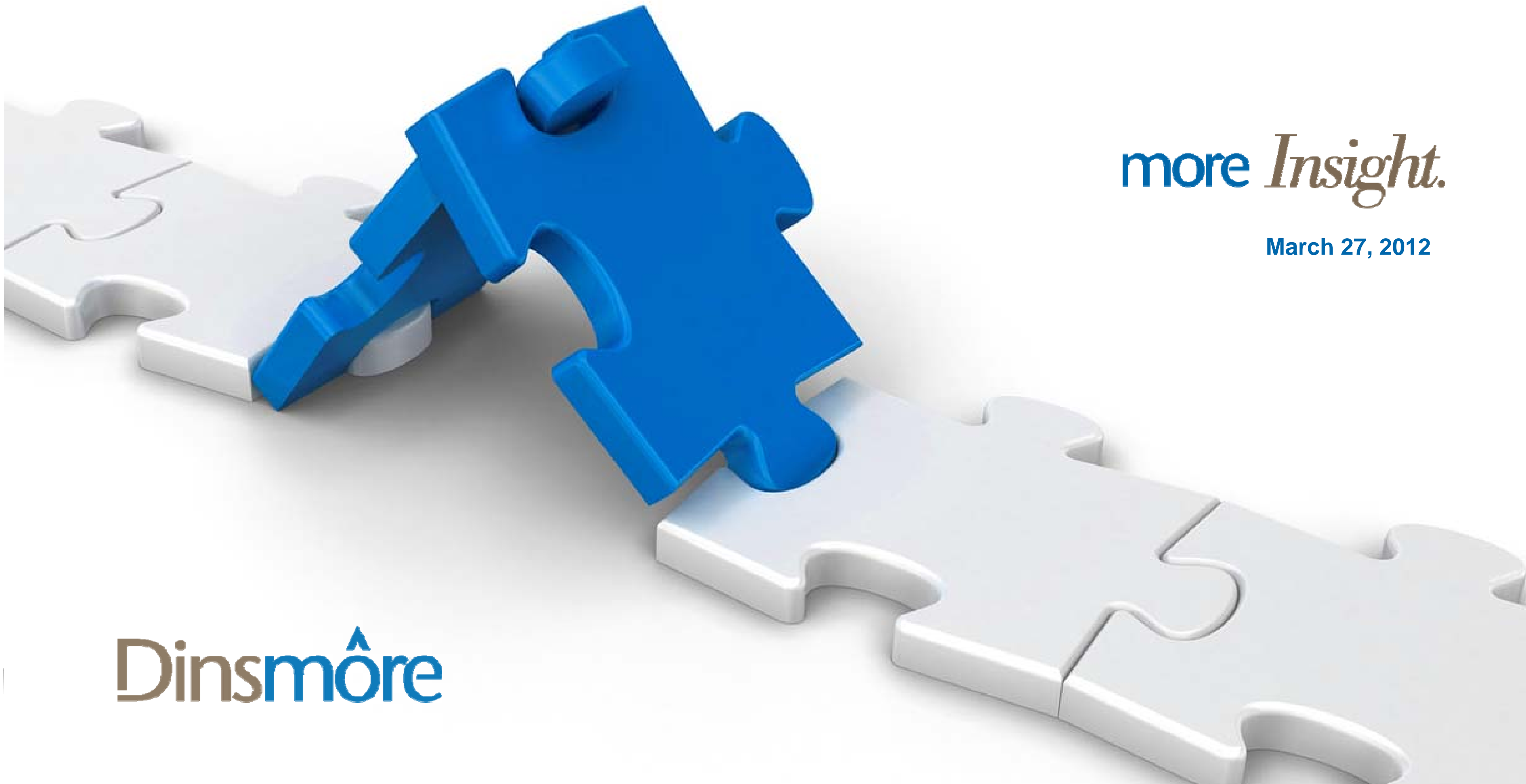
2011 Insurance Seminar

A View from the Courts



March 27, 2012

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Ohio

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Intentional Act Exclusion: Inferred Intent Doctrine

Allstate Insurance Co. v. Campbell, 128 Ohio St. 3d 186 (2010)

- **Issue:** Can Court infer that teenage boys intended resulting harm by placing fake deer next to the road at the bottom of a hill?
- **Held:** Inferred intent only applies in cases where action and resulting harm "are intrinsically tied so that the act has necessarily resulted in the harm."
  - Typically used in cases of sexual molestation and murder – but can be applied to other facts – ***however, inferred intent did not apply as a matter of law to teens' acts.***
  - Case remanded for proper weighing of facts to determine whether teens actually expected or intended harm to motorist.
- ***Not* substantial certainty test** – i.e. whether insured knew of danger such that harm would be "substantially certain" to occur.

Is an Award of Attorney's Fees Covered?

Neal –Pettit v. Lahman, 125 Ohio St.3d 327 (2010)

- Plaintiff awarded compensatory damages, punitive damages, expenses, and attorney's fees against insured.
- Insurer argued that attorney's fees are an element of a punitive damages award and public policy therefore precludes coverage for attorney's fees.
- **Held:** <u>No public policy</u> against covering attorney's fees.
    - Attorney's fee award not element of punitive damages.
    - Statute bars coverage only for punitive and exemplary damages and does not explicitly list attorney's fees.
    - Policy did not expressly exclude attorney's fees.

Declaratory Judgment Coverage Actions: When Are They Binding on an Insured's Judgment Creditor?

Estate of Heintzelman v. Air Experts, Inc., 126 Ohio St.3d 138 (2010)

- **Issue:** Is a declaratory judgment in favor of insurer binding on the insured's judgment creditor?
- **Held:** Only when the ***insured*** initiates the action.
  - R.C. 3929.06 unambiguously limits binding effect of declaratory judgment action between an insurer and an insured on a judgment creditor to those actions where the insured initiates the action against the insurer.
  - Court was clearly concerned with ***collusive*** nature of declaratory judgment action, as insurer had instructed insured to fall on its sword and concede there was no coverage.

Enforceability of Limitation of Action Clauses

Dominish v. Nationwide Ins. Co., Slip Opinion, No. 2011-Ohio-4102

- **Issue:** Is one-year limitation of action provision enforceable, particularly where insurer adjusts and partially pays claim?

- **Held:** One year limitation of action clause in policy is enforceable.

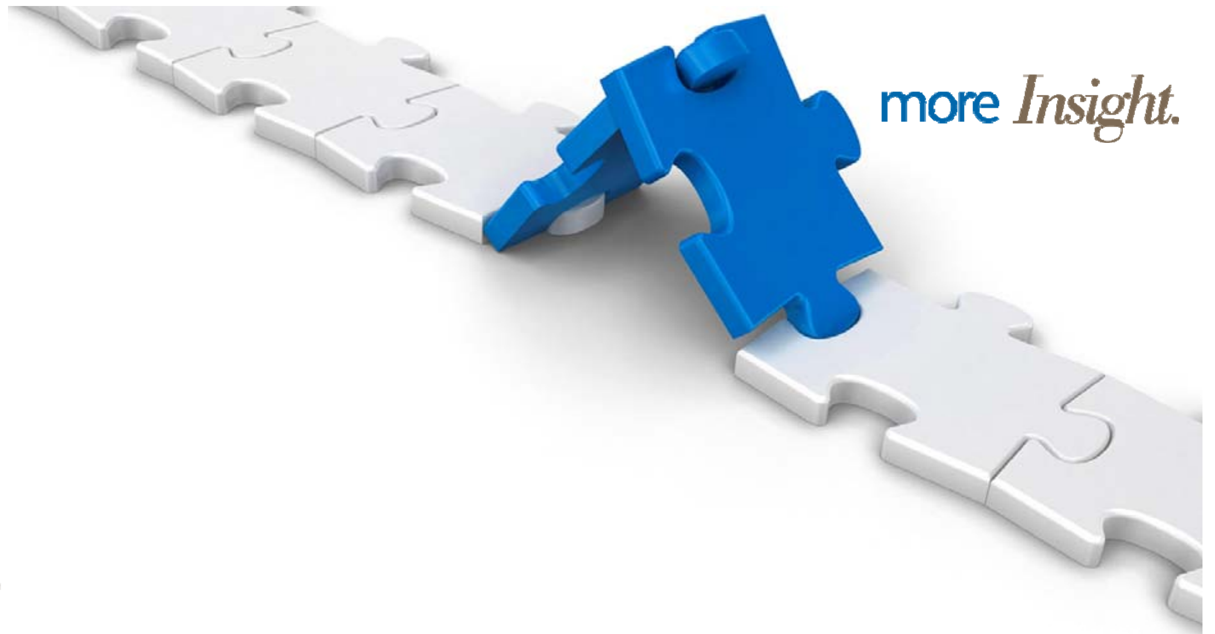
  - Policy language is unambiguous as "[t]he policy states in language clear enough to be plainly understood that any lawsuit by an insured against [the insurer] must be commenced within one year of the loss or damage sustained."

  - Insurer's partial payment and adjustment of claim insufficient to constitute a waiver of the limitation of action provision.

Enforceability of Limitation of Action Clauses (Cont'd)

- "[A]n insurance company must have either recognized liability or held out reasonable hope of adjustment and by doing so, induced the insured to delay filing a lawsuit until after the contractual period of limitation had expired."
- Insured :
  - clearly stated in its communications that it was not liable beyond the amount of the check, and
  - expressly reminded insured of one-year limitation of liability clause.

Insurers should take care to reserve their rights with respect to limitation of action clauses.



Pennsylvania

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Sufficiency of Waiver of UM/UIM Coverage

Orsag v. Farmers New Century Ins., 15 A.3d 896 (Pa. 2011)

- **Issue:** Does a signature on an insurance application containing lowered UM/UIM coverage sufficient to meet the requirements of Pennsylvania's Motor Vehicle Financial Responsibility Law?
- **Section 1734 of MVFRL:** "[a] named insured may request in writing the issuance of coverages . . . in amounts equal to or less than the limits of liability for bodily injury."
- Plaintiff signed two-page application for auto insurance.
- Pre-printed application included blanks where coverage amounts were to be written in for bodily injury and UM/UIM coverage.
- Amounts indicated for UM/UIM coverage on application were for less than liability amount.

Sufficiency of Waiver of UM/UIM Coverage

- Plaintiff sought UM/UIM coverage equal to BI limits – claiming insurance application wasn't sufficient to satisfy requirements of Section 1734.
- ***Held:*** Application signed by Plaintiff was sufficient to satisfy requirements of Section 1734.
  - Language of statute is plain and unambiguous – no detailed requirements for compliance with its terms.
  - Written request under Section 1734 need only include (1) **signature** of insured and (2) an **express designation** of the amount of coverage requested.
  - No more effective way to designate requested coverage than through a signed application.

Reimbursement of Defense Costs

Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 606 Pa. 584 (Pa. 2010)

- **Issue:** Is an insurer entitled to be reimbursed for costs of defending its insured where court later declares the insurer had no duty to defend?
- Policy at issue was **silent** regarding insurer's right to recover defense costs for a claim ultimately held to be outside the scope of coverage.
- Insurer attempted to reserve its rights to recover attorneys' fees.
- **Held:** No right to reimbursement, even where insurer attempts to claim a right to reimbursement in a reservation of rights letter.
  - Court noted that the insurance contract did not expressly provide for recovery of attorney's fees and insurer could not reserve a right it did not have.

Late Notice as Bar to Coverage

Vanderhoff v. Harleysville Ins. Co., 606 Pa. 272 (2010)

- **Issue:** Should an insurance carrier be required to prove prejudice for insured's late-reporting of accident claim?
- Insured hit by "phantom" driver. Timely made a workers' compensation claim to the insurer, but did not file a claim for UM benefits until eight months after the accident – MVFRL requires UM claim to be reported within 30 days of the accident.
- Insurer denied coverage due to late notice.
- **Held:** Court reads prejudice requirement in *Brakemen v. Potomac Ins. Co.*, 472 Pa. 66 (1977) into statute, requiring insurer to demonstrate prejudice in order to deny coverage due to insured's failure to timely notify insurer of accident.

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West Virginia

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Insurance Providers Can Be Subject to Discrimination Claim

Michael v. Appalachian Heating, LLC, 701 S.E. 2d 116 (W.Va. 2010)

- **Issue:** Can an insurance carrier be liable for discrimination under West Virginia's Human Rights Act, where carrier allegedly discriminated against third party claimants in adjusting their claim?
- Plaintiffs, who were African American, filed suit against their landlord for negligence in connection with an apartment fire.
- Landlord's insurance provider settled the plaintiffs' claims following the fire, but plaintiffs claimed insurer violated WVHRA by treating plaintiffs differently than other claimants based on their race.
- Insurer argued that plaintiffs were barred from bringing suit ,because West Virginia's Unfair Trade Practices Act provides the only avenue for a third party action against an insurance company.

Insurance Providers Can Be Subject to Discrimination Claim

Michael v. Appalachian Heating, LLC, 701 S.E. 2d 116 (W.Va. 2010)

- **Held:** Third party claimants can pursue a claim against an insurance company for violation of the WVHRA.
    - Insurance company falls within the definition of a “person” under WVHRA.
    - Accordingly, an insurance company is prohibited from engaging in unlawful discrimination in the settlement of a property damage claim.

Professional Services Exclusion

Boggs v. Camden-Clark Memorial Hospital Corp., 693 S.E.2d 53 (W.Va. 2010).

- **Issue:** Does a commercial general liability policy's "professional services exclusion" apply to a non-client's claim against an attorney?
- MedMal Plaintiff filed a malicious prosecution claim against a hospital and its attorney arising out of a counterclaim filed by the attorney on behalf of the hospital.
- Attorney reported the claim to his CGL carrier, which denied coverage due to exclusions for "professional services" and "professional liability."
- However, Plaintiff **was not** the client of the attorney.
- **Held:** Exclusions, by their terms, could be applied in situations where any party brought a claim related to an attorney's professional services, whether the party is a client or a non-client.

Protective Orders Governing Use of Medical Records

State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, 2011 W. Va. LEXIS 16 (2011).

- **Issue:** Can a court validly impose a protective order upon an insurance company limiting its use of medical records produced by a plaintiff?
- Plaintiff sought protective order for her medical records, citing confidentiality concerns. The insurer opposed, arguing there was no "good cause" for the protective order in that:
  - Sufficient protections were already in place to guard the medical records;
  - Protective order would require the insurer to violate affirmative reporting requirements of West Virginia law, including record retention requirements; and
  - The Order would require the insurer to destroy or relinquish its own claims files that merely contain "medical information."

Protective Orders Governing Use of Medical Records

State ex rel. State Farm Mutual Auto. Ins. Co. v. Bedell, 2011 W. Va. LEXIS 16 (2011).

- **Held:** Good cause existed for protective order.
  - Plaintiff had right to privacy in her medical records.
  - Insurer failed to raise arguments below regarding violation of affirmative reporting requirements.
  - Court did not interpret order as broadly requiring all documents to be returned or destroyed – only those portions referencing Plaintiff's medical information.

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Kentucky

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Other Insurance Clauses

Ky. Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co., 326 S.W.3d 803 (Ky. 2010)

- **Issue:** Where two auto policies cover a loss, which one is primary where both contain "other insurance" clauses providing they are excess over other coverage?
- Son was driving his parents' car as a permissive driver when he collided with another vehicle and caused injuries.
- Son had his own policy in addition to the policy maintained by the parents.
- **Held:** Where policies have "other insurance clauses" providing the other is "excess," the policy of the vehicle's owner is primary.
  - Legislature, through MVRA intended to place the primary responsibility for insurance on owner.
  - Court overruled prior precedent providing that policy language controls conflict between two insurers: "[I]n instances where both the vehicle owner and the non-owner driver are separately insured, the vehicle owner's insurance shall be primary."

UM/UIM Claims: *Coots* Notice of Intent to Settle

Ky. Farm Bureau Mut. Ins. Co. v. Young, 317 S.W.3d 43 (Ky. 2010)

- **Issue:** Did the failure of the insured's attorney to notify the UM/UIM insurer of the correct settlement amount render the insured's notice of intent to settle invalid?

- Kentucky law requires insureds to provide their UM/UIM carrier a notice of intent to settle in order to preserve their UM/UIM claim under K.R.S. 304.39.320 and *Coots v. Allstate Insurance Company,* 853 S.W.2d 895 (Ky. 1993).

- Insured's attorney informed insurer of settlement, but failed to provide insurer with the correct settlement amount until after the settlement was consummated. Insurer contended this was insufficient notice under *Coots.*

UM/UIM Claims: *Coots* Notice of Intent to Settle

Ky. Farm Bureau Mut. Ins. Co. v. Young, 317 S.W.3d 43 (Ky. 2010)

- **Held:** Notice from insured was sufficient.
  - While "the *Coots* notice should provide accurate information about the proposed settlement, including the correct amount of the written offer from the uninsured motorist's liability insurer," this rule is not a "weapon" to deny a policyholder's benefits.
  - If doubt exists as to the amount of the settlement, it is the burden of the underinsured motorist insurer to take reasonable measures to clear the doubt.

Definition of “Occurrence in CGL Policies”

Cincinnati Ins. Co. v. Motorists Mut. Ins. Co., 306 S.W.3d 69 (Ky. 2010)

- **Issue:** Does faulty, construction-related workmanship, standing alone, constitute an “occurrence” under a CGL policy?

- Homeowners sued builder, claiming that home was poorly built. Builder’s insurer settled claim and sought contribution from the builder’s present insurer.

- **Held:** Poor workmanship does not constitute an “occurrence” under a CGL policy.

  - Policy defined occurrence as an “accident” and doctrine of fortuity is inherent in the plain meaning of the term “accident.” Fortuity consists of “intent” and “control.”

  - Because the construction was within the homebuilder’s control, “[o]ne cannot logically say . . . that the allegedly substandard construction . . . was a fortuitous, truly accidental event.”

Definition of "Accident"

Stamper v. Hyden, 334 S.W.3d 120 (Ky. Ct. App. 2011)

- **Issue:** Is insured entitled to recover UIM benefits for damages resulting from the intentional criminal conduct of another?
- Plaintiff insured was injured when her former boyfriend intentionally collided with her vehicle. She brought a personal injury action against her ex-boyfriend and her UIM carrier to recover damages for her injuries.
- Insurer contended that the injury was not "accidental" and therefore not covered.
- **Held:** "Accident" is to be defined from the perspective of the insured, not the tortfeasor.
  - Court noted that the legislative intent of K.R.S. 304.20-020 is "to make whole . . . an injured party who would otherwise not receive compensation from an at-fault uninsured party." Legislative intent achieved by interpreting "accident" from insured victim's perspective.

Questions?

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