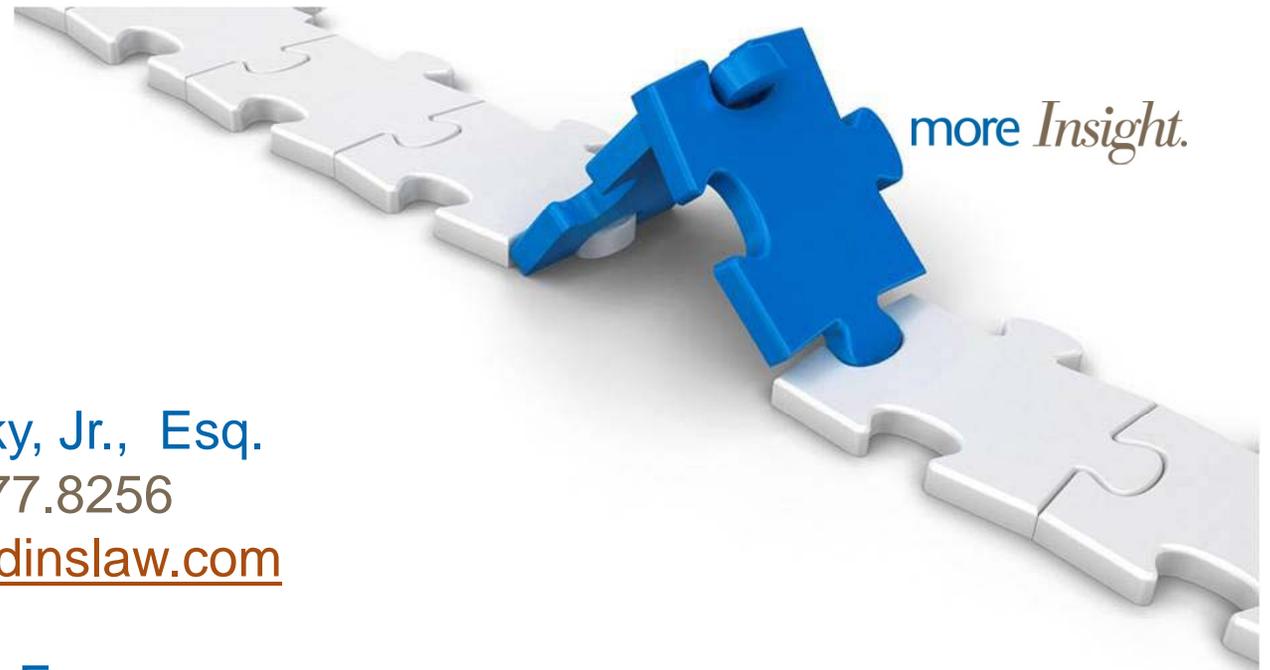




more *Insight.*

Proper Claims Handling to Avoid Bad Faith Claims



more *Insight.*

Presenters

Richard D. Porotsky, Jr., Esq.

Cincinnati ^ 513.977.8256

richard.porotsky@dinslaw.com

Ansley Westbrook, Esq.

Pittsburgh ^ 412.288.5864

ansley.westbrook@dinslaw.com

PROPER CLAIMS HANDLING TO AVOID BAD FAITH CLAIMS

Outline

- I. Introduction & Context
- II. Ohio Bad Faith Standards
- III. Framework for Proper Claims Handling
 - A. Policyholder Duties: Notice & Cooperation
 - B. Insurer Duties & Reservation of Rights
 - Details needed for letter?
 - Waiver of coverage defenses occur?
 - Recovery of defense costs?

Outline

C. Key Elements of Proper Claims Investigation

D. Use of Litigation – When and How

- When does collateral estoppel dictate action?

IV. Examples: Bad Faith Results in a Claims Handling Context

Introduction / Context

- ▶ Policyholders have certain obligations
 - ▶ Provide notice, Cooperate in investigation
- ▶ They also have certain rights
 - ▶ Prompt and diligent defense, potentially covered claims
 - ▶ Notice of Insured Client Rights (see book)
 - ▶ Good faith investigation and decision
 - ▶ Proper reservation of rights or denial
- ▶ Key: know the proper balance

THE OHIO BAD FAITH STANDARD

Current Definitions

Bad Faith Standard in Ohio

- ▶ *Zoppo v. Homestead Ins.* (1994), 71 Ohio St.3d 552:
 - ▶ Bad faith: “refusal . . . not predicated upon circumstances that furnish reasonable justification therefor.”
 - ▶ Similar to negligence
 - ▶ Does not warrant punitive damages
 - ▶ Timing: when assessment of coverage is being considered

Bad Faith Standard in Ohio

- ▶ No Bad Faith Where the Issue is "Fairly Debateable"
 - ▶ "Genuine dispute over either the status of the law at the time of the denial or the facts giving rise to the claim."
 - ▶ *Abon v. Transcont'l Ins. Co.* (5th Dist.), 2005-Ohio-3052, at ¶¶ 37-46 ("fairly debatable")

- ▶ "Mere refusal to pay" is not enough to prove bad faith

Types of Bad Faith Claims

- ▶ Bad Faith Failure to Settle a Covered Claim, Resulting in Excess Liability
 - ▶ Original basis for bad faith
 - ▶ Liability for entire judgment against the insured, above policy limits
 - ▶ “Incentive” to accept settlement offer with damages “near or over its policy limits.”
 - ▶ For more details see book

Types of Bad Faith Claims

- ▶ **Bad Faith Refusal or Delay in Paying Covered Claim**
 - ▶ Regardless of excess liability
 - ▶ Punitive damages due to unreasonable handling

- ▶ **Bad Faith Failure to Defend**
 - ▶ Even if Indemnity Is Ultimately Disproven
 - ▶ Potential for establishing punitive damages
 - ▶ Lack of good faith in “processing” a claim

Types of Bad Faith Claims

- ▶ Failure to Reasonably Handle a Non-covered Claim
 - ▶ *Bullet Trucking, Inc. v. Glenfalls Ins. Co.* (Montgomery Co. 1992), 84 Ohio App.3d 327, 333, 616 N.E.2d 1123.
 - ▶ Criticism and disapproval of *Bullet*
 - ▶ Possibly limited to intentional failure to determine a basis to deny or to contractual limitations issues

FRAMEWORK FOR PROPER CLAIMS HANDLING

--Policyholder's Duties of Notice and
Cooperation

Duty To Provide Notice & Cooperate

- ▶ Threshold requirement for covering a ‘claim’ / ‘suit’
 - ▶ Typical terms: “As soon as practicable” or “Immediately”
 - ▶ Interpretation: reasonable time under the circumstances
 - ▶ Usually for “finder of fact”
 - ▶ But unexcused significant delay can be a matter of law
 - ▶ Lack of notice / non-cooperation raises issue of prejudice

Cases Law Regarding Notice

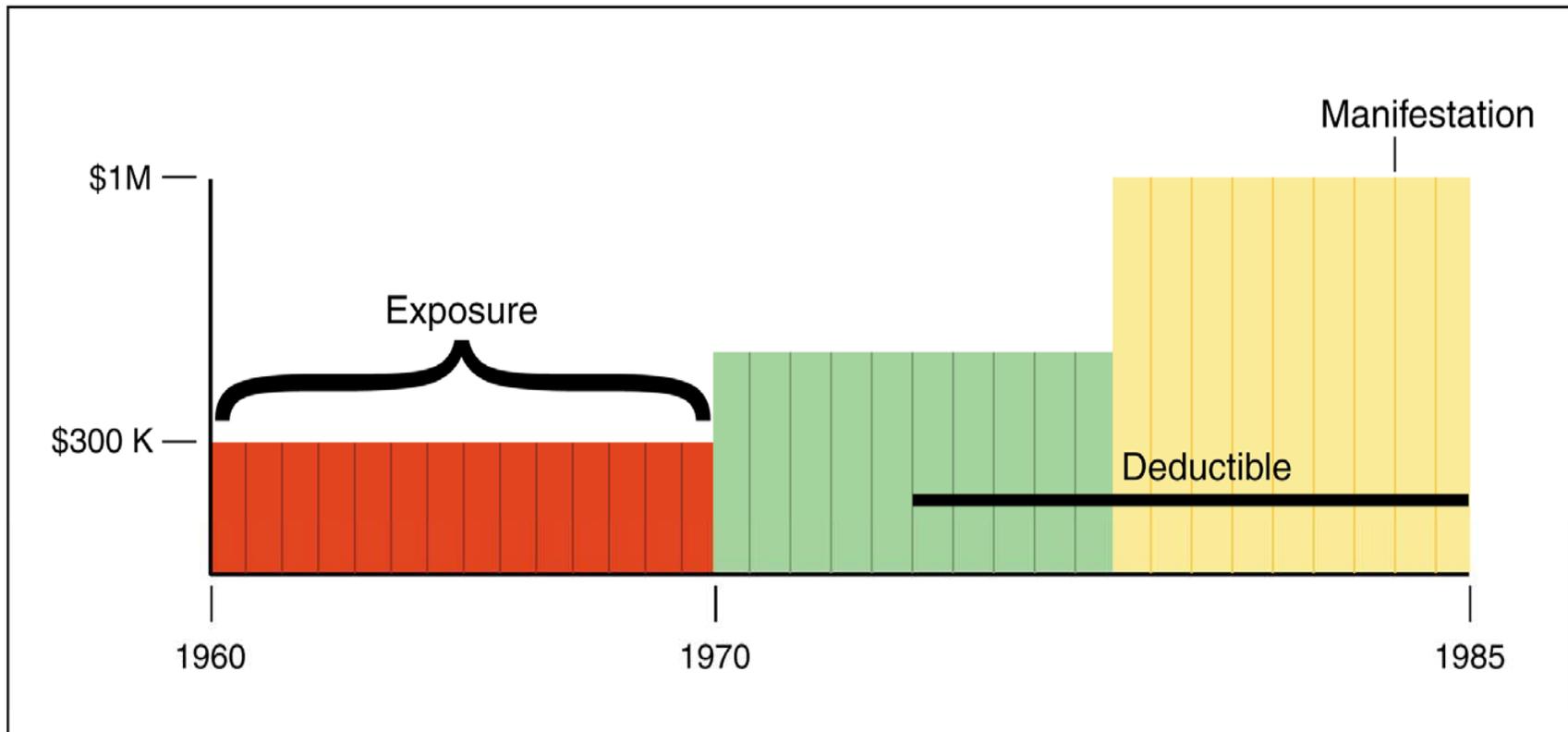
- ▶ Summary judgment possible for insurer
 - ▶ Ormet, 80 Ohio St. 3d 292 (decades-old envir'l damage)
 - ▶ Bellaire TV , (7th Dist.) 2002-Ohio-3203 (litigation progressed)
 - ▶ Novak (9th Dist), 2009 Ohio-6952 (consent judgment)
- ▶ Facts may preclude summary judgment
 - ▶ Hundsrucker v. Perlman (6th Dist.), 2004-Ohio-4851
 - ▶ 4½ yrs but no prejudice

Case Law Regarding Notice

- ▶ Delay Excused in Certain Circumstances
 - ▶ Contribution in complex environment'l / 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 the delay
- ▶ Effect on notice requirements?

FRAMEWORK FOR PROPER CLAIMS HANDLING

--Insurer's Duty to Defend and Provide
Reservation of Rights

Reservation Of Rights

- ▶ Insurer Options Upon Receipt of Notice

- (1) Accept coverage, defend unconditionally

- (2) Deny coverage

- (3) Investigate while defend under reservation of rights

Reservation Of Rights

- ▶ Honoring the broad duty to defend
 - ▶ “Potentially or arguably” within coverage
 - ▶ “Prompt and diligent” defense
 - ▶ Amid questions, must defend under reservation
 - ▶ Motorists Mut. Ins. v. Trainor (1973), 33 Ohio St. 2d 41
 - ▶ Willoughby Hills v. Cinti Ins. (1984), 9 Ohio St. 3d 177

Reservation Of Rights

- ▶ Why is a reservation of rights required?
 - ▶ Potential conflict of interest
 - ▶ “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.”
 - ▶ *Collins v. Grange Mut.* (1997), 124 Ohio App.3d 574
 - ▶ See Book for more on conflicts / ethics for defense counsel
 - ▶ Control of the defense to shape outcomes
 - ▶ Policyholder might have to pay

Reservation Of Rights

- ▶ Goal of the Reservation of Rights Letter
 - ▶ Enough for “knowing choice” to proceed or get independent counsel
 - ▶ Fairly apprise of possible denial
 - ▶ Cannot lull a policyholder into inaction
 - ▶ Prejudice
 - ▶ *Utica Mut. Ins. v. David Agency*, 327 F.Supp.2d 922 (N.D. Ill 2004)

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 details / clauses – how far can the insurer go?
 - ▶ Right to discontinue and withdraw defense
 - ▶ Court approval usually sought
 - ▶ Right to reimbursement of defense costs

Reservation Of Rights

- ▶ Reservation of rights for first party claims
 - ▶ 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
 - ▶ Supplemental letter if additional bases of denial arise
 - ▶ Waiver occurs if prejudice results
 - ▶ Lost settlement opportunity
 - ▶ Inability to produce witnesses
 - ▶ Time for adequate trial prep

Reservation Of Rights

▶ Examples of waiver

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

Reservation Of Rights

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

Reservation Of Rights

- ▶ Optional Clause: Reserving Right to Reimbursement of Defense Costs
 - ▶ “Majority rule,” 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
 - ▶ Travelers Prop. Cas. Co. v. Hillerich & Bradsby Co., 596 F. Supp. 2d 1020 (W.D. Ky. 2008)
 - ▶ Objection to reservation immaterial

Reservation Of Rights

▶ **Some Courts Reject Reimbursement**

- ▶ General Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co. (Ill. 2005), 828 N.E.2d 1092
- ▶ Am. & Foreign Ins. v. Jerry's Sport Ctr., 2 A.3d 526 (Pa. 2010)
- ▶ American Motorist Ins. v. Custom Rubber, (Aug. 23, 2006), N.D. Ohio No. 1:05cv2331 (2006 WL 2460861)
 - ▶ refusing to reimburse judgment

▶ **Policyholders' Options?**

- ▶ Accept / Object / Decline / DJ

FRAMEWORK FOR PROPER CLAIMS HANDLING

-- Key Elements of Proper
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, based upon complaint
 - ▶ Confine the third party's claim

Claims Investigations

- ▶ Understanding pertinent law
 - ▶ Coverage issues arising out of the policy
 - ▶ Legal Issues with the underlying claim
 - ▶ Key elements
 - ▶ Legal and/or Technical Expertise
 - ▶ i.e. IP Claims

Claims Investigations

- ▶ Involvement of Coverage Counsel
 - ▶ Possible benefit in establishing reasonable justification
 - ▶ Might be a problem if counsel is not consulted?
 - ▶ But can create discoverable materials if claim denied
 - ▶ Boone v. VanLiner Ins. Co. (2001), 91 Ohio St. 3d 209
 - ▶ Bad faith context

FRAMEWORK FOR PROPER CLAIMS HANDLING

-Use of Litigation: when and how

Use of Litigation

- ▶ Flows from the insurer's initial decision to:
 - (1) Accept or deny coverage / defense
 - (2) Investigate while defending

Use of Litigation

- ▶ Decision to litigate often turns on whether any coverage issues decided by the underlying case
 - ▶ If not, there is more flexibility as to strategy / timing:
 - ▶ File a separate DJ
 - ▶ Intervene
 - ▶ Wait and see
 - ▶ If yes, beware of ***collateral estoppel***
 - ▶ Howell v. Richardson (1989), 45 Ohio St. 3d 365
 - ▶ Alternative claims of negligence or intentional

Use of Litigation

- ▶ 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?
 - ▶ Use "independent counsel"
 - ▶ More discussion in Book . . .

BAD FAITH RESULTS IN THE CLAIMS HANDLING CONTEXT

- ▶ *Example of Bad Faith Claims Handling*

- ▶ *Goodrich Corp. v. Commerc'l Union Ins.* (9 Dist. 2008)

- ▶ One insurer guilty of bad faith
 - ▶ One insurer absolved of bad faith
 - ▶ Difference in conduct – diligence and investigation

- ▶ *Examples of Insurers Absolved of Bad Faith*
 - ▶ *Absolved via MSJ or DV* even when taking a losing coverage position
 - ▶ *Helmick v. Republic-Franklin Ins.* (1988), 39 Ohio St.3d 71, 75-76 (reasonably justified to question)
 - ▶ *Schuetz v. State Farm* (Franklin Co. Comm. Pls. 2007), 147 Ohio Misc.2d 22, ¶¶83-84 (some courts agreed with insurer)

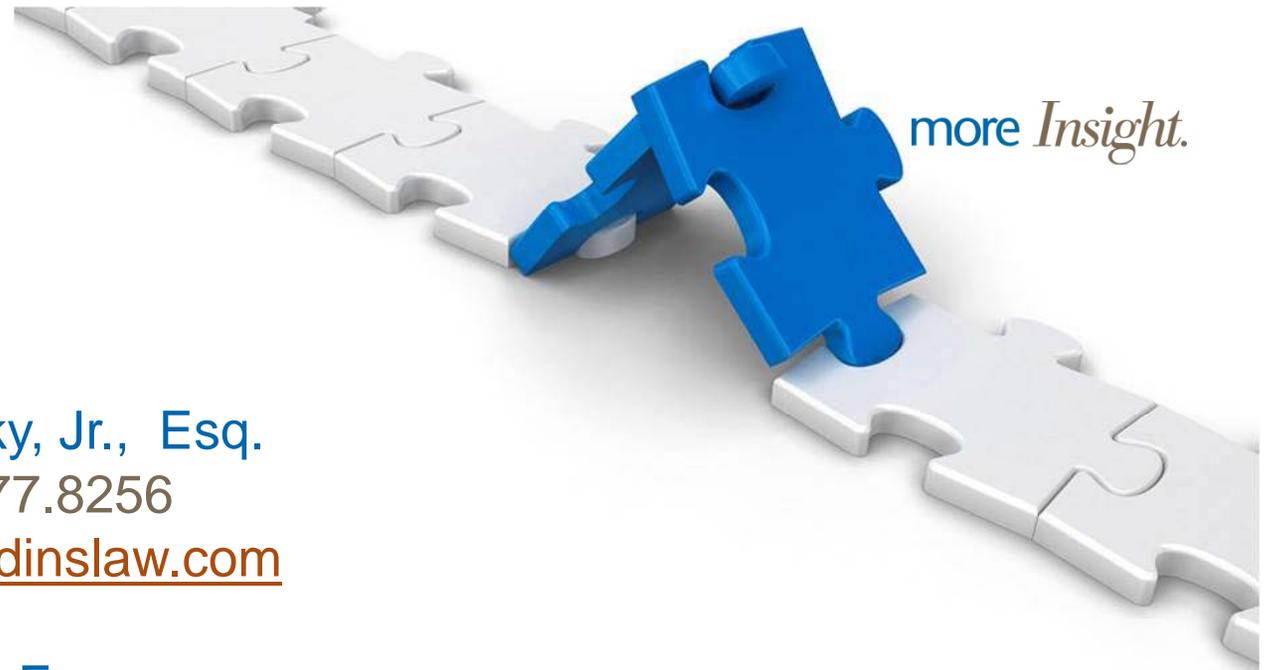


more *Insight.*

For more details, see

**Richard D. Porotsky, Jr.,
OHIO INSURANCE LAW: POLICY
ANALYSIS, BAD FAITH, AND
ETHICAL CONFLICTS (Ohio State
Bar Assoc'n CLE, 2011).**

Available for sale in the lobby . . .



Questions?

Richard D. Porotsky, Jr., Esq.

Cincinnati ^ 513.977.8256

richard.porotsky@dinslaw.com

Ansley Westbrook, Esq.

Pittsburgh ^ 412.288.5864

ansley.westbrook@dinslaw.com