



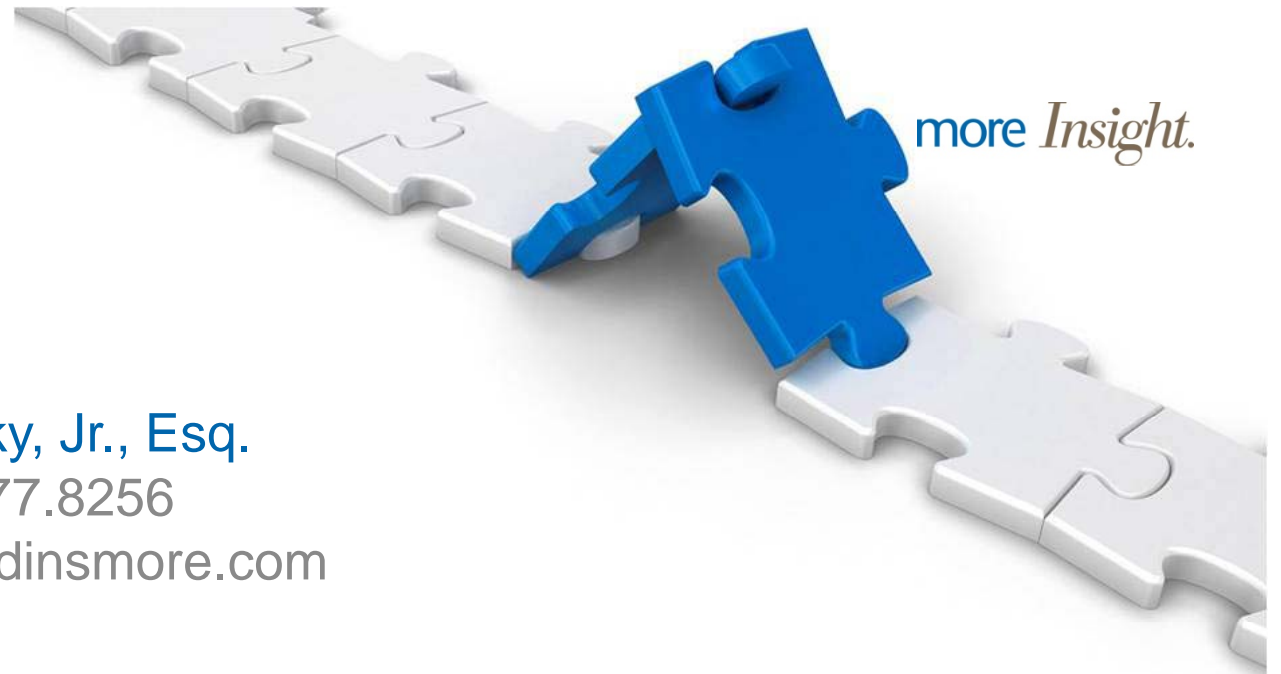
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# OSBA – Advanced Issues of Insurance Law

## Claims Handling Process

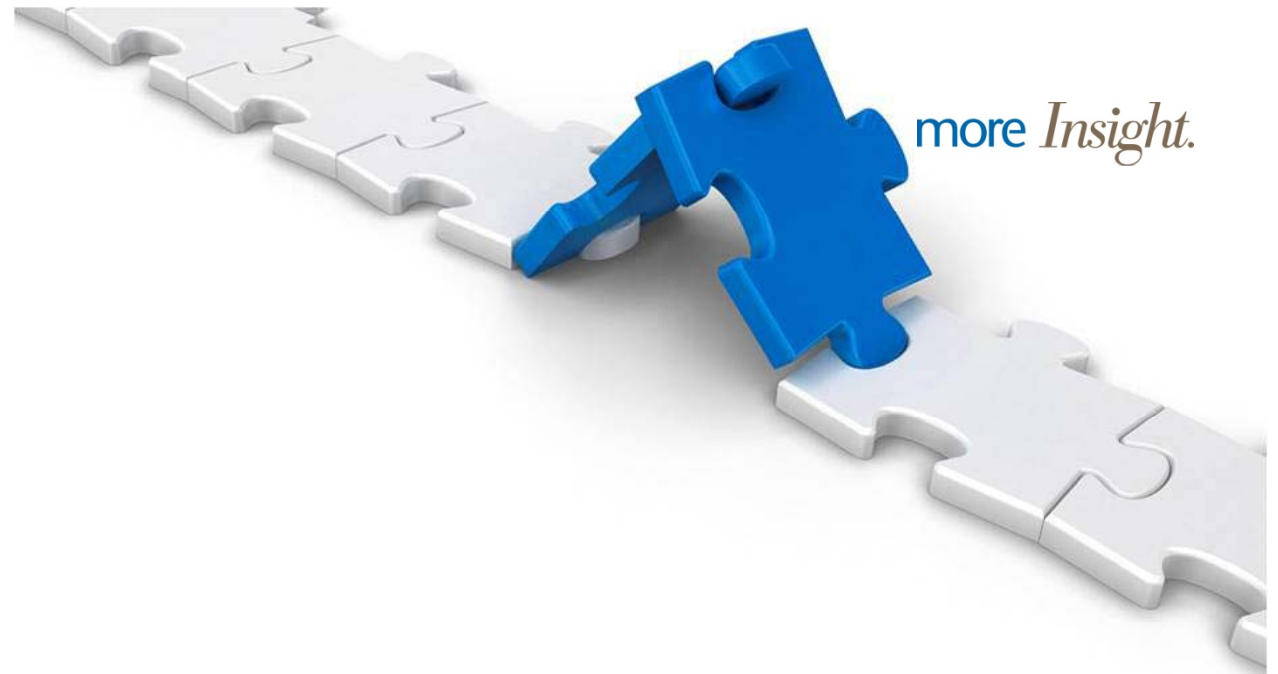
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August 28, 2013



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# Claims Handling Process

# Outline

- Introduction & Context
- Duty to Provide Notice
  - Is notice after settlement ever deemed timely?
- Reservation of Rights / Insurer Conflict of Interest
  - Can insufficient disclosure cause a waiver of coverage defenses?
  - Can insurers reserve rights to recover defense costs?

# Outline

## ■ Claims Investigations

- What are the standard issues?
- Can the right to insurance proceeds be assigned?

## ■ When is Litigation Necessary

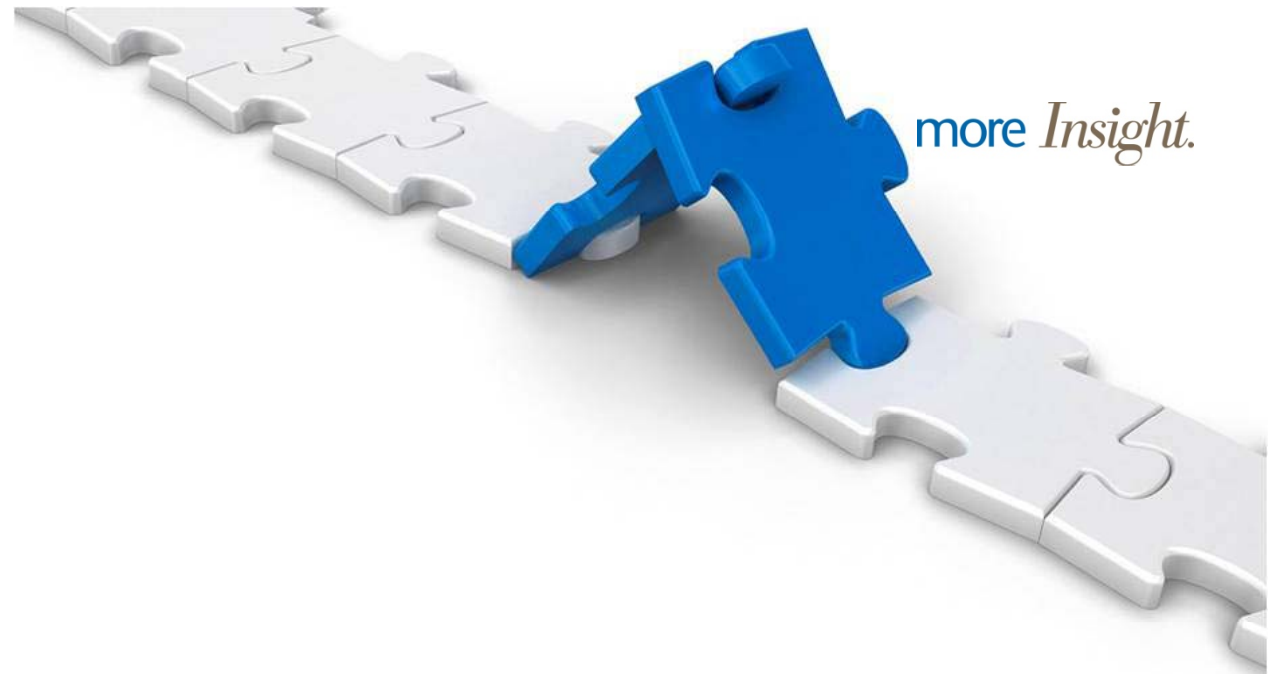
- Can inaction lead to collateral estoppel of the insurer?

# Introduction / Context

- Policyholders have certain obligations
  - Provide notice of suit / claim
  - Pay premiums
  - Cooperate in investigation

# Introduction / Context

- Policyholders have certain rights
  - Prompt and diligent defense, potentially covered claims
  - Statement of Insured Client Rights
    - Loyal counsel, free of material conflicts
  - Good faith investigation and decision
    - Proper reservation of rights or denial



## Duty to Provide Notice



# Duty to Provide Notice

- Applies to two types of events
  - Any occurrence or offense which may result in a claim
  - Any suit or claim
- Threshold requirement
  - Typical terms: “As soon as practicable” or “Immediately”
  - Interpretation: reasonable time under the circumstances

# Duty to Provide Notice

## ■ How late is too late?

— Usually decided by the “finder of fact”

- Issues of unreasonable delay and prejudice to insurer
- Unexcused significant delay can be unreasonable as matter of law
  - Ormet v. Employer’s Ins. of Wausau, 88 Ohio St. 3d 292 (2000).
- Unreasonable delay presumed prejudicial, absent rebuttal
  - Ferrando v. Auto-Owners Mut. Ins., 98 Ohio St. 3d 186 (2002)

# Duty to Provide Notice

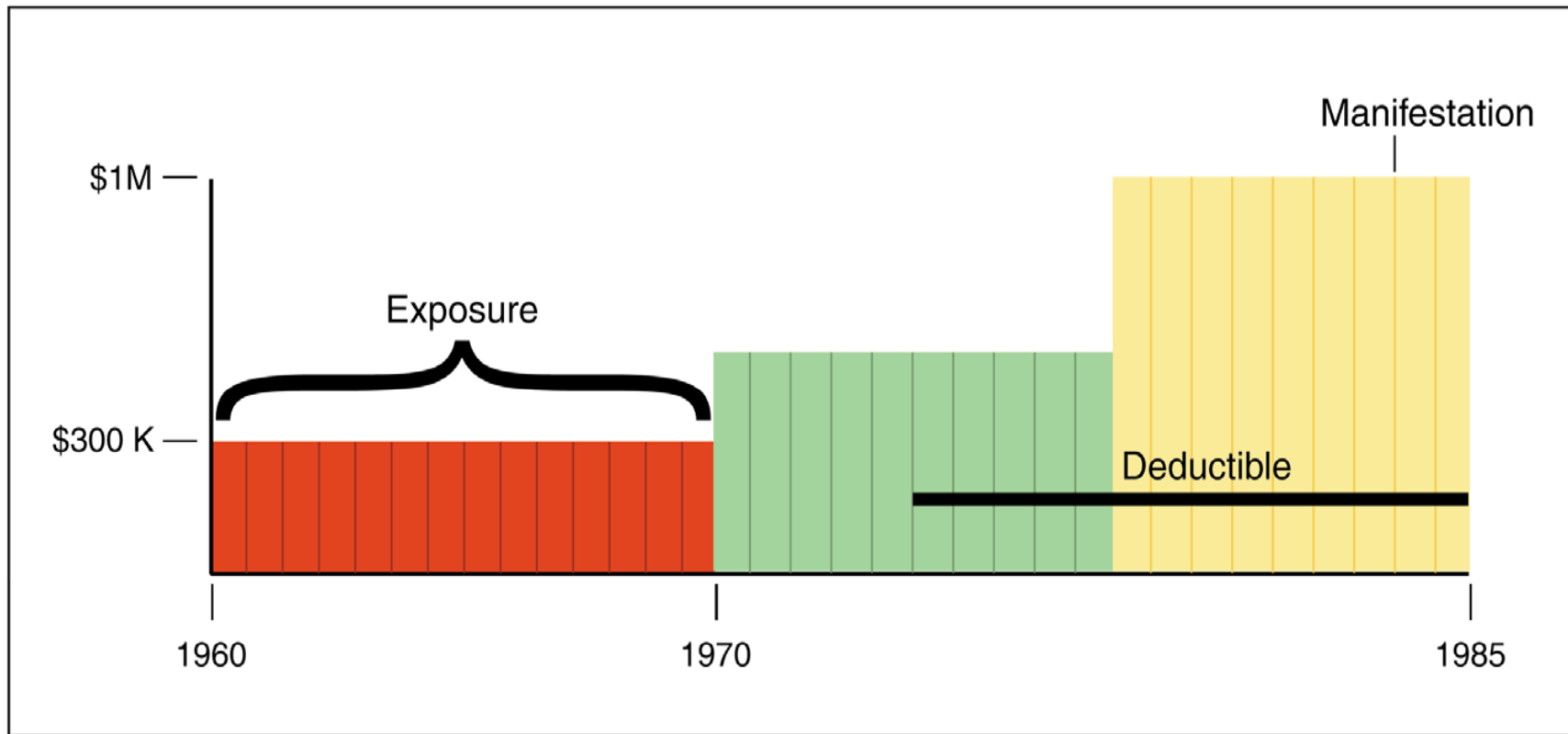
- Summary judgment possible for insurer
  - Ormet, 88 Ohio St. 3d 292 (decades-old environmental damage)
  - Bellaire TV Cable, (7th Dist.) 2002-Ohio-3203 (litigation progressed)
  - London v. Jeff Wyler, S.D. Ohio, 2007 WL 1989836 (precise policy)
- Facts may preclude summary judgment
  - Hundsrucker v. Perlman (6th Dist.), 2004-Ohio-4851
    - 4½ yrs but no prejudice

# Duty to Provide Notice

- Delay Excused in Certain Circumstances
  - Third-party beneficiary – no knowledge of policy
    - *Vecchio v. Montg’y Cty.* (2d Dist.), 2005 Ohio-313 (jury question)
  - Contribution in complex environmental or asbestos cases
    - *Pennsylvania Gen’l Ins. v. Park-Ohio* (2010), 126 Ohio St. 3d 98
      - Multiple insurers involved
      - “All sums” approach

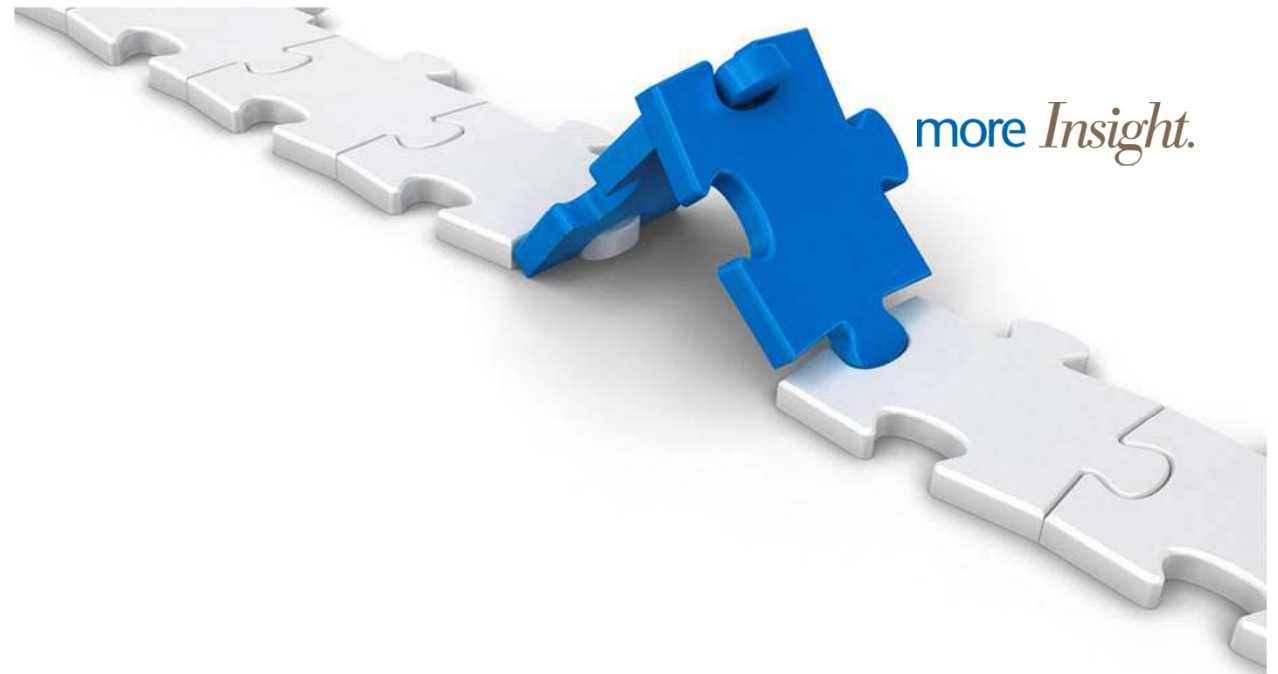
# Duty to Provide Notice

## Long Term Exposure/Delayed Manifestation



# Duty to Provide Notice

- Park-Ohio (2010), 126 Ohio St. 3d 98
  - Notified only the “targeted insurer”
  - Contribution claim after underlying settlement
    - Court allowed arguments of prejudice
    - But “all sums” presupposes one targeted insurer; excused delay
  
- Effect on notice requirements?
  - No effect on most cases
    - E.g. West’n Reserve Mut. Cas. Co. v. OK Café & Catering, 2013 Ohio 3397 (3<sup>rd</sup> Dist)
      - Citing Park-Ohio and Ferrando for presumption of prejudice after default



# Reservation of Rights

# Reservation of Rights

- Insurer Options Upon Notice (3<sup>rd</sup> party claim)
  - (1) Accept coverage, defend unconditionally
  - (2) Deny coverage
  - (3) Investigate while defending under reservation of rights
    - Defense is critical for the policyholder
    - Defend promptly and diligently if arguably within coverage
      - Motorists Mut. Ins. v. Trainor (1973), 33 Ohio St. 2d 41
      - Willoughby Hills v. Cincinnati Ins. (1984), 9 Ohio St. 3d 177



# Reservation of Rights

- Why is a reservation of rights required?
  - Policyholder might have to pay
  - Control of the defense to shape outcomes
  - Potential conflict of interest in handling the defense
    - Dietz-Britton v. Smythe (8th Dist. 2000), 139 Ohio App. 3d 337

## Reservation of Rights

- “The insured should know of the potential for a conflict in interest before accepting or proceeding with the insurer’s offer to provide a defense.” (emphasis added)
  - *Collins v. Grange Mut.* (12<sup>th</sup> Dist. 1997), 124 Ohio App.3d 574

# Reservation of Rights

- Goal of the Reservation of Rights Letter
  - Fairly apprise of basis for possible denial
  - Enough for “knowing choice” to proceed or independent counsel
  - Cannot lull a policyholder into inaction and prejudice

# Reservation of Rights

- Details for the letter:
  - Each potential basis for such denial
  - Pertinent policy provisions
  - Pertinent facts
  - **Right to rely upon all policy provisions**
  - Policy date(s) and number(s)
  - Date when the policyholder was served with suit
  - Limit of liability if relevant

# Reservation of Rights

- Optional clauses:
  - Right to discontinue and withdraw defense
    - Court approval usually sought. But is it required?
  - Right to reimbursement of defense costs
    - Additional slides below
- Fact development may require supplemental letter
  - Send timely, prevent prejudice

# Reservation of Rights

- First party claims
  - Reservation of rights is still often necessary
  - Regulations relevant
    - Ohio Admin. Code § 3901-1-54(F) and (G) (2 to 3 weeks)

# Reservation of Rights

- Waiver of Defenses Absent Proper Reservation
  - Timely at start of defense
  - Adequate information / disclosure
  - Waiver occurs if prejudice results
    - Lost settlement opportunity
    - Inability to produce witnesses
    - Time for adequate trial prep

# Reservation of Rights

- Examples of waiver due to delay
  - Dietz-Britton v. Smythe (8th Dist. 2000), 139 Ohio App. 3d 337
    - Two years late, near trial trial
  - Collins v. Grange (12th Dist. 1997), 124 Ohio App. 3d 574
    - One year late, lost settlement opportunities
  - Ins. Co. N. Am. v. Travelers (8th Dist. 1997), 118 Ohio App. 3d 302
    - 10 months' delay “of necessity...establish[ed] prejudice”



# Reservation of Rights

- Examples of no prejudice despite delay
  - Roark v. Medmarc Casualty Ins. (9th Dist.), 2007-Ohio-7049
    - Five months delay, remand
  - Yates v. Estate of Ferguson (1st Dist.), 2010-Ohio-892
    - One year but then underlying case dismissed

# Reservation of Rights

- Need for good faith disclosure to policyholder
  - Utica Mut. Ins. v. David Agency, 327 F.Supp. 922 (N.D. Ill. 2004)
    - Waiver found, inadequate disclosure
  - Nautilus Ins. Co. v. Dubin & Assoc., 2012 U.S. Dist. LEXIS 89066 (N.D. Ill.)
    - Waiver narrowly avoided, despite inadequate disclosures

# Reservation of Rights

- Reserving Right to Reimbursement of Defense Costs
  - Not addressed by Ohio state courts
  - United Nat'l Ins. v. SST Fitness (6th Cir. 2002), 309 F.3d 914
    - “implied in fact” contract to reimburse
    - “Majority rule” but controversial
  - Travelers v. Hillerich & Bradsby Co., 598 F.3d 257 (6<sup>th</sup> Cir. 2010)
    - Settlement reimbursement permitted
    - Policyholder controlled defense, demanded settlement
    - Objection to reservation immaterial

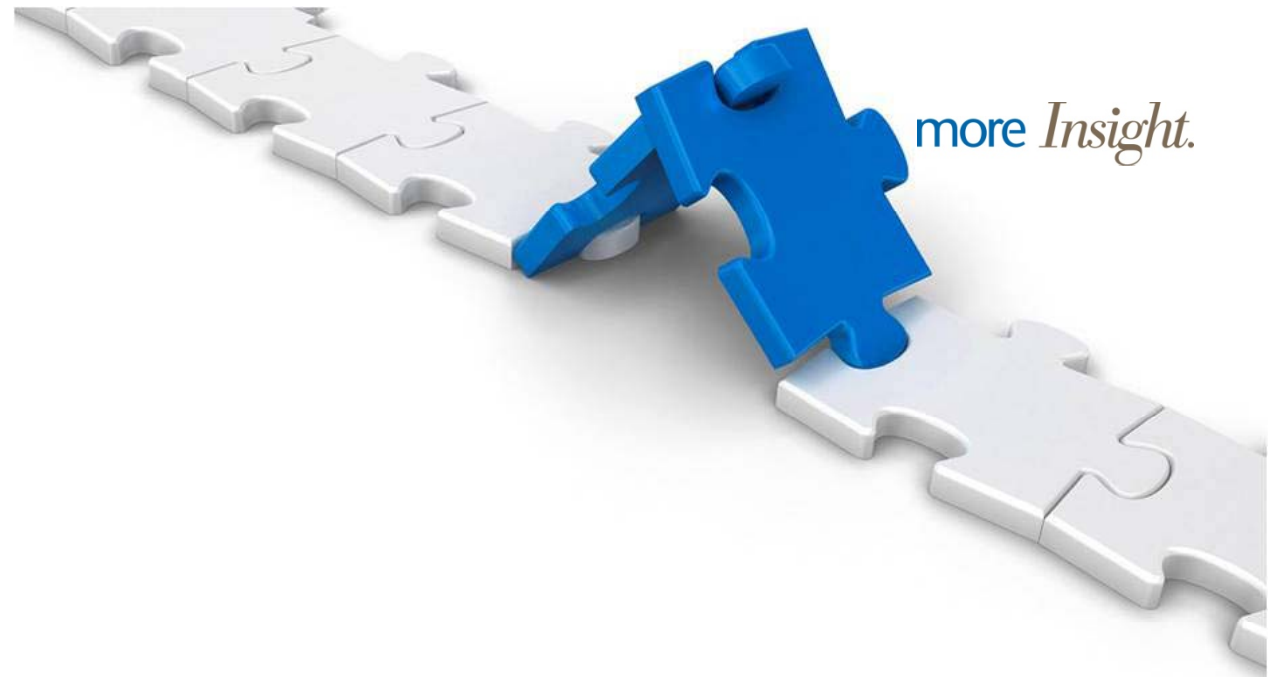
# Reservation of Rights

## ■ Some Courts Reject Reimbursement

- National Surety Corp. v. Immunex Corp, 176 Wn.2d 872; 297 P.3d 688 (2013)
  - Refusing to allow insurer “to impose a condition on its defense that was not bargained for”
- General Agents Ins. Co. v. Midwest Sporting Goods (Ill. 2005), 828 N.E.2d 1092
- Am. & Foreign Ins. v. Jerry's Sport 2 A.3d 526 (Pa. 2010)
- American Motorist Ins. v. Custom Rubber, N.D. Ohio No. 1:05cv2331 (2006 WL 2460861) (not reimburse judgment)

# Reservation of Rights

- Policyholders' Options on Reimbursement Reservation
  - Accept defense but object to reservation
    - Some courts find objection immaterial
  - Decline the offer, pay your own defense, sue
  - Decline the offer, seek DJ or sue for breach



# Claims Investigations

# Claims Investigations

- Two basic inquiries
  - 1) Facts behind the claim
  - 2) Terms and meaning of the policy

# Claims Investigations

## ■ Key Fact Issues for Investigation

- (1) Named insured
- (2) Type of damages
- (3) Timing of notice
- (4) Timing of damages / events
- (5) Other insurance
- (6) Issues from specific exclusions



# Claims Investigations

- Defining the facts
  - First party claims: policyholder statements
  - Third party claims: lawsuit or others' allegations
    - Duty to defend, reservation of rights

# Claims Investigations

- Issues relating to “Named Insured” status or assignment of rights to proceeds
  - Corporate assets sales / mergers / transactions
  - Assignment by tort plaintiffs to medical providers or body shops

## Claims Investigations – named insured

- Pilkington N.A., Inc. v. Travelers, 112 Ohio St.3d 482, 488, 2006-Ohio-6551 (certified questions)
  - Years of environmental damage
  - Normally, coverage cannot be assigned, and does not transfer automatically “by operation of law”
  - But some “rights of action” or “choses in action” for proceeds post-occurrence can be assigned
  
- Pilkington N.A., Inc. v. Travelers, N.D. Ohio No. 3:01CV7617, 2009 U.S. Dist. LEXIS 67291 (July 27, 2009)
  - Asset agreement transferred the “chose in action”
  - Judgment against insurers, in favor of transferee

# Claims Investigations

- Other “named insured” issues re corporate transactions
  - The Gliddon Co. v. Lumbermans Mutual Cas. Co et al., 112 Ohio St. 3d 470; 2006 Ohio 6553
    - Insurance not transferred despite an attempt by parent entity
    - “This attempt to totally disregard the corporate formalities is insufficient to establish a conveyance of SCM (NY)'s rights under the insurance policies”
  - Bondex Int’l, Inc. v. Hartford Acc. & Indemn. Co., N.D. Ohio No. 1:03-CV-1322 (2009 U.S. Dist. LEXIS 131638)
    - Finding a de facto merger between prior company and current
    - Insurer prevailed: prior company is named insured by operation of law for products liability limits

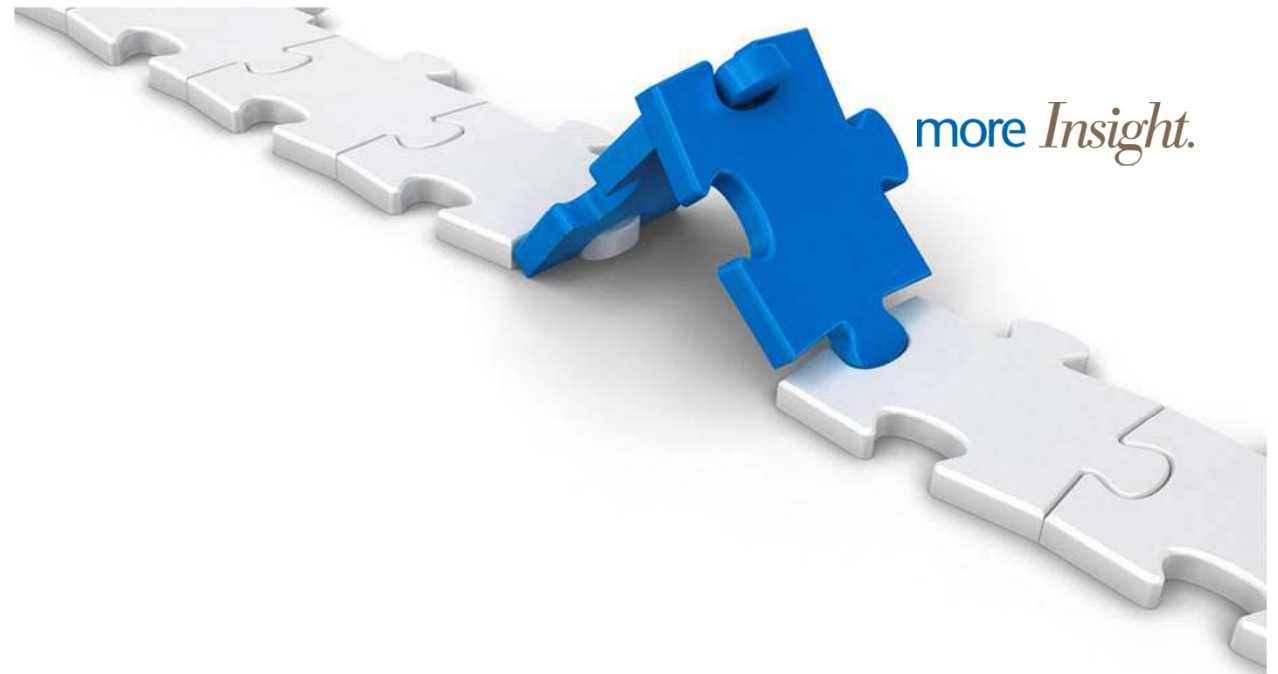
# Claims Investigations

- Assignments by tort plaintiffs to medical providers or auto service providers *not* permitted
  - *West Broad Chiropractic v. Am. Fam. Ins.*, 122 Ohio St. 3d 497; 2009 Ohio 3506
  - *Mercedes-Benz of West Chester v. Am. Fam. Ins.*, 2010 Ohio 2307 (12<sup>th</sup> Dist.)
- Proper course is to seek payment after judgment
  - R.C. 3929.06 (direct action statute)

# Claims Investigations

## ■ Involvement of Counsel

- Can create discoverable materials
- Boone v. VanLiner Ins. Co. (2001), 91 Ohio St. 3d 209
  - Bad faith context
- Do insurer counsel in Ohio now avoid written reports?



## When Is Litigation Necessary

# When Is Litigation Necessary?

- When insurer decides to dispute coverage, questions arise as to when to litigate
  - Key Question: are any coverage issues addressed by resolution of the facts in the underlying case?
    - If yes, insurers beware of collateral estoppel
    - If no, there is more flexibility as to strategy / timing:
      - File a separate DJ
      - Intervene
      - Wait and see



# When Is Litigation Necessary?

- To prevent collateral estoppel: insurer action often needed
  - Key example: alternative claims of negligence or intentional
    - Howell v. Richardson (1989), 45 Ohio St. 3d 365
    - But see Staley v. Grant (11th Dist. 1993), 1993 WL 130100

# When Is Litigation Necessary?

- Insurer's Options per *Howell*:
  - Decline to defend, intervene in underlying case
  - Attempt to defeat coverage
    - Usually submit jury interrogatories
    - Could involve advocacy?
- May be able to defend under reservation, independent counsel



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## For more details:

Richard D. Porotsky, Jr., Ohio Insurance Law:  
Policy Analysis, Bad Faith, and Ethical Conflicts  
(Ohio State Bar Assoc'n CLE, 2011).

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