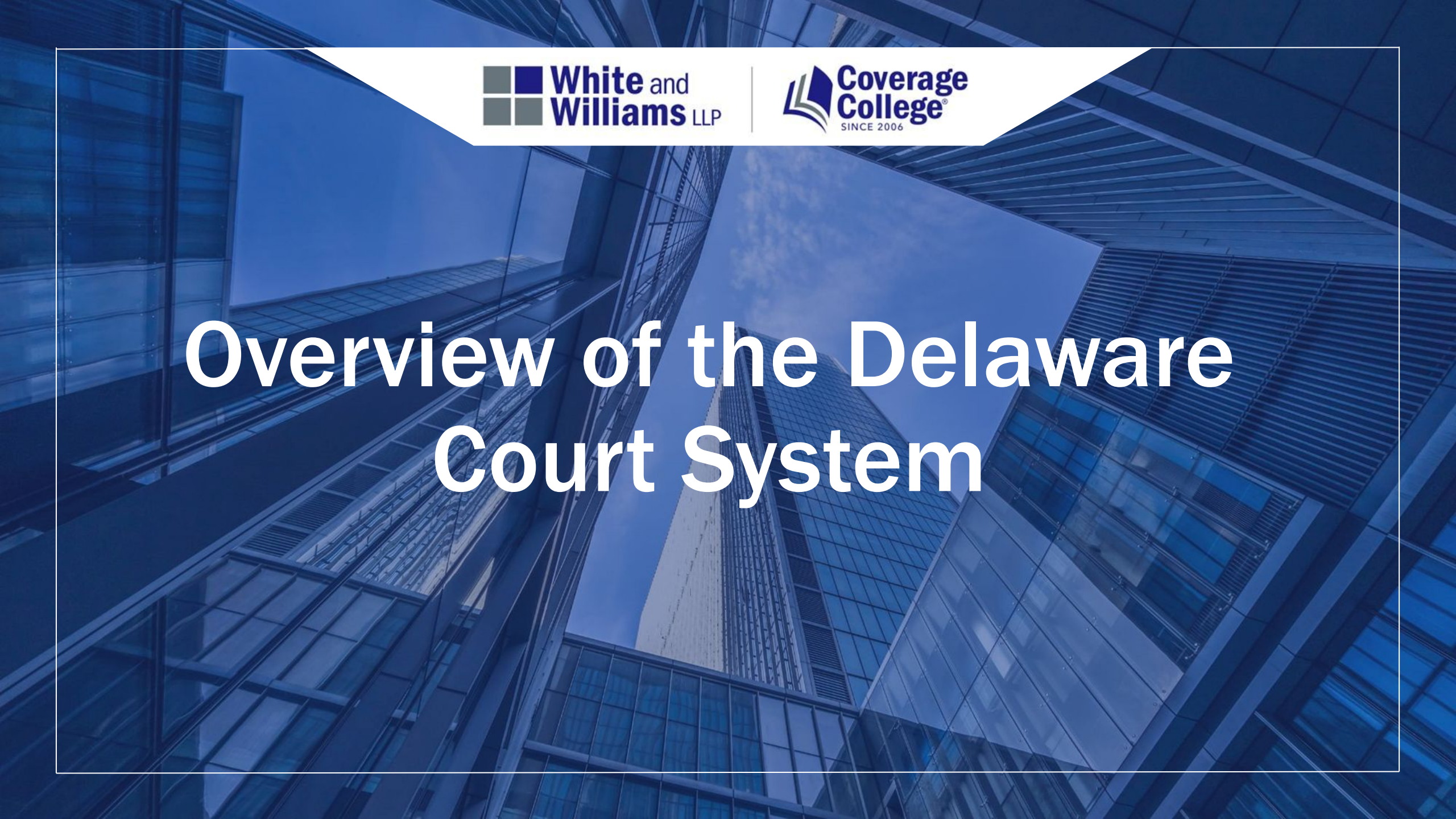
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Overview of the Delaware Court System

Delaware State Judicial System

Delaware Supreme Court

Absolute right of appeal

Delaware Chancery Court

Court of Equity – No Jury Trials

Delaware Superior Court

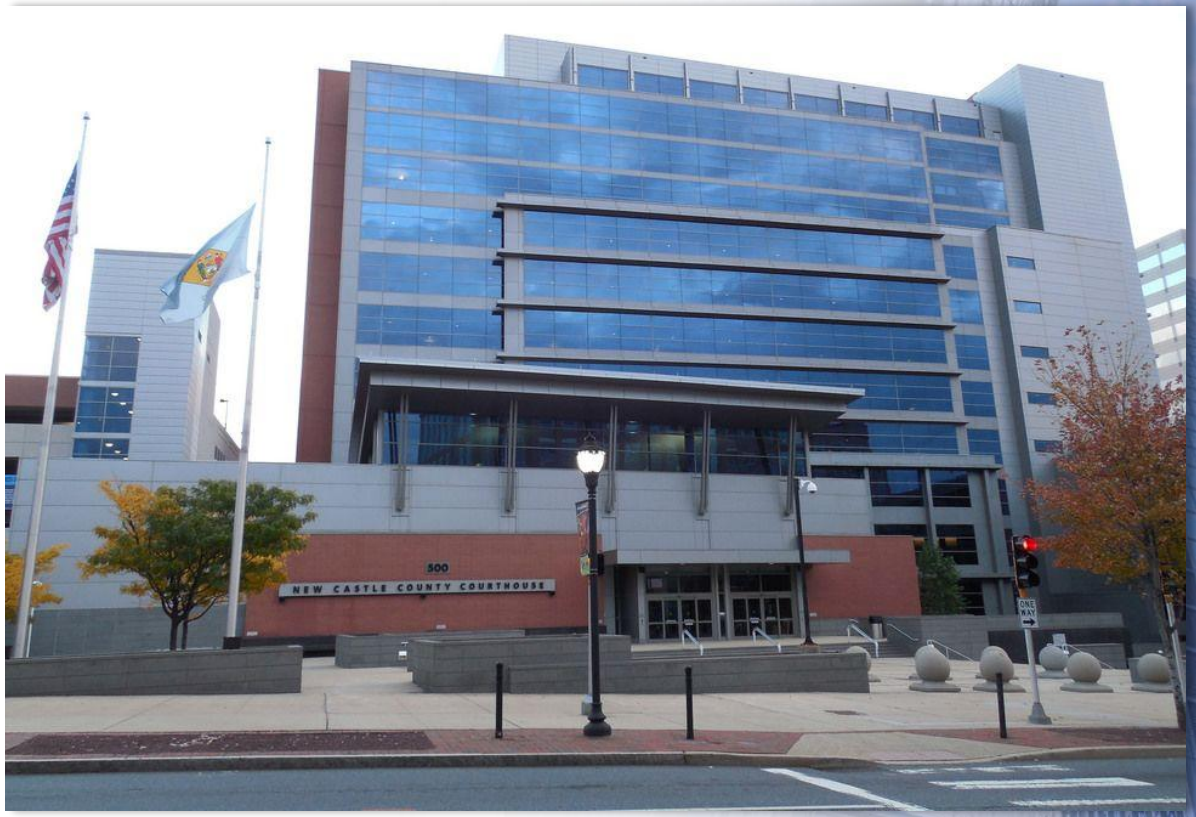
Complex Commercial Litigation Division

Court of Common Pleas

Jurisdiction cap of $75,000

Justice of the Peace

Jurisdiction cap of $25,000



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Complex Commercial Litigation Division (CCLD)

- Amount in controversy must exceed $1,000,000
- Cannot be personal injury cases
- All cases are handled in New Castle County
- Where most insurance coverage cases are litigated here
- Select panel chosen by President Judge
  - Current Panel: Davis, Wallace, Medinilla, Rennie, and Adams
- Priority access to court and trial dates

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Update on Insurance Coverage and Directors & Officers Litigation

OPIOID LITIGATION UPDATE

- **Purdue Pharma, maker of OxyContin, filed a Chapter 11 case in New York.**
- **Purdue's reorganization plan provided for the Sacklers (shareholders) to be released from opioid liabilities in exchange for a contribution of up to $6 Billion.**
- **The Bankruptcy Court approved the plan, and the District Court reversed, holding that nonconsensual third-party releases are not authorized under the Bankruptcy Code. The Second Circuit reversed, reinstating the plan.**
- **Disapproval of third-party releases is likely to change negotiating leverages and strategies in mass tort cases.**

UNITED STATES SUPREME COURT RULING:

- **A 5 to 4 majority decided that "nothing in present law authorizes the Sackler discharge"**
- **Dissent by Chief Justice John Roberts and Justices Brett Kavanaugh, Elena Kagan and Sonia Sotomayor**
  - **"Opioid victims and other future victims of mass torts will suffer greatly in the wake of today's unfortunate and destabilizing decision,"**

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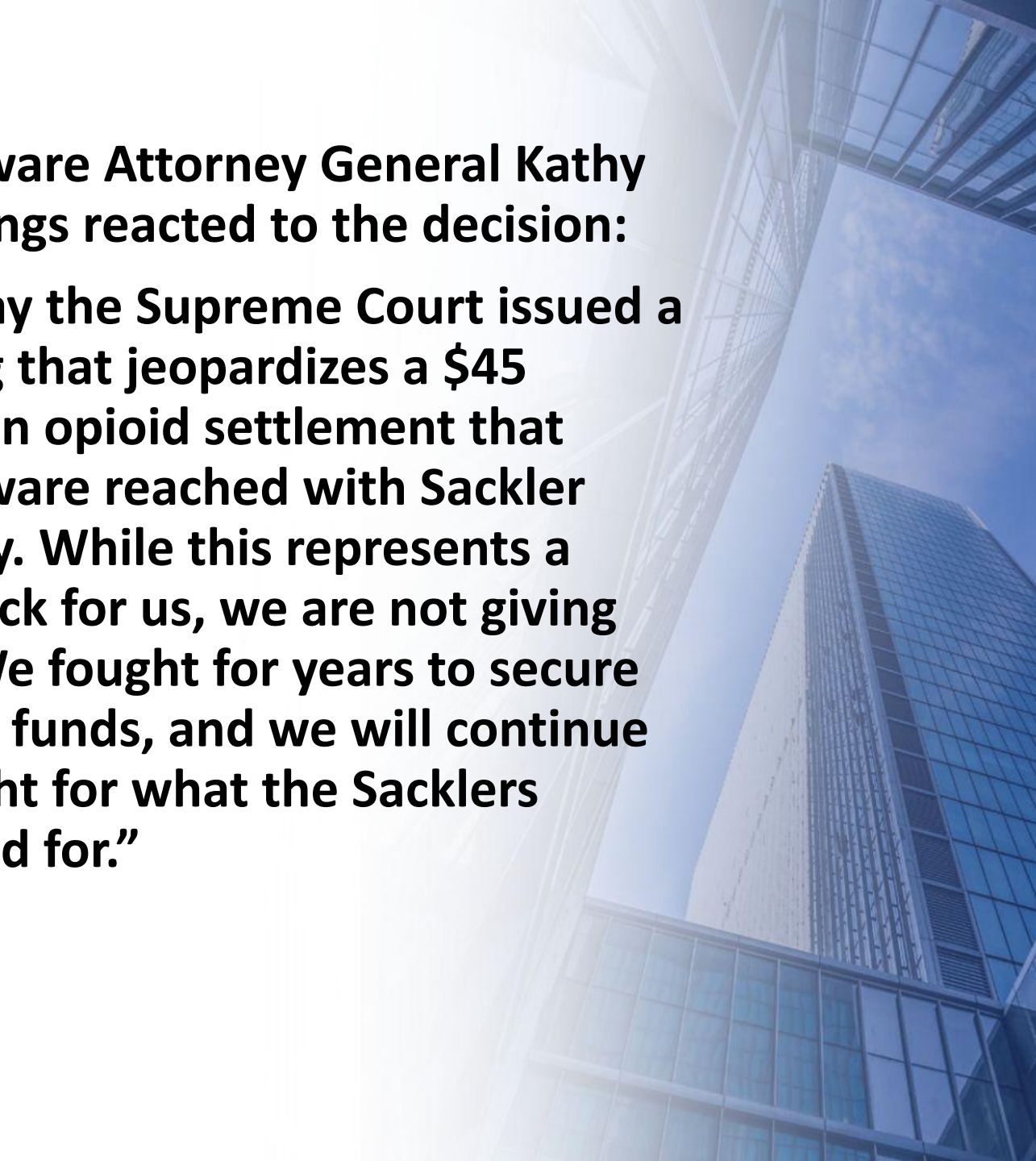
IMPACT ON DELAWARE

Delaware was one of eight states whose efforts secured an extra $1 billion from the Sacklers — effectively doubling Delaware's settlement.

- **Delaware Attorney General Kathy Jennings reacted to the decision:**
- **"Today the Supreme Court issued a ruling that jeopardizes a $45 million opioid settlement that Delaware reached with Sackler family. While this represents a setback for us, we are not giving up. We fought for years to secure these funds, and we will continue to fight for what the Sacklers settled for."**



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DELAWARE ASBESTOS DOCKET

- **Two Judge System: Judges Lugg & Jones**
- **Delaware used to be one of the hottest jurisdictions in the nation**
- **Filings have come to a crawl**
- **Reasons for disfavor among the Plaintiff bar:**
  - **Coordinated Defense effort**
  - **Procedural Structure**
  - **Conservative Verdict Value**

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Insurance Coverage Litigation Update

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> Since I have heard nothing from any outside counsel for Syngenta concerning the topic of our recent discussion[,] I have decided to write to explain this topic a bit further. Our firm has been retained by numerous victims of Parkinson's disease in connection with claims they and their spouses have against Syngenta for personal injuries and related damages. Virtually all of these men are farmers or pesticide applicators who have a positive history of exposure to Paraquat.[16]

> We believe that when all of this scientific information we have learned is publicly disseminated there will likely be a huge number of "copycat" lawsuits causing Syngenta to incur enormous defense costs all over the country and exposure to liability far above its insurance policy limits. As a simple example, if just 2,000 new Parkinson's cases are filed each year (we expect far more) and defense costs of $500,000 per case are incurred, the financial exposure to Syngenta will equal one billion annually before payment of compensatory or punitive losses. As I indicated in our call, we believe the prudent approach is to pursue a few "bellwether" cases. These trials will allow Syngenta and my firm to avoid the enormous time and expense of pursuing cases all over the country while we determine legally whether the chemical is responsible for the onset of Parkinson's disease. While those case are being pursued, I believe we can execute tolling agreements for the numerous (now over 200) remaining cases. Please let me hear from you regarding these matters at your earlier convenience.[18]

Coverage action over whether Syngenta was aware of Paraquat claims prior to the policy going into effect and whether they should have been identified on a policy application

Syngenta received a letter from a plaintiffs attorney a year before the policy went into effect that his firm represented numerous victims who developed Parkinson's disease as a result of exposure to Paraquat

The letter threatened future litigation and was sent from an attorney who Syngenta new well from prior litigation

Delaware Supreme Court affirmed the trial court's ruling and held that the letter, which did not identify any specific claimants, did not constitute a "claim for damages" that occurred prior to the policy that required disclosure.

A "claim for damages" is a demand or request for monetary relief by or on behalf of an identifiable claimant.

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ZANTAC

- The Delaware Superior Court's ruling in June was termed a "Daubert decision," referring to a 1993 U.S. Supreme Court case that provides criteria for determining whether expert testimony is admissible under a federal evidence rule.

- The Delaware Supreme Court has granted interlocutory appeal deciding to review the state's Superior Court decision to allow expert testimony that would support 75,000 personal injury Zantac lawsuits that have been consolidated in the state.

TWO TRACK SYSTEM

- One addresses whether the use of Zantac's original active ingredient, ranitidine, can cause cancer.
- Plaintiffs have retained 10 experts to offer their opinions on whether ranitidine can cause the 10 different cancers named in the cases.
- The other is focused on discovery and identifying bellwether cases to take to early trials.

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Market Place Amendments- SB313

- Restores market practices impacted by three recent Court of Chancery decisions.
  - *Crispo v. Musk*
  - *AP-Fonden v. Activision Blizzard, Inc.*,
  - *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*
- Simplify the approval of a merger by a board of directors, thereby removing the potential for certain technical foot faults.
- Permit parties to a merger agreement to contract for the ability to seek penalties or consequences in the event of a breach and for appointing stockholder representatives.
- Permit corporations to enter into stockholder governance agreements that may otherwise constrain the discretion of a board of directors under Delaware law.

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Impact on Merger Agreements

- **New § 147: Provides that when the DGCL requires the board to approve any agreement (e.g., merger agreements), instrument, or other document, the board may approve it in "substantially final form." The board also may ratify its prior approval of any document that is required to be, or referenced in a certificate, filed with the Secretary of State (e.g., again, a merger agreement), thus avoiding any later uncertainty over whether the document was approved in substantially final form. The ratification of a merger agreement would need to occur before the certificate of merger becomes effective.**
- **New § 232(g): Clarifies that any document enclosed with, or annexed or appended to, a notice will be deemed part of the notice (e.g., appending a merger agreement to a proxy statement accompanying a notice of a stockholder meeting, as is customary, will be deemed to satisfy the notice requirement).**
- **New § 268(a): Provides, among other things, that when stockholders do not receive stock in the surviving corporation as part of the merger consideration (e.g., cash-out mergers), the board of directors is not required to approve the surviving corporation's certificate of incorporation (though the constituent corporation may contract to do so).**
- **New § 268(b): Provides that disclosure schedules and similar documents are not deemed part of the merger agreement and therefore do not require submission to, or approval by, the board of directors or stockholders, unless the merger agreement expressly provides otherwise.**
    - By excluding disclosure schedules from the merger agreement that must be approved by a board of directors, Section 268(b) would permit the board to delegate the approval of the disclosure schedules to the officers or agents of the corporation.

Penalties for Breaches

- **New § 261(a): Permits the parties to a merger agreement to agree in the merger agreement:**
  - that a party to the agreement who fails to perform its obligations may have to pay such penalties or consequences as set forth in the agreement (including payment of any loss of premium due to the failure to consummate the merger);
  - that if a corporation is entitled to receive payment of any penalty, the corporation would be entitled to retain the amount of any payment it receives and need not distribute the payment to stockholders;
  - to the appointment of one or more persons to serve as representative(s) of the stockholders (including those whose shares will be cancelled, converted or exchanged in the merger), and such representatives shall have the authority to enforce the rights of all stockholders pursuant to the merger agreement (including the right to receive payment and enter into settlement agreements);
  - that any appointment of a stockholder representative may be irrevocable as of and after the adoption of the agreement;
  - that the appointment of a stockholder representative may be amended after the merger or consolidation becomes effectives only with the consent or approval of persons specified in the agreement; and
  - the stockholder representative may only represent the stockholders as it relates to the enforcement of their rights under the merger agreement, but not as to their appraisal rights or claims for breach of fiduciary duty (although stockholders may agree to a broader mandate in a separate agreement).

Governance Agreements

- **New § 122(18): Provides that, notwithstanding Section 141(a), a corporation may enter into governance agreements with stockholders: (1) restricting the corporation from taking action under circumstances specified in the contract, (2) requiring specific approvals before taking corporate action, and (3) covenanting that the corporation or one or more persons or bodies (including the board of directors) will take, or refrain from taking, specific actions.**
  - **In addition, new § 122(18):**
    - Requires the corporation to receive minimum consideration, as determined by the board, before entering into a governance agreement;
    - Provides that a corporation can enter into a governance agreement without an authorizing provision in the certificate of incorporation;
    - Allows a governance agreement to provide for a forum for resolving disputes other than Delaware;
    - Allows for remedies against the corporation for breach of a governance agreement;
    - Does not permit a corporation to enter into a governance agreement imposing remedies or other consequences against the directors personally or binding directors as parties to the governance agreement;
    - Still requires board or stockholder approvals for corporate actions that would otherwise be required by the DGCL, notwithstanding the approval or consent rights the contracting stockholder may have (e.g., while the board of directors would still need to approve a merger agreement, the failure to approve a merger agreement required by a governance agreement could give rise to a breach of contract claim, subject to equitable principles);
    - Ensures that, notwithstanding the above, a governance agreement provision is unenforceable if it would be contrary to the certificate of incorporation or the laws of Delaware if the provision were included in the certificate; and,
    - Does not eliminate any fiduciary duties directors, officers, or stockholders may owe to the corporation or its stockholders, including when entering into the governance agreement or deciding whether to cause the corporation to comply with its terms.
- **Amended § 122(5): Confirms that a corporation cannot delegate board-level functions pursuant to Section 141(a) to an officer or agent.**


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Choice of Law

Delaware Choice of Law Analysis In Coverage Cases

THREE STEP ANALYSIS FOR CONTRACTUAL CASES

- First Step – Did the parties make an effective choice of law through their contract?
- Second Step - Is there a true conflict?
  - If no, there is no need to do a choice of law analysis and Delaware law will apply
    - *Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 464 (Del. 2017)

IF THERE IS A CONFLICT …

- Delaware follows the Second Restatement's "most significant relationship" analysis
- Look to where the policies were issued
- D&O Policies – *RSUI Indem. Co. v. Murdock, et al.*, No. 154, 2020, C.A. No. N16C-01-104 CCLD (Del. March 3, 2021)
  - Delaware has the most significant relationship to a coverage dispute involving D&O policies purchased by a Delaware corporation
  - The court specifically rejected the insurer's arguments that California law, which likely precluded coverage, should apply under a policy that was purchased and issued in California to a Delaware corporation that was headquartered in California

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Thank You!

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Up next… PFAS Coverage Litigation: Emerging Lessons From an “Emerged” Risk

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PFAS Coverage Litigation: Emerging Lessons From an "Emerged" Risk

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Introduction

BRIEF OVERVIEW OF PFAS

COVERAGE LITIGATION

KEY COVERAGE ISSUES

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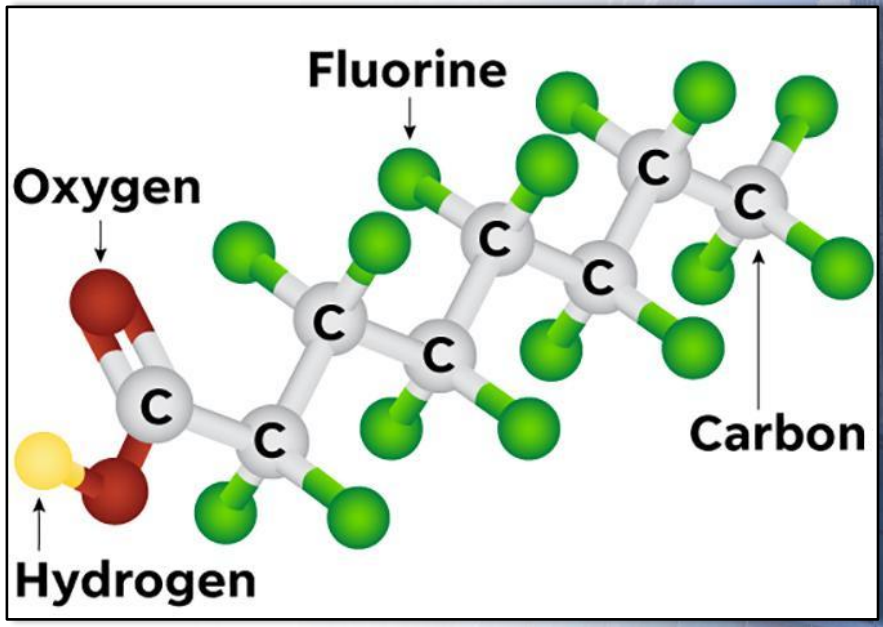
What PFAS Are and Why They Matter

- "PFAS": Per- and poly-fluoroalkyl substances
- A class of several thousand individual types of synthetic chemicals
- Strong carbon-fluorine bonds that resist breaking down in the environment
- Present a risk of significant bodily injury and property damage claims



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Regulatory Framework

- **Federal**
  - Maximum Contaminant Levels (MCLs): 4 ppt for PFOA and PFOS, 10 ppt for PFHxS, PFNA, and GenX, hazard index for combinations of PFHxS, PFNA, HFPO-DA, and PFBS
  - Historically, federal government lagged behind the states; before the MCLs, EPA had set health advisory levels for PFOA and PFOS
- **States**
  - MCLs
  - Consumer regulation

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Underlying Litigation

- AFFF MDL
- Ohio C-8 MDL
- Kidde Bankruptcy
- Deceptive Marketing Suits
- Other

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Underlying Litigation: AFFF MDL

- **Claims:**
  - Water Providers
  - Water Consumers
  - Firefighters
  - “Sovereigns”
  - Property Damage
- **Bellwether Programs:**
  - Water Providers
  - Water Consumers
- **Water Providers Class Settlements**
  - 3M: $10.5-$12.5 Billion
  - DuPont: $1.185 Billion
  - Tyco: $750 Million
  - BASF: $312.5 Million

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Underlying Litigation: Ohio C-8 MDL

- **History**
  - *Leach v. E.I. DuPont de Nemours & Co.*, No. 01-C-608 (W. Va. Cir. Ct., Filed Aug. 31, 2001)
  - Science Panel
- **Bellwether Trials**
  - Bartlett (2015): $1.6 million compensatory; no punitive
  - Freeman (2016): $5.1 million compensatory; $500,000 punitive
  - Vigneron (2017): $2 million in compensatory; $10.5 million punitive
- **Global Settlements: $754 Million**
- **Remnant Cases**
  - Abbott (2020): $40 million
  - Hardwick and Hardwick II
  - Other

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Underlying Litigation: Kidde Bankruptcy

- Kidde-Fenwal, Inc. filed for bankruptcy in the U.S. Bankruptcy Court for the District of Delaware shortly before the first bellwether water provider trial was scheduled in mid-2023.
- AFFF claims against entities currently and historically related to Kidde, including for instance Kidde's current parent Carrier Global Corp., have been stayed.
- The *Purdue Pharma* decision prevents non-debtors like Carrier from obtaining non-consensual third-party releases by contributing to a bankruptcy plan for a bankrupt entity like Kidde

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Underlying Litigation: Deceptive Marketing Suits

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Underlying Litigation: Other

- **Government Enforcement Actions and Other Litigation Involving Industrial Facilities and Agriculture**
  - Footwear manufacturing
  - Chemical production
  - Paper mills
  - Carpet manufacturing
  - Metal plating
  - Fertilizer production
  - Biosolids for farming
- **Turnout Gear Cases**
- **Generalized PFAS Contamination Suits**

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Coverage Litigation

- **Tyco**
- **AFFF MDL – BASF, et al.**
- **Kidde Bankruptcy**
- **Other**

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Coverage Litigation: Tyco

- Parallel actions in South Carolina federal court and Wisconsin state court
- Rulings on number of “occurrences” and allocation
- Pending motions on pollution exclusions, allocation, prior insurance, and duty to defend
- Several settlements

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Coverage Litigation: AFFF MDL and BASF

- Two “direct actions” filed in Wisconsin against multiple entities
- BASF-related coverage actions filed in South Carolina federal court and New York and New Jersey state courts
- “Direct actions” and New York coverage action involving BASF transferred to AFFF MDL
  - Judicial Panel on Multidistrict Litigation (JPML) rejected arguments that coverage actions are insufficiently related to the MDL
  - In BASF NY action, insurers have moved for realignment and to remand for lack of diversity jurisdiction

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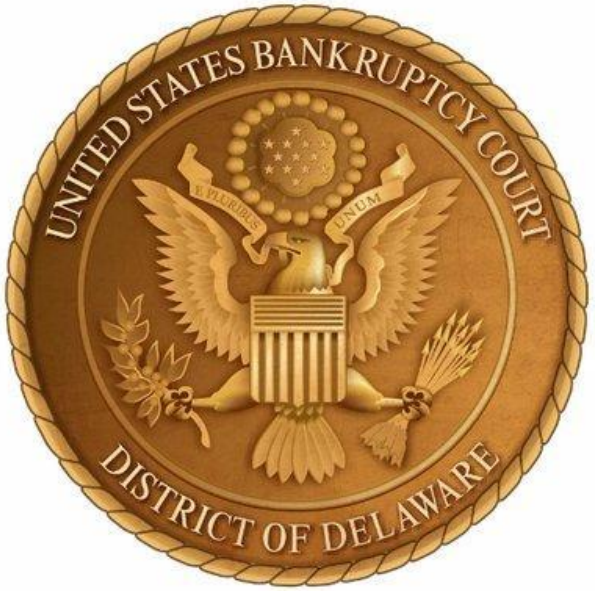
Coverage Litigation: Kidde Bankruptcy



- U.S. District Court for the District of Delaware denied insurers' motion to move case out of the Bankruptcy Court into the District Court until trial
- Insurers have sought bankruptcy mediation documents under Bankruptcy Rule 2004
- Certain insurers filed motions to dismiss or stay based on "trigger" and arbitration provisions in pollution exclusions, which remain pending

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Coverage Litigation: Other

- Examples:
  - Shambaugh & Son (AFFF distribution)
  - Lockheed (weapons production)
  - Shaw (carpet manufacturing)

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Key Coverage Issues

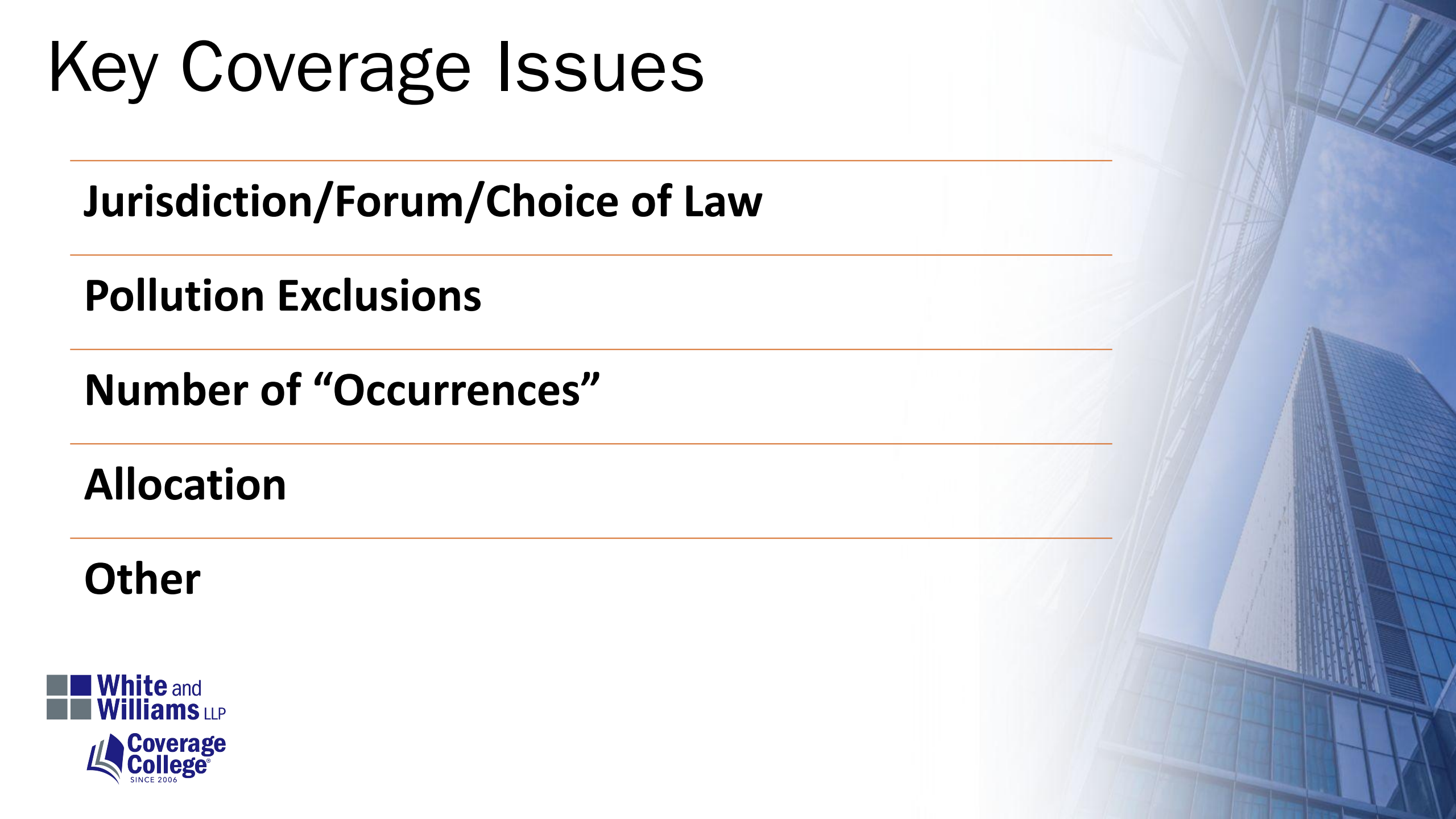
Jurisdiction/Forum/Choice of Law

Pollution Exclusions

Number of “Occurrences”

Allocation

Other



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Key Coverage Issues: Jurisdiction/Forum/Choice of Law

Federal Discretionary Jurisdiction

- Fire-Dex, LLC

AFFF MDL

- 3M
- Tyco
- BASF
- “Direct Actions”

Bankruptcy Jurisdiction

- Kidde: Insurers’ Motion to Remove the Reference to the Bankruptcy Court

State Law Peculiarities

- Shambaugh & Son

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Key Coverage Issues: Pollution Exclusions

Tonoga, Inc. v. New Hampshire Ins. Co.,
201 A.D.3d 1091 (3rd Dep't, N.Y. 2022)

Grange Ins. Co. v. Cycle-Tex, Inc.,
Civ. Action No. 4:21-cv-147-AT (D. Ga. Dec. 5, 2022)

Wolverine World Wide, Inc. v. Am. Ins. Co.,
2021 U.S. Dist. LEXIS 199675 (W.D. Mich. Oct. 18, 2021)

Colony Ins. Co. v. Buckeye Fire Equip. Co.,
2022 U.S. Dist. LEXIS 194709 (W.D.N.C. Oct. 19, 2020)

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Key Coverage Issues: Number of "Occurrences"

***Century Indem. Co. v. Tyco Fire Products LP*,**
Case No. 22-CV-283 (Cir. Ct., Marinette Cnty., Wis. Jan. 24, 2024)

"What is certainly clear to the Court is that the incident in Sioux Falls is completely separate and distinct from the incident in the Town of Ayer and the incidents to any other water providers in the [other] water provider lawsuits are separate and distinct from these two. At a minimum there is a separate occurrence for each separate water provider in a given geographic location."

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Key Coverage Issues: Allocation

***Century Indem. Co. v. Tyco Fire Products LP*,**
Case No. 22-CV-283 (Cir. Ct., Marinette Cnty., Wis. Mar. 21, 2024)

BASF has argued that, because of "all sums" allocation, it was not necessary for BASF to include all of its insurers in its South Carolina coverage action.

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Key Coverage Issues: Other

Insured Risks

- *Steadfast Ins. Co. v. Shambaugh & Son, L.P.*, 2024 U.S. Dist. LEXIS 165096 (D. Conn. Sept. 13, 2024)

"Trigger"

- *Crum & Forster Specialty Ins. Co. v. Chemicals, Inc.*, 2021 U.S. Dist. LEXIS 146702 (S.D. Tex. Aug. 5, 2021)

"Knowledge-Based" Defenses

- *James River Ins. Co. v. Dalton-Whitfield Reg'l Solid Waste Mgmt. Auth.*, 2022 U.S. Dist. LEXIS 238961 (N.D. Ga. Nov. 7, 2022)

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Up next… Mass Tort Bankruptcies After Purdue, Kaiser, and LTL – Implications for Insurers

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Mass Tort Bankruptcies After Purdue, Kaiser, and LTL – Implications for Insurers

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Mass Tort Bankruptcies – What? Why? Who?

- **What**:
  - Large number of claimants injured by the same alleged harm
  - Chapter 11 or a "reorganization" bankruptcy to address the liabilities and distribute payments
- **Why**:
  - Allows the debtor to reorganize and keep the doors open
  - Creates a trust funded by the bankrupt entity and potentially its insurers
  - Channeling injunction funnels all claims and future claims to the Trust
  - Allows for more equitable distribution of payments to the claimants, i.e., avoids a race to the courthouse
- **Who**:
  - Johns-Manville Corporation (asbestos claims);
  - Purdue Pharma (opioid claims);
  - Johnson & Johnson (talc claims);
  - Boy Scouts, USA Gymnastics, Numerous Catholic Dioceses (revived child sexual abuse claims)

Truck Insurance v. Kaiser Gypsum – Backdrop

- Debtor and a Committee representing the claimants often work together to create a Plan of Reorganization
- The Plan includes provisions how to get the debtor out of bankruptcy, including by creation of the trust
- The Plan dictates how the pending liability claims will be treated, e.g., assign rights to the claimants to recover insurance proceeds; how to value claims, recoveries for which can be sought from insurers
- Insurers, who are arguably the most financially affected, are not included in the process
- Examples:
  - Treatment of insurers in the Boy Scouts Plan
  - Treatment of insurers in the Diocese of Camden Plan

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Truck Insurance v. Kaiser Gypsum – Facts

- **Kaiser Gypsum Company, Inc.** and Hanson Permanente Cement, Inc. filed for Chapter 11 bankruptcy
- Reorganization Plan included the creation of a trust; **funding for the trust depended heavily on primary liability insurance policies issued by Truck Insurance Exchange**
- Plan allowed the Debtors to assign their rights under the Truck policies to the trust
- Truck opposed the Plan, arguing **it failed to provide anti-fraud measures for insured claims** that would be litigated in the tort system, thereby potentially exposing Truck to fraudulent claims.
- Bankruptcy court approved the Plan finding it "**insurance neutral**" and therefore not impacting Truck's rights or obligations under the existing policies.
- The district court confirmed the Plan over Truck's objections, finding **Truck lacked standing to challenge the Plan because it was not a "party in interest" under § 1109(b).** Fourth Circuit affirmed.

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Truck Insurance v. Kaiser Gypsum – Holding

- In a June 2024 decision, the Supreme Court **unanimously reversed**
- **Held that an insurer with financial responsibility for bankruptcy claims is a "party in interest" under 11 U.S.C. §1109(b) that "may raise and may appear and be heard on any issue" in a Chapter 11 case.**
- An insurer with financial responsibility for a bankruptcy claim is a "party in interest" because it may be directly and adversely affected by the reorganization plan.
- Insurers like Truck may be the only ones with an incentive to identify problems with a plan that puts them on the hook financially.
- The Court also **rejected the "insurance neutrality" doctrine** stating that it conflates the merits of an objection with the threshold party in interest inquiry and ignores the many other ways plans can affect insurers.

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Truck Insurance v. Kaiser Gypsum – Takeaways / Issues

- Plan proponents continue to challenge insurer standing arguing that insurers' standing is limited by:
  - **Article III standing**;
  - **Prudential standing**;
  - A Bankruptcy Court's **equitable discretion** to control participation in a proceeding, including, but not limited to, Section 105(a); and
  - Whether the insurers has acknowledged coverage, and therefore, **admitted it has a financial stake** in the outcome.
- Does "party in interest" status with the right to be heard confer the **right to propound and participate in discovery**? On all issues?
- As a "party in interest", are insurers "**indispensable**" parties such that the case must be dismissed if the party's participation is not feasible? See, e.g., UST's Brief in Sanchez Energy
- Does *Truck* address whether insurers have **standing to object to proofs of claim**?
- Does the ***Rite Aid*** case indicate another way to get around *Truck*?

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Harrington v. Purdue Pharma L.P. – Backdrop

- **What** are third party releases?
  - A third-party release is a release and injunction that, as part of a Chapter 11 Plan, effectively seeks to discharge claims against a non-debtor, a third-party who has not filed for bankruptcy.
  - A non-consensual third-party release discharges claims without the consent of the affected claimants.
  - Releases a non-debtor from both prepetition and postpetition claims.
- **Why** do they matter?
  - Promote an efficient and timely resolution of plan issues. E.g., Debtor may have an obligation to indemnify a third party. Avoid litigation that may hinder the reorganized debtor.
- **Who** do they benefit?
  - These releases are often used to release claims against the debtor's principals, officers, directors, affiliates, guarantors, insurers, and lenders. E.g., Non-Debtor Parishes and Schools affiliated with the Diocese.

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Harrington v. Purdue Pharma L.P. – Facts

- Purdue Pharma, the manufacturer of OxyContin, filed for bankruptcy resulting from liabilities for contributing to the opioid epidemic.
- The Sackler family, who purchased Purdue Pharma in the 1950s, heavily influenced the company's direction and was instrumental in the development and marketing of OxyContin.
- Prior to the bankruptcy filing, the board of Purdue entered into an expansive Indemnity Agreement to protect its directors and officers from financial liability related to lawsuits.
- Purdue's reorganization plan included a "shareholder release" that, in effect, permanently enjoined certain third-party claims against the Sacklers, who had not filed for bankruptcy, *but* were contributing $6 billion to the plan.
- Several parties objected to the plan, but the bankruptcy court rejected their claims and confirmed the plan. S.D.N.Y. District Court overturned plan confirmation. The Second Circuit reversed and affirmed approval of the plan.

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Harrington v. Purdue Pharma L.P. – Holding

- In June 2024, the U.S. Supreme Court reversed, in a 5-4 decision.
- Held that the Bankruptcy Code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants.
- Discharge is reserved for the debtor and "does not affect the liability of any other entity." Therefore, the Bankruptcy Code does not authorize releases of non-debtors that are equivalent to a discharge.
- The Sacklers, as non-debtors, seek greater protection than the Code typically allows for actual de t meeting the Code's usual requirements.

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Harrington v. Purdue Pharma L.P. – Takeaways / Issues

- **Takeaways**
  - Nonconsensual third-party releases of claims are not permitted under the Bankruptcy Code.
  - Consensual third-party releases remain a valid option.
- **Issues**
  - What constitutes consent? Opt in or opt out? Voting to accept plan? No vote to reject? Parties not entitled to vote on the plan?
  - Purdue involved a stayed reorganization Plan. The Court did "not address whether [the ruling] would justify unwinding reorganization plans that have already become effective and been substantially consummated." E.g., Boy Scouts Oral Argument on 11/06/24
  - What if the plan was confirmed and has not gone effective? E.g., Diocese of Camden
  - What about releases and 105 injunctions in connection with 9019 settlements? E.g., Bird case

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Third Party Releases Now

- **What workarounds are being attempted?**
  - Reliance on silence (failure to object) as consent
  - Opt-out plans
  - Affiliates filing for bankruptcy with pre-packaged plans
  - Attempts at 100% consent / pressure on claimants to opt-in
- **What have we seen courts do with third party releases since *Purdue*?**
  - Judge Warren in WDNY Bankruptcy Court (Diocese of Rochester) noted at an off the record status conference that consent must be affirmative and cannot be obtained by silence
  - *In re Bird Global,* No. 23-20514 (Bankr. S.D.Fla. Aug. 8, 2024) (unpublished order) – Under 11th Cir. precedent, Sections 105 and 363, and Bankruptcy Rule 9019, authorized bankruptcy court to approve releases as part of policy buyback coverage settlements

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Third Party Releases Now

- **What have we seen courts do with third party releases since *Purdue*? (Continued)**
  - Are opt-out mechanisms acceptable?
    - Yes in Texas -- *In re Robertshaw US Holding Corp.*, 2024 Bankr. LEXIS 1958 (Bankr. S.D.Tex. Aug. 16, 2024)
    - Yes in New Jersey – *In re Sam Ash Music Corp.,* No. 24-14727 (Bankr. D.N.J. Aug. 15, 2024)
    - Objections under advisement in NY – *In re Diocese of Syracuse*
  - What about in Delaware?
    - Opt-out disapproved: *In re Smallhold, Inc.*, 2024 Bankr. LEXIS 2332 (Bankr. D. Del. Sep. 25, 2024)
    - OK for unsecured creditors but not for "out of the money" shareholders: *In re Fisker Inc.,* No. 24-11390
    - Approved in *In re FTX Trading, Inc,* No. 22-1068
    - Some debtors have removed opt-outs after UST objected, e.g. *CalAmp Corp.*, No. 24-11136
  - Do state law provisions apply?
    - *In re Tonawanda Coke Corp.*, 662 B.R. 220 (Bankr. W.D.N.Y. 2024) – Opt out impermissible under NY statute

LTL Management LLC Bankruptcy – Status

- In 2021, Johnson & Johnson used the Texas divisive merger statute to assign its talc liabilities to a newly created subsidiary, LTL Management, and then placed LTL into Chapter 11 bankruptcy (the “Texas Two-Step”).
- On 1/30/2023, the Third Circuit reversed the bankruptcy court and dismissed the bankruptcy, holding that LTL was not entitled to bankruptcy relief because it was not in financial distress
- Immediately after the dismissal, LTL filed a second bankruptcy case with a different funding agreement and a significant base of claimant support (“LTL II”). However, the bankruptcy court dismissed LTL II and the Third Circuit affirmed on 7/25/2024.
- On 10/21/2024, J&J filed a third bankruptcy for a new Texas spinoff entity, Red River Talc, as a prepackaged Chapter 11 case with $6.5 billion in funding for claimants. Objections are pending from dissident claimant groups and from the US Trustee.

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LTL Management LLC Bankruptcy – Takeaways

- The Third Circuit's rulings did not directly pass on the validity of the Texas Two-Step. However, a group of claimants have filed suit in federal court in New Jersey seeking to declare it constitutes a fraudulent transfer. (*Rebecca Love, et al. v. LLT Management, LLC, et al.,* D.N.J., No. 24-6320).
- Other circuits may not follow the Third Circuit's financial distress standard. In particular, the Fourth Circuit employs a more restrictive two-prong test that requires the movant to demonstrate both the objective futility of the case and the subjective bad faith of the petitioner to dismiss a Chapter 11 case for lack of good faith. *In re Aldrich Pump LLC,* No. 20-30608, 2023 Bankr. LEXIS 3043 (Bankr. W.D.N.C. Dec. 28, 2023); *In re Bestwall LLC*, 658 B.R. 348 (Bankr. W.D.N.C. 2024).
- Courts have not litigated how availability and amount of insurance coverage factors into the financial distress analysis.
- Nor have courts addressed the financial distress standard outside of "Texas Two Step" type cases (e.g. a diocese with substantial real estate assets).

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Other Insurance-Related Developments in Bankruptcy Cases

- Status of Diocese cases
- Status of Boy Scouts case
- Attempts at extra contractual claims against insurers
- Attempts at Stipulated Judgments via bankruptcy plans

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Up next… Emerging Issues in Pennsylvania Bad Faith Claims

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EMERGING ISSUES IN PENNSYLVANIA BAD FAITH CLAIMS

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BAD FAITH CLAIMS IN THE ABSENCE OF COVERAGE

- Let's start with the often-cited general rule:

Where a court finds that an insurer was not obligated to cover a disputed claim, "by definition the insurer had a reasonable basis to deny the benefits" available under a policy and, hence, could not be liable for bad faith claims handling. *Walker v. Foremost Ins. Co. Grand Rapids*, 2022 U.S.Dist. LEXIS 36390, at *1 (E.D.Pa. Mar. 2, 2022)

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BAD FAITH CLAIMS IN THE ABSENCE OF COVERAGE

- Correct on coverage, so no potential bad faith exposure?

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BAD FAITH CLAIMS IN THE ABSENCE OF COVERAGE

- Section 8371 provides an "independent cause of action to the insured that is not dependent upon success on the merits . . . ." *Nealy v. State Farm Mut. Auto. Ins. Co.*, 695 A.2d 790, 793 (Pa. Super. 1997).

- Notwithstanding, "exceedingly rare" where an insurer can be liable for bad faith even through there was no duty to provide coverage. *Gallatin Fuels, Inc. v. West Chester Fire Ins. Co.*, 244 F. App'x 424, 435 (3d Cir. 2007)

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BAD FAITH CLAIMS IN THE ABSENCE OF COVERAGE

- Generally, there are three categories where an insurer can be liable for bad faith in the absence of coverage:

  (1) the underlying insurance claim has settled;

  (2) the underlying insurance claim is barred by the statute of limitations; and

  (3) when the policyholder's bad faith claim is based on more than just the correctness of the coverage decision.

Rohm & Haas Co. v. Utica Mut. Ins. Co., 2008 U.S.Dist. LEXIS 48077, at *8-9 (E.D.Pa. 2008).

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BAD FAITH CLAIMS IN THE ABSENCE OF COVERAGE

- Generally, if the bad faith claim alleges bad faith denial of coverage and coverage is correct, there is generally no bad faith claim.

"[A]n insurer's knee-jerk denial letter cannot be saved from triggering the penalties enumerated in Section 8371 merely because the insurer's lawyer is able to construct a post-hoc justification for denying coverage . . . . Holding otherwise could potentially result in insurers taking the gamble that a denial based on a cursory review will be rescued by a clever trial lawyer." *Ferguson v. USAA Gen. Indem. Co.*, 334 F.R.D. 407, 411 (M.D.Pa. 2019)

Compare Hamm v. Allstate Prop. & Cas. Ins. Co., 908 F. Supp. 2d 656, 669 (W.D.Pa. 2012) ("so if a reasonable basis exists for an insurer's decision, even if the insurer did not rely on that reason," there cannot be bad faith)

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BAD FAITH CLAIMS IN THE ABSENCE OF COVERAGE

- The problematic case of *Gallatin Fuels*:
  - Policy cancelled at the time the claim arose.
  - Insurer proceeded with a working assumption that the policy was not cancelled during claim handling.
  - $4.5 million award for bad faith punitive damages.

BAD FAITH CLAIMS IN THE ABSENCE OF COVERAGE

- Another recent example:
  - *Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co.*, 2021 U.S.Dist. LEXIS 7266 (E.D.Pa. Jan. 14., 2021)

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BAD FAITH AND THE COMMENCEMENT OF LITIGATION

- "[U]sing litigation in a bad faith effort to evade a duty under a policy would be actionable" under the bad faith statute. *W.V. Realty Inc. v. N. Ins. Co. of N.Y.*, 334 F.3d 306, 313 (3d Cir. 2003).
- Filing meritless case against insured for leverage to have insured accept insufficient settlement is bad faith. *Zenith Ins. Co. v. Wells Fargo Ins. Servs.*, 2011 U.S. Dist. LEXIS 143501 (E.D. Pa. Dec. 13, 2011).

BAD FAITH DURING LITIGATION

- "Bad faith is actionable regardless of whether it occurs before, during or after litigation." *O'Donnell v. Allstate Ins. Co.*, 734 A.2d 901, 906 (Pa. Super. 1999).
- Bad faith during litigation, require more than just garden-variety discovery violations. *Id.* at 908.
- Maintaining a meritless defense is potentially bad faith. *Hudgins v. Travelers Home and Marine Ins. Co.*, 2013 U.S. Dist. Lexis 107775, *30 (E.D. Pa. July 31, 2013).

BAD FAITH DURING LITIGATION

- Documents generated by insurer after litigation started may be discoverable if they concern reasonableness of persistent denial of the claim. *McAndrew v. Donegal Mut. Ins. Co.*, 56 Pa.D.&C4th (Lack. Co. 2002).
- Insurer's policy of aggressive litigation tactics was not bad faith as insurer had right to zealously defend itself. *Berg v. Nationwide Mut. Ins. Co.*, 189 A.3d 1030 (Pa. Super. 2018).

BAD FAITH AND RELEASES

- Often, the inclusion of a bad-faith claim is used as a catalyst to resolve first-party claims. That is, an insurer's willingness to waive the bad-faith claim helps to resolve the other claims.
- Potential for a bad-faith finding, if carrier asks for a release of a bad-faith claim as a precondition to paying undisputed insurance coverage. *E.g.*, *Hayes v. Harleysville*, 841 A.2d 121 (Pa. Super 2003); *Wisinski v. Am. Commerce Grp., Inc.*, No. 07-346 Erie, 2011 U.S. Dist. LEXIS 320, at *49 (W.D. Pa. Jan. 4, 2011).

MISUSE OF THE BAD FAITH STATUTE BY OUT-OF-STATE CLAIMANTS

- The Pennsylvania Bad Faith Statute, 42 Pa. Cons. Stat. Ann. § 8371, **lacks specification regarding its application to non-Pennsylvania insureds**, and there is no appellate precedent addressing this issue. *821,393 LLC v. Liberty Mut. Ins. Co.*, NO. 3573, 2011 LEXIS 7 (Phila. Ct. C.P. Jan. 5, 2011).

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MISUSE OF THE BAD FAITH STATUTE BY OUT-OF-STATE CLAIMANTS

- However, federal courts have held that the "**policy behind 42 Pa.C.S. § 8371 . . . is that the Pennsylvania legislature was concerned about protecting its own residents/insured** from overreaching insurance companies." *Celebre v. Windsor-Mount Joy Mut. Ins. Co.*, No. 93-5212, 2014 LEXIS 409 (E.D. Pa. Jan. 13, 1994).

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MISUSE OF THE BAD FAITH STATUTE BY OUT-OF-STATE CLAIMANTS

- In *Celebre v. Windsor-Mount Joy Mut. Ins. Co.*, the court determined that New Jersey, rather than Pennsylvania, had the **primary interest in resolving the dispute** between the policyholder and the insurance company over coverage denial. Id. at *11-12. The court based its decision on the fact that **New Jersey was the state where the policyholder resided, where the boat was docked, and where the damage occurred**. *Id*. at *6. Despite the **insurance company being incorporated in and its primary place of business being located in Pennsylvania, it held a license to sell insurance contracts in New Jersey and was subject to all relevant New Jersey laws and regulations.** *Id*. at *6-7. Consequently, the **court dismissed the policyholder's claims for breach of contract and wrongful denial of coverage, determining that New Jersey law was more appropriate** for adjudicating the case. *Id*. at *10-12.

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MISUSE OF THE BAD FAITH STATUTE BY OUT-OF-STATE CLAIMANTS

- Similar to and citing the ruling in *Celebre*, in *821,393 LLC v. Liberty Mutual Insurance Company*, the **court dismissed the plaintiff's request for punitive damages** under the Pennsylvania Bad Faith Statute because the **majority of the relevant facts occurred in Virginia**. *821,393* at *14.

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MISUSE OF THE BAD FAITH STATUTE BY OUT-OF-STATE CLAIMANTS

- The court based its decision on **several factors**:
  - Where the **plaintiffs resided**,
  - Where the **aircraft was stored and damaged**,
  - Where the **aircraft was registered, and**
  - **Where the hangar responsible for the damage was located**. *Id.* at 13-14.

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MISUSE OF THE BAD FAITH STATUTE BY OUT-OF-STATE CLAIMANTS

- Additionally, **Virginia was the residence of potential witnesses** who could testify on whether the plane was "lost" under the insurance policy, and **any assessment of the damage to the plane** had to be conducted there. *Id.* at 10.

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MISUSE OF THE BAD FAITH STATUTE BY OUT-OF-STATE CLAIMANTS

- Moreover, since the **decisions regarding coverage were not made in Pennsylvania, the court concluded that Virginia had a stronger interest in adjudicating the case** compared to Pennsylvania. *Id.* at *14.

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MISUSE OF THE BAD FAITH STATUTE BY OUT-OF-STATE CLAIMANTS

- In a more recent case, *Westfield Ins. Co. v. Icon Legacy Custom Modular Homes*, the Pennsylvania Middle District Court **reiterated that the purpose** of the Pennsylvania Bad Faith Statute is to **protect its residents and insured** from "overreaching insurance companies." No. 4:15-cv-00539, 2015 U.S. Dist. LEXIS 99214 (M.D. Pa. July 30, 2015).

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MISUSE OF THE BAD FAITH STATUTE BY OUT-OF-STATE CLAIMANTS

- Furthermore, Pennsylvania follows a **choice-of-law principle that prioritizes the law of the jurisdiction with the most significant interest** in the matter, rather than solely the law of the place where the injury occurred. *Id.* at *6-8.

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MISUSE OF THE BAD FAITH STATUTE BY OUT-OF-STATE CLAIMANTS

- CONCLUSIONS
  - The Pennsylvania Bad Faith Statute **does not expressly limit its application to Pennsylvania insureds.**
  - **No Pennsylvania appellate precedent** directly addressing this issue.
  - Pennsylvania courts have consistently interpreted **the Statute's purpose as protecting residents and insured individuals within the state**.
  - Therefore, it is likely that the Pennsylvania Bad Faith Statute is **only a remedy for Pennsylvania insureds**.

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Up Next… Emerging Risks: Coverage Issues and Claim Handling

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Emerging Risks: Coverage Issues and Claim Handling

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Overview

- The Costs of Emerging Risks
- Coverage Issues
- Claim Handling Conundrums

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What hazards are implicating CGL coverage?

- Talc
- Glyphosate (Roundup)
- Vioxx
- Zantac
- Baby Food
- Hair Straighteners
- Lead Cables

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Litigation of Emerging Risks

- Emerging risk litigation is often consolidated into a multi-district litigation ("MDL")
- MDLs are created by the Judicial Panel on Multidistrict Litigation and can include multiple defendants provided there are common questions of fact
- MDLs tend to include thousands of lawsuits

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The Costs of Emerging Risks

Talc MDL

- Approximately 60,000 lawsuits, majority in MDL in NJ
- Two failed attempts by J&J to transfer liabilities to new subsidiary ("LTL Mgmt.") and place it in bankruptcy in D.N.J.
- "Texas Two-Step" strategy cost ~$178 million in legal fees.
- Third bankruptcy filed as "Red River Talc LLC" in S.D. Tex.
- Proposed settlement **~ $10 billion** including future claims and other compensation

Glyphosate

- Nearly 150,000 bodily injury lawsuits
- Bayer/Monsanto agreed to pay **$11 billion** to settle ~ 125,000 current and future claims
- **$78 million verdict** ($3M compensatory; $75M punitive) in 6th Roundup trial in Philadelphia
- Lobbying state and federal legislators to pass bills stating that EPA-approved Roundup labels = sufficient warning

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The Costs of Emerging Risks

Vioxx MDL	• 47,000 plaintiffs • Merck set aside $1 billion to cover defense costs • Merck settled BI suits for ~ **$5 billion**
Zantac MDL	• GSK to pay up to **$2.2 billion** to settle 80,000 cases • GSK set aside **$45M** for annual defense costs • Sanofi agreed to pay **$100M** to settle ~ 4,000 cases • Pfizer agreed to settle 10,000 suits
Hair Straighteners & Baby Foods	• Over 8,000 cases in hair straightener MDL in N.D. Illinois • Baby food cases in state courts and MDL, but MDL in its early stages (32 cases, but thousands of potential cases) • SEC disclosures reflect millions in annual defense costs
Lead Cables	• CA, NY, AR, AZ, TN issued information requests seeking inventory of lead cables • Proposed class action filed in LA in July 2024

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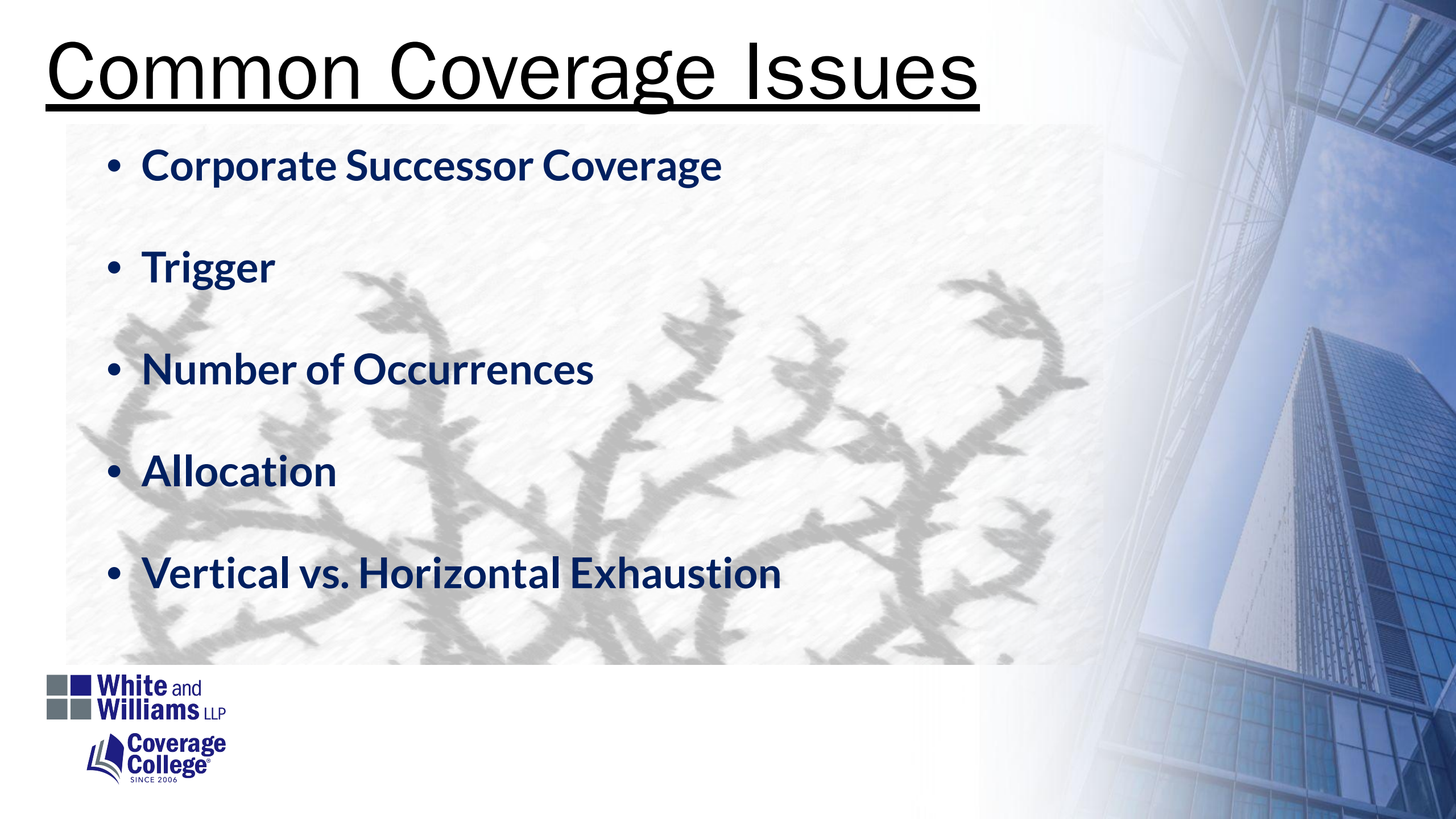
Common Coverage Issues

- Corporate Successor Coverage
- Trigger
- Number of Occurrences
- Allocation
- Vertical vs. Horizontal Exhaustion



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Notable Decisions

Am. Precision Indus., Inc. v. Fed. Ins. Co., 648 F. Supp.3d 442 (W.D.N.Y. 2022); 2023 U.S. Dist. LEXIS 207696 (W.D.N.Y. Nov. 23, 2023) (*certifying questions for interlocutory appeal*) (asbestos)

- Corporate succession / named insured
- Allocation

Fed Ins. Co. v. 3M Co., 2022 U.S. Dist. LEXIS 237440 (D. Minn. Nov. 23, 2022) (forced air warming devices)

- Number of occurrences
- Allocation for MDL defense costs

Radiator Specialty Co. v. Arrowood Indem. Co., **383 N.C. 387 (N.C. 2022) (benzene)**

- Allocation
- Trigger
- Exhaustion

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RSC: Three Significant Rulings

Pro-Rata Allocation

"All sums" language is limited by requirement that (a) bodily injuries occur during the policy period; or (b) occurrences take place during the policy period.

Exhaustion

Vertical exhaustion applies, reversing lower courts' application of horizontal exhaustion.

Exposure Trigger

Injury occurs at the time of benzene exposure.

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Claim Handling Conundrums

- **Who's in charge?**
- **Why does it matter?**
- **What can you do to enforce your right to control the defense?**

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The Right To Control The Defense: Selection of Counsel

Common Scenario:

- By the time the insured tenders the lawsuit, they have selected counsel
- Counsel bills at rates substantially higher than your panel counsel
- The insured instructs counsel not to provide substantive reports

You have no control!

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Why does this happen?

- Fortune 500 companies
- Bet-the-company litigation
- Reputational concern
- Large retentions
- Power

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The Right To Control The Defense and Select Counsel

- An insurer has the right and duty to defend the insured.
- The duty to defend gives the insurer the right and duty to control the defense.
- The right to control the defense includes including the selection of defense counsel.
  - *See Ottaviano v. Genex Coop., Inc.,* 15 A.D.3d 924 (N.Y. App. Div. 2005); *SL Indus. v. Am. Motorists Ins. Co.*, 128 N.J. 188 (N.J. 1992); *Scottsdale Ins. Co. v. The City of Hazleton*, 2009 U.S. Dist. Lexis 44861 (M.D. Pa. 2009) *citing Rector v. Am. Nat'l Fire Ins. Co.*, 97 Fed App'x 374, 378 (3d Cir. 2004); *State Nat'l Ins. Co. v. Eastwood Constr. LLC*, 2018 U.S. Dist. LEXIS 232022 (D.S.C. Sept. 5, 2018).

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The Right To Control The Defense and Select Counsel

- Consider the impact of a reservation of rights on selection of counsel.
- Know your jurisdiction.
- Common grounds for reservations of rights:
  - **Injury or damage outside the policy**. *Compare Federal Ins. Co. v. MBL, Inc.*, 219 Cal. App. 4th 29 (Cal. App. 2013) (no conflict); *Graphic Arts. Mut. Ins. Co. v. D.N. Lukens, Inc.*, 2013 U.S. Dist. LEXIS 75201 (D. Mass. May 29, 2013) (no conflict) with *Am. Family Mut. Ins. Co. v. W.H. McNaughton Builders, Inc.*, 363 Ill. App. 3d 505 (Ill. App. 2006) (conflict); *Moeller v. American Guar. & Liab. Ins. Co.*, 707 So.2d 1062 (Miss. 1996) (conflict).
  - **Punitive damages**. *Compare Nede Mgmt. Inc. v. Aspen American Ins. Co.*, 68 Cal. App. 5th 1121 (Cal. App. Ct. 2021) (no conflict); *Carucci v. Argonaut Ins. Co.*, 2009 U.S. Dist. LEXIS 75288 (W.D.N.Y. July 31, 2009) (no conflict); *Bean Prods. Inc. v. Scottsdale Ins. Co.*, 2018 IL App. (1st) 170421-U (App. Ct. 2018) with *Nandorf, Inc. v. CAN Ins. Cos.*, 134 Ill. App.3d 134 (App. Ct. 1985) (conflict); *Aquino v. State Farm Ins. Companies*, 397 N.J. 402 (App. Div. 2002)(conflict).

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The Right To Control The Defense and Select Counsel

Four Common Approaches:

1. **Per se rule that an insured is entitled to select independent counsel.** *United Servs. Auto. Ass'n v. Morris*, 154 Ariz. 113, 741 P.2d 246, 252 (Ariz. 1987); *Patrons Oxford Ins. Co. V. Harris*, 2006 ME 72 (Me. 2006).

2. **Fact-dependent analysis requiring there to be an actual conflict.** *Public Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392 (N.Y. 1981); *Twin City Fire Ins. Co. v. Ben Arnold Sunbelt Bev. Co. of S.C., LP*, 433 F.3d 365 (4th Cir. 2005).

3. **The insured has the right to accept or reject insurer-appointed defense, with the rejection translating the insurer's duty to defend into a duty to reimburse if the claim is covered.** *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383 (N.J. 1970).

4. **The insurer remains permitted to participate in the selection of counsel.** *See Finley v. Home Insurance Co.*, 90 Haw. 25, 975 P.2d 1145, 1151-52 (Haw. 1998) ; *HK Sys., Inc. v. Admiral Ins. Co.*, 2005 U.S. Dist. LEXIS 39939 (E.D. Wis. June 24, 2005); *Fed. Ins. Co. v. X-Rite*, 748 F. Supp. 1223 (W.D. Mich. 1990).

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The Right To Control The Defense and Select Counsel

- **What are your options?**
  - Dispute rates.
  - Split the defense.
  - Deny reimbursement.
    - *See Twin City Fire Ins. Co. v. Ben Arnold Sunbelt Bev. Co. of S.C., LP*, 433 F.3d 365 (4th Cir. 2005); *Red Head Brass, Inc. v. Buckeye Union Ins. Co.*, 135 Ohio App.3d 616 (App. Ct. 1999)
  - Seek a declaration that you have control.

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Questions?

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Up next… Coverage Implications from the Explosion of MDLs

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Coverage Implications from the Explosion of MDLs

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Multidistrict Litigation – A Process

- Multidistrict Litigation (MDL) is a legal **process** that consolidates multiple lawsuits into a single federal court for pretrial proceedings.
- MDLs are often used when a number of plaintiffs have filed lawsuits against the same defendant(s) for similar reasons.

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An MDL is NOT…

- Class Action - A class action lawsuit is a legal action where one or more people sue on behalf of a larger group of people, or class, who have similar claims. Class actions can consolidate many similar individual claims **into one lawsuit**, which can be more efficient for the courts.
- Related Cases - When separate actions are filed in the same jurisdiction based on the same incident, the cases are usually first deemed to be “related.”

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Judicial Panel on Multidistrict Litigation

- The Chief Justice of the United States Supreme Court appoints seven circuit or district judges, no two of whom may come from the same circuit, to the Judicial Panel on Multidistrict Litigation (JPML) to determine whether "transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions," according to 28 USC §1407(a).2, 3.

MDL: Purpose and Factors

- The purpose of the MDL is to avoid repetitive discovery compliance, eliminate inconsistent pretrial rulings, and conserve the resources of litigants and the judiciary.
- The JPML looks at three key factors in determining whether to consolidate:

1. whether there are common questions of fact;
2. whether transfer is convenient for the parties; and
3. whether transfer will promote judicial efficiency, economy, and fairness.

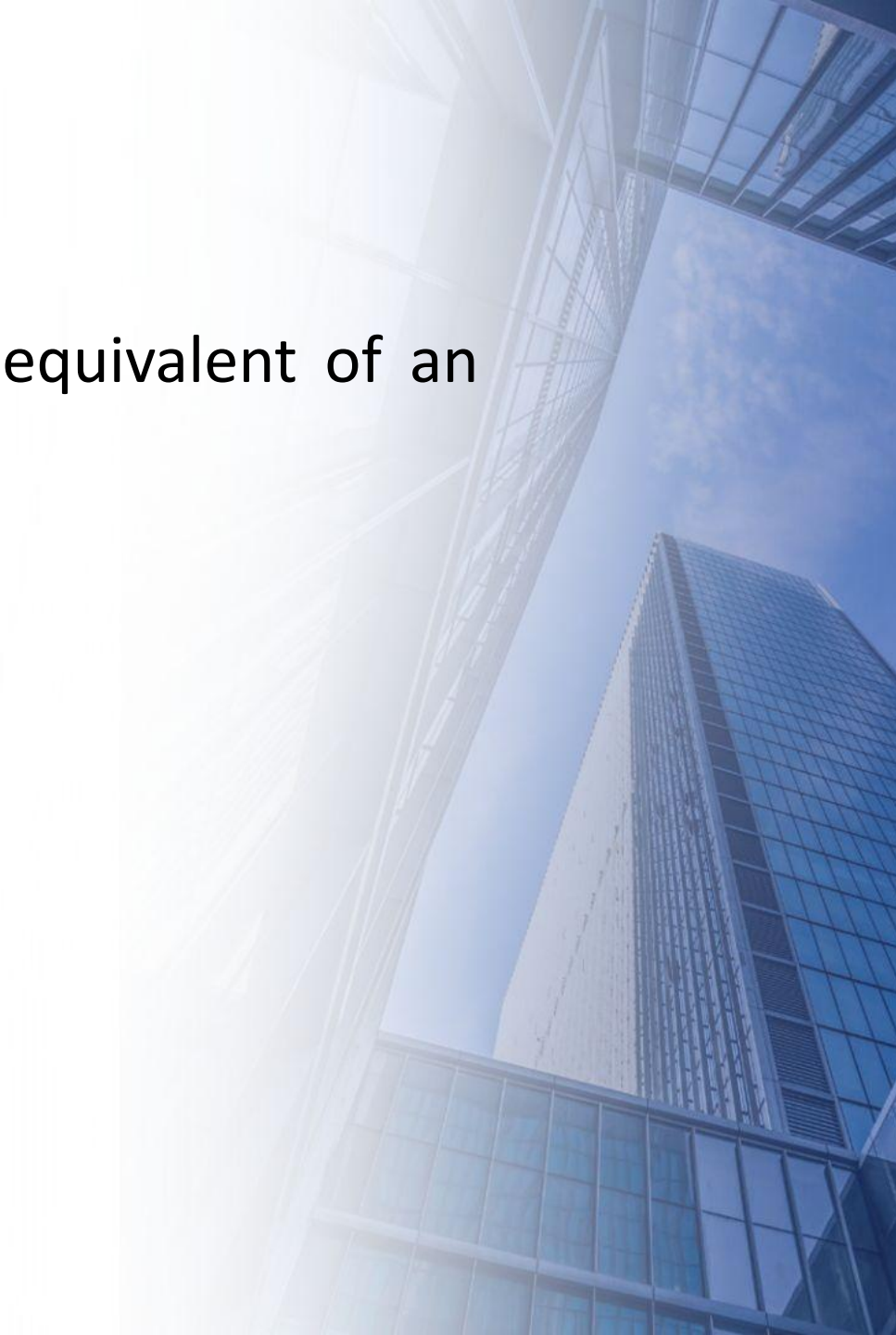
Formation of an MDL

- Proceedings for the transfer of an action under 28 U.S.C. § 1407 may be initiated by –
  - (i) the judicial panel on multidistrict litigation upon its own initiative, or
  - (ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of the motion shall be filed in the district court in which the moving party's action is pending.

- The party seeking centralization has the burden of showing that common questions of fact are so complex and that the accompanying discovery is so time-consuming as to overcome the inconvenience to the non-moving party.

State Court Equivalents

- About half of the states have created the equivalent of an MDL process, including:
  - California
  - Illinois
  - New Jersey
  - New York
  - Pennsylvania
  - Texas
  - West Virginia



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MDL Statistics

- As of the end of fiscal year 2019, there were a total of 134,462 individual actions in nearly 200 pending MDL proceedings.
- By the end of fiscal year 2020, that number increased to 327,204 individual actions in 176 MDL proceedings.
- About 38% of MDL cases pending in 2024 [68 of the 177] are product liability cases.
- Over 417,000 product liability litigants are in MDLs currently pending making up 70% of total district court pending actions.

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WHAT DOES THIS HAVE TO DO WITH COVERAGE COLLEGE?!?

- Insurers are likely to receive claims from insureds seeking coverage for all *lawsuits* that are transferred to an MDL.
- Insurers have a right and obligation to evaluate each lawsuit individually, including with respect to the *duty to defend*.
- Insureds are likely to claim Insurers must defend all *lawsuits* that are part of the MDL, but is that fair?

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Is There a Duty to Defend Covered and Uncovered Lawsuits in an MDL? First, Some Basics

- Generally, the obligation to defend is usually broader than the obligation to indemnify because it may apply whether or not the third-party claim has merit or is covered under the policy. See, e.g., *Century 21, Inc. v. Diamond State Ins. Co.*, 442 F.3d 79, 82 (2d Cir. 2006).
- To determine if the duty to defend is triggered, we compare the allegations of the complaint against the insured to the policy terms. If the allegations in the complaint fall within the scope of policy's coverage, even if the allegations are false or groundless, the insurer has a duty to defend its insured. *New York City Hous. Auth. v. Commercial Union Ins. Co.*, 734 N.Y.S.2d 590, 592 (2001).
- Effectively, the insurer has a duty to defend unless there is "no possible factual or legal basis on which an insurer's duty to indemnify under any provision of the policy could be held to attach." *Century 21, Inc.*, 442 F.3d at 82-83.
- If an insurer has a duty to defend a single claim the complaint presents, it must defend the entire action, including claims that are not covered by the policy. *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 667 N.Y.S.2d 982, 984-85 (1997). An insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course. See *Nat. Organics, Inc. v. OneBeacon Am. Ins. Co.*, 959 N.Y.S.2d 204 (2d Dep't 2013).

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Is There a Duty to Defend Covered and Uncovered Lawsuits in an MDL?

- Do NOT CONFLATE:
  - the obligation to defend uncovered claims plead in a lawsuit that alleges a potentially covered claim with
  - a new obligation to defend an uncovered lawsuit merely because it has been consolidated with a potentially covered lawsuit for the purposes of an MDL!

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There is No Duty to Defend Uncovered Lawsuits.

- New York law generally provides that there is no duty to defend uncovered lawsuits. See *Natl. Hockey League v. TIG Ins. Co.*, 76 Misc. 3d 427, 435 (Sup. Ct., N.Y. County 2022) citing *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1224-1225 (6th Cir 1980) ("An insurer contracts to pay the entire cost of defending a claim which has arisen within the policy period.").

- The insurer has not contracted to pay defense costs for occurrences which took place outside the policy period. Where the distinction can be readily made, the **insured** must pay its fair share for the defense of the non-covered risk. *Id*.

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NY Approach to Allocation

- New York courts typically apply pro rata, time-on-risk allocation of defense costs, even to years with SIRs, where there are allegations of occurrences outside of the policy period and where the policies do not contain non-cumulation or prior-insurance provisions. See *Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc.*, 31 N.Y.3d 51, 56 (N.Y. 2018) (holding insurer could allocate to years where the insured was self-insured even for years where insurance at issue was unavailable).

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NJ Approach to Allocation

- New Jersey law generally provides that there is no duty to defend uncovered lawsuits. See *Wear v. Selective Ins. Co.*, 190 A.3d 519, 528–29 (N.J. Super. 2018) (citing *Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co.*, 98 N.J. 18, 22 (1984)) ("Neither the duty to defend nor the duty to indemnify exists except with respect to occurrences for which the policy provides coverage."); see also *SL Indus. v. AM Motorists Ins. Co.*, 128 N.J. 188, 214–15 (1992) (hereafter "SL Indus.") (finding that principles of contract law "obligate the insurer to pay only those defense costs reasonably associated with claims covered under the policy").
- When there is a suit that involves causes of action that are both covered and uncovered, New Jersey courts convert the duty to defend to a duty to reimburse: "Where a conflict exists between an insurer and its insured by virtue of the insurer's duty to defend mutually-exclusive covered and non-covered claims against the insured, the duty to defend is translated into a duty to reimburse the insured for the cost of defending the underlying action if it should ultimately be determined, based on the disposition of that action, that the insured was entitled to a defense." See *Grand Cove II Condominium Ass'n, Inc. v. Ginsberg*, 676 A.2d 1123, 1131 (N.J. Super. 1996) (hereafter "Grand Cove II") (citing *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 389 (1970)).

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NJ Approach to Allocation

- In Grand Cove II, two primary insurers challenged their duty to defend the insured against certain construction and design defect claims, arguing that their duty to defend should have been converted to a duty reimburse defense costs for claims established as covered.
- The Court found that the trial court erred in ordering that the insurers must assume responsibility for defense of all claims. *Id*. ("The insurers' legal duty is to pay only those defense costs reasonably associated with claims covered under the policy.") (citing *SL Indus.*, 138 N.J. at 215).
- In the event an insurer initially declines to undertake the defense of a case, and a subsequent judgement renders one or more cause of action covered under the policy, the insurer must reimburse its insured for defense costs related to those covered cause(s) of action. See *SL Indus.*,138 N.J. at 214–15 ("The general rule is that when the insurer has wrongfully refused to defend an action and is then required to reimburse the insured for its defense costs, its duty to reimburse is limited to allegations covered under the policy, provided that the defense costs can be apportioned between covered and non-covered claims.").

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NJ Approach to Allocation

- The Court in *SL Indus.* also explicitly rejected the presumption held by other jurisdictions that apportioning costs between covered and uncovered causes of action is difficult:

> We recognize that insurers, insureds, and courts will rarely be able to determine the allocation of defense costs with scientific certainty. However, the lack of scientific certainty does not justify imposing all of the costs on the insurer by default. The legal system frequently resolves issues involving considerable uncertainty. We presume that the insurer and insured can negotiate a satisfactory settlement that fairly apportions the defense costs. When they are unable to agree, we likewise presume that our courts will be able to analyze the allegations in the complaint in light of the coverage of the policy to arrive at a fair division of costs.

- *Id*. at 216. The Court remanded the issue of apportionment to the trial court. *Id*.; see also *SL Indus v. Am. Motorists Ins. Co.*, 248 N.J. Super. 458, 467 (1991) ("If the allocation cannot be resolved by agreement, then on remand, the trial judge must conduct a hearing for the purpose of making such allocation.").

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NJ Approach to Allocation

- New Jersey courts typically apply a pro rata model for allocation, which is based on an insurer's time on the loss and limits of risk coverage in the policies. *See Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 479 (1994) (hereafter, "Owens-Illinois") ("A fair method of allocation appears to be one that is related to both time on the risk and the degree of risk assumed. When periods of no insurance reflect the decision by [the policyholder] to assume or retain a risk … to expect [the policyholder] to share in the allocation is reasonable.").
- Subsequent court decisions have solidified pro rata allocation as contemplated in Owens-Illinois as the primary method for allocating costs among insurers in long-tail environmental and contamination suits. See *Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr*, 172 N.J. 409, 435 (2002) (hereafter, "Quincy") (applying Owens-Illinois in a dispute over coverage for losses related to groundwater contamination); see also *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 154 N.J. 312, 324 (1998) (hereafter, "Carter-Wallace") (applying Owens-Illinois to a coverage dispute involving pharmaceutical products and the disposal of hazardous wastes).

NJ Approach to Allocation

- With respect to the apportionment of defense costs among covered and uncovered causes of action, the Third Circuit very briefly discussed the issue in *Cooper Laboratories Inc. v. International Surplus Lines Insurance Company*, 802 F.2d 667, 674 (3d Cir. 1986) (hereafter, "Cooper Laboratories"). The Court recognized that a factual question exists when an insured settles claims against it without determining the amount attributable to causes of action covered by the policy and those that are not covered by the policy.
- The Court relied upon *American Home Assurance Co. v. Libbey-Owens-Ford Co.*, 786 F.2d 22 (1st Cir. 1986) for the proposition that when an insured settles claims against it without allocating between the covered and the uncovered causes of action, the "apportionment [should] be made by the district court based on such evidence as was available, despite the potential for testimony colored by hindsight and self-interest." *Cooper Laboratories*, 802 F.2d at 674.

Impact of Self-Insurance

- In the context of self-insurance, New York Courts have held that apportionment applies to those years when the insurer was not on the risk. In *Cont'l Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640 (N.Y. 1993) (hereafter, "Rapid-American"), the insured was named in various asbestos lawsuits. The court held "the allegation that [the insured] was self-insured for a period of time predating the [insurer's] coverage cannot operate to deny [the insured] the complete defense to which it is entitled under the [insurer's] policies in the event of overlapping occurrence periods. The question whether the insured itself must contribute to defense costs ... is appropriately deferred at least until such time as the underlying lawsuits are shown to involve 'occurrences' during self-insured periods." *Id.* at 656.
- In *Danaher Corp. v. Travelers Indem. Co.*, No. 10-CV-121 (JPO), 2020 WL 6712193 (S.D.N.Y. Nov. 16, 2020), the Court clarified the holding in Rapid-American on apportionment to self-insured years and allowed an insurer to seek contribution/apportionment for defenses costs. The Court found that in the "wake of Rapid-American, courts have allowed insurers to seek contribution from insureds when the insurer had to defend against claims regarding 'occurrences which took place outside [any insurer's] policy period' and when 'defense costs can be readily apportioned.'" *Id.* at *2. Therefore, the Danaher decision reaffirms that apportionment of defense is proper when certain occurrences take place outside the insurer's policy period.

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Allocation of Defense Costs is Appropriate (and Fair)

- Courts examining the issue in the context of an MDL have permitted allocation. See *Fed. Ins. Co. v. 3M Co.*, 642 F. Supp. 3d 882 (D. Minn. 2022) (treating each case in an MDL separately and stating that "the Policies' full language makes clear that the Bair Hugger MDL as a whole is not a suit to which the defense duty applies *en masse*. This is so for two reasons.
  - First, the duty to defend only applies to civil proceedings in which damages are sought. Damages are not sought in the MDL itself but in each underlying case.
  - Second, the Policies specifically disclaim that Federal has a duty to defend in any suit to which the insurance does not apply. Requiring Federal to defend against the entire MDL would force it to defend thousands of individual cases to which the insurance specifically does not apply.").
- See also *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1224-25 (6th Cir. 1980), modified, 657 F.2d 814 (6th Cir.), cert. denied, 454 U.S. 1109, 102 S. Ct. 686, 70 L. Ed. 2d 650 (1981) (allowing apportionment of attorney's fees between covered and noncovered claims); *Budd Co. v. Travelers Indem. Co.*, 820 F.2d 787, 790-91 (6th Cir. 1987) (apportioning the total costs by the number of cases covered under Michigan law and stating "each Budd case came into MDL 362 at a specific time. Since Lathrop, Koontz billed on a periodic basis, it is entirely reasonable to pro-rate its charges in proportion to the number of cases each party was responsible for during each billing period.").

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What are the Practical Implications?

- MDLs are a significant and prevalent part of federal litigation. Similar state procedures are used in many jurisdictions.
- While some MDLs like 3M, Talc or MDL No. 875 (asbestos) may grow so large as to be unwieldy, most MDLs involve a few dozen to a few hundred cases.
- Insurers should not get bullied into defending "an entire MDL" but instead put thoughtful consideration into how to approach allocation of defense costs when an MDL is created.
- Reviewing each lawsuit submitted by an insured to evaluate coverage will help an Insurer to understand its exposure and evaluate its risks.
- Allocation decisions as to defense costs can often have a significant impact on allocation of settlement or indemnity; failure to think these issues through early can result in an unintended (and maybe unjustified price tag) later.

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Final Takeaways

- The insurance policy is a contract where the duty to defend (if any) only extends to covered lawsuits.
- It is reasonable (and appropriate) for defense costs for uninsured or self-insured periods to be allocated to the insured. The insured decided to retain that risk!
- Where claims present a potential for an MDL, get involved early and monitor developments often. While analyzing the lawsuits and coverage implications may create more work early, there is an opportunity for greater efficiency and fairness in the long run.
- Engage your insured. The best outcomes are likely instances where parties can reach an agreement on how to share in defense of the claims.
- Resolving defense cost sharing issues early creates a more favorable environment for Insureds, Insurers and Defense Counsel to work together in defense of all lawsuits to protect the Insureds, as well as Insurer's indemnity dollars.

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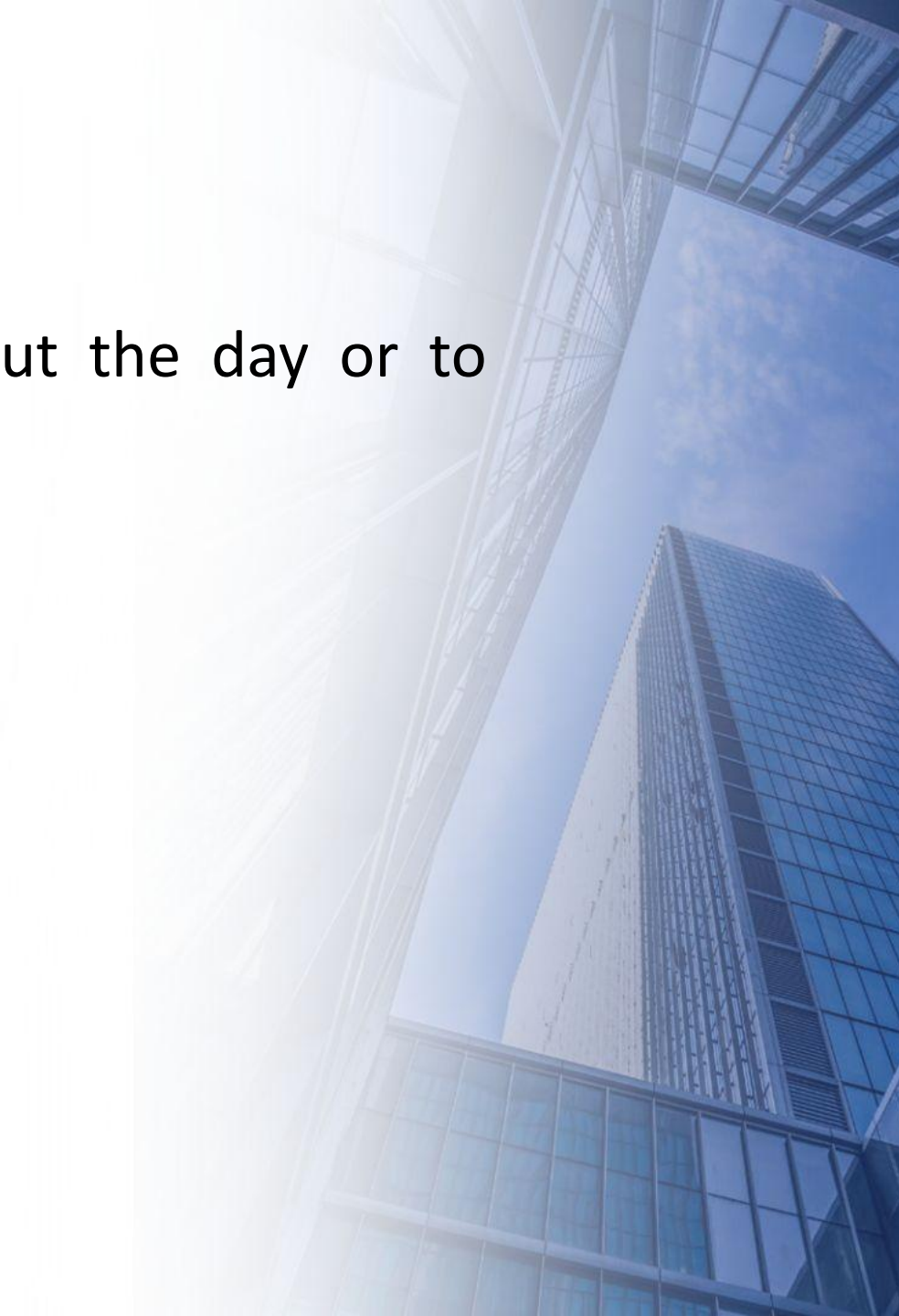
Questions?

- Feel free to raise any questions throughout the day or to contact us by email of phone.



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Long Tail Coverage Update

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OVERVIEW

- **Underlying Claims:** Asbestos, Climate Change, Lead Paint, MTBE, Opioids, PCE, Priest Abuse, Wildfires

- **Key Coverage Issues:** Allocation, "Claim" for "Damages," Occurrence, Number of Occurrences, Cooperation, Reimbursement, Pollution Exclusion, Trigger

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Scope of Coverage : "Occurrence"

- *AIU v. McKesson* (9th Cir. 2024)(Jan 26, 2024)(California law): underlying opioid litigation did not allege a covered "occurrence"
- *AIU. v. McKesson* (U.S. Dist. Ct. N.D. of CA)(July 30, 2024): Insured's subjective intent not relevant where policies define "occurrence" as an "accident…resulting in Bodily Injury or Property Damage neither expected nor intended from the standpoint of the Insured."

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Scope of Coverage : "Occurrence"

- *Aloha Petroleum v. National Union Fire Ins. Co.* (Hawaii): climate change claims of recklessness constitute an "occurrence", when defined in part as an "accident"

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Scope of Coverage : "Occurrence"

- *Certain Underwriters at Lloyd's London et al. v. Sherwin-Williams* (Ohio)(pending): whether manufacturers of lead paint "expected or intended" to cause injuries based on knowledge about risks associated with their products.

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Scope of Coverage: "Because of" Bodily Injury/Property Damage

- *Certain Underwriters at Lloyd's London et al. v. Sherwin-Williams* (Ohio)(pending): whether underlying public nuisance suits brought by local governments against lead paint manufacturers were brought "because of" bodily injury or property damage

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Scope of Coverage: Duty to Defend/Number of Occurrences

- *Zurich Am. Ins. Co. v. Burlington Northern & Santa Fe Railway Co.* (Tex. App.)(pending): whether insurer has duty to defend underlying claims arising out of transportation of vermiculite from Libby mine

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Scope of Coverage : Reimbursement of Defense/Indemnity

- *Berkley Nat'l Ins. Co. v. Atl.-Newport Realty* (1st Cir. 2024)(Massachusetts Law): reverses district court holding that insurer entitled to recoupment of both defense and settlement payments after finding of no coverage

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Scope of Coverage : Reimbursement of Defense/Indemnity

- *St. Paul Fire & Marine Ins. Co. v. Bodell Constr.* (Hawaii 2023): insurer may not seek reimbursement from insured for defending construction defect claims determined not to involve a covered occurrence when policy contains no express provision for reimbursement.

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SCOPE OF COVERAGE: COOPERATION

- *Century Indem. Co. v. Archdiocese of New York* (N.Y. App. Div. 1st Dep't 2024): insurer can proceed with declaratory judgment action in light of lack of cooperation by insured in providing information to assess underlying priest abuse claims.

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POLLUTION EXCLUSION

Wesco Ins. v. Brad Ingram Constr. (9th Cir. 2024)(California law)(request for rehearing denied): split panel (2-1) holds that total pollution exclusion does not unambiguously apply to bar coverage for claimant's injuries from exposure to toxic dust from wildfire and, therefore, insurer had a duty to defend

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POLLUTION EXCLUSION

St. Paul Fire and Marine Ins. Co. v. Getty Properties Corp. (N.Y. App. Div. 2nd Dep't 2024): pollution exclusion applies to MTBE, rejecting insured's argument that it could not be a "pollutant" because the use was legal at the time, and the insured did not know it was harmful.

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Pollution Exclusion

Aloha Petroleum v. National Union Fire Ins. Co. (Hawaii): greenhouse gasses are pollutants within the meaning of a pollution exclusion.

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POLLUTION EXCLUSION

- *Chisholm's-Village Plaza v. Cincinnati Ins. Co.* (10th Cir. 2024)(New Mexico Law)(pending): whether "absolute" pollution exclusion applies to claim arising out of PCE plume. District of New Mexico predicted that New Mexico would follow Indiana approach (PE per se ambiguous unless contaminants specifically identified).

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ALLOCATION

- *Truck Ins. Exchange v. Kaiser Cement and Gypsum Corp.* (Calif. 2024): court permits vertical (versus horizonal) exhaustion, but leaves open question whether primary insurer is entitled to equitable contribution from excess insurers

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Scope of Coverage : Trigger

- *Westfield Ins. Co. v. Sistersville Tank Works* (W.V. 2023): continuous trigger applies to latent disease bodily injury claims.

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CLAIMS TO WATCH

- Talc
- Glyphosate (Roundup)
- Vioxx
- Zantac
- Baby Food
- Hair Straighteners
- PFAS Coverage Cases (e.g., BASF, Kidde-Fenwal, Tyco, Wolverine)

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Up next… Insurance Coverage: I Ain't Missing You At All

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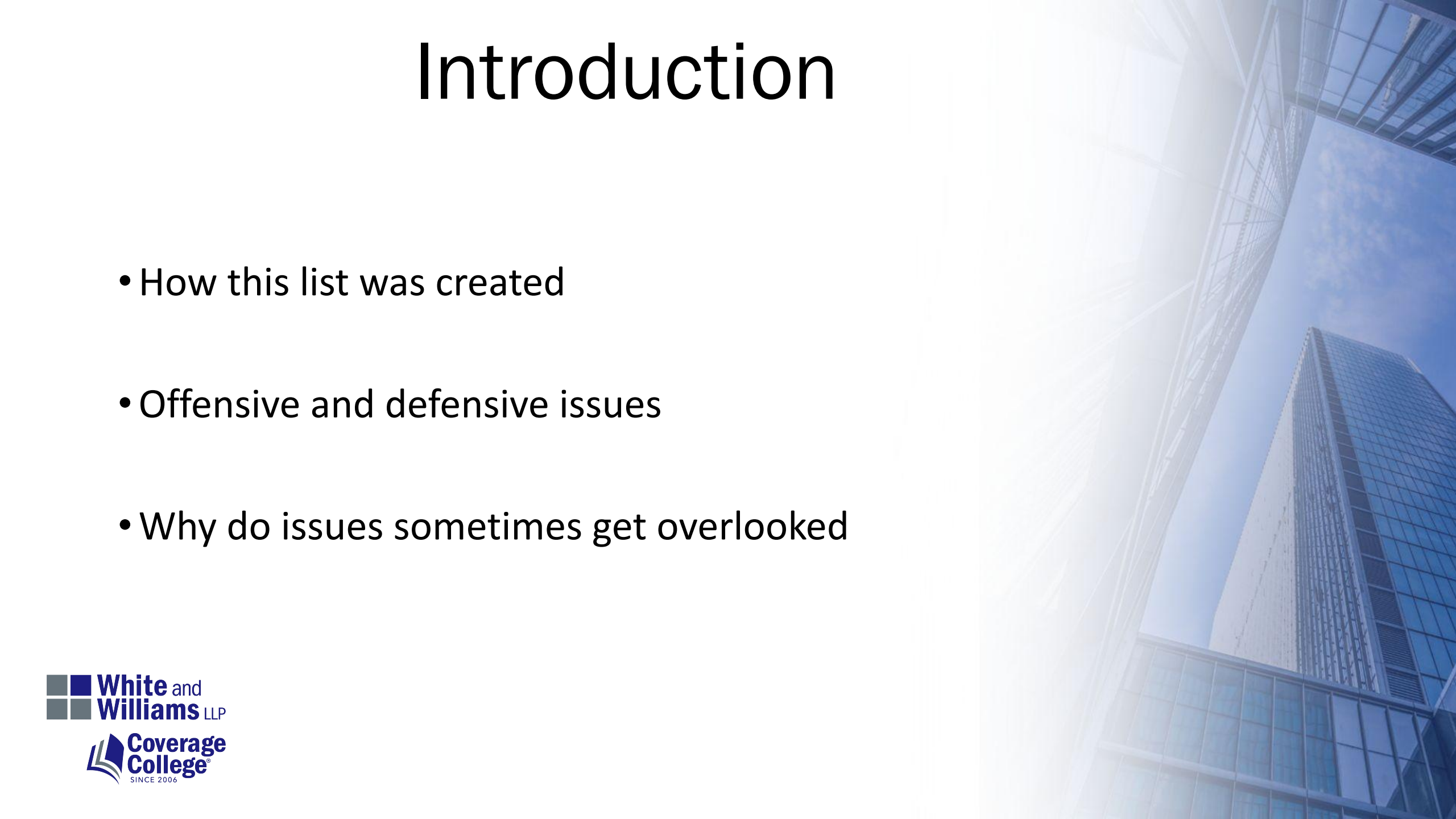
Insurance Coverage: I Ain't Missing You At All

Randy Maniloff
Partner
White and Williams LLP

Introduction

- How this list was created
- Offensive and defensive issues
- Why do issues sometimes get overlooked



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Pre-tender Defense Costs

New Jersey Supreme Court: Late Notice

***Cooper v. Gov't Emps. Ins. Co.*, 237 A.2d 870 (N.J. 1968) (appreciable prejudice standard)**

"This is not to belittle the need for notice of an accident, but rather to put the subject in perspective. Thus viewed, it becomes unreasonable to read the provision unrealistically or to find that the carrier may forfeit the coverage, even though there is no likelihood that it was prejudiced by the breach. To do so would be unfair to insureds. It would also disserve the public interest, for insurance is an instrument of a social policy that the victims of negligence be compensated."

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Pre-tender Defense Costs

New Jersey Supreme Court: Pre-tender defense costs

***SL Indus., Inc. v. Am. Motorists Ins. Co.*, 607 A.2d 1266 (N.J. 1992).**

Insurer has no obligation to pay "for that portion of the defense costs arising after it was informed of the facts triggering the duty to defend."

"[T]he duty to defend is triggered by facts *known* to the insurer. [I]f the insured does not properly forward the information to the insurance company, the insured cannot demand reimbursement from the insurer for defense costs the insurer had no opportunity to control."

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Prevailing Insured's Right to Recover Attorney's Fees

7 Rationales for Addressing Coverage for Insured's DJ Fees

"There are innumerable cases dealing with this specific issue [recovery of attorney's fees in bringing a declaratory judgment action against an insurer], and the courts have resolved the issue in practically every conceivable way." *Crist v. Ins. Co. of N. Am.*, 529 F. Supp. 601 (D. Utah 1982) (emphasis added).

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Prevailing Insured's Right to Recover Attorney's Fees

(1) *Automatic* recovery via statute- HAW. REV. STAT. ANN. §431:10-242.

(2) *Automatic* recovery via common law: *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 735 A.2d 1081, 1094-95 (Md. 1999)

(3) Recovery via statute: *Insurer's Conduct At Issue*: VA. CODE ANN. §38.2-209

(4) Recovery via common law: I*nsurer's conduct at issue*: *ACMAT Corp. v. Greater N.Y. Mut. Ins. Co.*, 923 A.2d 697, 708 (Conn. 2007).

(5) Hybrid: Court applies contract statute to an insurance dispute: *Lennar Corp. v. Auto-Owners Ins. Co.*, 151 P.3d 538, 553 (Ariz. Ct. App. 2007) ; ARIZ. STAT. ANN. § 12-341.01(A)]

(6) Recovery via statute generally covering frivolous or vexatious litigation: COLO. REV. STAT. ANN. §13-17-101.

(7) No recovery: "American Rule:" *Clark v. Exch. Ins. Ass'n*, 161 So. 2d 817 (Ala. 1964)

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Duty to Defend and Extrinsic Evidence

"4 Corners" is *not* the majority rule – and the extrinsic evidence rules are all over the place

Talen, 703 N.W.2d at 406 (Iowa 2005) ("The scope of inquiry [for the duty to defend] . . . [includes] the **pleadings of the injured party and any other admissible and relevant facts in the record**.")

Am. Bumper & Mfg. Co. v. Hartford Fire Ins. Co., 550 N.W.2d 475 (Mich. 1996) ("The insurer has the duty to **look behind the third party's allegations** to analyze whether coverage is possible.")

Garvis v. Employers Mut. Cas. Co., 497 N.W.2d 254, 258 (Minn. 1993) (determination of the duty to defend includes **consideration of facts of which the insurer is aware**)

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Duty to Defend and Extrinsic Evidence

"4 Corners" is *not* the majority rule – and the extrinsic evidence rules are all over the place

Farmland Mut. Ins. Co. v. Scruggs, 886 So. 2d 714, 719 n.2 (Miss. 2004) (in determining whether an insurer has a duty to defend an insurer may consider those **"true facts [that] are inconsistent with the complaint**," the insured brought to the insurer's attention)

Peterson v. Ohio Cas. Group, 724 N.W.2d 765, 773-74 (Neb. 2006) (duty to defend exists where the **"actual facts"** reveal such a duty exists)

Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co., 799 P.2d 1113, 1116 (N.M. 1990) ("The duty of an insurer to defend arises from the allegations on the face of the complaint or from the **known but unpleaded factual basis** of the claim.")

State Farm Fire & Cas. Co. v. Harbert, 741 N.W.2d 228, 234 (S.D. 2007) ("[T]he issue of whether an insurer has a duty to defend is determined by . . . **'other evidence of record.**'")

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Independent Counsel

California's "Cumis" Rule is the Majority Rule Nationally

"If there is a reasonable possibility that the manner in which the insured is defended could affect the outcome of the insurer's coverage dispute, then the conflict may be sufficient to require the insurer to pay for counsel of the insured's choice. Evaluating that risk requires close attention to the details of the underlying litigation. The court must then make a reasonable judgment about whether there is a significant risk that the attorney selected by the insurance company will have the representation of the insureds significantly impaired by the attorney's relationship with the insurer."

Armstrong Cleaners, Inc. v. Erie Ins. Exch., 364 F. Supp. 2d 797 (S.D. Ind. 2005).

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“Any” Insured vs. “The” insured

Johnson v. Allstate, 687 A.2d 642 (Me. 1997) (No coverage for an “innocent co-insured”)

“Bodily injury intentionally caused by ***an insured*** *person.”*
**Caveat: Separation of Insureds or Severability of Interests condition

Less than one month later…

Hanover Insurance Co. v. Crocker, 688 A.2d 928 (Me. 1997) (Coverage for an “innocent co-insured”)

“Bodily injury … which is either expected or intended from the standpoint of ***the insured.***”

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Coverage for Punitive Damages

Not a Yes-No Question

"The cases defy easy categorization, but it appears that: **19 states** generally permit coverage of punitive damages; **8 states** would permit coverage of punitive damages for grossly negligent conduct, but not for more serious conduct; **11 states** would permit coverage of punitive damages for vicariously-assessed liability, but not directly-assessed liability; **7 states generally prohibit an insured from indemnifying himself against punitive** damages; and **the remainder** have silent, unclear, or otherwise inapplicable law. States may fall into more than one category.

Fairfield Ins. Co. v. Stephens Martin Paving, L.P., 246 S.W.3d 653 (Tex. 2008) (Hecht, J., concurring) (emphasis added).

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Indemnification For a Party's Own Negligence

***Bernotas v. Super Fresh Food Mkts., Inc.*, 863 A.2d 478, 482–83 (Pa. 2004)**

"It is well-settled in Pennsylvania that provisions to indemnify for another party's negligence are to be narrowly construed, requiring a clear and unequivocal agreement before a party may transfer its liability to another party. *Ruzzi v. Butler Petroleum Co.*, 588 A.2d 1, 7 (Pa. 1991); *Perry v. Payne*, 66 A. 553 (Pa. 1907)."

Words of general import can establish such indemnification.

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Indemnification For a Party's Own Negligence

Countless statutes address indemnity in the construction contexts

Ohio statute prohibits indemnification for **any character of an indemnitee's own negligence.** OHIO REV. CODE ANN. 2305.31

Hawaii statute prohibits indemnification for an indemnitee's **sole negligence**. HAW. REV. STAT. ANN. § 431:10–222

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“Pollutant Exclusion” and the “Movement” Requirement

CG 00 01 “Absolute” Pollution Exclusion does not apply to products claims

The “movement” requirement: “discharge, dispersal, seepage, migration, release or escape of ‘pollutants.’”

Lititz Mut. Ins. Co. v. Steeley, 785 A.2d 975 (Pa. 2001) (holding that lead paint is a “pollutant,” but exclusion not applicable because the process by which it degrades and became available for ingestion and inhalation does not involve a “discharge,” “dispersal,” “release,” or “escape”).

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Choice of Law

Does the "standard rule" give way for independent counsel issues?

Standard Rule: Law of the state where the policy was issued controls choice of law and not where the underlying tort took place.

But, choice of counsel is not an insurance policy issue *pe se*, it is tied to a lawyer's ethical obligation to provide conflict-free representation.

Choice of Law

Hartford Underwriters Ins. Co. v. Foundation Health Services, Inc. 524 F.3d 588 (5th Cir. 2008)

Applying Mississippi's most significant relationship test, the Fifth Circuit determined that even though the right to select counsel related to the duty to defend, which was contractual in nature, the issue was not one of “pure contract interpretation” but “is closely connected to the court where the ‘defending took place’” and “[t]he court where a case is tried has a substantial interest in preventing conflicts of interest . . . [and] in whether independent counsel is provided to avoid a conflict of interest.”

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Sending ROR to All Insureds Being Defended

Erie Insurance Exchange v. Lobenthal, No. 1971 WDA 2013 (Pa. Super. Ct. Apr. 15, 2015). ("Erie's reservation of rights letter was addressed solely to the named insureds, Adam and Jacqueline Lobenthal, not to Michaela. The letter made no mention of Michaela. As in [citation omitted], we will not impute notice to Michaela based on the fact the letter was sent to counsel where the letter was addressed to her parents and made no reference whatsoever to Michaela. By the same token, we refuse to attribute notice to Michaela based on the fact that she was living with her parents at the time. Michaela was an adult at the time the lawsuit was filed, and there is no evidence that she actually read the letter. **Michaela was the defendant in the underlying tort action, and the letter should have been addressed in her name.")** (emphasis added).

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“Property Damage”: Loss of Use

Definition of “Property damage”

The “loss of use” trigger: What and When? 5/65 (8%) = Physical Injury

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it. * * *

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The Artfully Pleaded Complaint and the "Four Corners" challenge

***Allstate Ins. Co. v. Carioto*, 551 N.E.2d 382 (Ill. Ct. App. 1990)**

Plaintiff stabbed 15-17 times

"[Insured] carelessly and negligently fell on and/or came into contact with Plaintiff in such a manner as to cause his injuries."

***State Farm v. Simone*, 2021 U.S. Dist. LEXIS 15790 (W.D. Pa. Jan. 28, 2021)**

Insured punched plaintiff and broke 7 bones in his face

Insured breached the duty to act reasonably by failing to stop his arm before striking Plaintiff

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Insured Status: “Scope of Employment

ISO CG 00 01: “Employees…but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business”

The “scope of employment” issue – No blanket rules

Six cases w/ seven versions of the so-called “course and scope” policy language: 1) scope of employment; 2) while performing duties; 3) while acting on behalf of; 4) while acting in the interest of; 5) scope of duties; 6) scope of job duties; and 7) served or acted in an official capacity

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Emotional Injury as Bodily Injury

Is emotional injury "bodily injury"?

Yes (Automatic -- Minority Rule):

Lavanant v. Gen. Acc. Ins. Co. of Am., 595 N.E.2d 819, 822 (N.Y. 1992) ("bodily injury" is ambiguous.) ("We decline General Accident's invitation to rewrite the contract to add *'bodily* sickness' and *'bodily* disease,' and a requirement of prior physical contact for compensable mental injury. General Accident could itself have specified such limitations in drafting its policy, but it did not do so.").

Depends (Majority Rule) (BI=Emotional injury w/ Physical Manifestation):

Allstate Ins. Co. v. Wagner-Ellsworth, 188 P.3d 1042, 1051 (Mont. 2008) ("Many courts have concluded in insurance interpretation cases like this one that the term 'bodily injury' is ambiguous when applied to physical problems arising from a mental injury.").

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Personal and Advertising Injury Exclusions

<u>Knowledge of Falsity Exclusion</u>

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

Axiom Ins. Managers, LLC v. Capitol Specialty Ins. Corp., 876 F.Supp.2d 1005 (N.D. Ill. 2012)

"Even though the Texas Suit alleges intentional and knowing conduct, the exclusions do not negate the duty to defend since plaintiffs could have been held liable for defamation without proof of intent and knowledge."

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Montrose Endorsement and Strict "Sameness"

CGL Insuring Agreement

b. This insurance applies to "bodily injury" and "property damage" only if:

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. (emphasis added).

Strict "Sameness" Test

Scottsdale Ins. Co. v. Kaplan Family Trust, No. 15-538 (N.D. Calif. Nov. 23, 2015)

"An insured being on notice of general habitability allegations in certain parts of a building does not negate any future insurance coverage for allegations relating to other partially overlapping, partially different habitability issues."

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Restitution or Amount Otherwise Obligated to Pay

Bank of the West v. Superior Court, 833 P.2d 545 (Cal. 1992) (precludes indemnification and reimbursement of claims that seek the restitution of an ill-gotten gain) (against public policy to permit a wrongdoer to transfer the cost of disgorgement to an insurer because doing so would eliminate the incentive for obeying the law).

Amount otherwise owed under a contract

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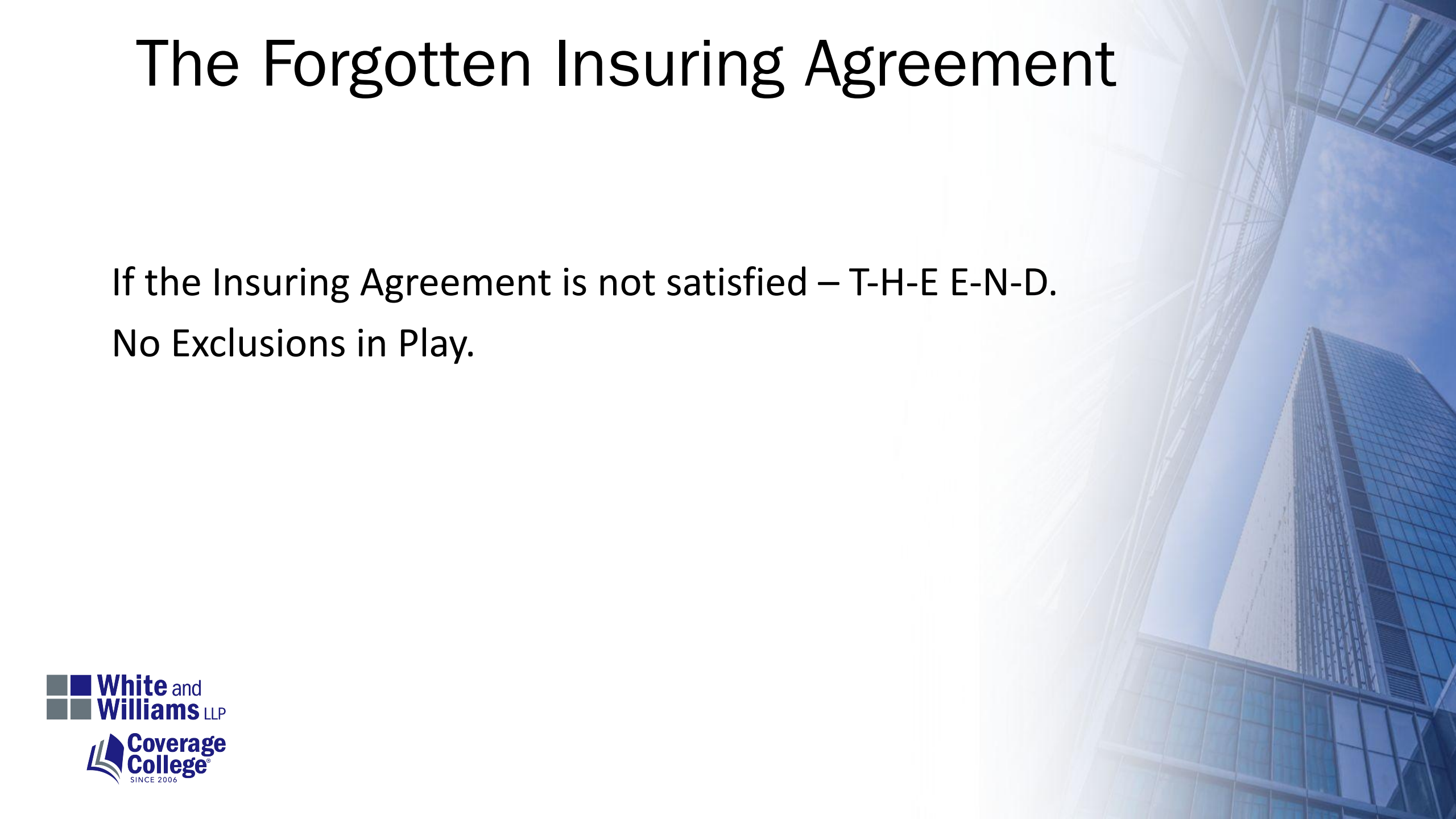
The Forgotten Insuring Agreement

If the Insuring Agreement is not satisfied – T-H-E E-N-D.

No Exclusions in Play.



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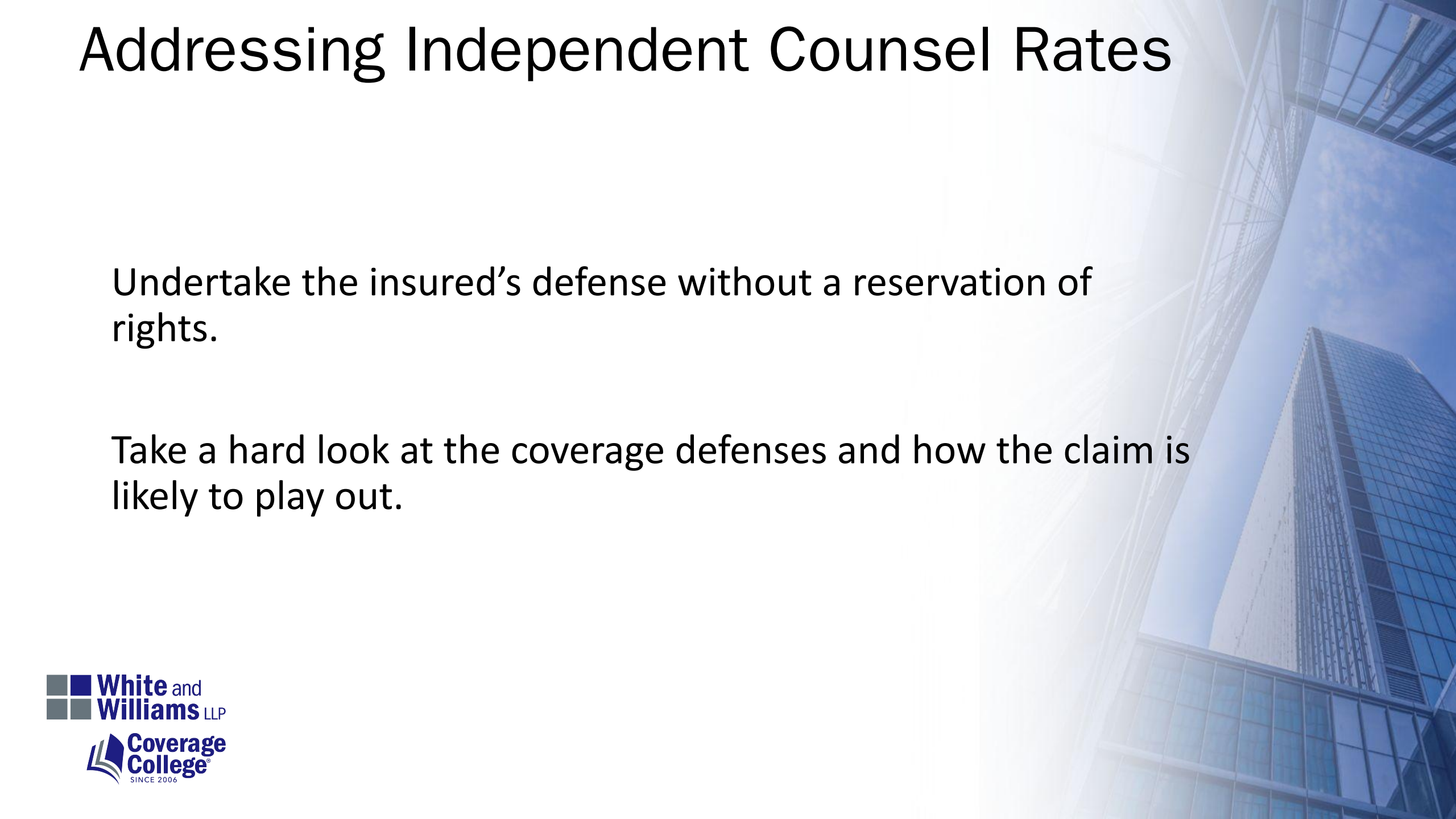
Addressing Independent Counsel Rates

Undertake the insured's defense without a reservation of rights.

Take a hard look at the coverage defenses and how the claim is likely to play out.



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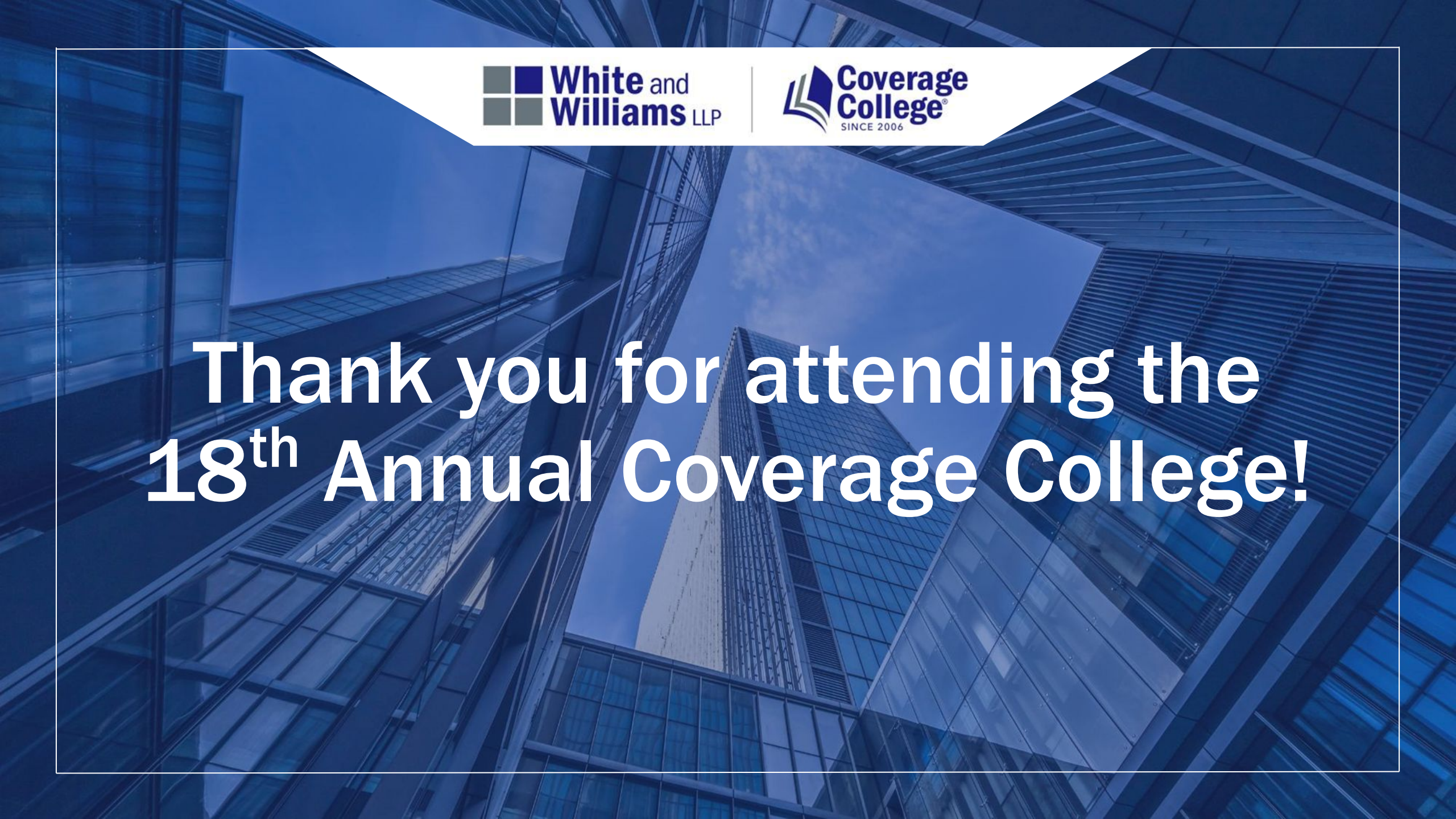
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