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2019 Insurance Law Symposium
November 1, 2019 | Nova Southeastern University | Davie, FL

AGENDA

2019 ACCC
Insurance Law Symposium
Nova Southeastern University Shepard Broad College of Law, Panza Maurer Law Library
Fort Lauderdale, Florida

Insurer Bad Faith: Best Practices and Litigation Trends

Friday, November 01, 2019	
8:15-9:00 am	***Registration and Continental Breakfast***
9:00-9:15 am	***Welcome and Introductions*** **Michael Aylward**, Morrison Mahoney LLP; President ACCC **Professor Amanda Foster**, Nova Southeastern University Shepard Broad College of Law **Douglas M. McIntosh**, McIntosh Sawran & Cartaya, P.A. and **R. Hugh Lumpkin**, Reed Smith, LLP; Co-chairs ACCC Law School Symposium Committee
9:15-10:05 am	***Anatomy of a Bad Faith Claim*** **Meghan Magruder**, King & Spalding **John Bonnie**, Weinberg Wheeler Hudgins Gunn & Dial **Robert Allen**, The Allen Law Group
10:05-10:55 am	***Case Law update:* Harvey v Geico *(FL S CT) and Other National Cases of Interest*** **Melissa Sims**, Berk, Merchant & Sims PLC **Jason Mazer**, Cimo Mazer Mark PLLC
10:55-11:10 am	***Break***
11:10-12:00 pm	***Climate Change Litigation and the Insurance Issues It Generates*** **Nancy Sher Cohen**, Lathrop Gage LLP **Brian Martin**, Thompson Coe **Michael Gerrard**, Columbia Law School **Tracy D. Hester**, University of Houston Law Center

12:00-1:15 pm *12:15-1:15 pm*	***Lunch*** ***Keynote:*** **Honorable Robert M. Gross**, Florida Fourth District Court of Appeal
1:15-2:05 pm	***Best Practices: Mediating the Insurance Coverage and Bad Faith Claim*** **Marialuisa Gallozzi**, Covington & Burling LLP **Dave Schoenfeld**, Shook Hardy & Bacon **Peter Rosen**, JAMS The successful mediation of insurance coverage and bad faith claims often presents special challenges. Coverage issues may depend on resolution of underlying claims, may drive resolution, or both. Multiple insurers may have competing interests quite apart from their dispute with the policyholder. Bad faith issues may implicate interests that are not readily apparent to policyholders. These challenges call for careful attention to when mediation should occur, who should participate, and how should the process unfold.
2:05-2:55 pm	***Privileges: Litigation Immunity, Waiver and Other Roadblocks*** **Mark Boyle**, Boyle, Leonard & Anderson, P.A. **David L. Brown**, Goldberg Segalla
2:55-3:10 pm	***Break***
3:10-4:00 pm	***Experts and their Role in Bad Faith Litigation*** **Walter Andrews**, Hunton Andrews Kurth, LLP **Julia Molander**, Cozen O'Connor
4:00-4:30 pm	***Final Closing Notes and Tour of NSU Facilities***
4:30-6:15 pm	***Networking Reception*** (Faculty Study)

PRESENTATIONS

Anatomy of a Bad Faith Claim

2019 Law School Symposium

Nova Southeastern University, Shepard Broad College of Law

Fort Lauderdale, FL

November 1, 2019

John Bonnie, Weinberg Wheeler, Hudgins, Gunn & Dial, LLC

Meghan Magruder, King & Spalding LLP

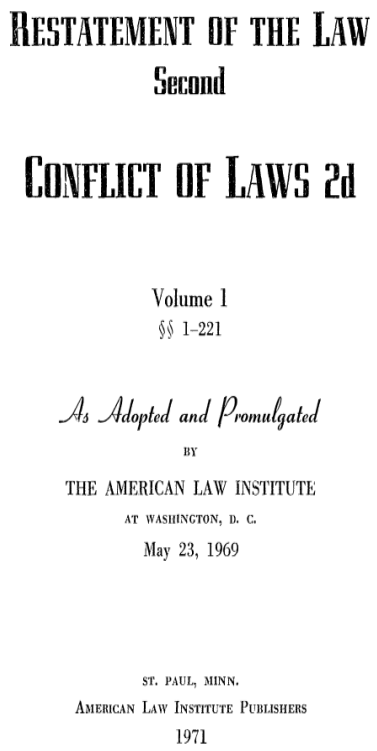
Robert Allen, The Allen Law Group

Conflict of Law Considerations

Is there a statute mandating application of forum state's law to insurance contracts?

Restatement (Second) of Conflict of Laws§ 6. Choice-Of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.


RESTATEMENT OF THE LAW
Second

CONFLICT OF LAWS 2d

Volume 1
§§ 1–221

As Adopted and Promulgated
BY
THE AMERICAN LAW INSTITUTE
AT WASHINGTON, D. C.
May 23, 1969

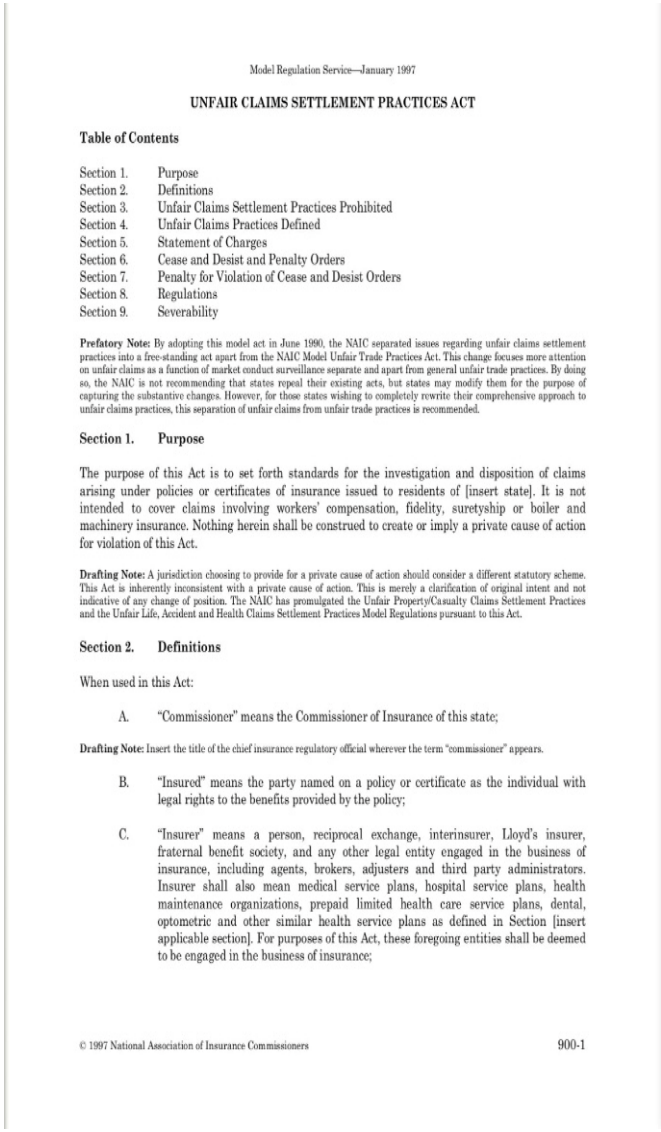
ST. PAUL, MINN.
AMERICAN LAW INSTITUTE PUBLISHERS
1971

AMERICAN COLLEGE OF COVERAGE COUNSEL

Conflict of Law Considerations

Do state's Unfair Claims Settlement Practices provisions create a private right of action?

1990 NAIC Model Act - Unfair Claims Settlement Practices Act - uniform standards for investigation and disposition of insurance claims. Expressly not intended to create or imply a private right of action for violation of its provisions.



Model Regulation Service—January 1997

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

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Prefatory Note: By adopting this model act in June 1990, the NAIC separated issues regarding unfair claims settlement practices into a free-standing act apart from the NAIC Model Unfair Trade Practices Act. This change focuses more attention on unfair claims as a function of market conduct surveillance separate and apart from general unfair trade practices. By doing so, the NAIC is not recommending that states repeal their existing acts, but states may modify them for the purpose of capturing the substantive changes. However, for those states wishing to completely rewrite their comprehensive approach to unfair claims practices, this separation of unfair claims from unfair trade practices is recommended.

Section 1. Purpose

The purpose of this Act is to set forth standards for the investigation and disposition of claims arising under policies or certificates of insurance issued to residents of [insert state]. It is not intended to cover claims involving workers' compensation, fidelity, suretyship or boiler and machinery insurance. Nothing herein shall be construed to create or imply a private cause of action for violation of this Act.

Drafting Note: A jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This Act is inherently inconsistent with a private cause of action. This is merely a clarification of original intent and not indicative of any change of position. The NAIC has promulgated the Unfair Property/Casualty Claims Settlement Practices and the Unfair Life, Accident and Health Claims Settlement Practices Model Regulations pursuant to this Act.

Section 2. Definitions

When used in this Act:

A. "Commissioner" means the Commissioner of Insurance of this state;

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term "commissioner" appears.

B. "Insured" means the party named on a policy or certificate as the individual with legal rights to the benefits provided by the policy;

C. "Insurer" means a person, reciprocal exchange, interinsurer, Lloyd's insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters and third party administrators. Insurer shall also mean medical service plans, hospital service plans, health maintenance organizations, prepaid limited health care service plans, dental, optometric and other similar health service plans as defined in Section [insert applicable section]. For purposes of this Act, these foregoing entities shall be deemed to be engaged in the business of insurance;

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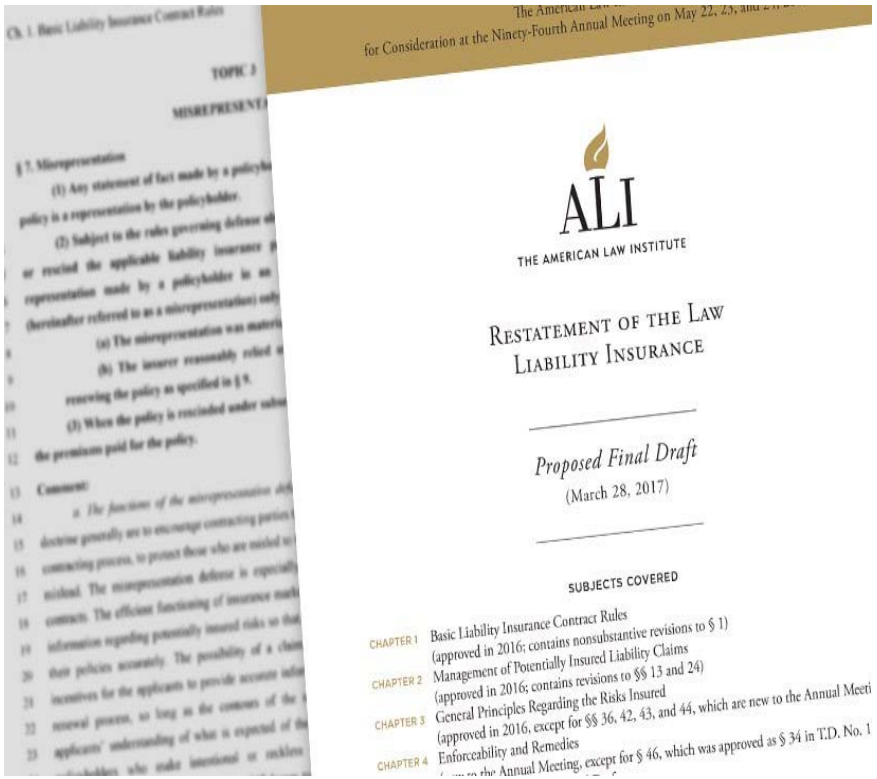
Conflict of Law Considerations

Have the courts/ legislature of the forum commented on the Restatement of the Law of Liability Insurance?



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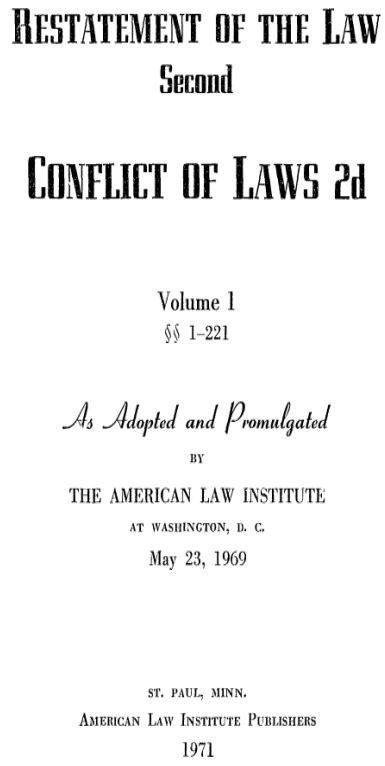
Conflict of Law Considerations

Is bad faith a remedy in contract, or a remedy in tort?



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Conflict of Law Considerations

Is bad faith a remedy in contract, or a remedy in tort?

Tort Choice of Law Rule

Restatement 2d § 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which . . . has the most significant relationship to the occurrence and the parties . . .

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue . . . include:(a) place injury occurred, (b) place the conduct causing injury occurred, (c) domicile/residence/ nationality/place of incorporation/place of business of parties, and (d) place where relationship, between the parties is centered ...

Conflict of Law Considerations

Is bad faith a remedy in contract, or a remedy in tort?

Contract Choice of Law Rule

Restatement 2d § 188. Law Governing In Absence Of Effective Choice By The Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which. . . has the most significant relationship to the transaction and the parties . . .

(2) The contacts to be taken into account include:
   (a) place of contracting,
   (b) place of negotiation of the contract,
   (c) place of performance,
   (d) location of the subject matter of the contract, and
   (e) domicile/residence/nationality/place of incorporation/place of business of the parties.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied. . .

Conflict of Law Considerations

Bad faith is so intertwined with duties under insurance contract the same law that controls application and interpretation of the policy controls the question of bad faith.

AT&T Wireless Services, Inc. v. Federal Ins. Co., No. 03C-12-232, 2007 WL 1849056, (Del. Super. June 25, 2007)(applying § 188 and not §145; "breach of contract claim and the bad faith claim are too intertwined and interdependent to be separated").

Fogarty v. Allstate Ins. Co., No. CCB–04–414, 2011 WL 1230350, *7 (D. Md. March 30, 2011)("under Maryland's choice of law rules, the law that governs a bad faith claim is the same law that governs the insurance contract from which the claim of bad faith arises").

Lafarge Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 935 F.Supp. 675, 692 (D.Md. 1996) (contract and bad faith claims "inextricably intertwined"; won't subject insurer to "potentially conflicting standards of conduct").

Commerce and Indus. Ins. Co. v. U.S. Bank Nat. Ass'n, No. 07 Civ. 5731, 2008 WL 4178474, *4-6 (S.D.N.Y. Sept. 3, 2008)("the bad faith claim is 'inextricably intertwined' with the contract claim).

Conflict of Law Considerations

Bad faith is a contract claim – Other examples

Payless Shoesource, Inc. v. The Travelers Companies, Inc., 569 F.Supp.2d 1189 (D. Kan. 2008), *citing Mirville v. Allstate Indem. Co.*, 71 F.Supp.2d 1103 (D. Kan. 1999).

Yeager v. Maryland Cas. Co., 868 F.Supp. 141 (D.S.C. 1994)(bad faith claim "is basically one in contract"; applying Georgia law pursuant to the rule of *lex loci contractus*).

Certain Interested Underwriters Subscribing to Policy No. B1262P20017013 v. American Realty Advisors, No. 5:16-CV-940-FL, No. 5:17-CV-74-FL, 2017 WL 5195864 (E.D.N.C. Nov. 9, 2017) ("breach of the covenant of good faith and fair dealing is not an independent tort, but . . constitutes part of the underlying breach of contract"; applying California law per policy).

Moon v. N. Am. Ins. Co., No. 06-13102, 2007 WL 1599743, at *1 (E.D. Mich. June 1, 2007) (Michigan, not Arizona law controlled bad faith claim; not recognized under Michigan law).

Comer-Beckett v. State Farm Mut. Auto. Ins. Co., No. CIV. 11-5017-JLV, 2013 WL 12412010, at *1 (D.S.D. June 19, 2013) (Minnesota, not South Dakota law controlled bad faith claim; not recognized under Minnesota law).

Conflict of Law Considerations

Bad faith is a tort claim and therefore not controlled by the same law applicable to breach of the insurance contract.

ROC ASAP, L.L.C. V. Starnet Ins. Co., 2014 WL 667833 (W.D. Okla. Feb 20, 2014)(bad faith is an independent tort subject to Oklahoma's "most significant relationship" test).

Martinez v. Nat'l Union Fire Ins. Co., 911 F.Sup.2d 331 (E.D.N.C. 2012)(bad faith refusal to settle is a claim in tort subject to North Carolina's "law of the situs test", i.e., state of the injury).

Hillman v. Nationwide Mut. Fire Ins. Co., 855 P.2d 1321 (Alaska 1993)(characterizing bad faith as a tort claim).

TPLC, Inc. v. United Nat. Ins. Co., 44 F.3d 1484 (10th Cir. 1995) (Pennsylvania law controlled coverage dispute; Colorado law controlled tort claim of bad faith).

Newmont U.S.A., Ltd. v. American Home Ass. Co., Newmont USA Ltd. v. American Home Assur. Co., 676 F. Supp. 2d 1146 (E.D. Wash. 2009)(Washington law controlled bad faith (tort) claim although contract claims likely determined by New York law; "[a]s messy and unpredictable as it may be, certainly is not an anomaly to have various states laws applied to different issues in an insurance dispute involving a policy without a choice of law provision.") *Id.*

Conflict of Law Considerations

Bad faith is a tort claim but still controlled by the same law applicable to breach of the insurance contract – party stipulation.

Pogue v. Principal Life Ins. Co., 2015 WL 5680464 (W.D. Ky. 2015)(acknowledging that the insured's claims were founded on both contract and tort; that the "most significant relationship test" of §188 of the *Restatement* applies to contract disputes and that the "any significant contacts" test applies to tort actions; but that all tort claims arose out of the breach of contract claim and that the parties agreed the more stringent "most significant relationship test" applied to both claims).

Conflict of Law Considerations

Bad faith is a tort claim but still controlled by the same law applicable to breach of the insurance contract.

Protective Ins. Co. v. Plasse, 2014 WL 3898084 (S.D. Ala. 2014)(holding that breach of contract claims are determined by the rule of *lex loci contractus*, whereas bad faith claims are determined by the rule of *lex loci delicti,* with the latter determined by the state of injury, and then applying Florida law to both claims).

Engineered Structures, Inc. v. Travelers Prop. Cas. Co. of Am., 328 F. Supp. 3d 1092 (D. Idaho 2018) (applying Idaho law—which recognizes independent cause of action for bad faith—while declining to apply Oregon law (which does not) to builder's bad faith tort claim and breach of contract claim against insurer and recognizing that because "both the breach of contract claim and the bad faith claim depend upon the provisions of the Policy . . . an unnecessarily confusing situation would result if the law of one state is used to interpret the insurance agreement regarding the breach of contract claim and the law of a second state is applied to interpret the same agreement with regard to the bad faith claim")

Sentry Ins. v. Novelty, Inc., No. 09-CV-355-SLC, 2009 WL 5087688, at *1 (W.D. Wis. Dec. 17, 2009) (applying Wisconsin law to contract claims based upon policy choice of law provision and applying Wisconsin law to tort of bad faith).

Conflict of Law Considerations

Bad faith is a hybrid claim, implicating both contract law and tort law.

Larson v. Auto Owners Ins. Co., No. CIV. 12-4020-KES, 2012 WL 4005614, at *1 (D.S.D. Sept. 12, 2012) (although South Dakota permits a cause of action in tort for bad faith, Minnesota law applied to both breach of contract and bad faith claims "regardless of whether it is seen as a contract or tort claim").

Ryder Truck Rental, Inc. v. UTF Carriers, Inc., 790 F. Supp. 637, 638 (W.D. Va. 1992) (bad faith a "pure contract claim" under Virginia law but deferring decision whether Connecticut or New York law governed the policy).

2002 Lawrence R. Buchalter Alaska Tr. v. Philadelphia Fin. Life Assur. Co., 96 F. Supp. 3d 182 (S.D.N.Y. 2015) (applying Alaska not New York law to bad faith claim; finding bad faith a tort claim; but dismissing same since the insurance portion of the contract was collateral to the main investment portion of the contract, and breach of contract claim under both Alaska and New York law since no substantive difference in contract law).

Harmon v. State Farm Mut. Ins. Co., 162 Idaho 94, 394 P.2d 796 (2017)(citing both Idaho and Alaska bad faith law under policy held to be governed by Alaska law for breach of contract claims).

Bad Faith Remedies: Comparison of State Statutes Overview

- **Statutes / Common Law** – While many jurisdictions have adopted bad faith statutes, other jurisdictions rely on common law claims governing an insurer's bad faith conduct.
- This presentation will focus on comparing some of the key distinguishing characteristics of bad faith laws—e.g., pre-suit requirements, remedies, and bad faith standards.
- But, the common purpose of these laws is to level the playing field for policyholders by shifting the risk of extra-contractual liability to insurers that fail to fairly and promptly adjust claims.

Remedies – Statutory Penalties

- **Louisiana** – Allows for recovery of statutory penalties in an amount up to two times the amount owed or $5,000, whichever is *greater.* (La. Rev. Stat. § 22:1973(C)).
- **Georgia** – Allows for the recovery of the *greater* of either: (a) 50% of the amount of the loss; or (b) $5,000. (Ga. Code § 33-4-6).
- **Illinois** – In contrast, allows for the recovery of the *lesser* of 60% of the amount owed or $60,000. (215 ILCS 5/155).
- **Missouri** – Recovery of 20% for the first $1,500 of the loss, and 10% for the loss in excess of $1,500. (Missouri Stat. §375.420).

Remedies – Attorneys' Fees

- Most bad faith statutes allow for the recovery of attorneys' fees incurred in bringing a recovery action when the insurer denies coverage in bad faith.
- Even in jurisdictions that do not have a bad faith statute, attorneys' fees may be awarded under the common law as damages from the breach of the implied covenant of good faith and fair dealing.

Key Issue – Policyholders have the burden to prove the "reasonableness" of attorneys' fees in many jurisdictions, which may require testimony from an expert.

Pre-Suit Conditions

- **Georgia** – Requires the policyholder to make a demand for payment from the insurer 60 days prior to filing suit. (Ga. Code § 33-4-6).
- **Tennessee** – Policyholder must "wait 60 days after making his demand before filing suit" unless the insurer affirms its denial prior during the waiting period. (Tenn. Code § 56-7-105(a)).
- **Florida** - To bring a claim, an insured must provide written notice to the Department of Financial Services and the insurer at least 60 days before suit is filed. (Fla. Stat. § 624.155(3)(a)).

Key Issue - Notice gives the insurer an opportunity to beat the policyholder to the courthouse and file a declaratory relief action in its preferred venue.

Bad Faith Standard – Unreasonable

- **Unreasonable or Unjustified Denial** – Lower standard that only requires the policyholder to prove that the insurer's denial was unreasonable.
  - **California** – "The reason for withholding the benefits was unreasonable or without proper cause." Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973).
  - **Colorado** – "The insurer's conduct was unreasonable under the circumstances." *Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 414 (Colo. 2004)
- **Bona Fide Dispute Defense –** Under this standard, the insurer is not liable if it is relied on a legitimate coverage defense.
- **Illinois** (215 ILCS 5/155)**-** An insurer's conduct is not unreasonable if:
  1) there is a bona fide dispute concerning the scope and application of insurance coverage;
  2) the insurer asserts a legitimate policy defense;
  3) the claim presents a genuine legal or factual issue regarding coverage; or
  4) the insurer takes a reasonable legal position on an unsettled issue of law.

Bad Faith Standard – Dishonest

- **Dishonest or Malicious Denial** – Higher standard that requires some evidence of wrongful motive, or knowledge that denial was unjustified.
  - **Arkansas -** The insured must also establish that the insurer's conduct was "carried out with a state of mind characterized by hatred, ill will, or a spirit of revenge." *Aetna Cas. & Sur. Co. v. Broadway Arms Corp*., 664 S.W.2d 463, 465 (Ark. 1984)
  - **Connecticut** – Policyholder must show that the insurer denied policy benefits with an "improper motive" or "dishonest purpose" in order to maintain a claim for bad faith. *PSE Consulting, Inc. v. Frank Mercede and Sons, Inc*., 838 A.2d 135 (Conn. 2004).
  - **Indiana** - To establish bad faith, an insured must show that the insurer acted with a dishonest purpose, moral obliquity, furtive design, or ill will. *Johnson v. State Farm Mut. Auto. Ins. Co*., 667 N.E.2d 802, 805 (Ind. Ct. App. 1996).
  - **Pennsylvania** - To establish a bad faith claim, an insured must establish that: (1) The insurer did not have a reasonable basis for denying policy benefits; and (2) Knew or recklessly disregarded its lack of reasonable basis in denying the claim.
- **Punitive Damages –** In many jurisdictions with a common law tort for bad faith, proof of malice or dishonest intent will unlock the potential for punitive damages.

Institutional Bad Faith

- **Pattern or Practice** – Other states require (or permit additional remedies) the policyholder to prove an institutional practice of bad faith conduct.
- **New York** (New York Gen Bus. §349) **–** Only recognizes a private right of action for bad faith if the insurer's conduct has broad impact on consumers at large (i.e. deceptive business practices).
- **Alabama** (ALA. ADMIN CODE r. 27-12-24 (2007)- Statutory bad faith allows for recovery when an insurer, without just cause, refuses to pay or settle claims arising under coverages provided by its policies in the state and with such frequency as to indicate a general business practice. A general business practice is evidenced by:
  1) A substantial increase in the number of complaints against the insurer received by the insurance department;
  2) A substantial increase in the number of lawsuits against the insurer or its insureds by claimants; and
  3) Other relevant evidence.

Conclusion / Key Takeaways

- **Not all bad faith statutes are created equal** – The remedies available and the standard for proving bad faith vary significantly across state lines.
  - When there are multiple potential venue for a recovery action, evaluate choice of law rules and determine what bad faith law will apply in each potential venue.
  - When negotiating policies, remove provisions that restrict right to bring bad faith claims or that mandate the law of unfavorable jurisdictions (e.g., New York) will govern.
- **Be wary of pre-suit requirements** – Confirm that the bad faith statute you are relying on does not have a prescribed waiting period or requires notice to the insurance commissioner.
- **Consider evidentiary issues and burden of proof at an early stage** – A bad faith standard that requires proof of intent or institutional bad faith will dictate a different discovery strategy and may require the use of experts.

Bad Faith Cases in the Trial Court

- Bad Faith combines objective legal issues with subjective fact issues
- Use of term “bad” connotes sinisterism (not just wrong; but bad)
- Plaintiff/Insureds seek to create facts issues
- Defendant/Insurers seek to resolve as many issues as possible as a matter of law
- Focus is on conduct

Trial Court Objectives for Insureds

- File in most favorable forum and venue
- Development of a Theme (what will the jury be asked to decide?)
- Discovery Plan (Paper/Depositions)
- Retention of Experts
- Proving Liability and Damages

Trial Court Objectives for Insureds

- Influence forum and venue to the extent possible
- Combat Insured's Theme
- Assertion of procedural and legal defenses
- Retention of Experts
- Disproving Liability and Damages

Insured Bad Faith Theme Development

- Seek to demonstrate that the insurer is unfair
- We buy insurance for when we are the most vulnerable and the insurer denied coverage when we needed it most
- Insurer had a chance to settle; however, they were playing with our money. We paid the insurer to assume the risk
- Insurer didn't follow its own guidelines that were there to protect us

Insured Bad Faith Theme Development

- Seek to demonstrate that the Insurer is motivated to be unfair (focus on motive)
- Contrast Insurer from Corporate Insured (if we treated our clients/customers like that, we would be out of business)
- Purchased Insurance, so we could go on and conduct our business (with friends like the Insurer, who needs enemies)

Insured Bad Faith Theme Development

- Since 2009, Insureds are now utilizing the Reptile Theory, which can work well in certain bad faith situations
- Goal is to introduce fear to jurors (what if this happened to me)
- Switch the jurors mindset to survival mode
- Present case as a way to prevent danger in the future
- Nothing is an accident; errors are avoidable
- But for the grace of God go I

Combating Insured's Bad Faith Theme Development

- Insurer's seek to humanize the company
- Focus on Insurer's efforts
- Explain reasons why decisions were made
- Demonstrate objective reasonableness

Insured Discovery Plan

- Claim File (good faith letter to the jury; or the ticket to the gold mine)
- Underwriting File
- Manuals/Training Materials (use to set standards)
- Reserves
- Reinsurance

Insured Discovery Plan

- Depositions (place to introduce the Reptile)
- Start at the top—30 b 6 witness to set standards
- Proceed down the chain to show standards not met
- Get agreement on basics through black & white concessions

Insured Discovery Plan

- Highlight problems with Insured's case (lack of cooperation, embellishment)
- Combat the Reptile (preparation of key witnesses)
- Limit the Insured's Damages

Insurer Procedural and Legal Defenses

- Removal
- Severance/Separate Trials
- Motions to Dismiss
- Motions for Summary Judgment

Expert Witnesses

- Must be credible
- SKEET (skill, knowledge, education, experience, training)
- Cottage Industry for Early Retirees
- Issues with Attorneys

Bad Faith Damages

- Personal Lines (mental anguish)
- Treble damages for knowing violations (actual awareness of the unfairness of the act)
- Punitive Damages
- Attorneys Fees

Mediation

- Qualifications of the Mediator

- Tactics (trying to raise a floor for future negotiations)

The Bad Faith Trial

- Where the Rubber meets the Road
- Tell the story
- Focus Groups and Mock Trials

Climate Change Litigation and the Insurance Issues it Generates: The Policyholder's Perspective

2019 Law School Symposium

Nova Southeastern University, Shepard Broad College of Law

Fort Lauderdale, FL

November 1, 2018

Nancy Sher Cohen, Lathrop Gage LLP

Climate Change Litigation Landscape

Litigation that does <u>not</u> implicate insurance:

- Claims by citizens, NGOs, municipalities against the United States EPA, DOT, DOE and DOI seeking to advance or undermine statutory and regulatory climate protections

Litigation that does implicate insurance:

- Common law claims by private citizens, municipalities, NGOs for nuisance, trespass, and unjust enrichment against corporations
- Shareholder claims against the directors and officers of the same companies

Litigation implicating insurance: Common law claims

- **Potentially applicable common law tort claims**
  - Nuisance
  - Trespass
  - Failure to warn
  - Unjust enrichment

- **Does state or federal common law apply?**
  - The Clean Air Act displaced ***federal*** common law claims for public nuisance: *American Elec. Power Co. v. Connecticut, et. al*, 564 U.S. 410 (2011).
  - The Clean Air Act does not pre-empt ***state*** common law tort claims for private nuisance: *Bell v. Cheswick*, 734 F.3d 188 (3d Cir. 2013) & *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014).

Litigation implicating insurance: Common law claims (cont'd)

- **Parties**
  - Plaintiffs are private citizens, NGOs, and municipalities
  - Defendants are fossil fuel companies and utilities
- A**llegations**
  - Defendants use, produce and/or distribute fossil fuels resulting in emission of CO2 and GHGs contributing to global warming and climate change.
  - Nuisance: Emissions substantially and unreasonably interfere with private use and enjoyment of land through release of the offensive materials resulting in rising sea levels, drought, extreme precipitation, extreme heat, etc.
  - Trespass: Emissions trespass on property.
  - Failure to warn: Defendants had a duty to warn of climate change risks.
  - Unjust enrichment: Production of fossil fuels enriched defendants at the expense of property and communities who have to abate the damage.
- **Remedies sought**
  - Money damages (compensation for past and future damage)
  - Punitive damages (intentional and malicious conduct)
  - Disgorgement of profits (unjust enrichment of fossil fuel companies)
  - Injunctive relief (abatement or mitigation of the nuisance or trespass)

Types of insurance available for common law claims: Commercial General Liability ("CGL")

- CGL: covers sums legally obligated to pay for bodily injury or property damage as the result of an occurrence.
  - CO2 and GHG emissions collect in the atmosphere absorbing sunlight and trapping heat → global warming
  - Global warming → wildfires, named storms, flooding, melting of ice, erosion
  - Wildfires, named storms, etc. → bodily injury and property damage

Types of insurance available for common law claims: Pollution Legal Liability ("PLL")

- **PLL:** Covers the defendant energy companies or utilities for clean up and/or liability to third parties arising out of a polluting event

Available insurance for common law claims: CGL coverage issues

- **Is there property damage at issue?**
  - Defined as physical injury to tangible property or loss of use of tangible property
  - Does damage to the environment from CO2 and GHG emissions meet that definition? Probably: Numerous courts have held that environmental is covered under a CGL policy.
- **Is there an occurrence?**
  - An "occurrence" is typically defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."
  - Numerous courts have held that emissions of pollutants constitute an accident/occurrence.
  - In 2012, Virginia Supreme Court decides *AES Corp. v. Steadfast Ins. Co.*, 725 S.E.2d (Va. 2012).
    - Native village sues energy companies alleging they knew that GHG emissions contribute to global warming which results in melting ice and erosion of coastline that rendered their village uninhabitable
    - Defendant AES seek insurance coverage under CGL policy; insurer seeks declaration that it has no duty to defend or indemnify AES
    - Virginia Supreme Court finds ExxonMobil knew or should have known the probable consequences of its acts – i.e., the conduct was intentional
    - Result: No occurrence; no coverage for AES.
  - Future coverage litigation post-*AES*: Coverage may depend on the language of the complaint – whether it alleges "intentional" conduct or "known" consequences.

Available insurance for common law claims: CGL coverage issues (cont'd)

- **Do any exclusions apply?**
  - Pollution exclusion: Did the alleged harm arise out of the release of pollutants?
    - Maybe, because carbon dioxide is a pollutant within meaning of the Clean Air Act and the policy definition is also broad. *See Massachusetts v. EPA* 549 U.S. 497 (2007)
    - Maybe not, if the language of the exclusion would not alert a reasonable insured that it applies to : *Donaldson v. Urban Land Interests*, 564 N.W. 2d 728 (Wis. 1997)
    - Pre-1986 coverage without the pollution exclusion may be compromised or exhausted after years of environmental coverage litigation
  - Expected or intended harm: Did the insured policyholder expect or intend for harm to occur?
    - Intent: Did the policyholder have the subjective intent to cause injury? Is climate change the general type of injury the insured intended to cause?
    - Expectation: Was the insured substantially certain its conduct would cause harm?

Available insurance for common law claims: PLL coverage issues

- **Pollution Legal Liability insurance**
  - Filling the gap left by the CGL pollution exclusion
  - Coverage for on-site or off-site clean up costs arising from unknown or new pollution events
  - Coverage for third party claims alleging bodily injury and property damage caused by release of pollutants during a company's business operations

Available insurance for common law claims: PLL coverage issues (cont'd)

- **Coverage Issues**
  - Are GHGs pollutants?
    - Typical definition: "Pollutant means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."
    - Maybe:
      - *Massachusetts v. EPA*, 549 U.S. 497 (2007): CO2 is a pollutant under the Clean Air Act.
    - Maybe not:
      - *Anderson v. Highland House Co.,* 757 N.E.2d 239 (Ohio 2001): Carbon monoxide from a residential heater is not an excluded "pollutant"
      - *Donaldson v. Urban Land Interests*, 564 N.W.2d 728 (Wis. 1997): Coverage for allegations that CO2 accumulated in work area due to inadequate ventilation; court finds pollution exclusion does not clearly and unambiguously include exhaled CO2.
  - Expected or intended harm
    - Did the policyholder have the subjective intent to cause injury?
    - Is climate change the general type of injury the insured intended to cause?
    - Was the insured substantially certain its conduct would cause climate change?
  - Known loss
    - PLL policies exclude damage known at inception of the policy
    - Given the evolving state of climate science, is global warming a known issue?

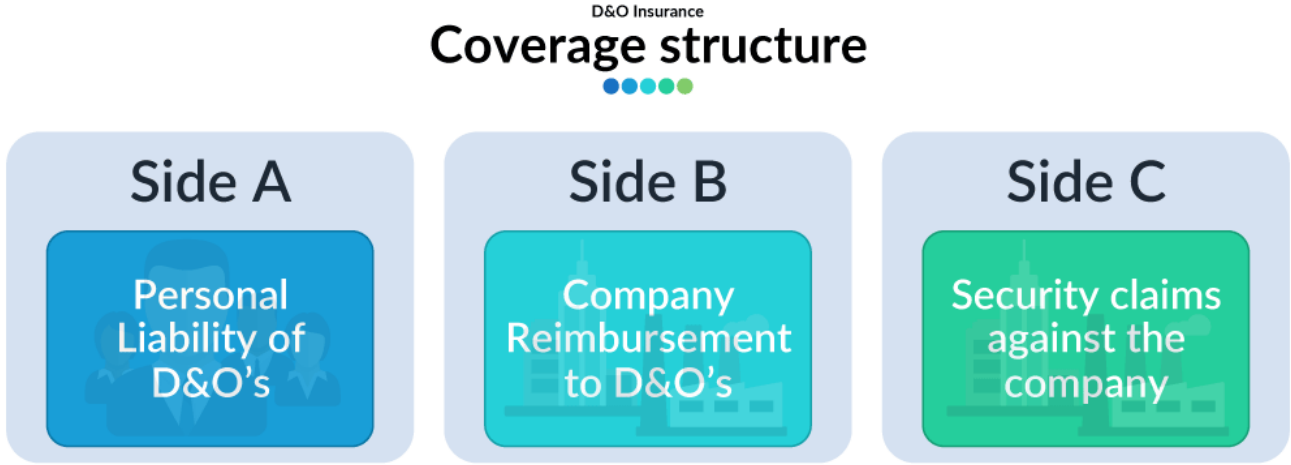
Shareholder claims Implicating insurance

- Allegations that defendants breached fiduciary duty by failing to mitigate climate change risk
- Claims for violations of the securities laws: Allegations that defendants made misrepresentation or omissions and/or did not accurately report climate change risk in SEC filings

- **Example**
  - Securities class action against Southern California Edison after Woolsey and Hill fires
  - Allegations: Defendants made false and misleading statements or failed to disclose that: "(i) the Company failed to maintain electricity transmission and distribution networks in compliance with safety requirements and regulations promulgated under state law; (ii) consequently the Company was in violation of state law and regulations; (iii) the Company's noncompliant electricity networks created a significant heightened risk of wildfires in California; and (iv) as a result, the Company's public statements were materially false and misleading at all relevant times."

Available insurance for shareholder claims: D&O coverage issues

- **Available insurance**
  - Management Liability insurance aka D&O insurance
  - Covers errors or omissions of Ds and Os in their capacity as such
  - Covers the company and its Ds and Os for claims alleging violations of the securities la



Available insurance for shareholder claims: D&O coverage issues (cont'd)

- **Coverage issues**
  - No coverage for remediation or clean up costs
  - Pollution exclusion (varies by form)
    - Some forms contain no pollution exclusion
    - Some forms exclude claims "alleging, arising out of, based upon or attributable to any presence of Pollutants" but …
      - carve back coverage for securities claims
      - carve back coverage for Side A claims, i.e., claims against individual Ds and Os for non-indemnifiable loss

UNIVERSITY of HOUSTON

Climate Change Lawsuits and the Insurance Issues They Generate

Prof. Tracy Hester

2019 ACCC Annual Law School Symposium

Nova Southeastern University Shephard Broad College of Law
Ft. Lauderdale, FL
Nov. 1, 2019

Exciting times…

(ORDER LIST: 589 U.S.)

TUESDAY, OCTOBER 22, 2019

ORDER IN PENDING CASE

19A368 BP P.L.C., ET AL. V. MAYOR AND CITY COUNCIL BALTIMORE

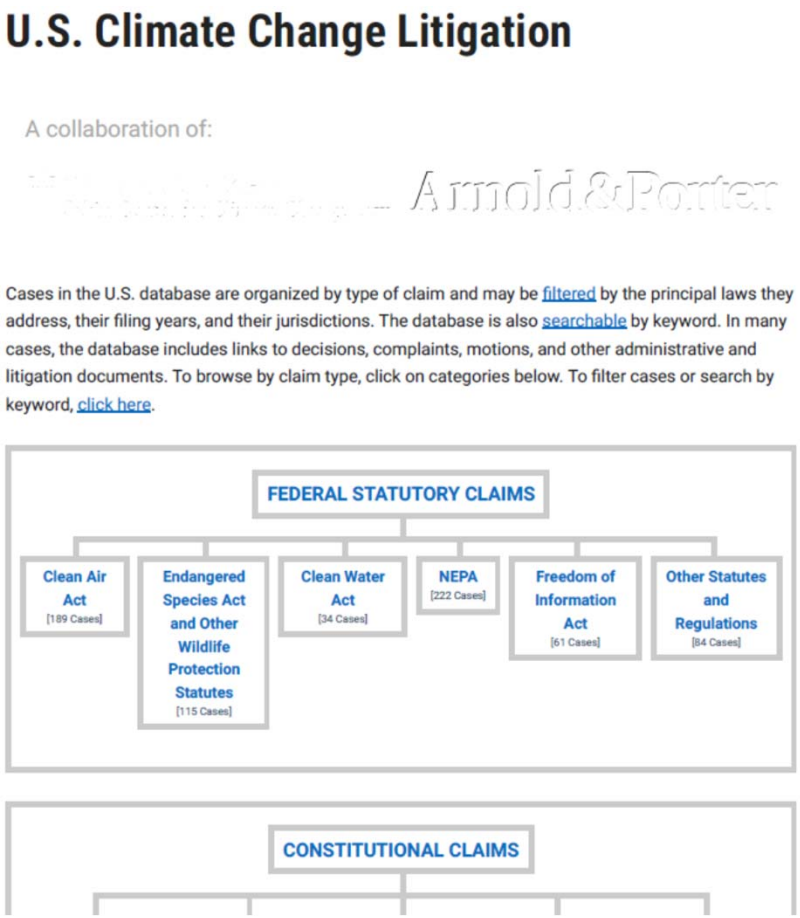
The application for stay presented to The Chief Justice and by him referred to the Court is denied. Justice Alito took no part in the consideration or decision of this application.

Big picture issues on climate litigation liability

- Part of a larger puzzle of corporate climate liability response
- Financial risks to insurance sector
  - Losses to insurance system from claims
  - Stranded assets
    - Risk to insurers as investors
    - $1-$4 trillion in energy; $28 trillion related industrial sectors
    - One-third of equity and fixed income assets
  - Climate change liability litigation

Climate Change Liability Litigation: Some Types

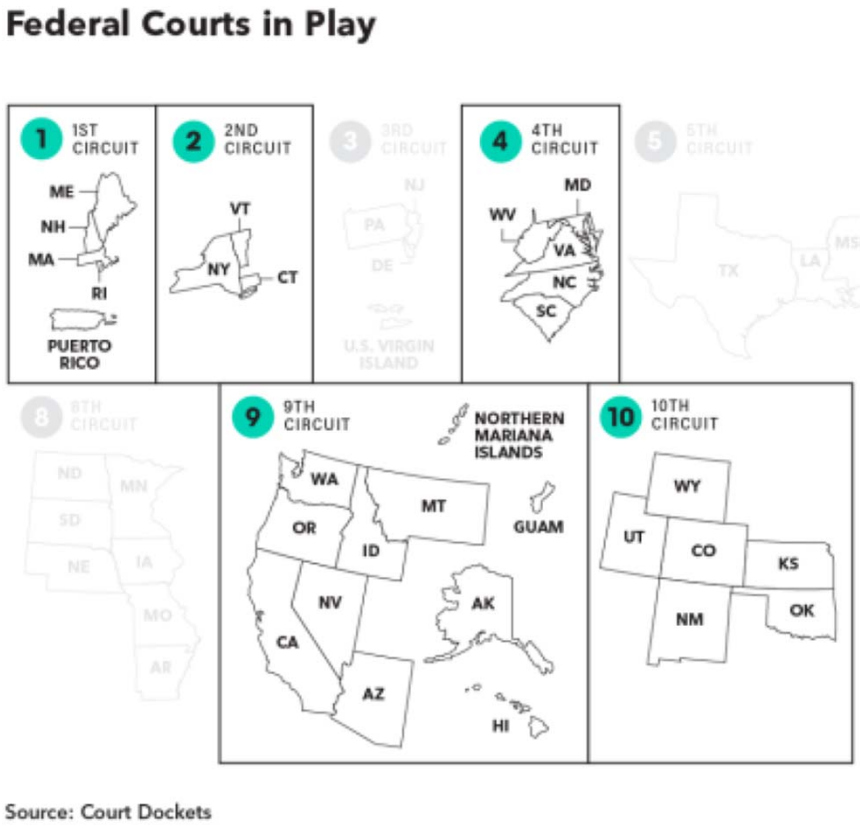
- Beyond lawsuits to compel (or restrain) government action, climate liability litigation includes:
  - *What policyholders do*: to enforce compliance obligations affected by climate change
  - *What policyholders say:* disclosures and deceptive trade practice claims
  - *What policyholders did:* tort claims



- Watch for growth of transnational lawsuits and enforcement of foreign judgments

Climate Change Torts - A quick look

- Active trial docket – 14 governments, one trade association, multiple states
- Prior history – fate of federal common law tort actions
- Immediately ahead – status of trials and appeals



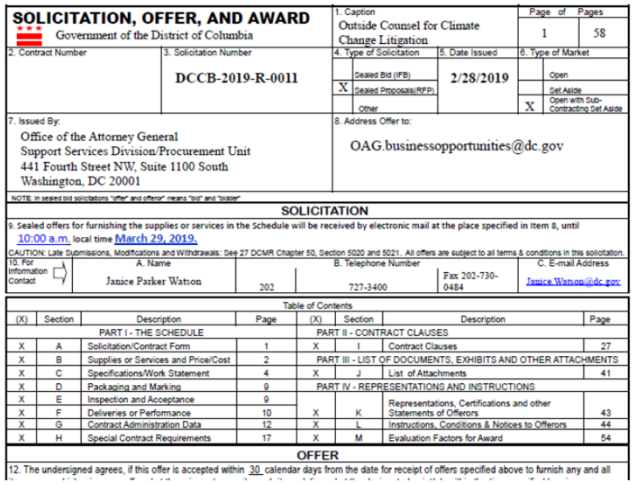
The Big Three Federal Common Law Tort Lawsuits

- **Connecticut v. AEP (2d Cir.)**
  - Eight AGs sued five power companies
  - **U.S. Supreme Court ruled that federal common law nuisance claims were displaced by Clean Air Act**

- **Comer v. Murphy Oil Co. (5th Cir.)**
  - Class action suit for Katrina property damages
  - Targeted oil, coal, chemical and – notably - insurance companies
  - Fifth Circuit lost jurisdiction in very odd fashion; district court dismissed re-filed complaint on multiple grounds

- **Native Village of Kivalina v. Exxon Mobil (9th Cir.)**
  - District court in California dismissed as political question
  - Ninth Circuit dismissed on displacement grounds as well

The second wave: State Law Tort Claims



SOLICITATION, OFFER, AND AWARD
Government of the District of Columbia

1. Caption	Page of	Pages
Outside Counsel for Climate Change Litigation	1	58

2. Contract Number	3. Solicitation Number	4. Type of Solicitation	5. Date Issued	6. Type of Market
	DCCB-2019-R-0011	Sealed Bid (IFB) / X Sealed Proposals (RFP) / Other	2/28/2019	Open / Set Aside / X Open with Sub-Contracting Set Aside

7. Issued By:
Office of the Attorney General
Support Services Division/Procurement Unit
441 Fourth Street NW, Suite 1100 South
Washington, DC 20001

8. Address Offer to:
OAG.businessopportunities@dc.gov

NOTE: In sealed bid solicitations "offer" and "offeror" means "bid" and "bidder"

SOLICITATION

9. Sealed offers for furnishing the supplies or services in the Schedule will be received by electronic mail at the place specified in item 8, until 10:00 a.m. local time March 29, 2019.

CAUTION: Late Submissions, Modifications and Withdrawals: See 27 DCMR Chapter 50, Section 5020 and 5021. All offers are subject to all terms & conditions in this solicitation.

10. For Information Contact	A. Name	B. Telephone Number		C. E-mail Address
	Janice Parker Watson	202 727-3400	Fax 202-730-0484	Janice.Watson@dc.gov

Table of Contents

(X)	Section	Description	Page	(X)	Section	Description	Page
PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES			
X	A	Solicitation/Contract Form	1	X	I	Contract Clauses	27
X	B	Supplies or Services and Price/Cost	2	PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACHMENTS			
X	C	Specifications/Work Statement	4	X	J	List of Attachments	41
X	D	Packaging and Marking	9	PART IV - REPRESENTATIONS AND INSTRUCTIONS			
X	E	Inspection and Acceptance	9				
X	F	Deliveries or Performance	10	X	K	Representations, Certifications and other Statements of Offerors	43
X	G	Contract Administration Data	12	X	L	Instructions, Conditions & Notices to Offerors	44
X	H	Special Contract Requirements	17	X	M	Evaluation Factors for Award	54

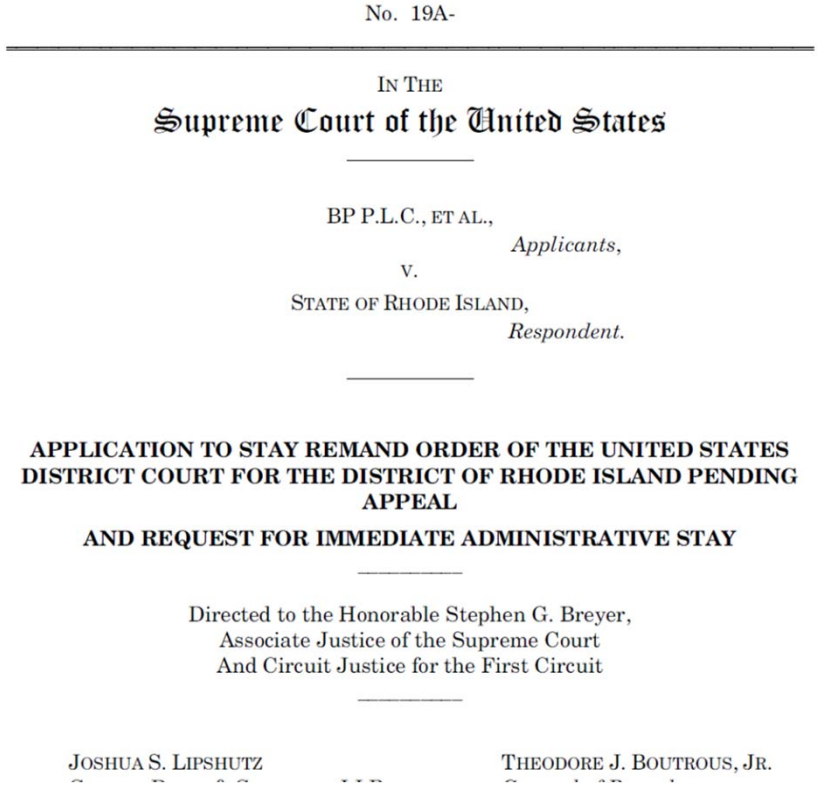
OFFER

12. The undersigned agrees, if this offer is accepted within 30 calendar days from the date for receipt of offers specified above to furnish any and all

- New wave of lawsuits in 2018 relying on state law claims, usually in state courts.
- Thirteen counties and cities, one state (Rhode Island), one trade group (Pacific Coast Federation of Fisherman's Assocation)
- Claims: public/private nuisance, strict liability for failure to warn/design defect, negligent failure to warn, unjust enrichment, trespass, and others
- Relief sought: compensatory damages, attorney's fees, punitive damages, disgorgement, and (for some) injunctions and adaptation program funding

Exciting times (with details)…

- Emergency removal and remand petitions to SCOTUS:
  - 1st Circuit denied stay during remand review
  - 4th Circuit granted stay pending SCOTUS review
  - 10th Circuit reviewing *Boulder* denial of stay



No. 19A-

IN THE
Supreme Court of the United States

BP P.L.C., ET AL.,
Applicants,
v.
STATE OF RHODE ISLAND,
Respondent.

APPLICATION TO STAY REMAND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND PENDING APPEAL

AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

Directed to the Honorable Stephen G. Breyer,
Associate Justice of the Supreme Court
And Circuit Justice for the First Circuit

JOSHUA S. LIPSHUTZ THEODORE J. BOUTROUS, JR.

- Court unanimously refused to stay trial during appellate review of remand rulings (8-0; Alito abstaining)

- Result: trials now will proceed while appellate courts consider remand appeals

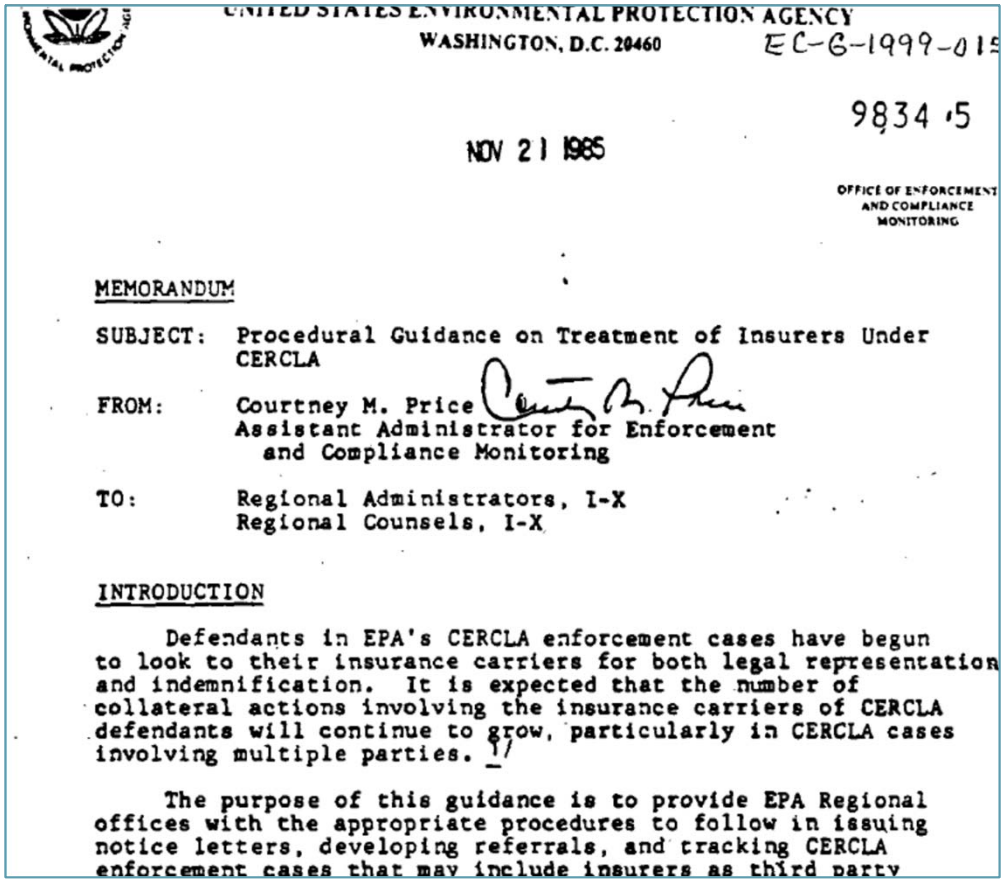
Future Directions in Climate Change Litigation

- Continued scorched earth battles over procedural and tactical barriers to trial
  - Discovery can begin
  - Political question, standing, preemption – all under state law tests
  - Trial tactics: expert admissibility, remedies, MDL complex litigation models
  - Impact of tort reform laws (including Texas affirmative defense for greenhouse gas nuisance torts)

- Legislative interventions

Climate Liability Issues For Coverage Counsel

- Traditional policyholder claims for direct risks and transitional risks
  - *AES v. Steadfast Ins. Co.*, 72 S.E.2d 532 (Va. 2012)
- Financial assurance demonstrations under federal laws



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EC-G-1999-01

9834 '5

NOV 21 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Procedural Guidance on Treatment of Insurers Under CERCLA

FROM: Courtney M. Price
Assistant Administrator for Enforcement and Compliance Monitoring

TO: Regional Administrators, I-X
Regional Counsels, I-X

INTRODUCTION

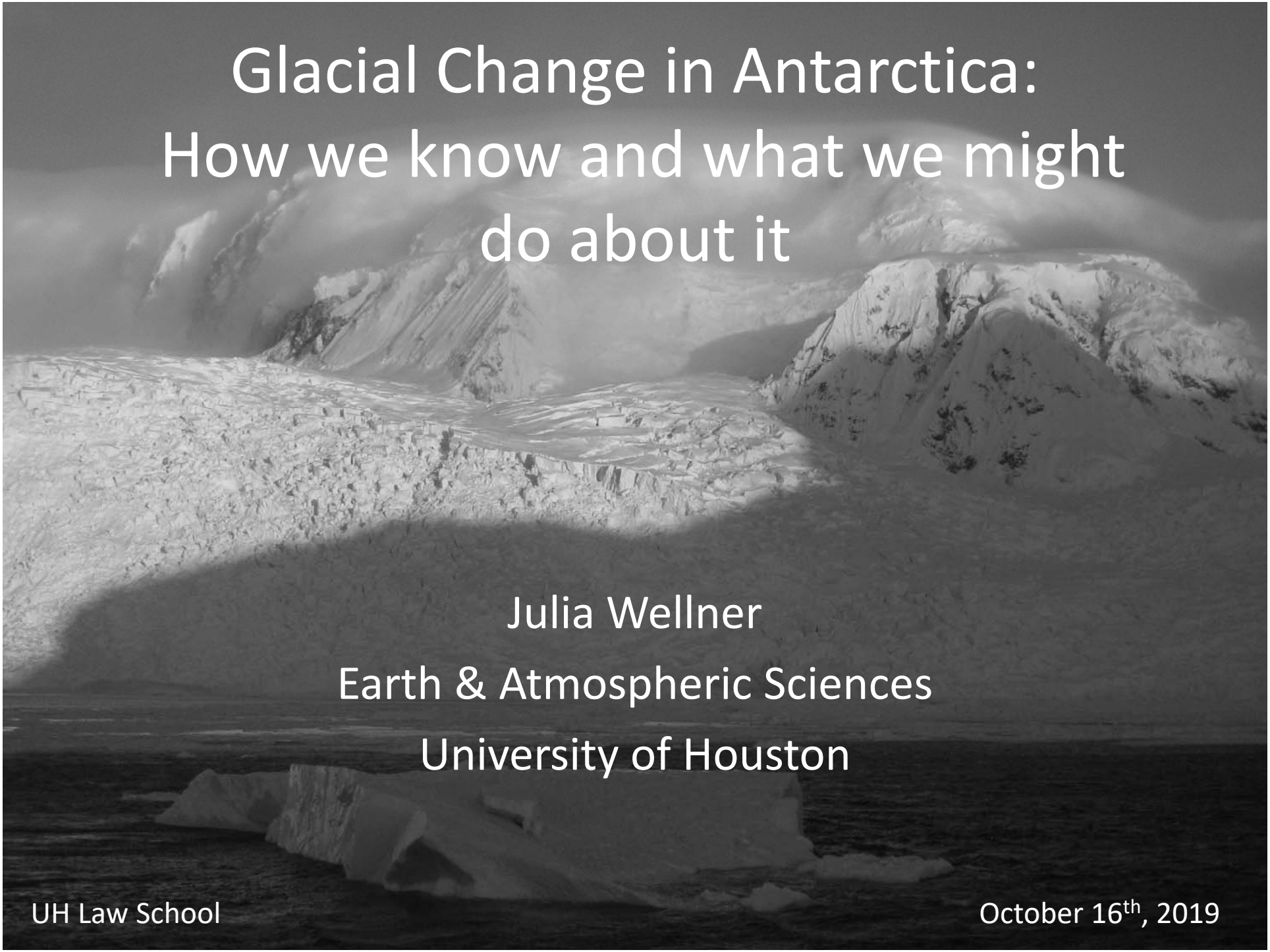
Defendants in EPA's CERCLA enforcement cases have begun to look to their insurance carriers for both legal representation and indemnification. It is expected that the number of collateral actions involving the insurance carriers of CERCLA defendants will continue to grow, particularly in CERCLA cases involving multiple parties. 1/

The purpose of this guidance is to provide EPA Regional offices with the appropriate procedures to follow in issuing notice letters, developing referrals, and tracking CERCLA enforcement cases that may include insurers as third party

- Direct action provisions, including some under federal environmental laws

Professor Tracy Hester
University of Houston Law Center

tdheste2@central.uh.edu
713-743-1152 (office)



Glacial Change in Antarctica: How we know and what we might do about it

Julia Wellner

Earth & Atmospheric Sciences

University of Houston

UH Law School

October 16th, 2019

Plan

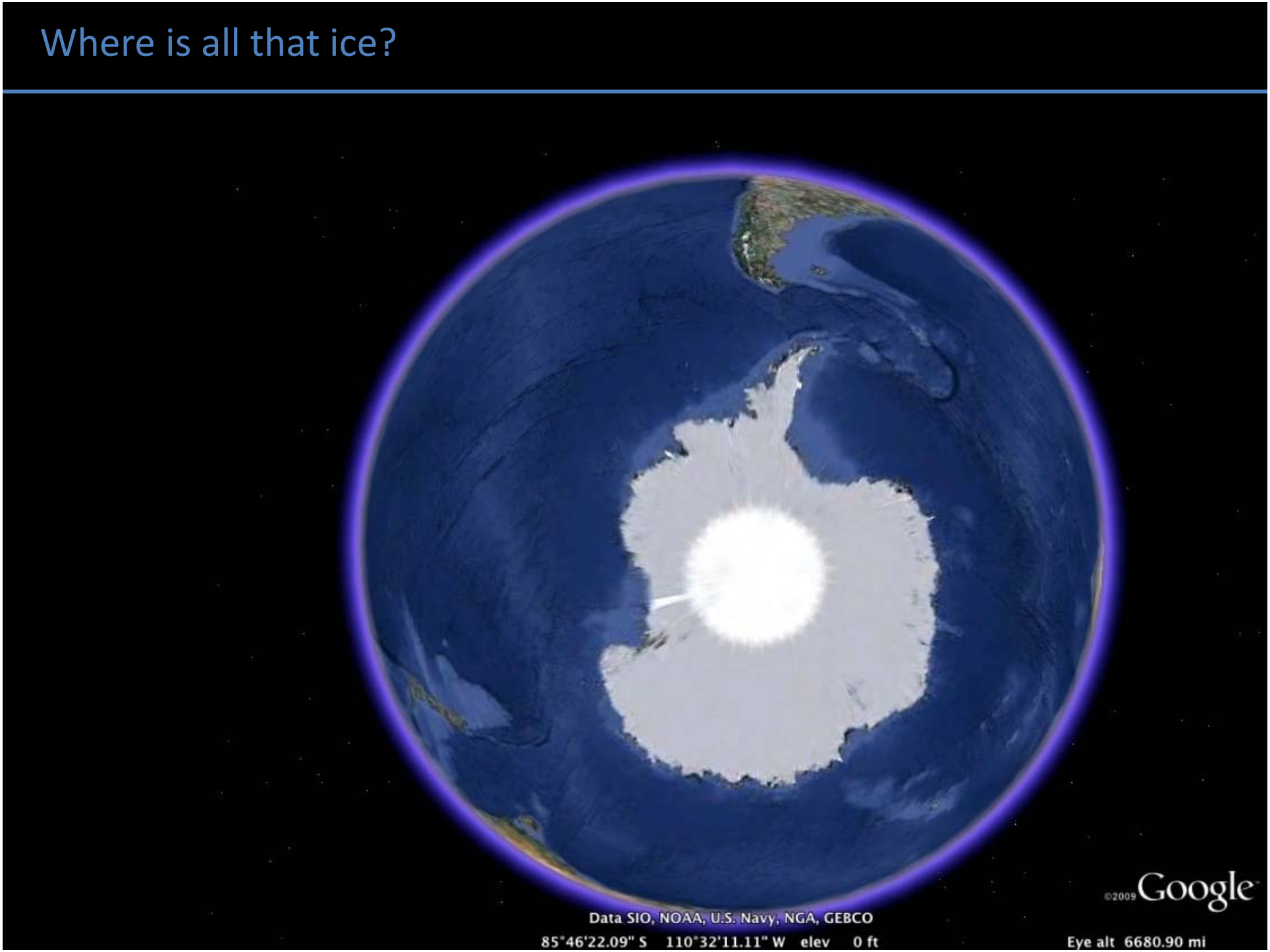
- Antarctic basics
- Who am I and what do I do?
- Thwaites Glacier
  - How it's changing
  - How do we know
- Geo-Engineering of ice sheets


NSF

What would happen if all glaciers melted?

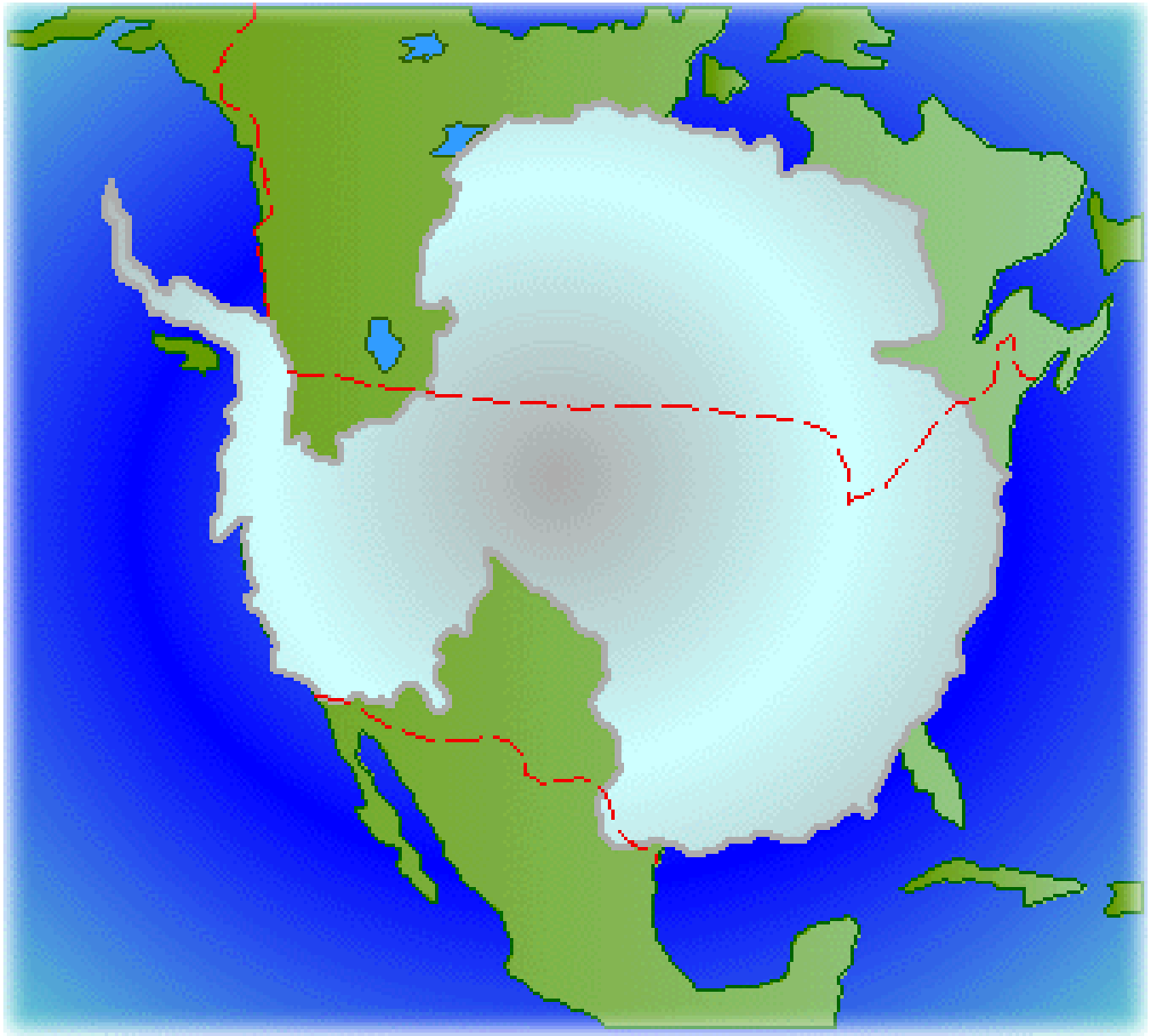
- Sea level would rise about 70 m
  - many of the world's large population centers would be flooded

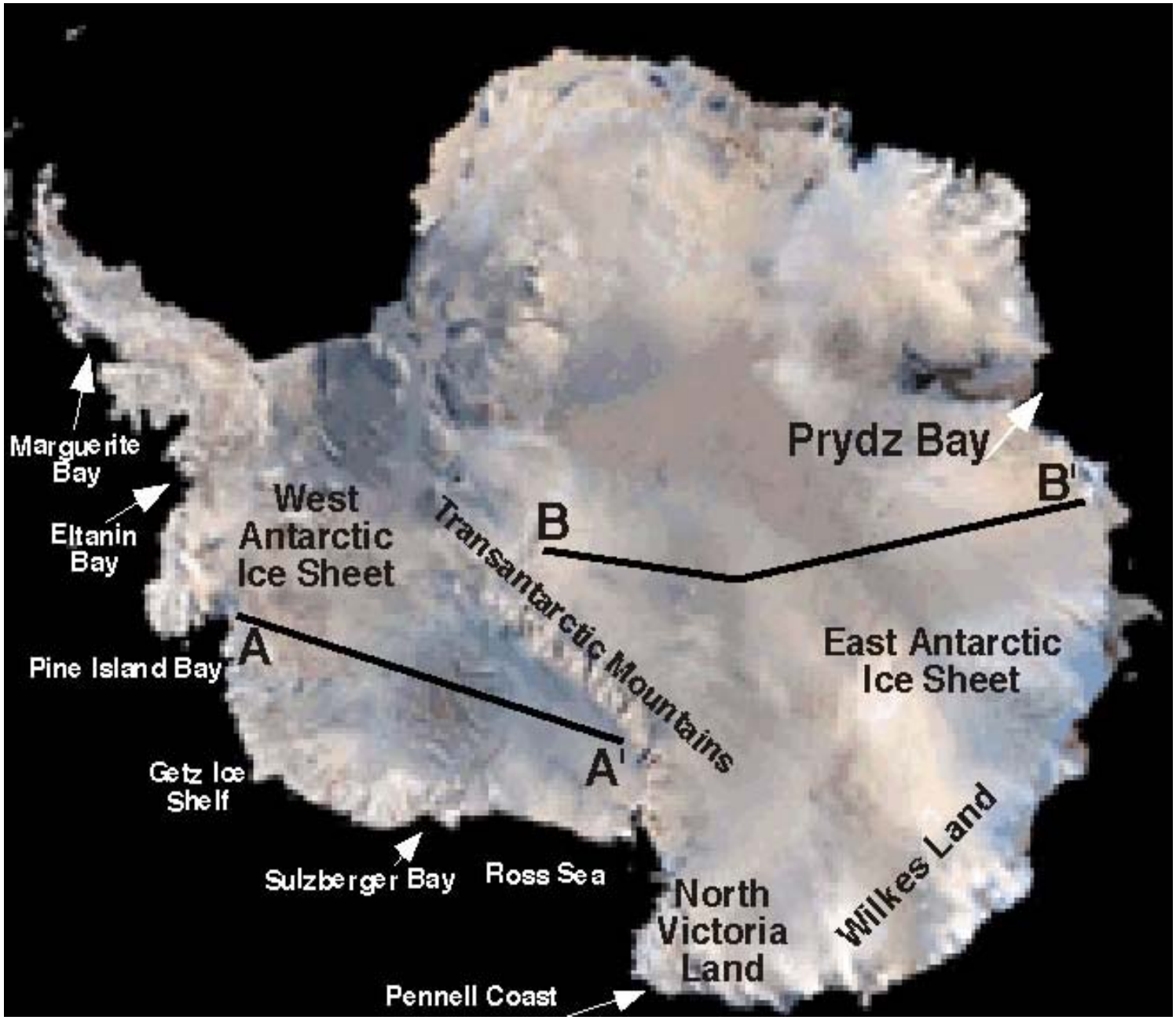
Where is all that ice?



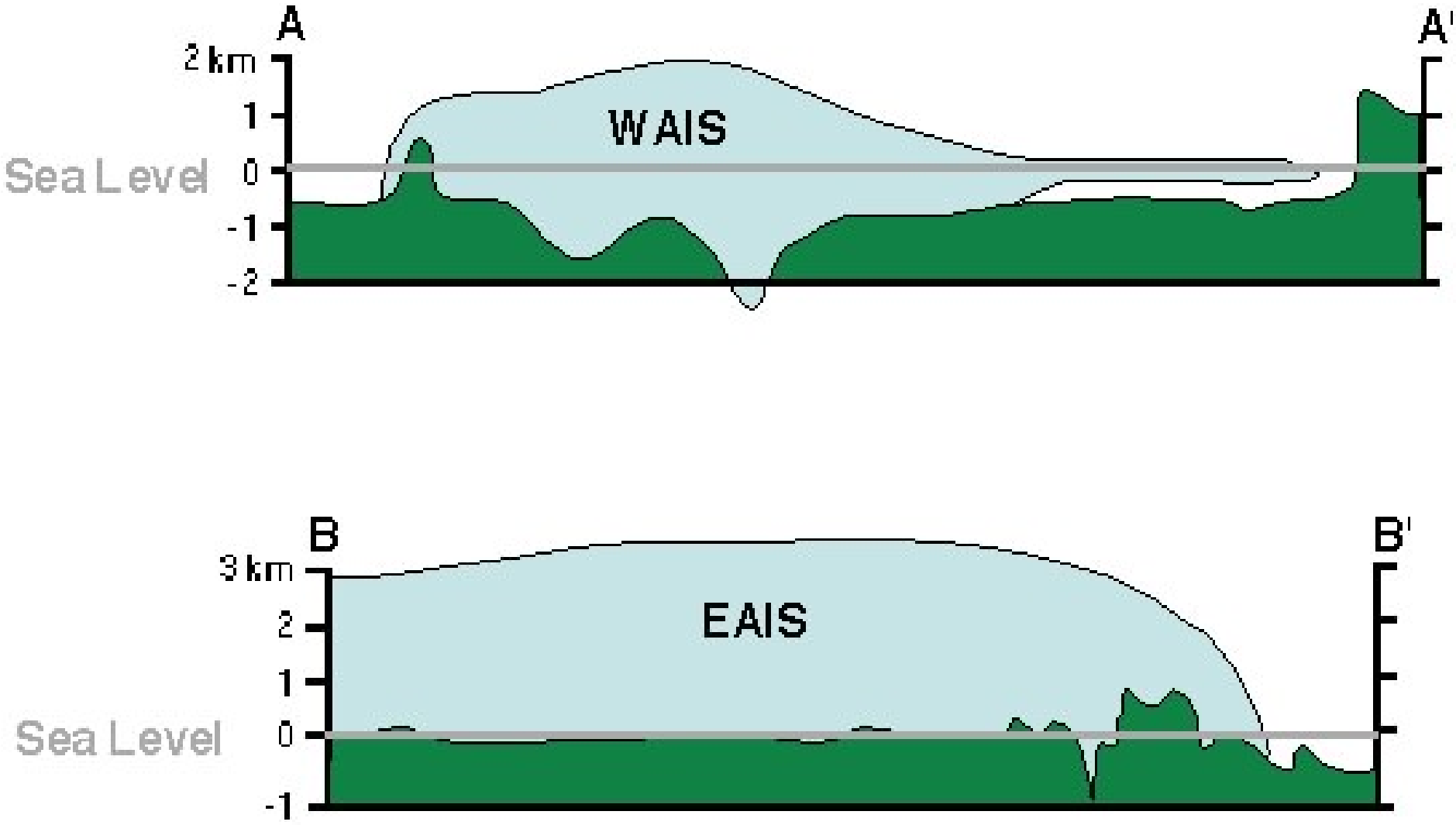
Where is all that ice?

~65 m is in Antarctica

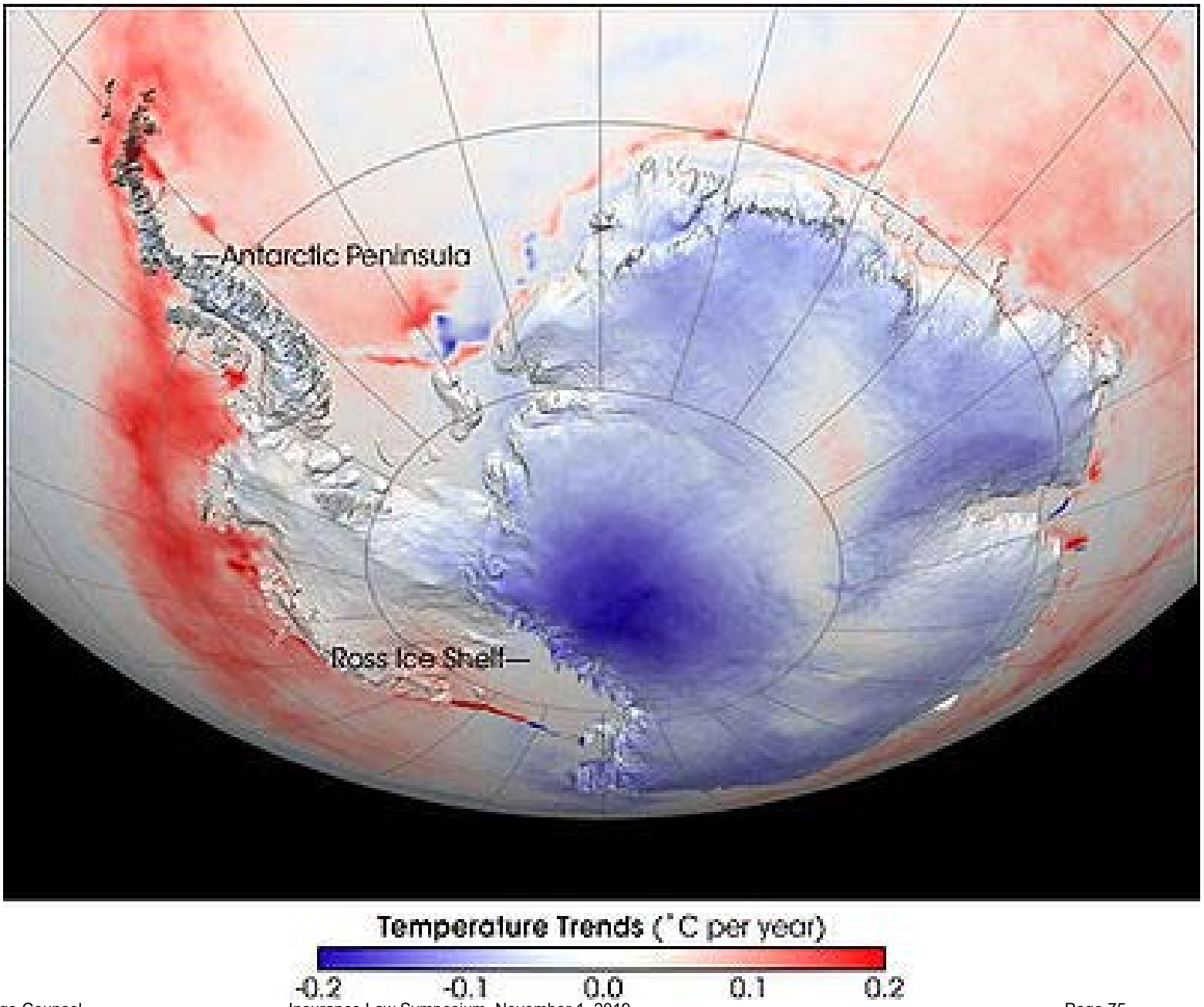



Marguerite Bay
Eltanin Bay
Pine Island Bay
West Antarctic Ice Sheet
Transantarctic Mountains
A
A'
B
B'
Prydz Bay
East Antarctic Ice Sheet
Getz Ice Shelf
Sulzberger Bay
Ross Sea
North Victoria Land
Wilkes Land
Pennell Coast

Antarctica: Highest Continent



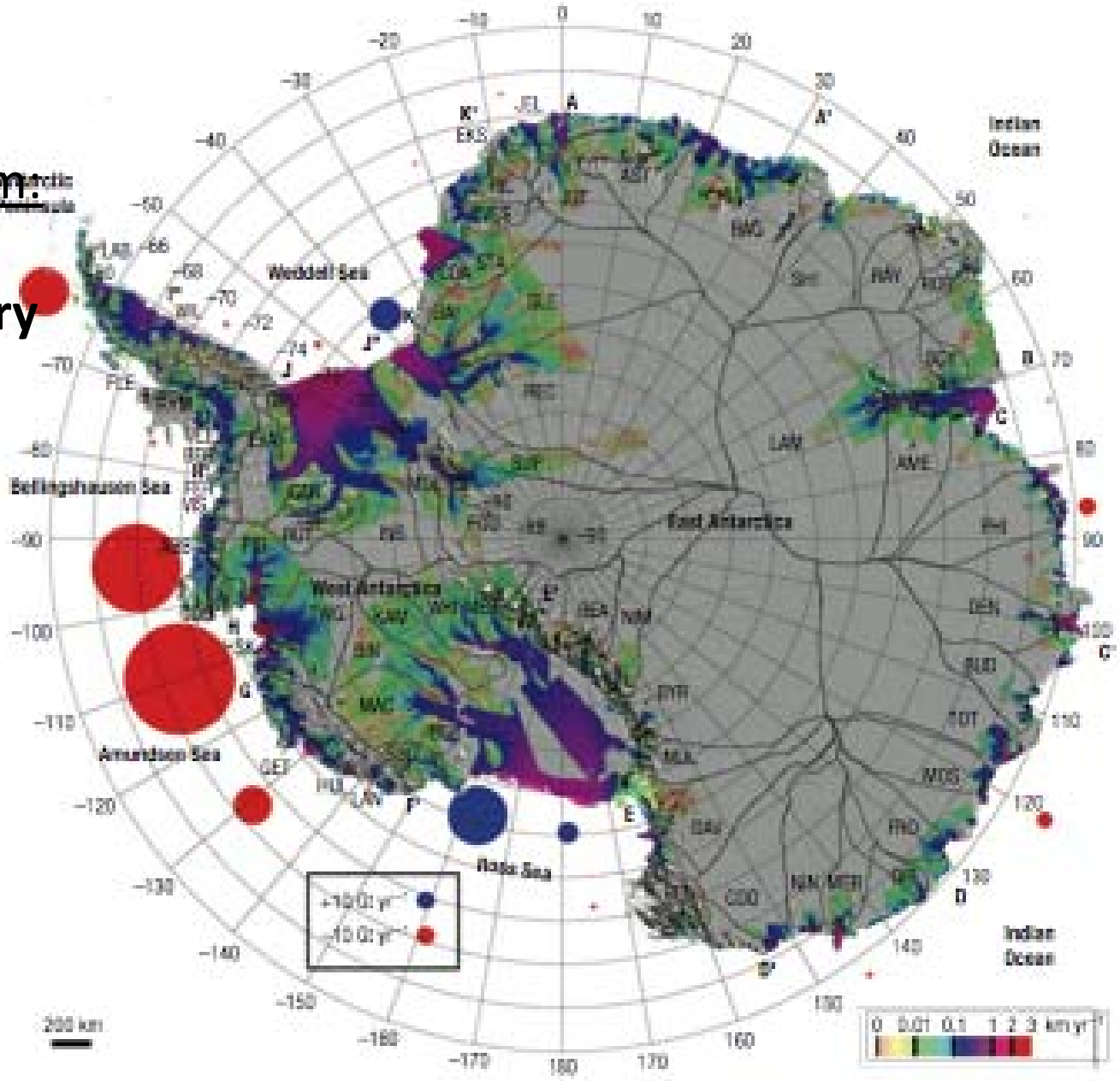
Antarctic Temperature Change



Mass balance is what counts, not temperature anyway

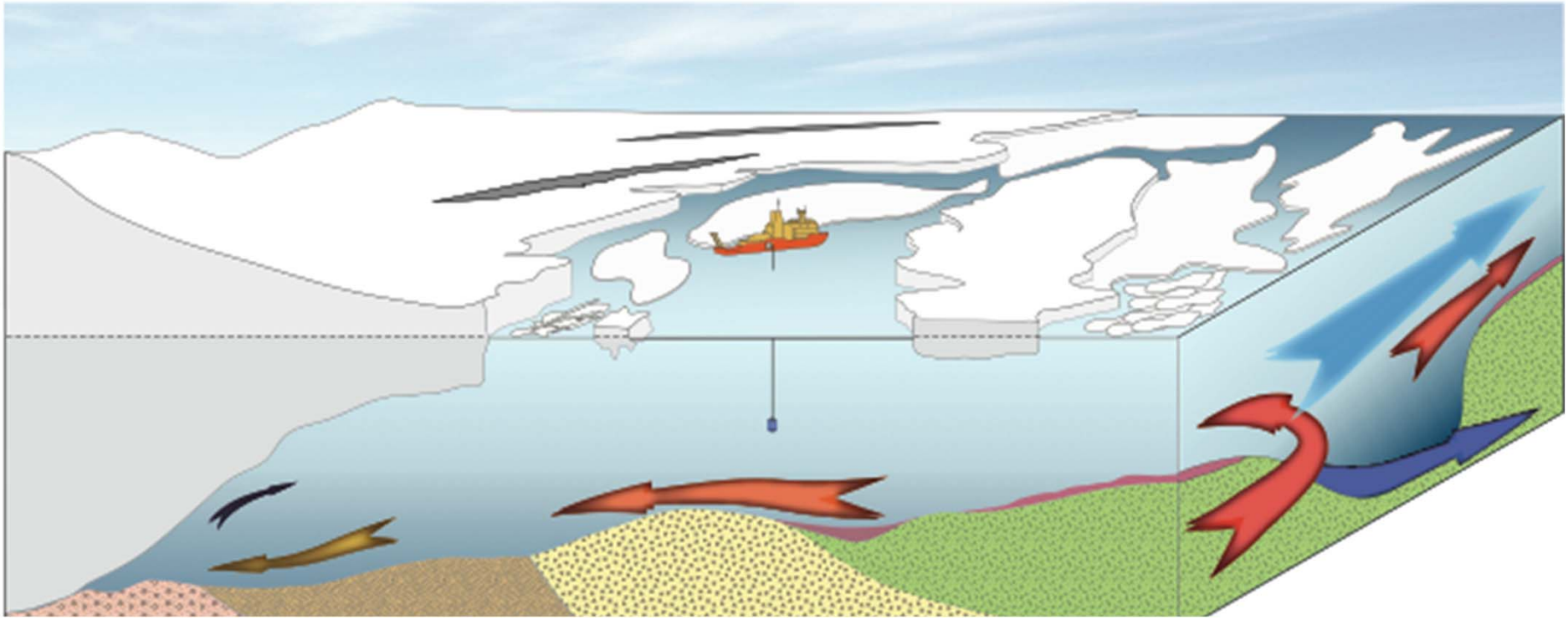
Measurements from:

- **SAR Interferometry**
- GRACE

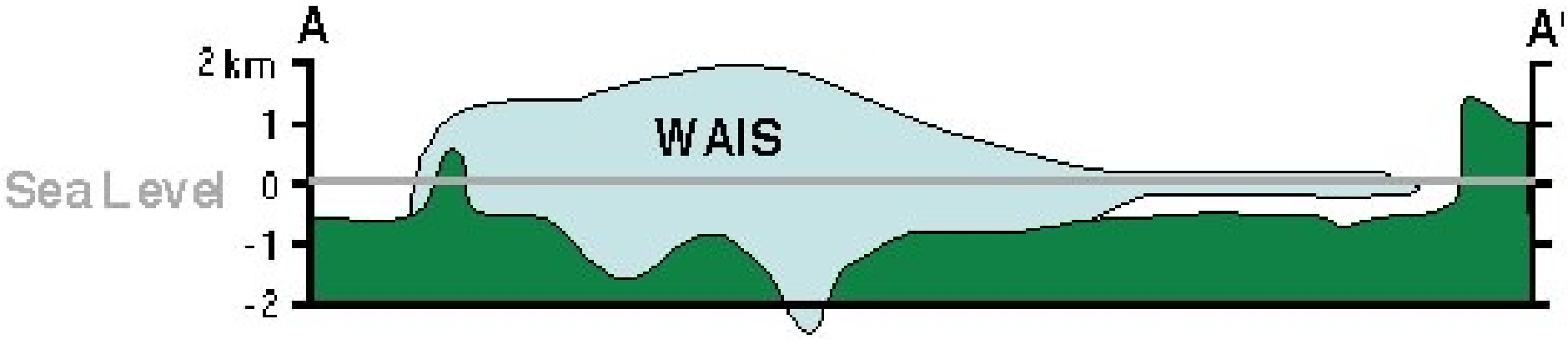


Rignot et al., 2008

Ice Behavior is Controlled by Water (2 of 3 ways in Antarctica)



Marine-based Ice



The WAIS, and Peninsula Ice Cap, are:

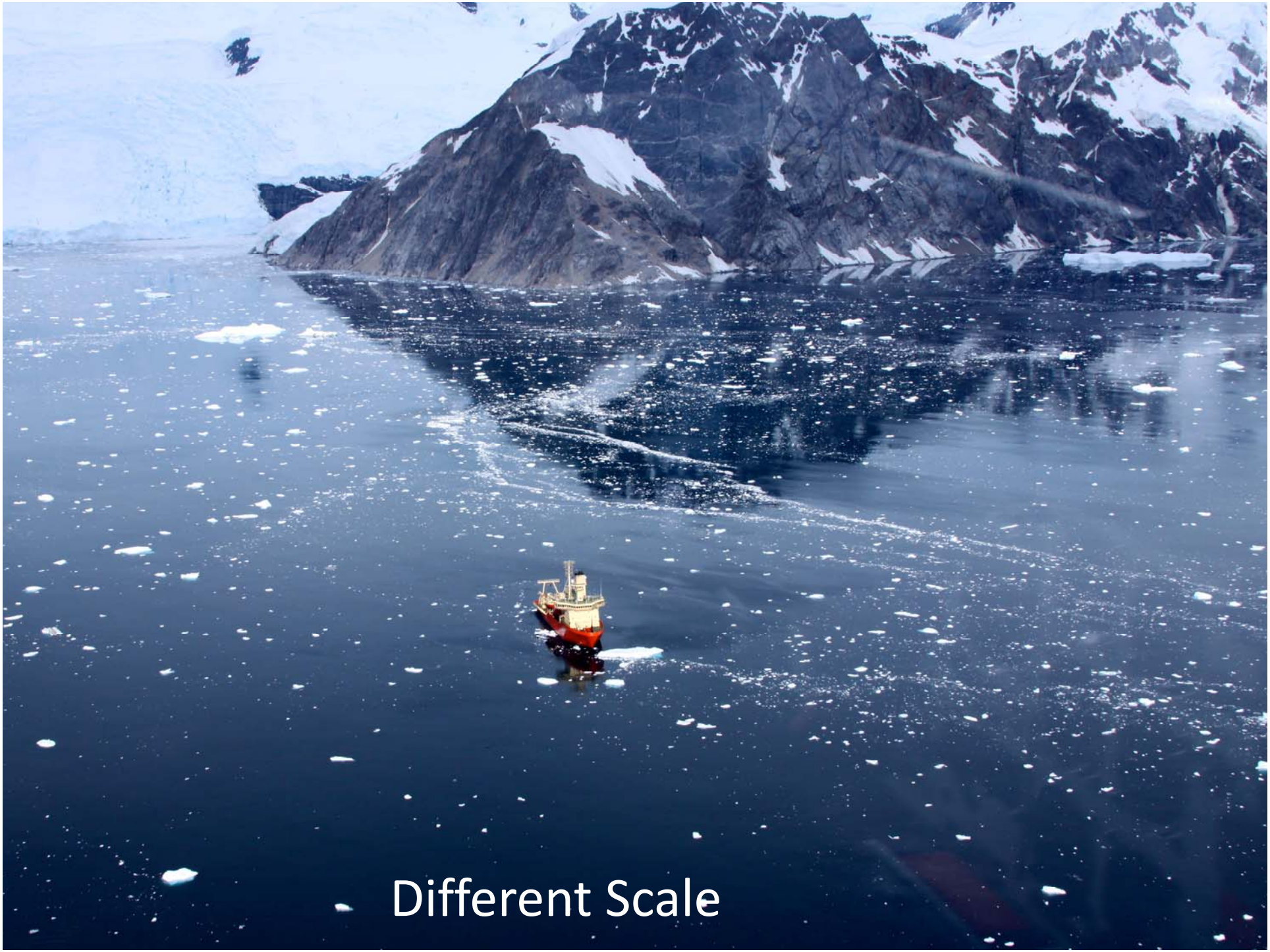
- Grounded below sea level
- On a Foredeepened shelf
- Many areas have ice shelves

Plan

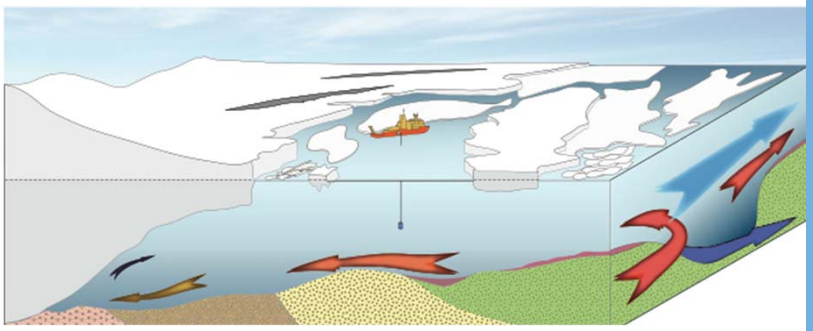
- Antarctic basics
- Who am I and what do I do?
- Thwaites Glacier
  - How it's changing
  - How do we know
- Geo-Engineering of ice sheets

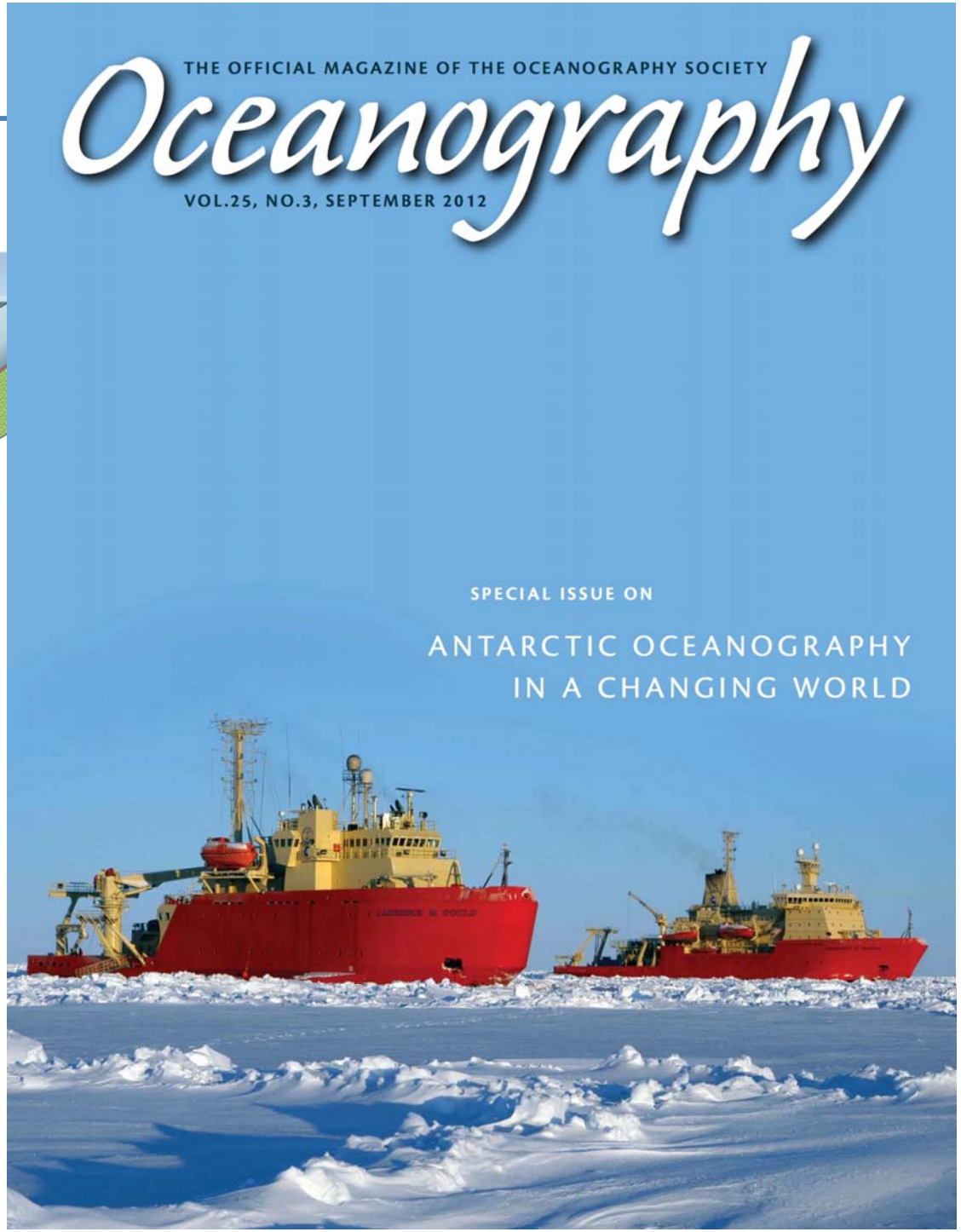
Quickly: What do I do?

R/V Mishipeshu University of Houston


Different Scale

What do we do?




THE OFFICIAL MAGAZINE OF THE OCEANOGRAPHY SOCIETY
Oceanography
VOL.25, NO.3, SEPTEMBER 2012
SPECIAL ISSUE ON
ANTARCTIC OCEANOGRAPHY
IN A CHANGING WORLD

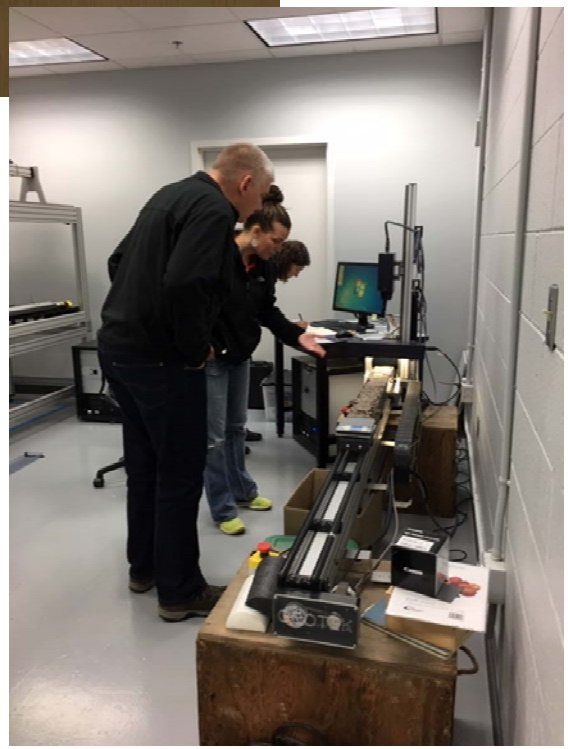
What do we do? Core on sunny days

Photo by Y. Muñoz (2010)

What do we do? Core on cold days

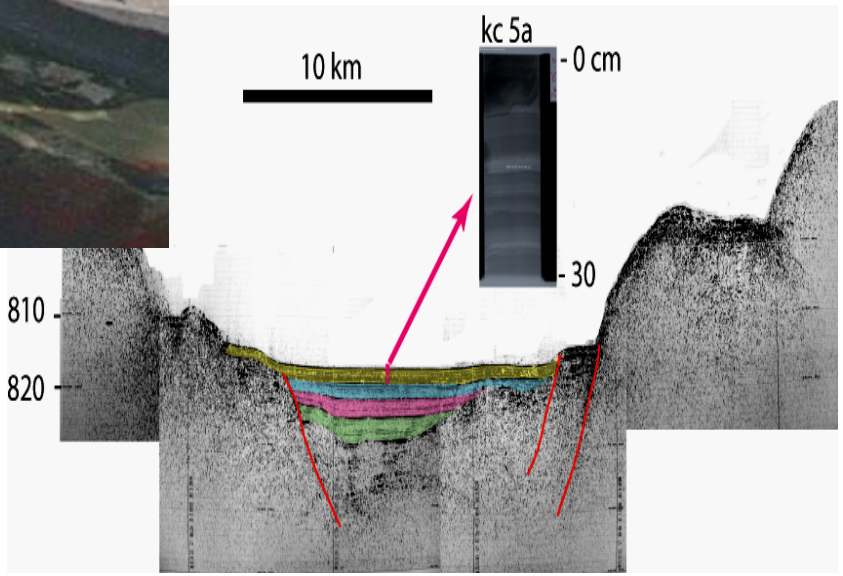
Photo by K. Gavahan (2012)

What do we do? Core Repository

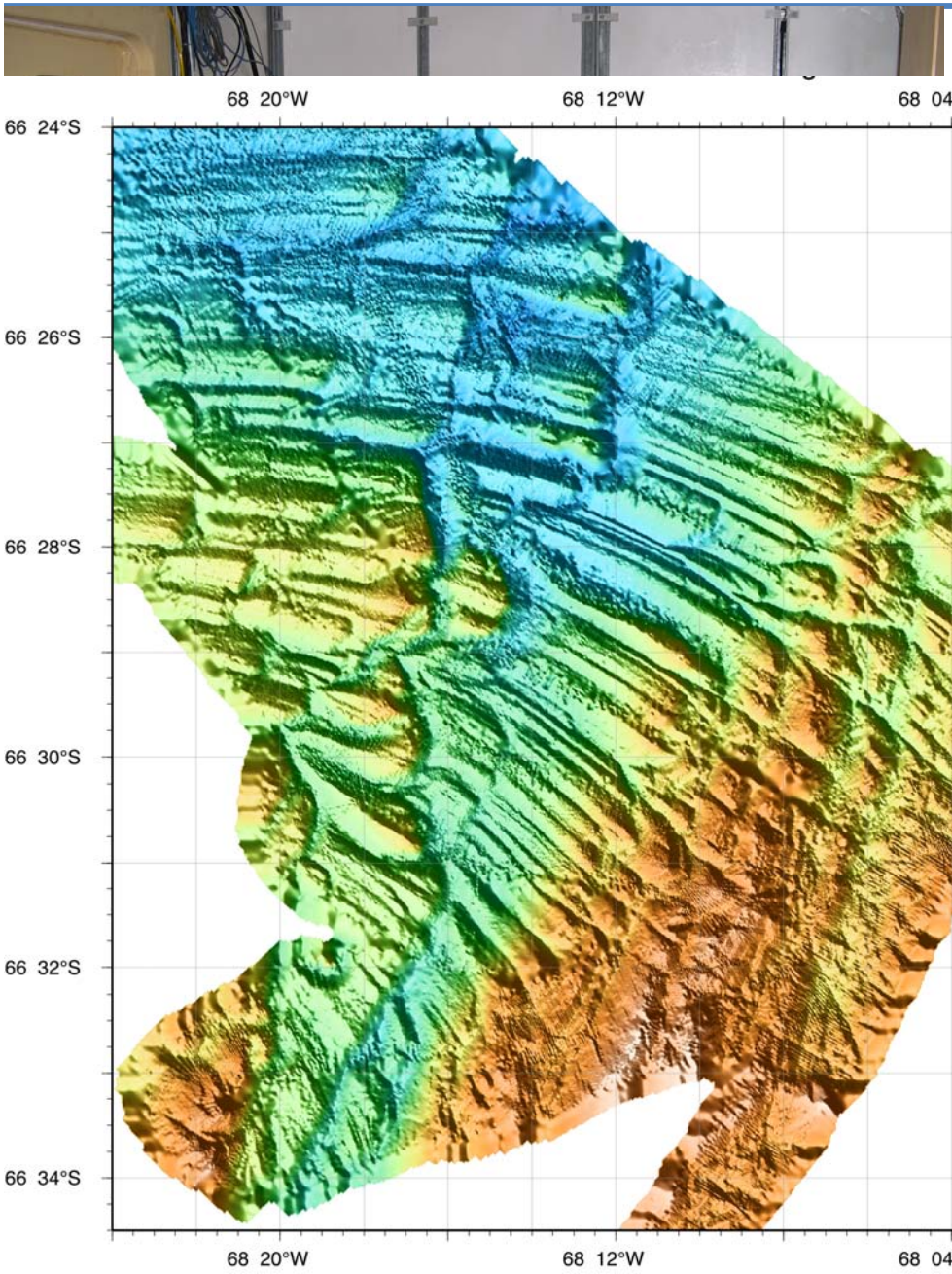


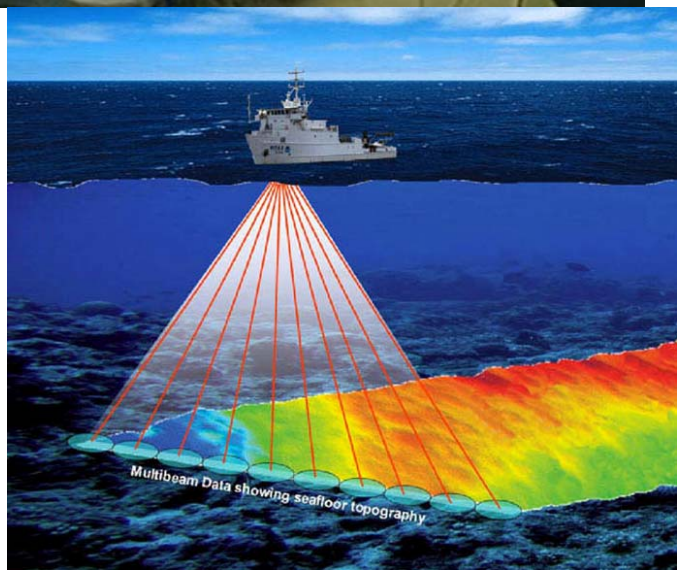
What do we do? Seismic

(2005)



What do we do? Multibeam Swath Bathymetry





What do we do? Collaborate with ocean and bio teams


Yuribia Muñoz with Amy Leventer


Kimberly Mead


CTD Photo by Y. Muñoz (2010)

What do we do? GPS (rebound)

Photos by Y. Muñoz (2010)

What do we do? Go Ashore in Small Boats (cheaper than helo)

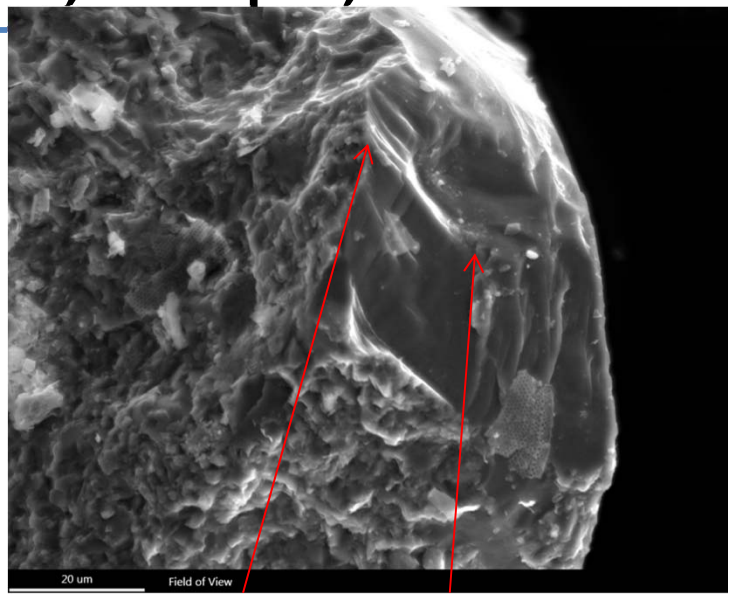
(1998)

(2012)

What do we do? Date Sediments

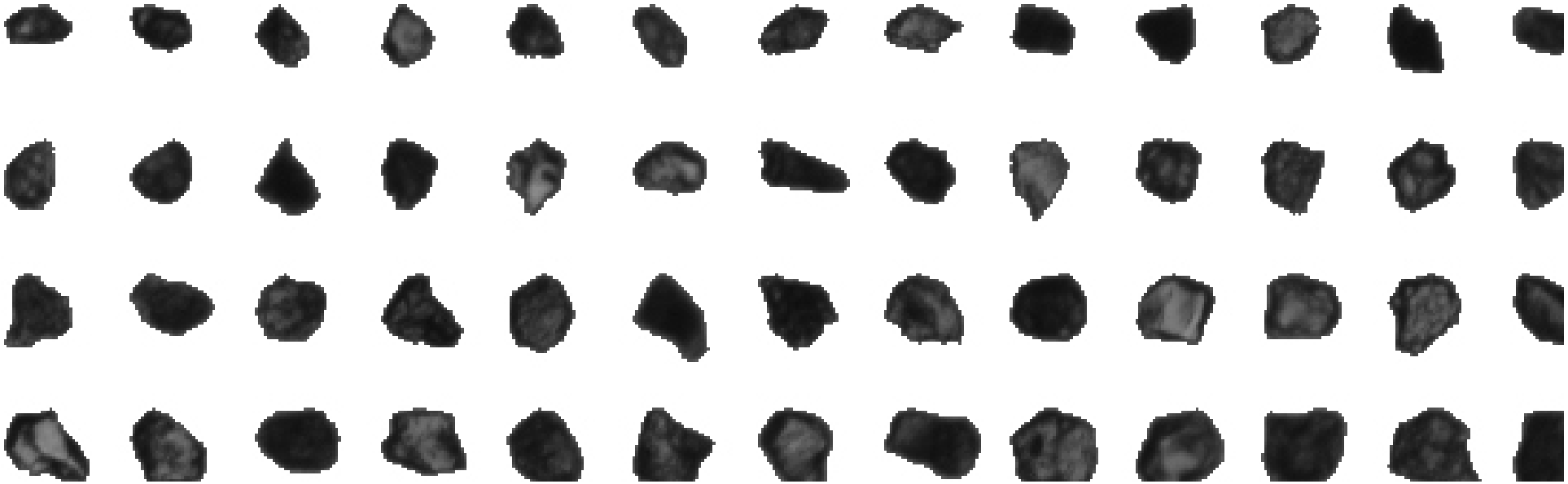
Gamma-ray spectrometry to measure ^{210}Pb, ^{137}Cs, other

What do we do? Sediment size, shape, texture

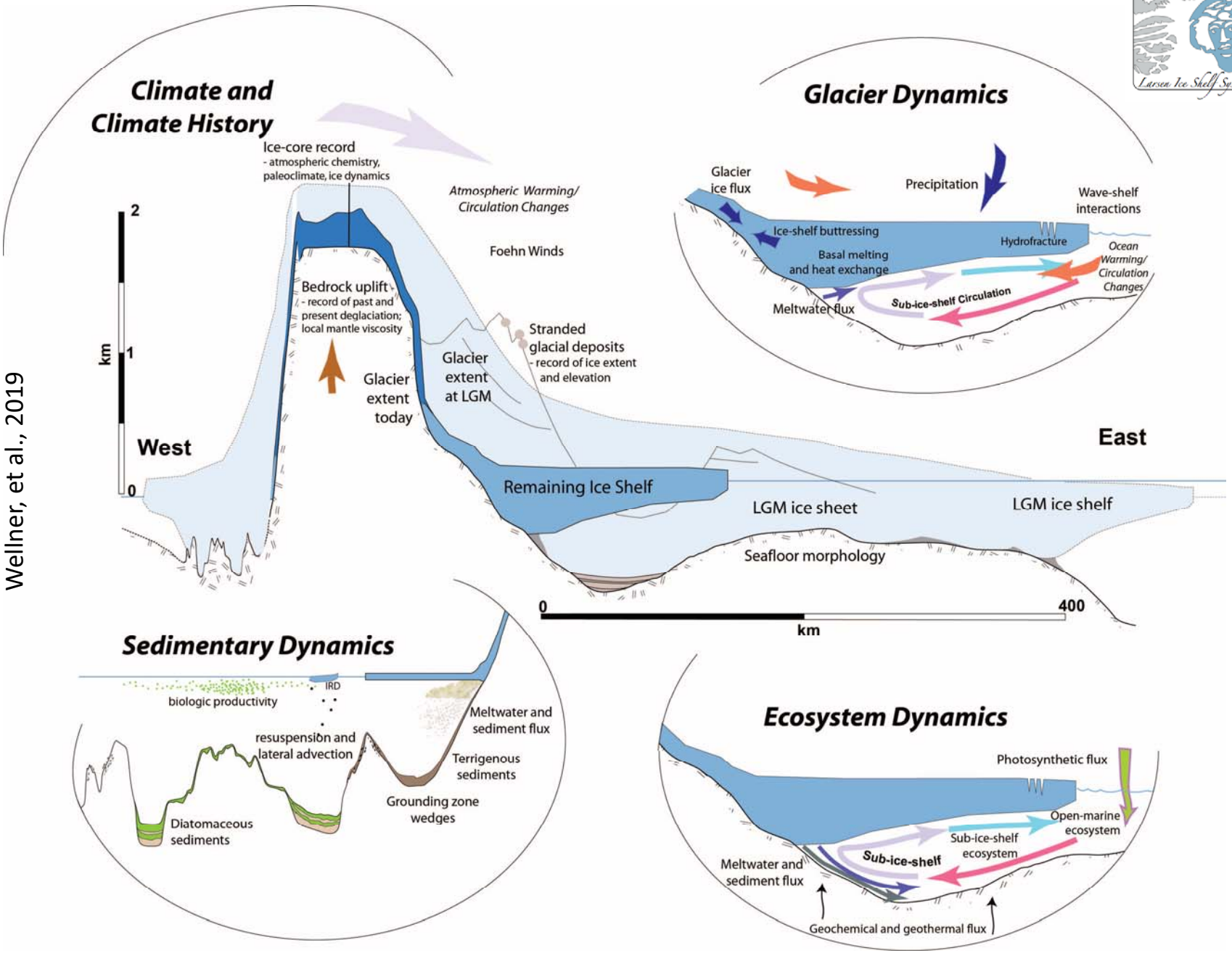


Small conchoidal fractures

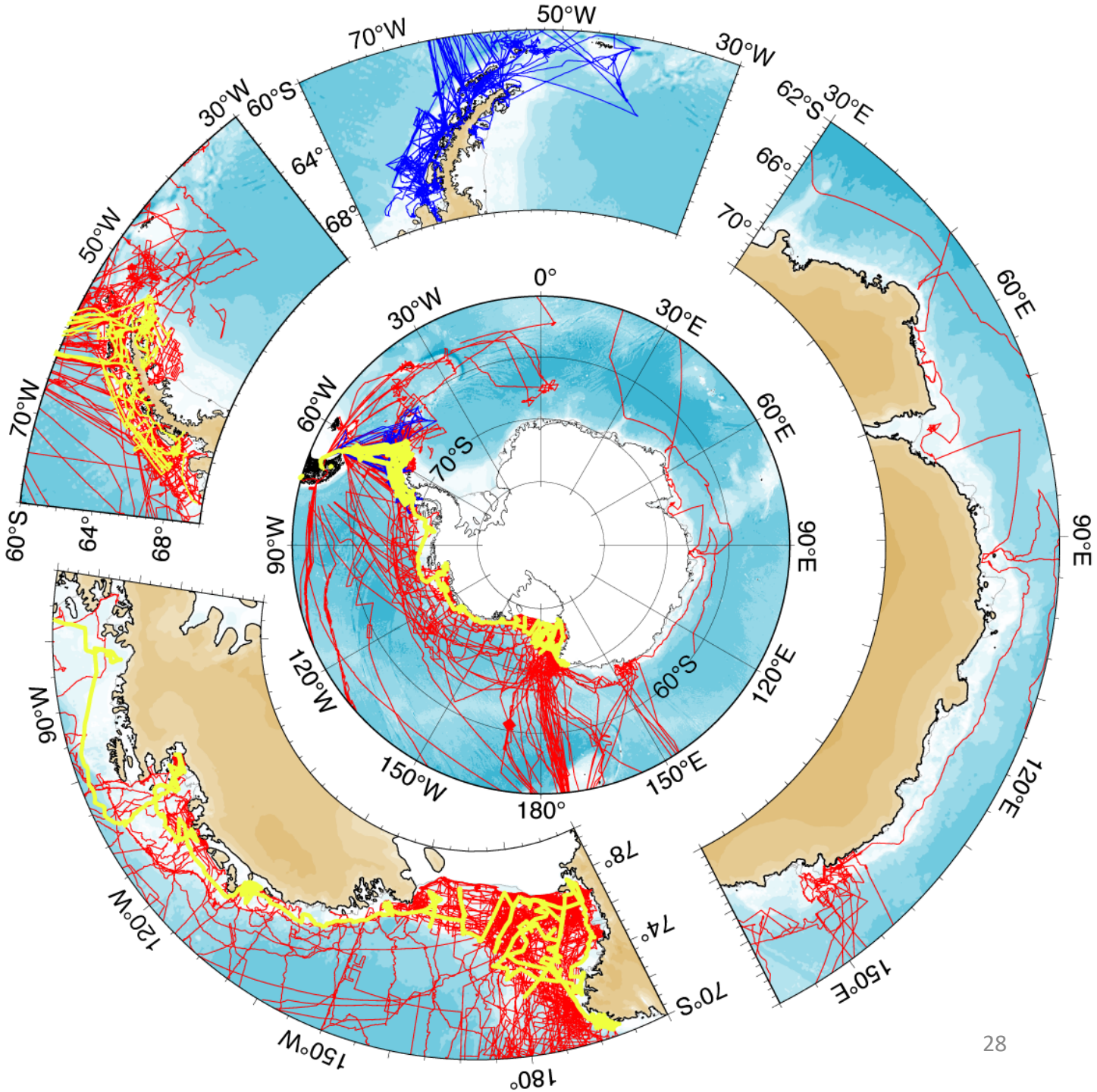
Dish-shaped concavitity



Geology, but highly interdisciplinary



Wellner, et al., 2019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90°W

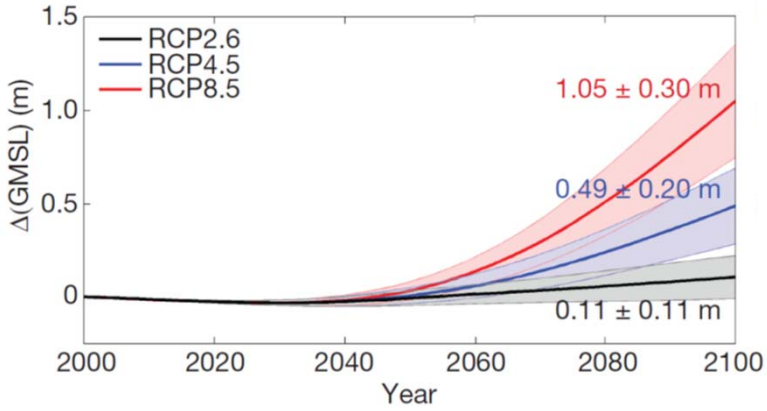
Plan

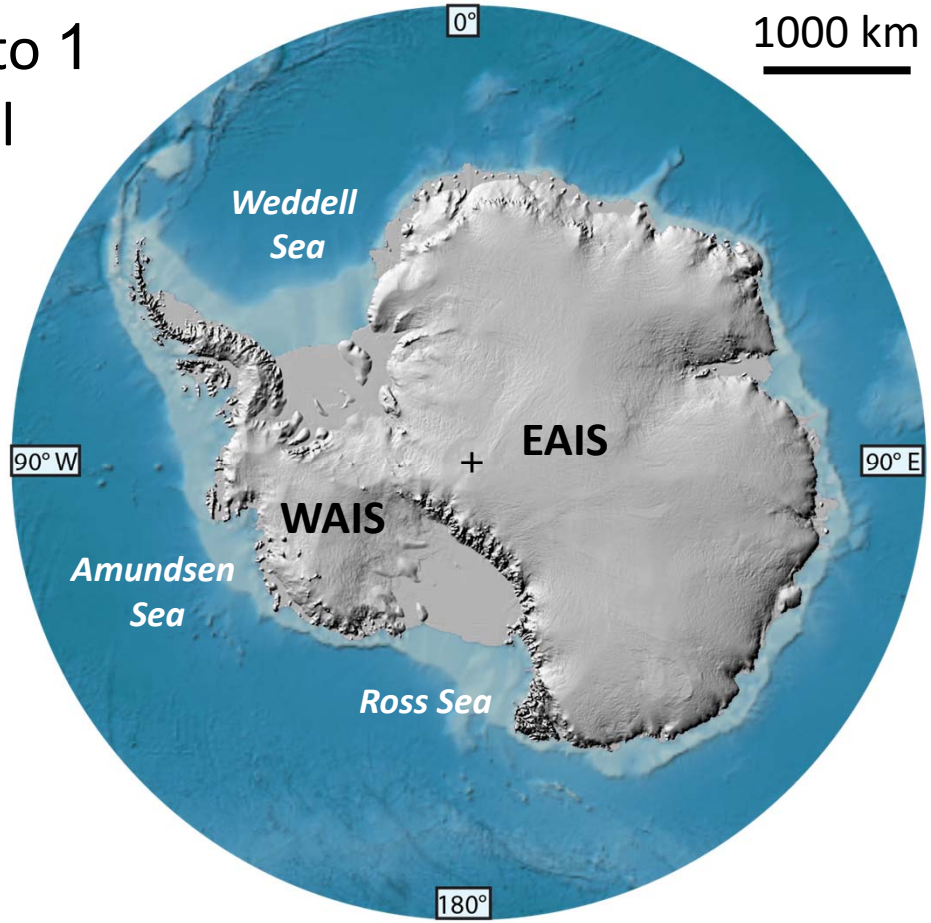
- Antarctic basics
- Who am I and what do I do?
- Thwaites Glacier
  - How it's changing
  - How do we know
- Geo-Engineering of ice sheets

Future of the West Antarctic Ice Sheet

- Antarctica may contribute up to 1 meter to global mean sea level (GMSL) in this century*.
- More data is required from Thwaites Glacier to improve predictive climate models.

Modeled Scenarios of Antarctic Contribution to GMSL





WAIS: West Antarctic Ice Sheet
EAIS: East Antarctic Ice Sheet

** Based on DeConto and Pollard, 2016*

Future of the West Antarctic Ice Sheet

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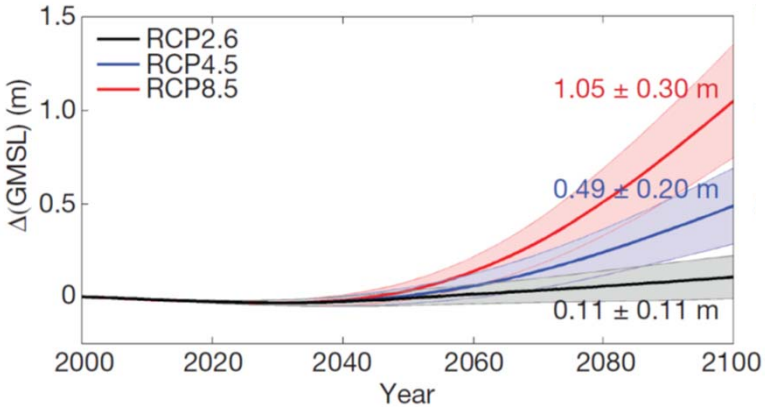
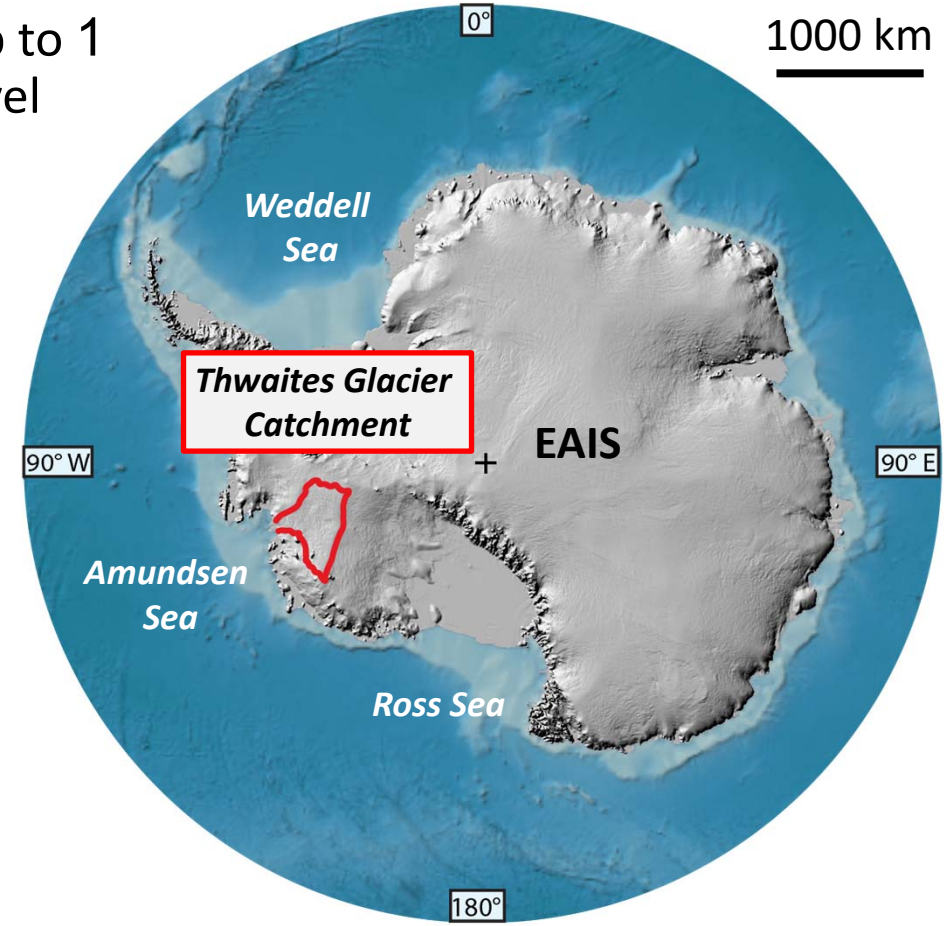
Modeled Scenarios of Antarctic Contribution to GMSL

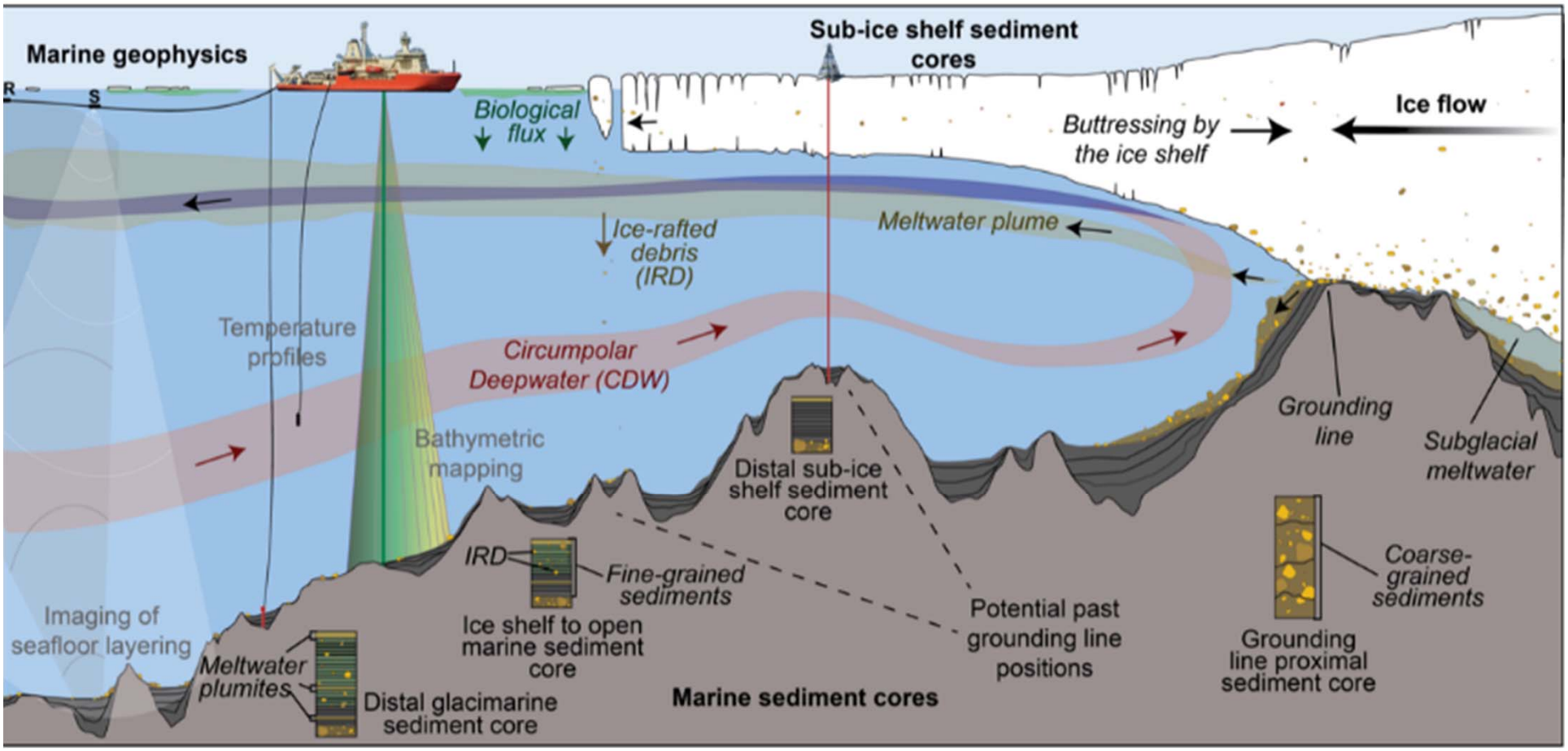




WAIS: West Antarctic Ice Sheet
EAIS: East Antarctic Ice Sheet

** Based on DeConto and Pollard, 2016*

Marine Ice Sheets, Stability, Instability, and Sediments

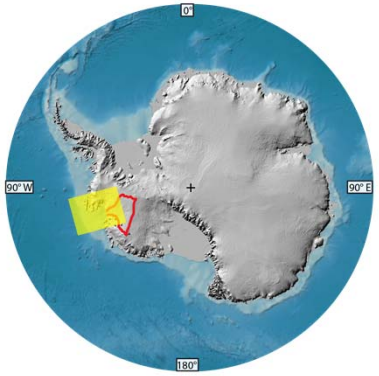


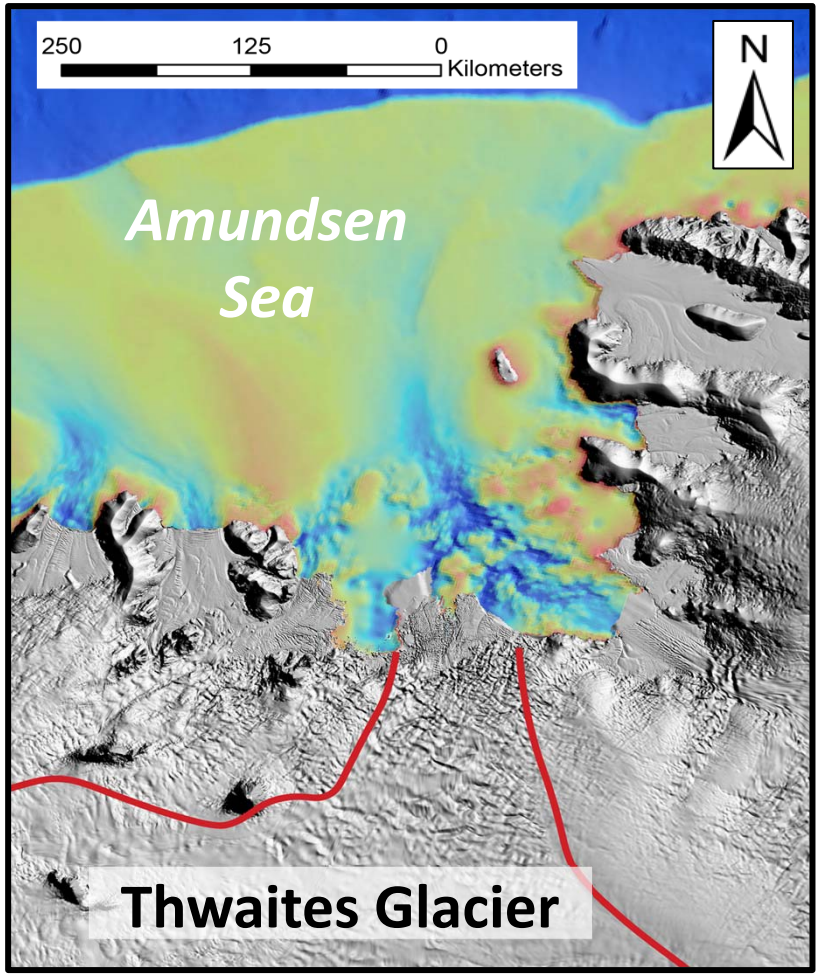
THwaites Offshore Research

INTERNATIONAL THWAITES GLACIER COLLABORATION

THOR

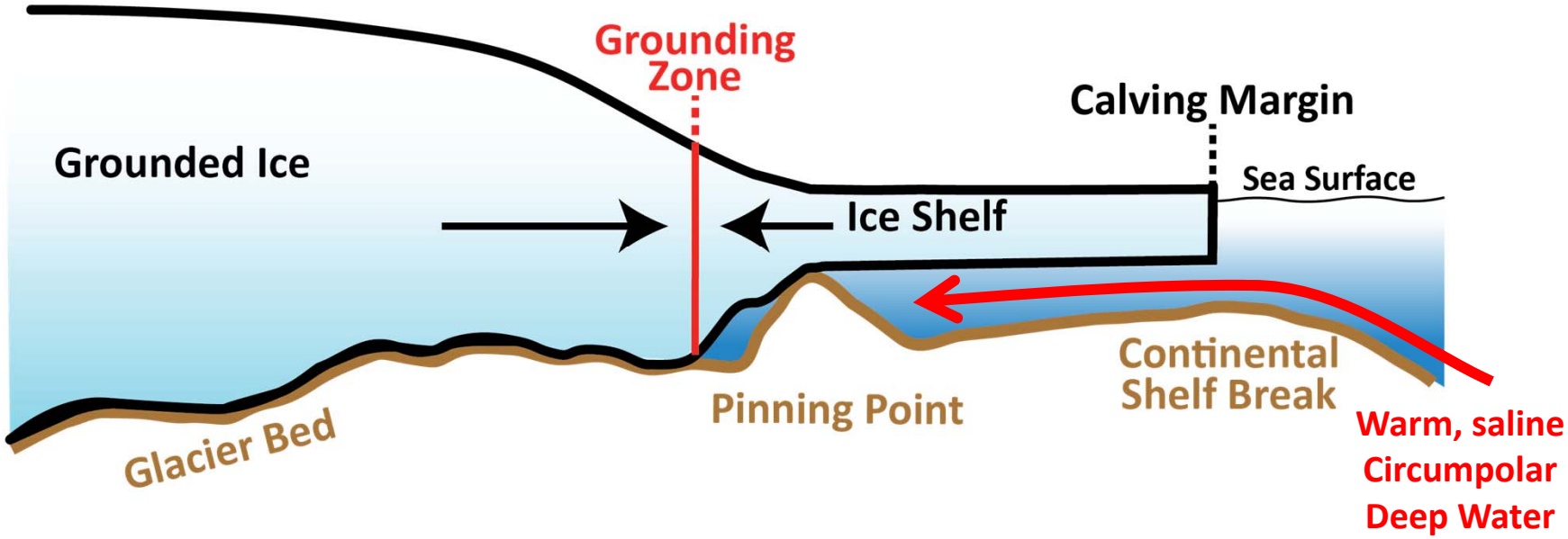
https://thwaitesglacieroffshoreresearch.org/





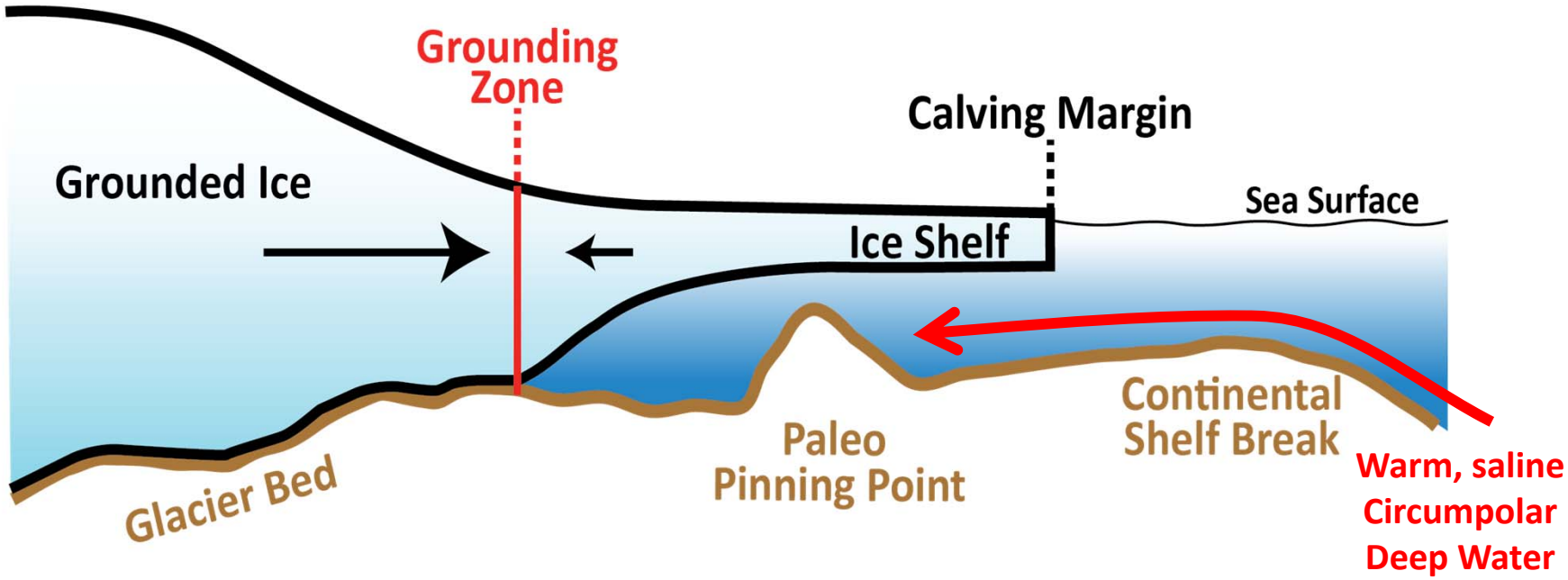
Stability is dependent on…

- Atmospheric conditions
- **Oceanographic changes**
- **Bed topography**

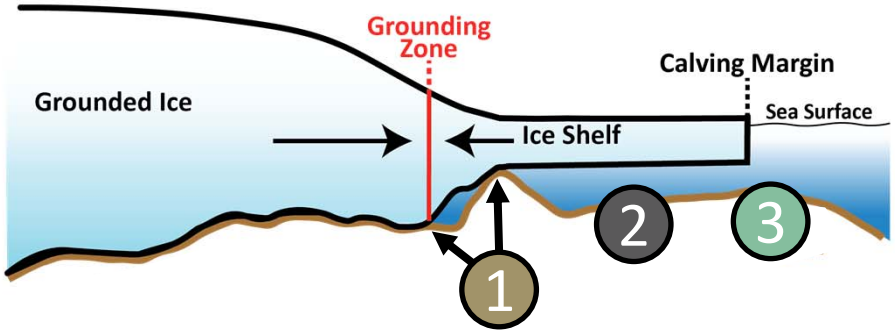


When did Thwaites lift off pinning points?

Need to reconstruct glacier position using **sedimentary facies** and **age modeling.**

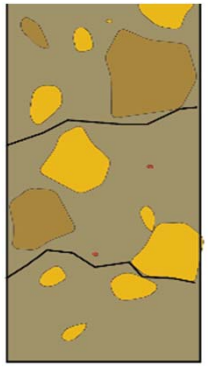


Glacial Marine Depositional Model



1

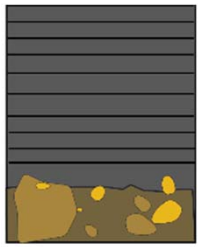
Grounding Zone Proximal



Coarse-grained, Poorly sorted or normal grading

2

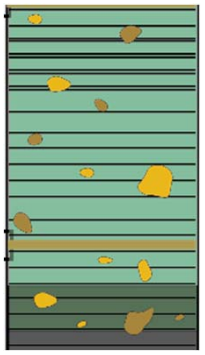
Sub-Ice Shelf



Laminated silty clay

3

Seasonally Open Marine



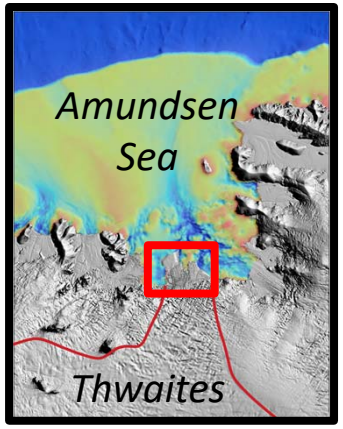
Diatomaceous, silty clay Larger clasts (*ice rafting*)

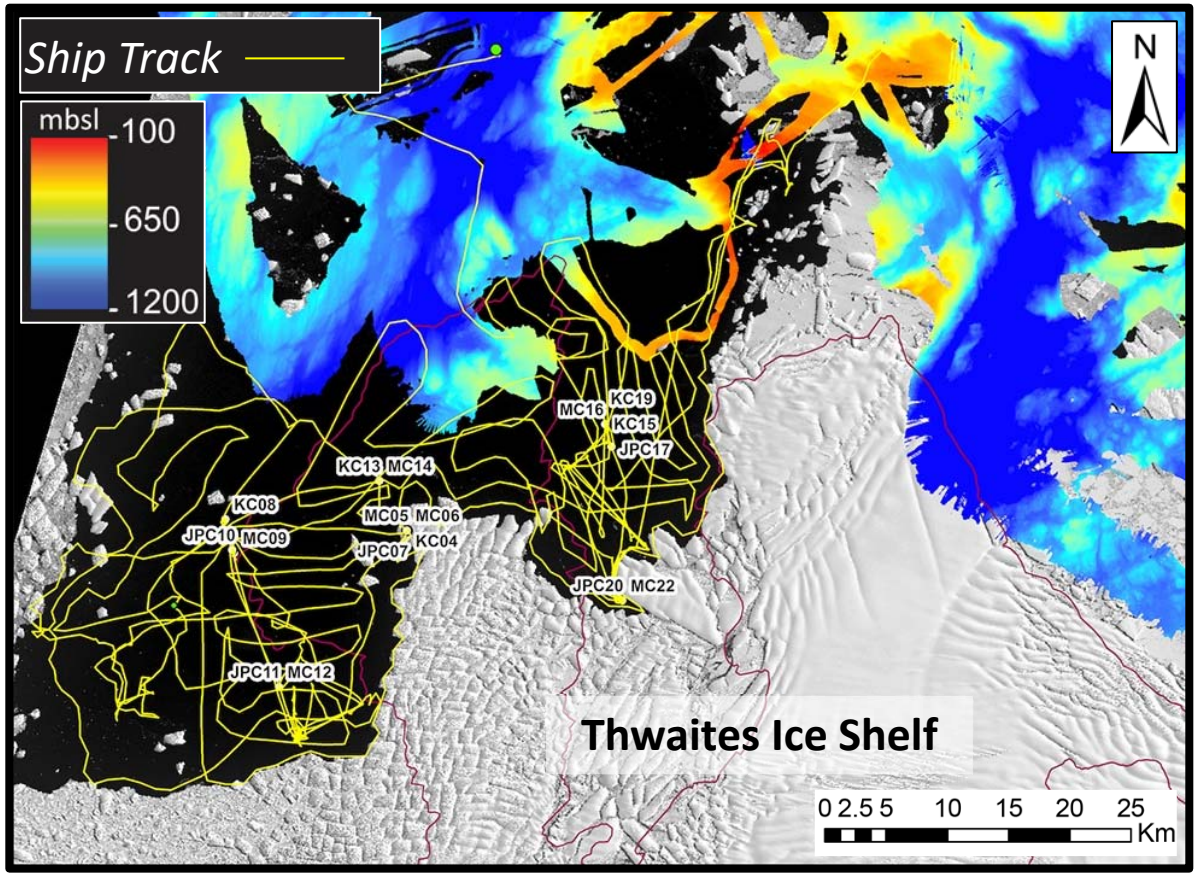
Model adapted from Kirshner et al., 2012; Hillenbrand et al., 2013; Smith et al., 2017

2019 Field Season in the Amundsen Sea

Photo: James Kirkham

Research Vessel/Ice Breaker Nathaniel B. Palmer

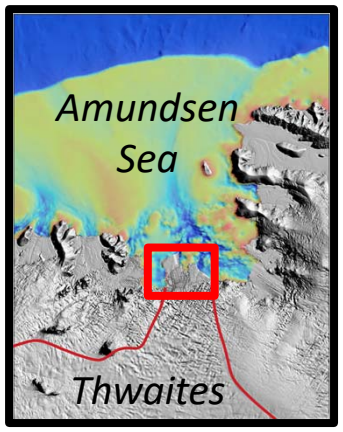


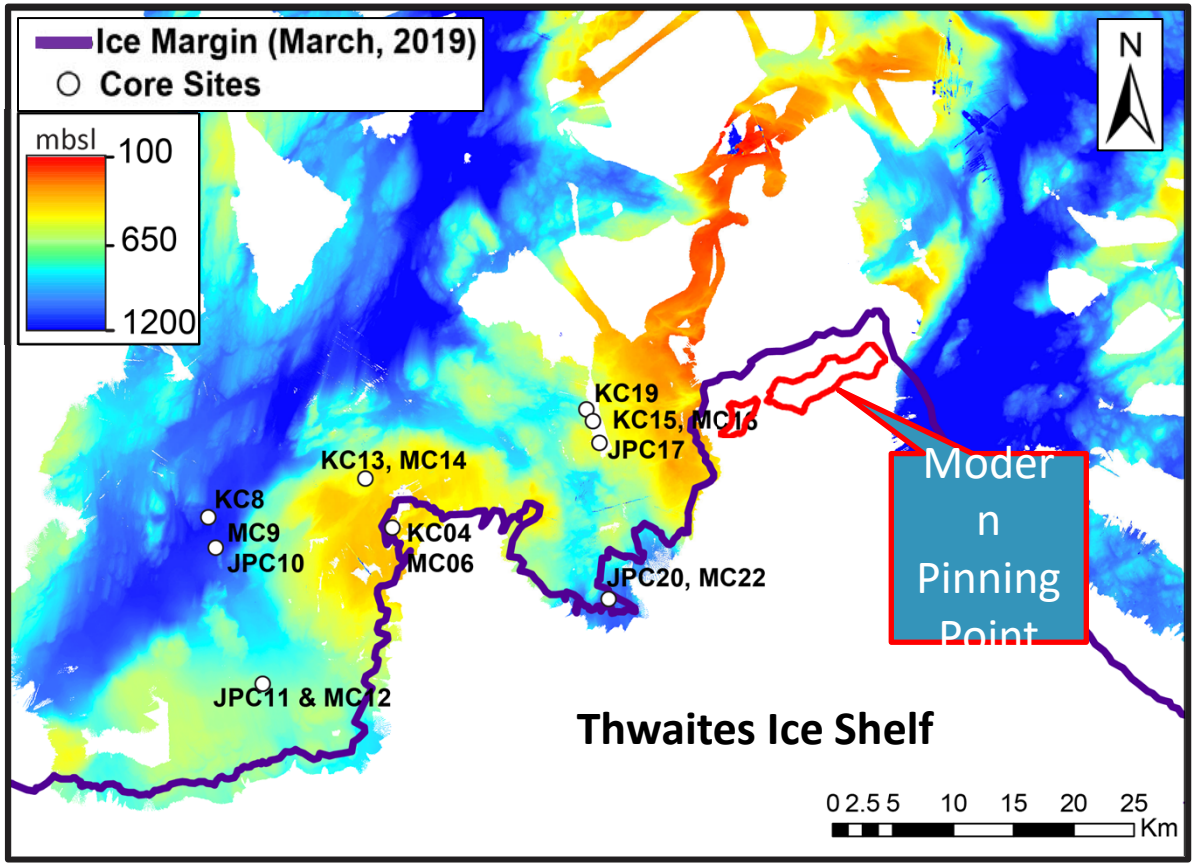


Map of ship track, ice imagery, & preexisting bathymetry near Thwaites Glacier.

Rugged Seafloor Near Thwaites Glacier

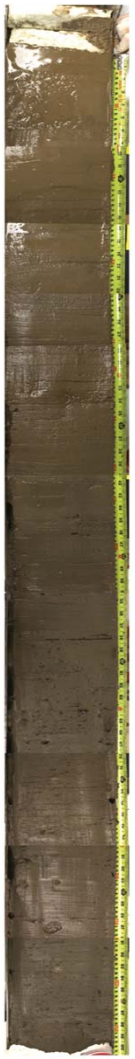
Cored on **two bathymetric highs** that are possible **pinning points** in the past.

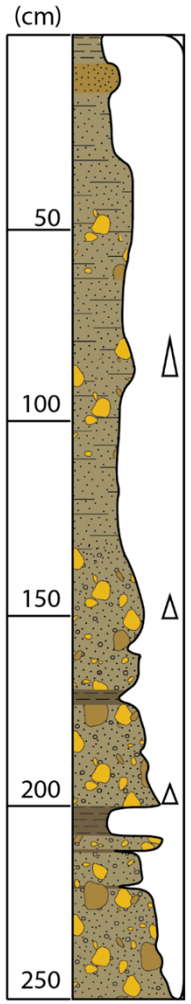




New bathymetry data and core sites around Thwaites Glacier

Preliminary Interpretation - KC04



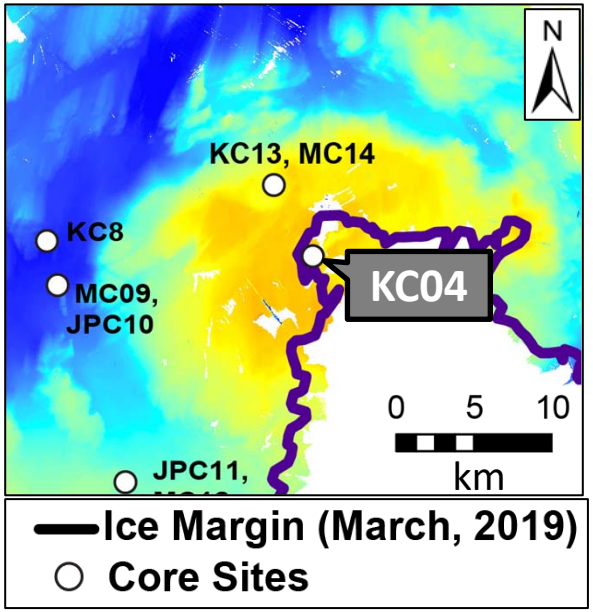


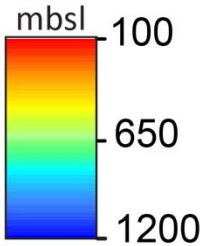
Clay laminations and sand lenses with sparse gravel

Sandy mud, no gravel

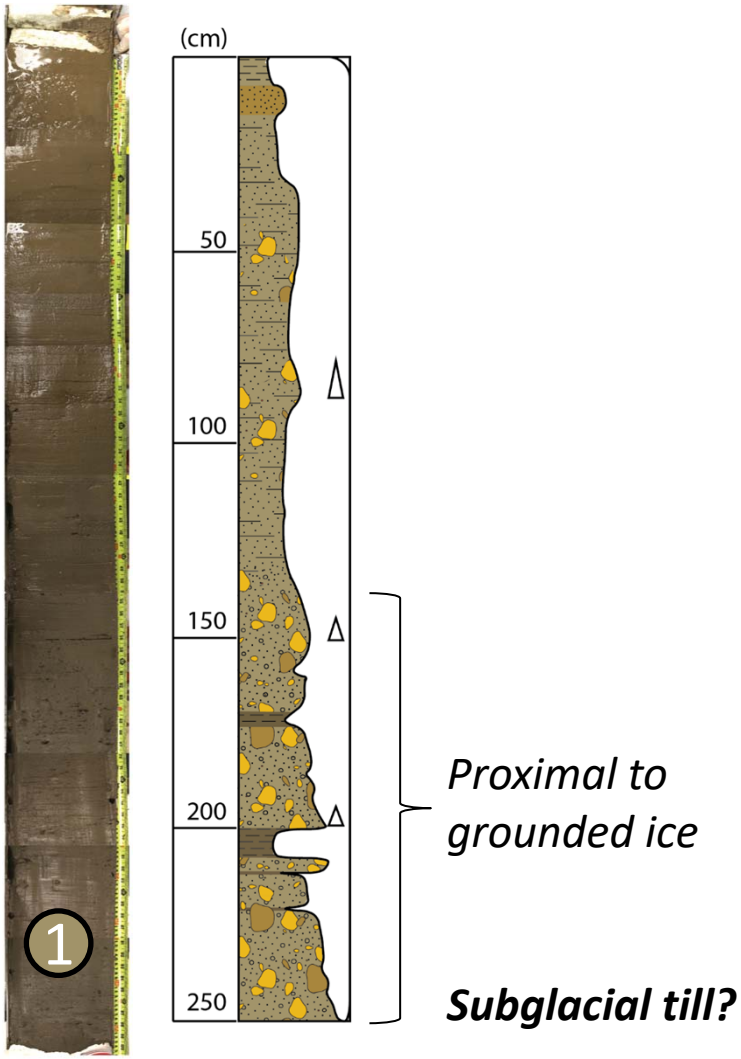
Sandy mud with some gravel

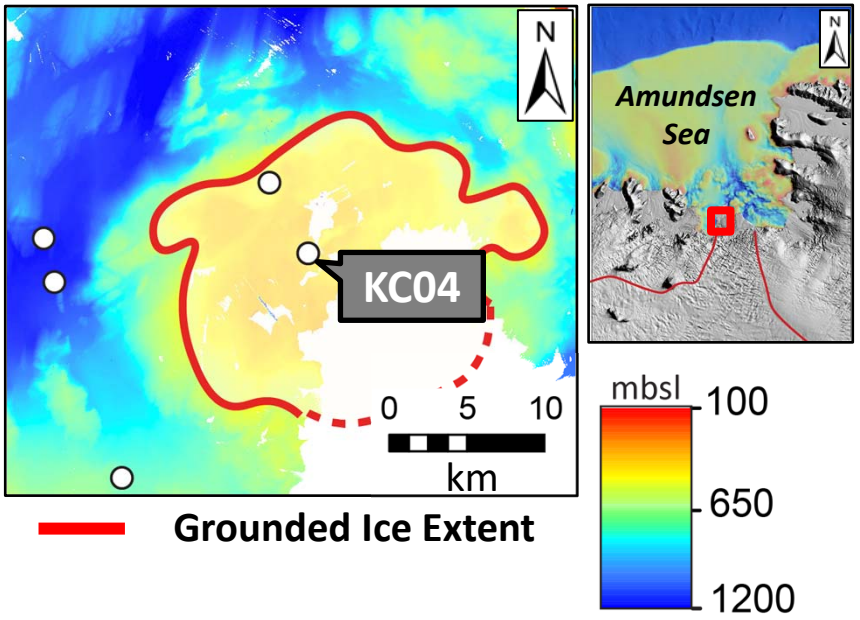
Pebbly sandy mud with cobbles, high shear strength at base

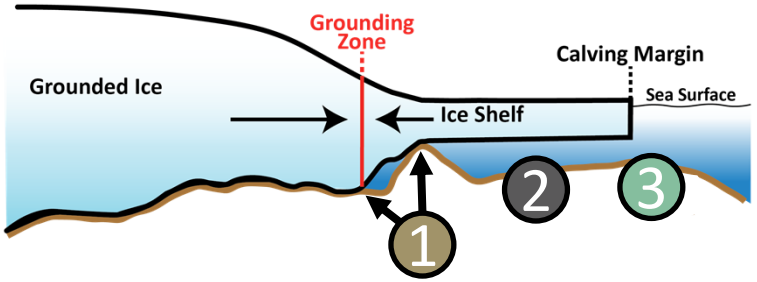




Unpinning of Thwaites Ice Shelf







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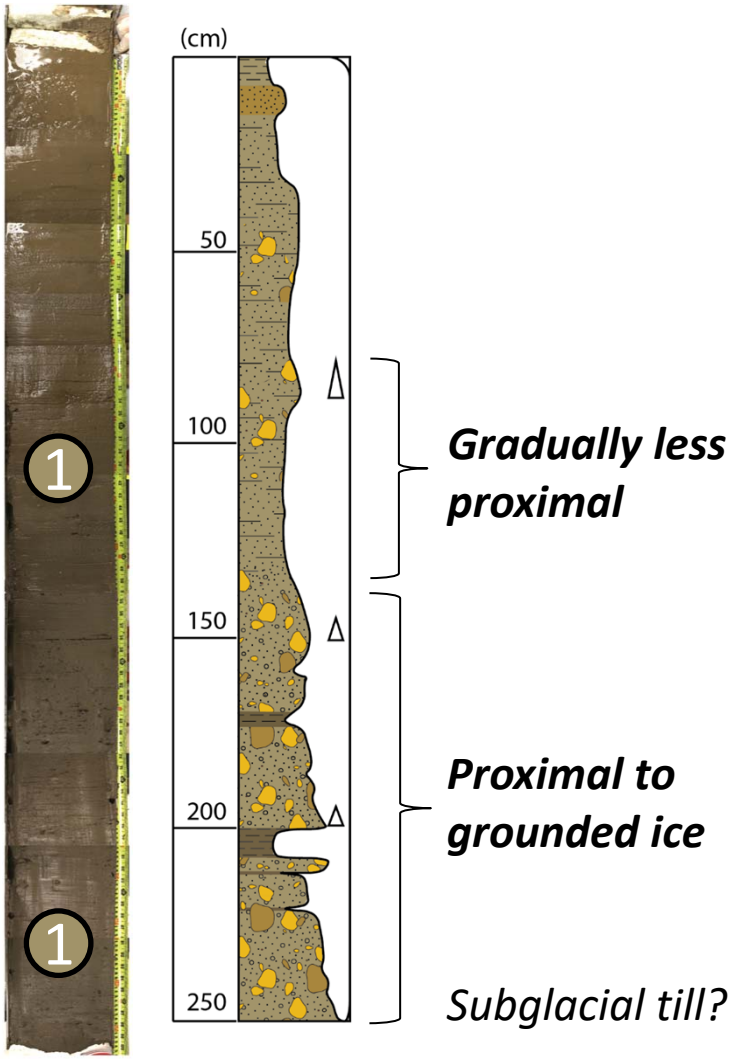

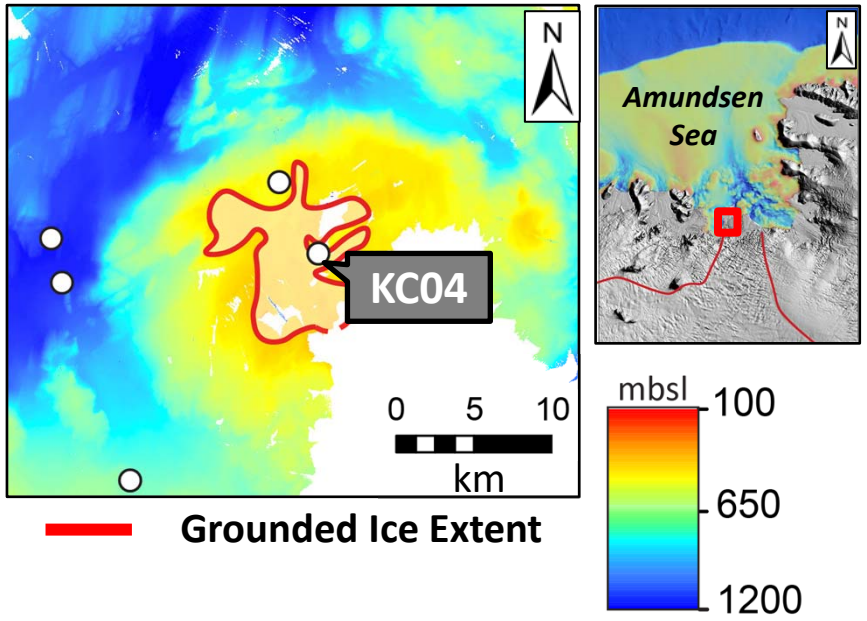

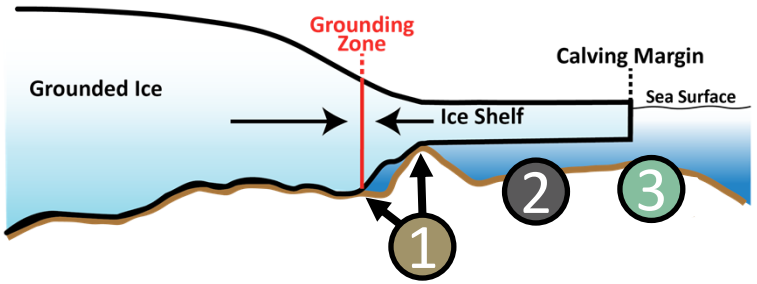

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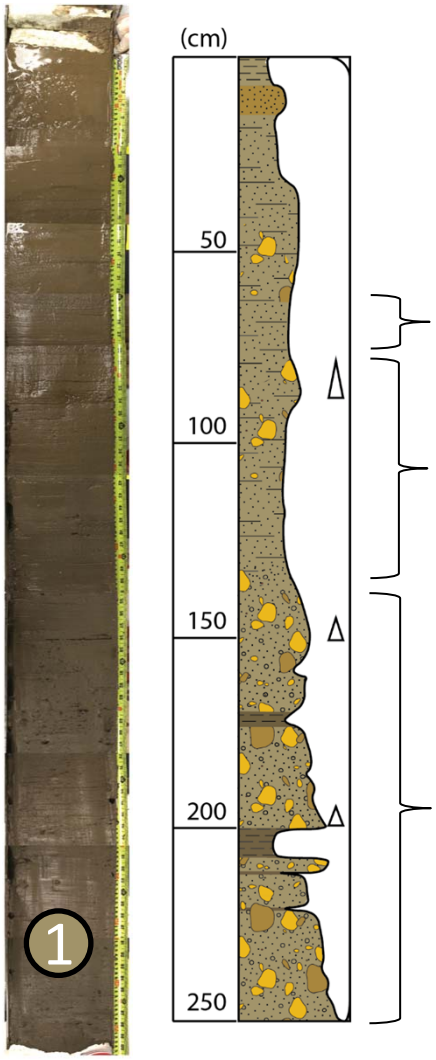
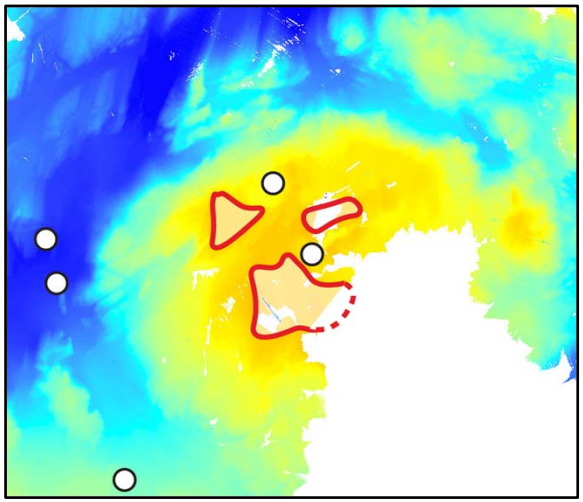


Transitional facies



Mediation of Insurance Coverage Disputes and Bad Faith Claims

2019 Law School Symposium

Nova Southeastern University, Shepard Broad College of Law

Fort Lauderdale, FL

November 1, 2019

Gerald Albrecht, Marialuisa Gallozzi,
Peter Rosen, David Schoenfeld

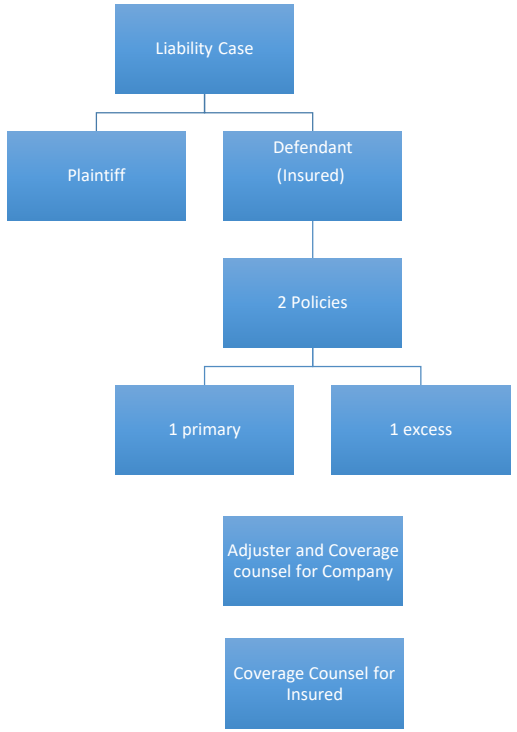
Chapters

- Mediation 101
  - Why mediate?
  - Mediation Process
  - When to Mediate?
- Navigating the Tripartite Relationship (plaintiff, insured, insurer)
- Scenario 1
- Scenario 2
- Scenario 3
- Q&A

Mediation 101

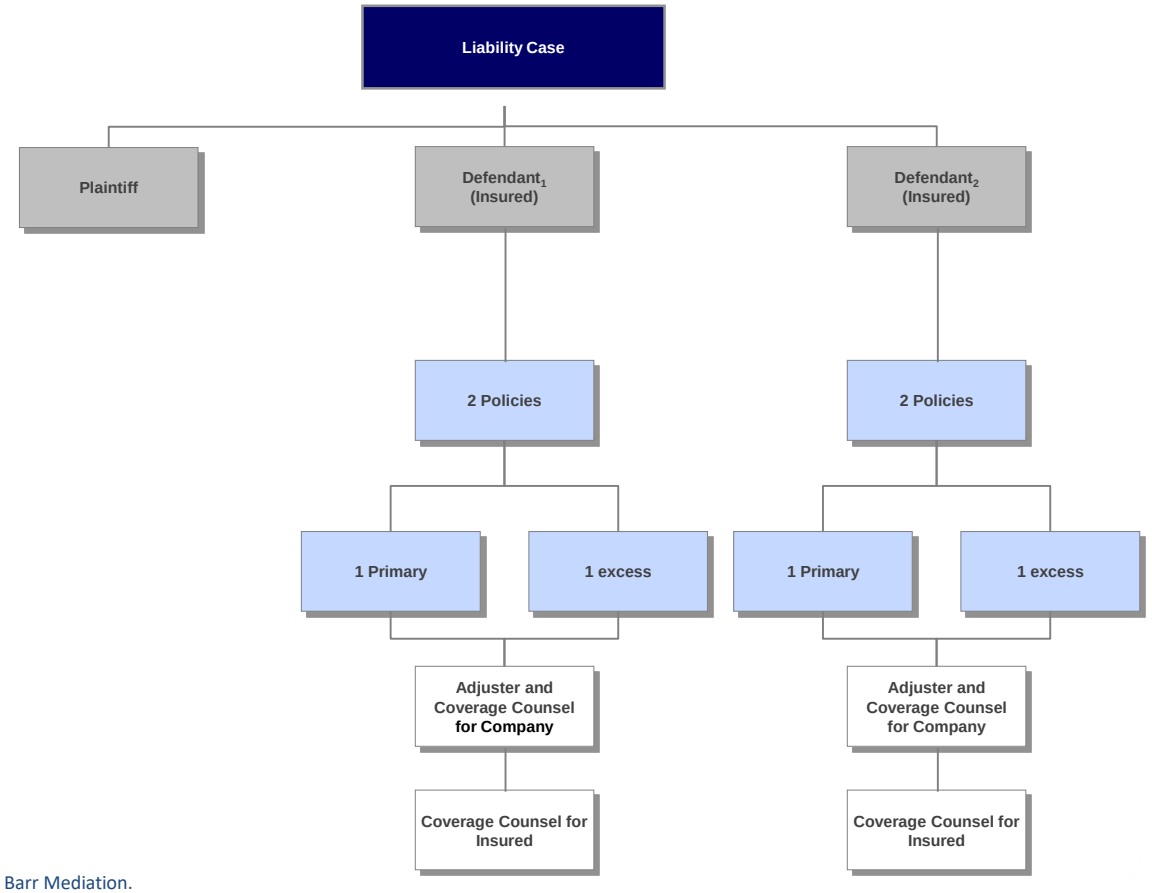
- Why mediate?
- Players
- Process

Liability Case: Mediation Structure -Single Plaintiff/Defendant



Prepared by and Courtesy of Barr Mediation.

Liability Case: Mediation Structure - Multiple Defendants



Prepared by and Courtesy of Barr Mediation.

Why Mediate?

- Control of Process and Outcome
  - Parties communicate directly
  - Parties decide whether to settle and on what terms
  - Doesn't leave the discussion and the outcome to judges, juries and lawyers
- Better understand your case and other side's position
  - Avoid surprises
  - Improve case evaluation
- Deal with critical information needs, not discovery
  - Brush away information obstacles to settlement
  - Including use of privileged information
- Contain Costs
  - Avoid costs of litigation
  - Avoid loss of time, focus and opportunity costs
  - Avoid emotional costs

Why Mediate?

- Control Over the Outcome
  - Litigation has risk
    - Timing risk
    - Outcome risk
  - Parties can agree on an outcome
- Confidentiality
  - Court proceedings are a matter of public record
- Creativity
  - Courts bound to the law (however unpredictable courts may be)
  - Courts decide cases
    - Procedural restrictions on what they can and will decide
    - Usually a winner and a loser
  - Mediations can deal with needs and interests and develop win/win solutions
    - E.g., policy buy back vs declaration of rights and payment of past costs
    - E.g., change the deal

Why Mediate?

- Continue the relationship
  - Litigation makes people angry and hardens positions
  - Mediation can help parties find ways to continue a relationship
    - E.g., ongoing defense of claim litigation, patent case and licensing agreement
  - Forward looking vs. backwards looking
- Closure
  - Mediation can resolve the conflict now
  - Ends painful need to focus on past and who was right and who was wrong

Why Mediate?

- Calendar
  - Forces parties to communicate, show up, focus and engage
    - Difficulty of getting meeting
    - Difficulty of getting information
    - Mediator follow up
  - Mediator's Role
    - Mediator can help the parties make decisions on where to start and how and when to move
    - Mediator can provide a buffer - take the heat of bad news and bad moves
    - Helps negotiations to continue rather than get side tracked

Why Not to Mediate?

- Precedent - Desire to use the case as a vehicle to make law
- Business or Litigation Practice/ Strategy (This is what we do and we can't deviate)
- Animosity ("Pound of Flesh")

Process Issues in Mediation

- Picking the mediator
  - Style
- Opening memos
  - Confidential or not
  - Working with client
  - Make client read them
  - Setting tone
- Preparation, preparation, preparation
  - Importance of case evaluation
- Who will be there
  - People with authority?
- Initial conference/Pre-mediation calls
- Opening session or not
- Use the mediator/help the mediator
  - Being candid with mediator
  - What gets held back if anything?

Navigating the Tripartite Relationship

- Liability insurance context
- Nature of the relationship among insurer, insured, underlying plaintiff
- Control of settlement issues

Scenario 1

- The insured hospital received an investigative subpoena and paid $600,000 in legal fees to respond. The hospital was unaware that it was a party to a sealed qui tam complaint seeking disgorgement of profits and regulatory penalties.
- Before the complaint was served, the hospital incurred $100,000 in defense legal fees.
- While the complaint was sealed, the hospital was prevented from tendering the suit to its insurance carrier. When the complaint was unsealed, the hospital tendered it to its D&O Insurer.
- The hospital incurred an additional $100,000 in legal fees before settling for $1M. The settlement payments included $600,000 paid to the individual plaintiff ("Relator") and $400,000 paid to the DOJ.

Scenario 1 (Continued)

- *Insurer's Coverage Defenses.*
  - Pre-tender defense costs, including those related to the subpoena, are not covered.
  - The Regulatory Claim endorsement has a $500K SIR and $1M sub-limit.
  - The settlement was purely repayment of ill-gotten gains, excluded from the definition of "Loss" under the policy.
  - The policy excludes coverage for penalties.
- Mediation stalled when the hospital was at $1.5M, and the insurer was at $200,000.
- The insured's General Counsel tells the mediator that, if the insurer doesn't reach agreement with the hospital, the hospital will sue for bad faith.

Scenario 2

- A massive multi-district litigation consisting of multiple anti-trust class actions brought against thirty or more service providers by attorneys representing both service providers and consumers.
- Global settlement effort involving all policyholders and all insurers was unsuccessful.
- Each service provider has D&O and E&O towers
- Mediations – one policyholder/all insurers – are ongoing. Some have resulted in settlements. The policyholders' counsel has advised the mediator that the insurers resisting settlement are acting in bad faith in refusing to settle.
- The insurers have developed a set of settlement parameters; they are not willing to deviate because such a deviation could impact negotiations with other insureds.

Scenario 3: Conflicts Among Insurers

- A lawsuit implicates 3 different insurance policies for one of defendants/insureds.
- Two of the three insurers agree on about case value and settlement strategy; the third is taking a hard line.
- The two aligned insurers want to approach plaintiff separately, get a release for the insured, but leave the case open solely to the extent of the available coverage under the third carrier's policy.
- Plaintiff then makes a settlement demand (in connection with the mediation) that is within the combined policy limits of the three insurers.
- The insured defendant recommends that its three insurers settle because the demand is reasonable; the insured says all three insurers will be in bad faith if they don't settle.
- The same two insurers remain on the same page about case value and settlement, especially given the within-policy-limits demand.
- The third insurer's position hardens because it disagrees with the reasonableness of the demand.

When to Mediate? Early Mediation

- PROS
  - Lower attorneys fees and costs (especially 627.428 fees in Florida)
  - Parties are less entrenched in their positions
  - May limit damages-especially in bad faith cases
  - Early resolution
  - For the insured: Getting the floor of what “is on the table”, i.e., there will always be more
- CON: less information for decision making:
  - Little or no discovery-so wide fact gaps and disputes
  - Legal and factual issues are not adequately identified
  - Continuing and/or unknown damages

When to Mediate? Late Mediation

- PROS
  - Fully developed facts and legal issues
  - Pre trial Rulings for guidance
  - Pressure of trial induces settlement
- CONS
  - Greater expenses, fees and damages incurred during discovery and trial preparation
  - Entrenchment of positions
  - Personal animosity and tensions

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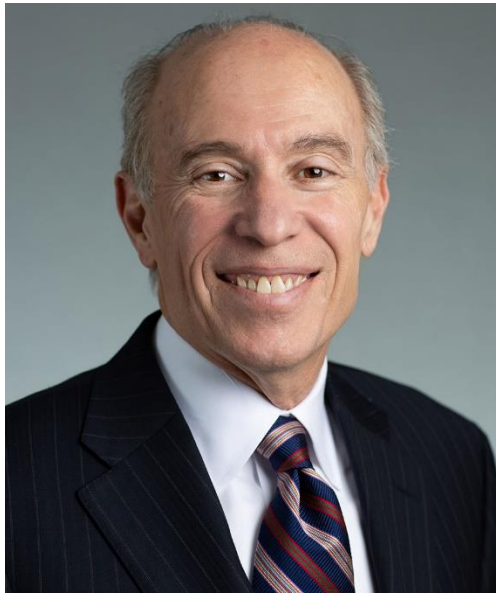

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Privilege: Litigation Immunity, Waiver and Other Roadblocks

2019 Law School Symposium

Nova Southeastern University, Shepard Broad College of Law

Fort Lauderdale, FL

November 1, 2018

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Litigation immunity

How should an Insurer's conduct during claims-related litigation be treated?

Continuing Duty of Good Faith – *White v. Western Title Insurance Co.*, 40 Cal.3d 870 (1985)

- Issue: was evidence of insurer's "nuisance value" settlement offers during litigation admissible on insured's bad faith claim?

- Insured also argued that Insurer's litigation tactics were evidence of bad faith

White v. Western Title Insurance Co., 40 Cal.3d 870 (1985)

Insurer Arguments:

- Continuing Duty of Good Faith would prevent insurers from effectively defending coverage and bad faith lawsuits
- Insurer would be required to reveal all information discovered post-filing
- Counsel defending the bad faith suit would be trial witnesses

White v. Western Title Insurance Co., 40 Cal.3d 870 (1985)

Holding: "as a matter of principle…the contractual relationship between insurer and the policyholder and does not terminate with commencement of litigation"

Examples of Litigation Conduct Subject to "Ongoing Good Faith"

- Settlement offers
- Unreasonable defenses
- Filing of suit in a particular forum
- Filing of responsive pleadings
- Filing a meritless appeal
- Conducting Discovery
- Cross examination of a witness

Narrowing of *White*

- *Tucson Airport Authority v. Certain Underwriters at Lloyds*, 186 Ariz. 45 (1996): litigation privilege precludes a bad faith claim based solely on privileged statements

- *Old Republic Insurance Co. v. FSR Brokerage, Inc.*, 80 Cal.App.4th 666 (2000): bad faith claim premised solely on statements in the insurer's second amended complaint not actionable

Litigation Immunity / Litigation Privilege

- Immunity/Privilege allows attorneys representing their clients to publish otherwise-defamatory material related to the proceeding
- Purposes:
  - Ensure free access to courts
  - Promote complete and truthful testimony
  - Encourage zealous advocacy
  - Give finality to judgments

Timberlake v. U.S. Fidelity & Guaranty Co., 71 F.3d 225 (10th Cir. 1995)

- Insurer challenged admission of three items of evidence of bad faith:
  - Letter from insurer's counsel to one of its adjusters
  - Insurer's filing a counterclaim against policyholder
  - Insurer's filing a motion to join a necessary party

Timberlake v. U.S. Fidelity & Guaranty Co., 71 F.3d 225 (10th Cir. 1995)

- Held: evidence of an insurer's litigation conduct is generally inadmissible
- Rationales:
  - Would undermine an insurer's right to contest questionable claims
  - Could unfairly inhibit insurers' attorneys from zealously and effectively advocating on their behalf

Waiver: Attorney-Client Privilege and Work Product Protection

What Circumstances Might Merit Allowing a Policyholder to Discover an Insurer's Communications With Counsel?

Waiver: Attorney-Client & Work Product

- Two general tests:
  - 1) *Per Se* Waiver Rule
  - 2) Implied Waiver
    - Automatic
    - Intermediate
    - Restrictive
- Attorney-Client Privilege and Work Product Protection Defined

Per Se Waiver

- Minority Rule
- Rule: attorney-client privilege and work product protection do not apply in bad faith cases
  - Usually applied only to pre-denial communications
- Rationales
  - Denial changes relationship between insurer and insured
  - Allows insured to show the manner in which the claim was analyzed and denied

Application of *Per Se* Waiver Rule

- *Boone v. Vanliner Insurance Co*., 91 Ohio St.3d 209 (2001): "the policyholder is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage."
- *Colonial Gas Co. v. Aetna Casualty & Surety Co*., 144 F.R.D. 600 (D. Mass. 1992): if insurer wants to protect pre-denial communications under work product protection, it must submit a detailed affidavit setting forth facts supporting its "anticipation of litigation"

Implied Waiver

- Majority Rule
- Three approaches
  - Automatic Waiver
  - Intermediate Test
  - Restrictive Test

Implied Waiver: Automatic Waiver Rule

- Provides that an insurer waives attorney-client privilege upon assertion of a claim, counterclaim, or affirmative defense that raises an issue to which otherwise privileged information is relevant
- Most Common Manifestation: advice of counsel defense

Applying "Advice of Counsel" Defense to In-House Counsel

- Business advice vs. legal advice
  - Legal advice from in-house attorneys is generally held to be protected to the same extent as a communication between client and outside counsel
  - In-House Counsel often have multiple roles: corporate defendant has burden to "clearly show" that in-house counsel was acting in legal capacity
- Coverage advice as "business advice"?

Intermediate Test

- Majority Rule – elements (*Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)):
  - Assertion of the privilege was the result of some affirmative act by the asserting party
  - Through the affirmative act, the party asserting the privilege put the protected information at issue by making it relevant to the case
  - Application of the privilege would deny the opposing party access to information that is vital to its defense
- Intermediate test adopted in DC, First, and Eighth Circuits

Restrictive Test

- Rule: litigant waives the attorney-client privilege only if the litigant puts its attorney's advice directly at issue in the litigation
- *Mendoza v. McDonald's Corp*., 222 Ariz. 139 (2009): "in the bad faith context, when an insurer raises a defense based on factual assertions that, either explicitly or implicitly, incorporates the advice of counsel, it cannot deny the opposing party the opportunity to discover the foundation of those assertions in order to contest them"

Restrictive Test - Applications

- *City of Myrtle Beach v. United National Insurance Co.*, 2010 WL 3420044 (D.S.C. 2010): found implied waiver of attorney-client privilege based on denials and affirmative defenses in insurer's answer
- *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13 (2011): "a client only waives the privilege by expressly or impliedly injecting his attorney's advice into the case" and "only waives the privilege to the extent necessary to reveal the advice of counsel he placed at issue"

Restrictive Test - Applications

- *In re County of Erie*, 546 F.3d 222 (2d. Cir. 2008): pleading claims or affirmative defenses insufficient to waive the privilege unless the insurer relies on privileged advice in the assertion of the claim or defense
- *Everest Indemnity Insurance Co. v. Rea*, 236 Ariz. 503 (2015): assertion of a subjective good faith defense and the consultation with counsel did not waive attorney-client privilege

Key Takeaways

- Case by case basis
- Know the law -- be aware of jurisdiction and its rule
- Informing clients on both sides

Experts and Their Role in Bad Faith Cases

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Walter Andrews

Julia Molander

Experts in Bad Faith Cases

Pros and Cons of Choosing Experts

Choosing Experts

What is the Bad Faith Climate?

- Need to Know:
  - Insured's = Self Interest
  - Insured's Counsel = Set-up
  - Judiciary = Impractical Assessment
  - Pressures on Industry = Heightened exposure
  - Jury = Penalize

Choosing Experts

When to *Use* An Expert

- Client Wants One
- Counter Insured's Expert
- Assist on the Burden of Proof
- Need a Parade of Experts
- Misdirection
- Can Assist The Trier of Fact

See generally, Thomas M. Herlihy, The Use of a Defense Expert. herihy@kether.com

Choosing Experts

How To *Choose* an Expert

- Is One Needed?
  - How will an expert assist?
  - What are the elements of proof?
  - How are you going to prove?
  - Will your expert persuade the jury?

Choosing Experts

How To *Choose* An Expert
Traits That Lead To High Expert Credibility

- Sound Credentials.
- Good Teacher.
- Acceptable Motives.
- Intelligent demeanor.
- Utilize back up documents to support opinions.
- Clarity of expression.
- Able to stand up to cross-examination.
- Use visual aids.

Choosing Experts

How To *Choose* An Expert
Ineffective Experts

- Deliver very one-sided presentation.
- Clearly doesn't have command of the case.
- Do not have the time to actually practice in their profession.
- Overly emphasize credentials which can cause juror skepticism.

Source: Sanja Kutnjak Ivkovic & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 Law & Soc. Inquiry 441 (2003)

Choosing Experts

How To *Choose* An Expert

What Are The Attributes Of A Pro-insurer Juror?

- Open-mindedness.
- Not influenced by the plaintiff's attorneys gamesmanship.
- Must be skeptical of posturing.
- The juror must be willing to follow the rule of law.
- Distinguish from vulnerable.

What Are The Attributes of A Pro-Insured Juror?

- Jurors who believe the world has treated them poorly.
- Jurors who view themselves as socially and economically vulnerable.

Experts in Bad Faith Cases

Legal Parameters on Experts

Legal Parameters

- The Boundaries of Evidence Code 702
  - *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)
  - *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

Legal Parameters

- The Application of *Daubert/Kumho* to Insurance Bad Faith Cases
  - 246 Published Cases
  - Trends Nationally

Legal Parameters

- Attorneys as Experts
  - What particular qualifications are needed
  - What lines the courts have drawn

Legal Parameters

- Reliability of Testimony

Legal Parameters

- Helpfulness of Opinions

Experts in Bad Faith Cases

Use of Experts

Use of Experts

Use of Experts

Use of Experts

Use of Experts

Use of Experts

Experts in Bad Faith Cases

Questions??


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PAPERS

Anatomy of a Bad Faith Claim

American College of Coverage Counsel
2019 Law School Symposium
Nova Southeastern University, Shepard Broad College of Law

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November 1, 2019

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Choice of law considerations can have a critical impact on the success or failure of either the prosecution or the defense of a bad faith claim. Where more than one proper venue potentially exists for litigation of bad faith claims; jurisdiction may reside in the state court, the federal court or both; and the choice of law rule varies depending upon the nature of the claim or the source of the alleged bad faith standard, a clear understanding of the potentially applicable conflict of law rules and considerations is imperative.

The choice of law considerations in insurance bad faith cases are many, but several significant issues that can dramatically impact the outcome of the bad faith case are addressed here.

A. Is There A Statute In the Forum Jurisdiction Mandating Application of the Forum State's Law to the Insurance Policy?

At least thirteen states (and one territory) have enacted statutes mandating the proper choice of law outcome in the case of insurance contracts, with the effect of legislatively varying the rule otherwise applicable to non-insurance contracts. Five of these address choice of law in the case of contracts generally and utilize the same model wording.[1] Nine of them address choice of law in the context of certain insurance policies, and include Alabama (Ala. Code § 27-14-22), Arizona (Ariz. Rev. Stat. Ann. § 20-1115), Minnesota (Minn. Stat. Ann. § 60A.08), North Carolina (N.C. Gen. Stat. Ann. § 58-3-1), Oregon (Or. Rev. Stat. Ann. § 465.480)(environmental contamination only), South Carolina (S.C. Code Ann. § 38-61-10), Tennessee (Tenn. Code Ann. § 56-7-102), Texas (Tex. Ins. Code Ann. Art 21.42), Virginia (Va. Code Ann. § 38.2-313).

As addressed below, these statutes do not necessarily prevent or obviate the need for reference to the otherwise prevailing choice of law rules, and do not mean that in these states a choice of law analysis can be dispensed with in favor of the law of the place of the statute. In fact, the statutes are not absolute, are subject to exceptions, and have been judicially limited in some circumstances. It is important to know of their existence, however, because they are the starting point for consideration of the law which may control a policy of insurance deemed to be or arguably issued in any of these jurisdictions.

1. Alabama

Ala. Code § 27-14-22 provides that: "All contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state and subject to the laws thereof." By its terms, the focus of the statute is the location of the application, rather than the location of the subject matter of the insurance or the location of the delivery of the policy. As a general matter, however, it might be assumed that if an application for insurance coverage is made in Alabama, the property or insured interest is located there and the policy will then necessarily be delivered there.

[1] California (Cal. Civ. Code § 1646), Guam (Guam Code Ann. Tit. 18, § 87112); Montana (Mont. Code Ann. § 28-3-102), Oklahoma (Okla. Stat. Ann. Tit. 15, § 162), and South Dakota (S.D. Codified Laws § 53-1-4).

Alabama has repeatedly followed the rule of *lex loci contractus*, and in a recent case involving a dispute over the application of Tennessee or Alabama law to an uninsured motorist claim, the court applied Tennessee law to a policy issued there, without reference to where the application for the coverage was taken. *Cherokee Ins. Co., Inc. v. Sanches,* 975 So.2d 287 (Ala. 2007). In an older case, the Alabama Supreme Court noted that the application for the involved policy was taken in Alabama, but proceeded to note also that the policies were issued in Alabama, ultimately applying Alabama law to the question of insured motorist coverage under the policy. *American Economy Ins. Co. v. Thompson*, 643 So.2d 1350 (Ala. 1994). It is not entirely clear then how the statute would be deemed to apply if application of the statute resulted in an outcome different from application of the rule of *lex loci contractus*. Notably, an Ohio Court, applying the most significant relationship test of the *Restatement (Second)*, recently applied Alabama law to an insurance policy in part due to the Alabama statute, where the application for insurance occurred in Alabama. *Liberty Mut. Ins. Co. v. Petit,* No. 2:09-cv-111, 2010 WL 2302372 (S.D. Ohio Jun. 7, 2010).

2. Arizona

Ariz. Rev. Stat. Ann. § 20-1115 provides that:

> No policy delivered or issued for delivery in this state and covering a subject of insurance resident, located or to be performed in this state, shall contain any condition, stipulation or agreement:
>
> 1. Requiring the policy to be construed according to the laws of any other state or country, except as necessary to meet the requirements of the motor vehicle financial responsibility laws or compulsory disability benefit laws of such other state or country.
>
> 2. Preventing the bringing of an action against the insurer for more than six months after the cause of action accrues.
>
> 3. Limiting the time within which an action may be brought to a period of less than two years from the time the cause of action accrues in connection with all insurances other than property and marine and transportation insurances. In property and marine and transportation policies such time shall be one year from the date of occurrence of the event resulting in the loss except that an insurer may extend such limitation beyond one year in its policy provisions.
>
> Any such condition, stipulation or agreement shall be void, but such voidance shall not affect the validity of the other provisions of the policy.

With rare exception, the case law addressing this statute has only considered the provisions of the statute regarding the limitations period for bringing an action under an insurance policy. There is no case addressing the manner in which the statute interfaces with Arizona's application

of the *Restatement (Second)* approach to the resolution of conflict of law issues. In *Mission Ins. Co. v. Nethers*, 581 P.2d 250 (Az. App. 1978), however, the court found the statute inapplicable to a policy issued in California.

3. Minnesota

Minn. Stat. Ann. § 60A.08 Subd. 4 provides that "All contracts of insurance on property, lives, or interests in this state shall be deemed to be made in this state."

The application of this statute has been limited, and the place of contracting has instead been given greater weight, resulting in the non-application of the statute to policies issued elsewhere. *U.S. Fid. & Guaranty Co. v. Louis A. Roser Co., Inc.*, 585 F.2d 932 (8th Cir. 1978); *Travelers Ins. Co. v. American Fidelity & Cas. Co.,* 164 F.Supp. 393 (D. Minn. 1958). In both *Louis A. Roser* & *Travelers v. American Fidelity*, the courts applied the law of other states because the policies were negotiated, entered into and performed elsewhere, although Minnesota interests were likely involved. This result was at least in part based upon the decision of the United States Supreme Court in *Hartford Accident & Indemn. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178 (1934), in which the Court voided on constitutional grounds application of a similar Mississippi statute. See *Louis A. Roser Co., supra*, at 941, n.2; *Travelers v. American Fidelity, supra*, at 398-399. The statute was not cited or addressed in a recent case applying Minnesota law to a class action coverage case in which Minnesota law was found to apply to claims by those both within and outside the state. *Mooney v. Allianz Ins. Co.*, 244 F.R.D. 531 (D. Minn. 2007). This statute was cited, however, and Minnesota law applied in *Onstad v. State Mut. Life Assur. Co.*, 32 N.W.2d 185 (Minn. App. 1948).

4. North Carolina

N.C. Gen. Stat. Ann. § 58-3-1 provides that: "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof."

The North Carolina statute has been similarly limited, again on the authority of *Hartford Accident & Ind. Co. v. Delta & Pine Land Co.,* 292 US. 143, 54 S.Ct. 634, 78 L.Ed. 1178 (1934). *See Turner v. Liberty Mut. Ins. Co.*, 105 F. Supp. 723 (E.D.N.C. 1952)(applying New Jersey law, despite location of insured tractor in North Carolina). But *Delta & Pine Land* has also been distinguished by other North Carolina courts and the statute more often than not applied to policies issued in other states where the interests of a North Carolina insured and property located in North Carolina are at issue. *Collins & Aikman Corp. v. Hartford Acc. & Indemn. Co.,* 436 S.E.2d 243, 245 (N.C. 1993)(finding that North Carolina had much more "than a casual connection with the substance of the insurance policy", justifying application of North Carolina law); *Martin v. Continental Ins. Co.,* 474 S.E.2d 146 (N.C. App. 1996)(same). *See also, Continental Cas. Co. v. Physicans Weight Loss Centers of America, Inc.*, 61 Fed.Appx. 841 (4th Cir. 2003)(but noting the *Delta & Pine Land* issue was not raised in the lower court). In a recent case, the North Carolina federal court noted that the statute is applicable giving due consideration to constitutional concerns "where there is

a 'close connection' between North Carolina and the interests insured by the policy." *Hartford Fire Ins. Co. v. St. Paul Fire & Marine Ins. Co.,* 606 F. Supp.2d 602 (E.D.N.C. 2009), *citing Continental Cas. Co. v. Physicians Weight Loss Centers of America, Inc., supra.*

5. Oregon

Or. Rev. Stat. Ann. § 465.480(2) provides in relevant part that:

> (2) Except as provided in subsection (8) of this section, in any action between an insured and an insurer to determine the existence of coverage for the costs of investigating and remediating environmental contamination, whether in response to governmental demand or pursuant to a written voluntary agreement, consent decree or consent order, including the existence of coverage for the costs of defending a suit against the insured for such costs, the following rules of construction shall apply in the interpretation of general liability insurance policies involving environmental claims:
>
> (a) Oregon law shall be applied in all cases where the contaminated property to which the action relates is located within the State of Oregon. Nothing in this section shall be interpreted to modify common law rules governing choice of law determinations for sites located outside the State of Oregon
>
> ***
>
> (8) The rules of construction set forth in this section and sections 2 and 7 of this 2013 Act do not apply if the application of the rule results in an interpretation contrary to the intent of the parties to the general liability insurance policy.

Or. Rev. Stat. Ann. § 465.480(2).

It appears from the scant case law available that the conflict of law provisions of this statute will be applied as written, *Continental Ins. Co. v. Fost Maritime Co.*, No. 302CV03936 (N.D. Cal. 2002), but there is little case law on the provisions.

6. South Carolina

S.C. Code Ann. § 38-61-10 provides that: "All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State."

This statute has been determined to modify the rule of *lex loci contractus* otherwise applicable to other contracts, under circumstances where a contract of insurance is involved. *Sangamo Weston, Inc. v. National Sur. Corp.,* 414 S.E.2d 127 (S.C. 1992). South Carolina courts have also consistently maintained that application of the statute does not violate constitutional protections

because of the state's significant interest in determining who bears responsibility for injury to South Carolina property and citizens. *Id.* The statute is applicable regardless of whether the insurance contract was entered into in another state, *Johnston v. Comm'l Travelers Mut. Acc. Assoc. of America*, 131 S.E.2d 91 (S.C. 1963), and the policyholder need not be a citizen of South Carolina for the statute to apply. *Sangamo Weston, supra.* The inquiry is whether the subject of the insurance contract is located in South Carolina. *Heslin-Kim v. CIGNA Group Ins.*, 377 F. Supp.2d 527 (D.S.C. 2005). Other cases applying the law of other states have been distinguished on the basis that they involve merely transient contacts with South Carolina. *Id.* at 532.

7. Tennessee

Tenn. Code Ann. § 56-7-102 (West) provides that:

> Every policy of insurance, issued to or for the benefit of any citizen or resident of this state on or after July 1, 1907, by any insurance company or association doing business in this state, except fraternal beneficiary associations and mutual insurance companies or associations operating on the assessment plan, or policies of industrial insurance, shall contain the entire contract of insurance between the parties to the contract, and every contract so issued shall be held as made in this state and construed solely according to the laws of this state.

In an early case, the Tennessee Court of Appeals found the statute inapplicable to a policy of insurance applied for and covering an insured located in Michigan, although he ultimately moved to North Carolina. *Page v. Detroit Life Ins. Co.,* 11 Tenn. App. 417 (Tenn. App. 1929). The statute was held applicable to a policy issued and delivered to Tennessee residents in another case, however, with the court rejecting the insurer's contention that the policy was a Connecticut contract because it was issued by a company located in that state. *Gray v. Aetna Life Ins. Co.,* 156 S.W.2d 391 (Tenn. 1941). In *Burns v. Aetna Cas. & Sur. Co.*, the Tennessee Supreme Court found the statute inapplicable to the uninsured motorist claim of an employee of a company (and the employee's spouse) issued a vehicle fleet insurance policy by an insurer in Connecticut to the corporate insured in Rhode Island via a Massachusetts broker. This despite the fact that the employee and his spouse were Tennessee residents and that the vehicle involved in the accident was principally garaged in Tennessee. Notably, the Tennessee federal court refused to apply the statute at the request of an insurer, stating that since the statute's enactment it had never been applied in a manner which was contrary to the state's adoption of the *lex loci contractus* rule. *NGK Metals Corp. v. National Union Fire Ins. Co.*, No. 1:04-cv-56, 2005 WL 1115925 (E.D. Tenn. Apr 29, 2005). The court noted in any event that the statute was enacted to protect Tennessee insureds, not to harm them, and that the carrier sought to invoke the statute so as to avoid the application of another state's law which was more favorable to the insured.

8. Texas

Tex. Ins. Code Ann. Art. 21.42 (West) provides that:

> Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same.

In an early case, the Supreme Court of Texas found this statute inapplicable to the claim of a Texas resident claiming insured status under a policy covering property located in Kansas and destroyed by a fire in Kansas. The court determined that the rule of *lex loci contractus* controlled, and that the statute should not be given extraterritorial effect. *Austin Bldg. Co. v. National Union Fire Ins Co.*, 432 S.W.2d 697 (Tex. 1968). Citing *Austin Bldg. Co.,* the Fifth Circuit concluded that the statute was "designed only to assure that Texas law will apply to contracts made between Texas citizens and insurance companies doing business in Texas, *when and only when* those contracts are made in the course of the company's Texas business." *Howell v. American Live Stock Ins. Co.,* 483 F.2d 1354 (5th Cir. 1973). Consequently, New Mexico law was deemed to apply to an insurance policy issued to a Texas resident operating a farm in New Mexico which covered the death of a thoroughbred horse which was stabled in New Mexico. *Hefner v. Republic Indemn. Co. of America*, 773 F. Supp. 11 (S.D. Tex. 1991). The statute was found inapplicable although the insurance claim was by a Texas resident injured on property in Texas. The policy had been issued by a California insurer to the limited partner of a Texas limited partnership who was a California resident. The court held that the contract did not arise in the course of in-state business; that California had the more significant relationship (applying the *Restatement (Second)*); and that it had a greater interest in having its law applied. The Texas Court of Appeals reached a similar result in a recent case in which a Texas physician seeking coverage under a policy issued to an entity in California sought to invoke the statute. *Scottsdale Ins. Co. v. National Emergency Services, Inc.*, 175 S.W.3d 284 (Tex. App. 2004). The court noted that for the statute to apply, the contract of insurance must satisfy three requirements:

> (1) The insurance proceeds must be payable to a citizen or inhabitant of Texas;
>
> (2) The policy issued pursuant to the contract must be issued by a company doing business in Texas; and
>
> (3) The policy must be issued in the course of the insurance company's Texas business.

Id. at 292, *citing Hefner, supra*. The court found that "[i]t is not enough for the application of [the statute] that . . . certain of [the named insured's] physicians are Texas residents so that insurance proceeds would be payable in some instances to a citizen or inhabitant of Texas. *Id.* In a recent case finding Texas law controlling in part based upon the statute, the Fifth Circuit also analyzed the choice of law issue in the context of the *Restatement (Second)*, suggesting that the statute is not the only relevant conflict of law consideration. *Mid-Continent Cas. Co. v. Eland Energy, Inc.*, 709 F.3d 515 (5th Cir. 2013).

9. Virginia

VA Code Ann. § 38.2-313 provides that: "All insurance contracts on or with respect to the ownership, maintenance or use of property in this Commonwealth shall be deemed to have been made in and shall be construed in accordance with the laws of this Commonwealth."

Until a 2019 decision of the Virginia Supreme Court, the decisions addressing the statute were entirely from the Virginia federal courts. In a 1989 decision, the Virginia federal court noted that there were no Virginia decisions interpreting the statute, but that "it appears that the Virginia General Assembly intended to alter the general rule regarding interpretation of insurance contracts." *City Insurance v. Lynchburg Foundry Co.*, No. 88-0178, 1989 WL 1102787, *2 (W.D. Va. Apr. 25, 1989). Noting the general application of the *lex loci contractus* rule, the court said the question of application of the statute was academic, since there was no evidence that the law of the place where the policy was issued (Georgia) conflicted with Virginia law. *Id.* at *1. In a more recent case, the Virginia federal court cited the statute without discussion as the basis for applying Virginia law to a dispute involving the value of items comprising a burglary claim against a property insurer. *Sewarz v. First Liberty Ins. Corp.*, No. 3:10CV120, 2012 WL 12438 (E.D. Va. Jan. 3, 2012). In an earlier case, the Virginia federal court cited both the rule of *lex loci contractus* and the statute as the basis for applying Virginia law, without addressing the way in which they would be harmonized if application of the rule and the statute led to different results. *Factory Mut. Ins. Co. v. Liberty Mut. Ins. Co.*, 518 F. Supp.2d 803 (W.D. Va. 2007). *See also City of Lynchburg v. Ins. Co. of Ireland,* No. 87-0181, 1990 WL 1232911 (W.D. Va. Aug 24, 1990). Finally, a Virginia federal court considered the argument that a policy was a Maryland policy because it said it was despite being issued to a Maryland resident, but summarily rejected it and noted the language of the statue.

Earlier this year, the Virginia Supreme Court touched on the statute in *Erie Ins. Exch. v. EPC MD 15, LLC*, 297 Va. 21, 24, 822 S.E.2d 351, 353 (2019). There, EPC was a named insured on a commercial property policy issued by Erie, which sued Erie in connection with fire damage to a building owned by an EPC subsidiary. The subsidiary was not an insured on the policy, but the trial court concluded that EPC's ability to control the subsidiary meant that EPC acquired all of the subsidiary's property for insurance coverage purposes. Since this was tantamount to finding coverage for the loss, judgment was entered for EPC. Erie appealed, and the determination was reversed. In the course of doing so, the court noted § 38.2-313

Specifically, in footnote 5, the Court noted that Erie issued and delivered the policy to a Maryland company to at least initially cover property in Maryland, and that under Virginia choice-of-law principles, the court would ordinarily look to the law of the place where the insurance contract was made/written/delivered. *Id*. at 28 n. 5; 822 S.E.2d at 355. The Court went on to cite § 38.2-313, but noted out that "[n]either party on appeal mentions this statute or questions whether it applies solely to third-party liability insurance on property located in this Commonwealth or also to first-party property insurance on such property." *Id*. Accordingly, the court declined to address the potential applicability of the statute. Additionally, because the parties failed to address Maryland law, the court declined to predict the impact, if any, of Maryland law and

instead stated that "[i]n the absence of a showing to the contrary, we presume that foreign law—whether applicable because of a choice-of-law clause or because of nonconsensual choice-of-law principles—is the same as the law of the forum. Virginia law, therefore, will guide our decision in this case." *Id*.

It therefore remains unclear what the outcome would be if a party advocated the rule of *lex loci contractus* to invoke the law of another state where the insurance policy involved the ownership, maintenance or use of property in Virginia, and thereby implicating VA Code Ann. § 38.2-313.

B. Is Bad Faith a Cause of Action Sounding in Contract or in Tort?

The choice of law rule for tort actions in a particular state is often vastly different than the rule for contract actions. Where the accident occurred is generally paramount in tort cases, while contractual negotiations are significant in contract cases. Even with respect to the majority of states employing some version of the *Restatement (Second) of Conflicts of Laws* most significant relationship test, the factors determinative of the most significant relationship differ in tort cases as compared to contract cases. *Compare* §145 with §188.

Most insurance coverage disputes present threshold issues of contract – the meaning and interpretation of the applicable policy of insurance. But where an insured asserts claims both for breach of the insurance contract and for bad faith, it is not a foregone conclusion that the same law will apply to the two claims from a choice of law standpoint.

In some states, claims of bad faith are considered so intertwined with the duties of the insurer under the insurance contract that the same law which controls the interpretation and application of the policy also controls the question of bad faith. *See, e.g. Colonial Life & Acc. Ins. Co. v. Hartford Fire Ins. Co*., 358 F.3d 1306 (11th Cir. (Ala.) 2004)(applying Alabama's choice of law rules and holding that the bad faith claim sounded in contract and therefore, the doctrine of *lex loci contractus* was applicable); *AT&T Wireless Services, Inc. v. Federal Ins. Co*., No. 03C-12-232, 2007 WL 1849056, (Del. Super. June 25, 2007)(holding that the most significant relationship test of § 188 (contracts) and not §145 (torts) applied to the bad faith claim, finding that the "breach of contract claim and the bad faith claim are too intertwined and interdependent to be separated"); *Fogarty v. Allstate Ins. Co.,* No. CCB–04–414, 2011 WL 1230350, *7 (D. Md. March 30, 2011)("judges of this court have repeatedly held that under Maryland's choice of law rules, the law that governs a bad faith claim is the same law that governs the insurance contract from which the claim of bad faith arises"); *Lafarge Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, Pa., 935 F.Supp. 675, 692 (D.Md. 1996) (holding that the law governing contract interpretation also governed the bad faith claim, since the claims are "inextricably intertwined" and the court would not subject the insurer to "potentially conflicting standards of conduct"); *Commerce and Indus. Ins. Co. v. U.S. Bank Nat. Ass'n,* No. 07 Civ. 5731, 2008 WL 4178474, *4-6 (S.D.N.Y. Sept. 3, 2008)(finding that because "the bad faith claim is 'inextricably intertwined' with the contract claim. . . the same law should govern both the contractual claim as well as the bad faith claims").

Other jurisdictions, however, consider bad faith to arise in tort rather than contract. In these jurisdictions, the law applicable to the bad faith claim upon application of the forum state's

choice of law rule can be different than the law applicable to the contract claim. The rationale of these jurisdictions is often that alleged bad faith handling of a claim is extra-contractual, subject to the law of the place where the bad faith conduct occurred (e.g., where the duty to defend was improperly denied, where the case was improperly settled, etc.), and should therefore not necessarily be determined under the same law applicable contractual claims. *See World Plan Executive Council-U.S. v. Zurich Ins. Co.,* 810 F.Supp. 1042 (S.D. Iowa 1992)(holding that pursuant to policy's choice of law provision, Swiss law controlled claims for breach of the insurance policy, but that policy's choice of law provision was inapplicable to tort claims, which pursuant to §145 of the *Restatement* were controlled by Iowa law); *Schuller v. Great-West Life & Annuity Ins. Co*., No. C-04-62, 2005 WL 2259993 (N.D. Iowa Sept. 15, 2005)(holding that policy's choice of law provision rendered Illinois law applicable to the breach of contract claims, but that bad faith claims were in tort, which pursuant to §145 of the *Restatement* were controlled by Iowa law); W*est American Ins. Co. v. RLI Ins. Co.*, No. 07-0566, 2008 WL 1820839 (W.D. Mo. April 21, 2008)(in dispute between primary and excess carriers regarding alleged bad faith failure to settle, since the bad faith claim sounded in tort, Missouri law required application of §145 of the *Restatement*, as a result of which the bad faith claim was subject to the law of Kansas where the insured was domiciled, and not the law of Missouri where the underlying case was filed and the excess judgment entered); *General American Life Ins. Co. v. Ofner*, 972 F.2d 1339 (Table) (9th Cir. 1992)(affirming district court's determination that the law of Montana and §145 of the *Restatement* controlled the insured's tort claims for bad faith since the insured relocated to Montana after issuance of the policy and resided there at the time of the coverage denial, and that the law of Texas – where the policy was originally issued – did not apply); *Butterfly-Biles v. State Farm Life Ins. Co.,* No. 09–CV–0086*,* 2010 WL 346839 (N.D. Okla. Jan. 21, 2010)(holding that breach of contract claims were controlled by Colorado law, but that bad faith claims were governed by Oklahoma law applying §145 of the *Restatement*); *Martin v. Gray,* 385 P.3d 64 (Okla. 2016)(reversing trial court's determination that Kansas law applied to both the insured's breach of contract claim and claim for bad faith because claim for bad faith sounded in tort, and holding pursuant to Oklahoma's most significant relationship test that Oklahoma law applied to the bad faith cause of action); *Rupp v. Transcontinental Ins. Co*., 627 F.Supp.2d 1304 (D. Utah 2008)(holding that all claims against the carriers sounded in tort not conflict, and that pursuant to §145 of the *Restatement*, Utah law controlled those tort claims, not the law of California where the policies may have been delivered).

The analysis is not necessarily so simple as placing a jurisdiction into one of just two categories, however. While there are outcomes in which the finding of bad faith as a contract claim resulted in application of the same law as the claim for breach of contract (further case examples identified in Item **1.**below) and where the finding of bad faith as a tort claim resulted in application of different laws to the breach of contract and tort claims (further case examples identified in Item **2.**below), other scenarios also arise. These include outcomes in which bad faith is held to be a tort claim but is nonetheless governed by the law applicable to the breach of contract claim (case examples identified in Item **3.**below); in which bad faith is held to be a tort claim and governed by the law applicable to tort claims, but reaching a choice of law outcome the same for both claims (case examples identified in Item **4.**below); and in which bad faith claims

are determined to be "hybrid" in nature, implicating both principles of contract and tort law (case example identified in Item **5.**below).

1. Bad Faith is a contract claim and governed by the same law as the breach of contract claim.

Royal Indem. Co. V. Salomon Smith Barney, Inc., 308 A.D.2d 349, 764 N.Y.S.3d 187 (1st Dept. 2003)(holding that bad faith denial of coverage is redundant of cause of action for breach of contract based on denial of coverage).

Continental Information Systems Corp. v. Fed. Ins. Co., 2003 WL 145561 (S.D.N.Y. Jan 17, 2003)(holding that New York does not recognize a claim for bad faith denial of coverage regardless of whether characterized as sounding in tort or contract).

Payless Shoesource, Inc. v. The Travelers Companies, Inc., 569 F.Supp.2d 1189 (D. Kan. 2008)(holding that allegations of bad faith in handling insurance claims arise under contract law, *citing Mirville v. Allstate Indem. Co.*, 71 F.Supp.2d 1103 (D. Kan. 1999).

Yeager v. Maryland Cas.. Co., 868 F.Supp. 141 (D.S.C. 1994)(holding that a bad faith claim "is basically one in contract", and applying Georgia law pursuant to the rule of *lex loci contractus*).

Certain Interested Underwriters Subscribing to Policy No. B1262P20017013 v. American Realty Advisors, No. 5:16-CV-940-FL, No. 5:17-CV-74-FL, 2017 WL 5195864 (E.D.N.C. Nov. 9, 2017) (recognizing that under North Carolina law, "for choice of law purposes, breach of the covenant of good faith and fair dealing is not an independent tort, but, rather, constitutes part of the underlying breach of contract" and concluding pursuant to a California choice of law provision in the policy, that California law controlled).

Moon v. N. Am. Ins. Co., No. 06-13102, 2007 WL 1599743, at *1 (E.D. Mich. June 1, 2007) (concluding that where beneficiary of life insurance policy executed in Michigan brought claims for breach of contract and bad faith against carrier, law of Michigan and not Arizona law applied, and that under Michigan law, no independent cause of action for bad faith existed).

Comer-Beckett v. State Farm Mut. Auto. Ins. Co., No. CIV. 11-5017-JLV, 2013 WL 12412010, at *1 (D.S.D. June 19, 2013) (holding that Minnesota law and not South Dakota law applied to Plaintiffs' third-party bad faith claims against automobile insurer, and concluding that notwithstanding South Dakota's recognition bad faith action arising in tort, Plaintiffs' bad faith claim had to be treated as one for breach of contract consistent with Michigan law, such that extra-contractual damages were unavailable).

Cecilia Schwaber Tr. Two v. Hartford Acc. & Indem. Co., 437 F. Supp. 2d 485 (D. Md. 2006) (applying Maryland choice of law rules and Maryland law rejecting tort cause of action for insurer bad faith in first party cases, rather than the tort law of Pennsylvania and Indiana, the states in which claim handling operations took place).

Aetna Cas. & Sur. Co. v. Dow Chem. Co., 883 F. Supp. 1101 (E.D. Mich. 1995) (applying Michigan law and finding that although "an insurer has [an implied contractual] duty to act in good faith in negotiating a settlement within the policy limits, and the duty to act in good faith in investigating and paying claims" Michigan law "does not recognize an independent tort based upon a bad faith breach of contract").

In re Payroll Exp. Corp., 921 F. Supp. 1121 (S.D.N.Y. 1996) (holding that under both New Jersey and New York law, bad faith claim sounds in breach of contract and does not otherwise give rise to an independent tort action).

2. Bad faith is a tort claim and governed by the law applicable to tort claims, with the choice of law outcome different for the tort and contract claims.

ROC ASAP, L.L.C. V. Starnet Ins. Co., 2014 WL 667833 (W.D. Okla. Feb 20, 2014)(holding that bad faith is an independent tort subject to Oklahoma's "most significant relationship" test).

Martinez v. Nat'l Union Fire Ins. Co., 911 F.Sup.2d 331 (E.D.N.C. 2012)(holding that bad faith refusal to settle is a claim in tort subject to North Carolina's "law of the situs test", determined by the state of the injury).

Hillman v. Nationwide Mut. Fire Ins. Co., 855 P.2d 1321 (Alaska 1993)(characterizing bad faith as a tort claim).

TPLC, Inc. v. United Nat. Ins. Co., 44 F.3d 1484 (10th Cir. 1995) (applying conflict of laws rules of Colorado and determining that (1) Pennsylvania, the insurer's state of incorporation, had "the most significant relationship to the policy at issue" and thus applying Pennsylvania law to coverage dispute based upon untimely notice while (2) applying Colorado law—which the Court observed recognized the tort of bad faith and which had the most significant relationship to insured's claim—to Plaintiff's bad faith claims)

Newmont U.S.A., Ltd. v. American Home Ass. Co., Newmont USA Ltd. v. American Home Assur. Co., 676 F. Supp. 2d 1146 (E.D. Wash. 2009)(holding in action against primary and excess insurers arising out of environmental liability from operation of a Washington uranium mine that bad faith sounds in tort, implicating §145 rather than §188 of the *Restatement* which then pointed to Washington law; further noting that contract claims would likely be determined by New York law; and concluding that "[a]s messy and unpredictable as it may be, certainly is not an anomaly to have various states laws applied to different issues in an insurance dispute involving a policy without a choice of law provision." *Id.*

3. Bad faith is a tort claim but still governed by the law applicable to the breach of contract claim.

Pogue v. Principal Life Ins. Co., 2015 WL 5680464 (W.D. Ky. 2015)(acknowledging that the insured's claims were founded on both contract and tort; that the "most significant relationship test" of §188 of the *Restatement* applies to contract disputes and that the "any significant

contacts" test applies to tort actions; but that all tort claims arose out of the breach of contract claim and that the parties agreed the more stringent "most significant relationship test" applied to both claims).

4. Bad faith is a tort claim and governed by the law applicable to tort claims, but the outcome is the same for both claims.

Protective Ins. Co. v. Plasse, 2014 WL 3898084 (S.D. Ala. 2014)(holding that breach of contract claims are determined by the rule of *lex loci contractus*, whereas bad faith claims are determined by the rule of *lex loci delicti,* with the latter determined by the state of injury, and then applying Alabama to both claims without explanation).

Engineered Structures, Inc. v. Travelers Prop. Cas. Co. of Am., 328 F. Supp. 3d 1092 (D. Idaho 2018) (applying Idaho law—which recognizes independent cause of action for bad faith—while declining to apply Oregon law (which does not) to builder's bad faith tort claim and breach of contract claim against insurer and recognizing that because "both the breach of contract claim and the bad faith claim depend upon the provisions of the Policy . . . an unnecessarily confusing situation would result if the law of one state is used to interpret the insurance agreement regarding the breach of contract claim and the law of a second state is applied to interpret the same agreement with regard to the bad faith claim") (citing *Allis–Chalmers Corp.*, 471 U.S. 202, 217, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985)).

Phan v. Great-W. Life & Annuity Ins. Co., No. CV 13-1318 GAF (ANX), 2013 WL 12133645, at *1 (C.D. Cal. Apr. 30, 2013) (applying California law to Plaintiff's bad faith claim (as opposed to Illinois law given that Illinois law conflicts with fundamental policy of California) and concluding that bad faith claim could proceed since, pursuant to California law, "breach of the implied covenant [of good faith and fair dealing] will provide the basis for an action in tort" but failing to address law applicable to Plaintiff's breach of contract claim since that issue was not before the Court on Defendant's motion to dismiss).

Sentry Ins. v. Novelty, Inc., No. 09-CV-355-SLC, 2009 WL 5087688, at *1 (W.D. Wis. Dec. 17, 2009) (applying Wisconsin law to contract claims based upon policy choice of law provision and as between Indiana and Wisconsin law, and applying Wisconsin law to Plaintiff's bad faith claim, which Wisconsin recognizes as "an intentional tort claim separate from a breach of contract claim").

5. Bad Faith Claims Are "Hybrid" In Nature, Implicating Both Contract and Tort Law.

Larson v. Auto Owners Ins. Co., No. CIV. 12-4020-KES, 2012 WL 4005614, at *1 (D.S.D. Sept. 12, 2012) (observing that although South Dakota permits a cause of action in tort for bad faith in the insurance context, the law of Minnesota applied to Plaintiff's breach of contract and bad faith claims "regardless of whether [the bad faith claim] is seen as a 'contract' or a 'tort'")

Ryder Truck Rental, Inc. v. UTF Carriers, Inc., 790 F. Supp. 637, 638 (W.D. Va. 1992) (observing that Virginia law characterizes a "bad faith claim [a]s a pure contract claim" but declining, at the

motion to amend stage, to "make a determination as to whether Connecticut or New York law governs the insurance contract" since the "record [wa]s not sufficiently developed").

2002 Lawrence R. Buchalter Alaska Tr. v. Philadelphia Fin. Life Assur. Co., 96 F. Supp. 3d 182 (S.D.N.Y. 2015) (applying Alaska law to Plaintiff's bad faith claim (as opposed to New York law)—which generally treats a bad faith claim as sounding in contract but noting a limited exception in cases of insurance contracts where a tort claim is permitted—to Plaintiff's bad faith claim, determining that bad faith claim could not survive since the insurance portion of the contract was collateral to the main investment portion of the contract and likewise dismissing Plaintiff's breach of contract claim pursuant to both Alaska and New York law in light of any lack of conflict between each state's substantive contract law)

Harmon v. State Farm Mut. Ins. Co., 162 Idaho 94, 394 P.2d 796 (2017)(citing both Idaho and Alaska bad faith law under policy held to be governed by Alaska law for breach of contract claims).

C. Do the State's Unfair Claims Settlement Practices Provisions Create a Private Right of Action on the Part of the Insured?

In 1990, the National Association of Insurance Commissioners ("NAIC") adopted a Model Act entitled the Unfair Claims Settlement Practices Act, setting forth uniform standards for the investigation and disposition of insurance claims. The Model Act excepts from its provisions claims involving workers' compensation, fidelity, suretyship or boiler and machinery insurance, and as drafted and issued by the NAIC, is expressly not intended to create or imply a private right of action for violation of its provisions.

Instead, the provisions created a set of standards by which state insurance commissioners could consider and punish the actions of insurance carriers in the handling and payment of insurance claims.

Most states have adopted some form of the model act, but not all states preserved the provision respecting the existence of a private right of action (as opposed implementing the provisions purely as a basis for enforcing administrative penalties). Pursuant to the current version of the Model Act, it is an improper claims practice for a domestic, foreign or alien insurer transacting business in a state to commit enumerated acts if committed flagrantly and in conscious disregard of the Model Act or related rules, or if it has been committed with such frequency to indicate a general business practice to engage in that type of conduct. The Model Act defines "Unfair Claims Practices" as follows:

> A. Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue;
>
> B. Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;

C. Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;

D. Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;

E. Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;

F. Refusing to pay claims without conducting a reasonable investigation;

G. Failing to affirm or deny coverage of claims within a reasonable time after having completed its investigation related to such claim or claims;

H. Attempting to settle or settling claims for less than the amount that a reasonable person would believe the insured or beneficiary was entitled by reference to written or printed advertising material accompanying or made part of an application;

I. Attempting to settle or settling claims on the basis of an application that was materially altered without notice to, or knowledge or consent of, the insured;

J. Making claims payments to an insured or beneficiary without indicating the coverage under which each payment is being made;

K. Unreasonably delaying the investigation or payment of claims by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form;

L. Failing in the case of claims denials or offers of compromise settlement to promptly provide a reasonable and accurate explanation of the basis for such actions;

M. Failing to provide forms necessary to present claims within fifteen (15) calendar days of a request with reasonable explanations regarding their use;

N. Failing to adopt and implement reasonable standards to assure that the repairs of a repairer owned by or required to be used by the insurer are performed in a workmanlike manner.

Notwithstanding the provision of the Model Act as promulgated by the NAIC, the following states recognize a private right of action for purposes the states' respective versions/enactments of the Model Act:

Alabama (possibly)
Arkansas (possibly)
Connecticut (possibly)
District of Columbia (possibly)
Florida
Kentucky
Maine
Maryland
Massachusetts
Montana
Nebraska (possibly)
Nevada
New Mexico
North Carolina
North Dakota (possibly)
Rhode Island
Texas
Washington (first party)
West Virginia

D. Has the State Adopted or Rejected the ALI's Restatement of the Law of Liability Insurance?

When the American Law Institute issued its Restatement of the Law of Liability Insurance in 2018, it contained various provisions addressing the standard for determining and the damages recoverable for insurer bad faith. These provisions include Section 24, The Insurer's Duty to Make Reasonable Settlement Decisions; Section 27, Damages for Breach of the Duty to Make Reasonable Settlement Decisions; Section 36, Assignment of Rights Under a Liability Insurance Policy; Section 49, Liability for Insurance Bad Faith; and Section 50, Remedies for Liability Insurance Bad faith.

How the Restatement will be received or applied by the courts of the fifty states remains to be seen. Late last year, the Nevada Supreme Court favorably cited the Restatement in answering a certified question from the Ninth Circuit as to the measure of damage for a breach of the duty to defend in the absence of bad faith. *Century Sur. Co. v. Andrew*, 432 P.3d 180 (Nev. 2018).

More neutrally, a Delaware court cited provisions of the Restatement in stating the applicable burden for determining application of an exclusionary provision in an insurance policy, *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, *59, n. 619 (Del. Ch. Ct. 2018), and a Kentucky federal court cited the Restatement in addressing the question of how many claims were presented by an event which was the subject of an alleged liability. *National Cas. Co. v. Western Express*, 356 F. Supp. 3d 1288, 1200 (Okla. 2018).

Other courts have been less charitable, or refused application of various principles of the Restatement: *Catlin Specialty Ins. Co. v. J.J. White, Inc.*, 309 F. Supp. 3d 345, 362 (E.D. Pa. 2018)(declining to apply the Restatement as contrary to the controlling New York law); *Catlin Specialty Ins. Co. v. CBL & Associates Property, Inc.*, 2018 WL 3805868 (Sup. Del. 2018)(same); *Progressive Northwestern Ins. Co. v. Gant*, 2018 WL 4600716 (D. Kan. 2018)(same); *Outdoor Venture Corp. v. Philadelphia Indemn. Ins. Co.*, 2018 WL 4656400 (E.D. Ky. 2018)(same).

Perhaps more importantly, the legislatures of eight states have passed statutes or resolutions questioning, limiting, or outright condemning application of the Restatement in those states, including:

Arkansas (Ark. Code § 23-60-112)
Indiana (House Concurrent Resolution 62)
Kentucky (House Resolution 222)
Michigan (Mich. Comp. Laws § 500.3032)
North Dakota (N.D. Cent. Code § 26.1-02)
Ohio (Ohio Rev. Code § 3901.82)
Tennessee (Tenn. Code § 56-7-1-2)
Texas (Concurrent Resolution 58).

Case Law update:
Harvey v Geico and Other National Cases of Interest

American College of Coverage Counsel
2019 Law School Symposium
Nova Southeastern University, Shepard Broad College of Law

Fort Lauderdale, FL
November 1, 2019

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Florida Bad Faith and Harvey v. Geico:

What Causes of Action are Available?

- **Is there a common law cause of action for bad faith?**

    - Florida *does NOT* recognize a common law claim based on the breach of the implied warranty of good faith and fair dealing. These claims must be brought under statute. *QBE Ins. Corp. v. Chalfonte Condominium Apartment Assoc., Inc.*, 37 Fla. L. Weekly S395, *6 (Fla. May 31, 2012)
    - Third party: *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980).

- **Is there a statutory basis for a bad faith claim?**

    - Fla. Stat. § 624.155(1)(a)
        - Incorporated provisions of Fla. Stat. §626.9541, Unfair Methods of Competition and Unfair or Deceptive Acts or Practices
        - Fla. Stat. §626.9541(1)(i), (o) or (x)
        - Unfair Claim Settlement Practices, Fla. Stat. §626.9541(1)(i)(1), (2), and (3)a-i
    - Fla. Stat. § 624.155(1)(b)

- **Who can bring a statutory action for bad faith?**

    - Fla. Stat. § 624.155(1)
    - *Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co.*, 945 So. 2d 1216 (Fla. 2006).
    - *Auto-Owners Ins. Co. v. Conquest*, 658 So. 2d 928 (Fla. 1995).

- **Are there prerequisites to bringing a bad faith action?**

    - Fla. Stat. § 624.155(3)(a) "As a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days' written notice of the violation. . ."
    - *Vest v. Travelers Insurance Company*, 753 So. 2d 1270, 1275 (Fla. 2000).
        - *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991).
        - *Brookins v. Goodson*, 640 So. 2d 110 (Fla. 4th DCA 1994).
        - *Trafalgar at Greenacres, Ltd. v. Zurich American Insurance Company*, Case No. 4D11-1376 (Fla. 4th DCA (Sept. 5, 2012).
        - *Plante v. USF&G*, No. 03-23157CIVGOLD, 2004 WL 741382, at *3 (S.D. Fla. Mar. 2, 2004).
        - *Royale Green Condo. Ass'n, Inc. v. Aspen Specialty Ins. Co.*, No. 07-21404-CIV, 2008 WL 540742, at *1-2 (S.D. Fla. Feb. 25, 2008).
        - *Makes & Models Magazine, Inc. v. Assurance Co. of Am.*, No. 8:05-CV-1330T30EAJ, 2005 WL 2045780, at *1 (M.D. Fla. Aug. 25, 2005).

Damages:

- *What damages are available? How are they measured?*
  - Fla. Stat. § 624.155(4), (5) and (8)
  - Fla. Stat. § 624.155(8), which provides in part: "The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits."

- *Do these include attorneys' fees?*

  - Fla. Stat. § 624.155(4): "Upon adverse adjudication at trial or upon appeal, the authorized insurer shall be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff."
  - *Galante v. USAA Cas. Ins. Co*., 868 So. 2d 1291, 1291 (Fla. 4th DCA 2004).

- *Do these include consequential damages?*

  - *See* Fla. Stat. § 624.155(8)

- *What is a consequential damage?*

  - *See* Fla. Stat. § 624.155(8).
  - *Conquest v. Auto-Owners Ins. Co.*, 773 So.2d 71 (Fla. 2d DCA 1998).
  - *McLeod v. Continental Ins. Co.*, 591 So. 2d 621 (Fla. 1992).
  - *Continental Ins. Co. v. Jones*, 592 So. 2d 240 (Fla. 1992).
  - *Adams v. Fid. Cas. Co. of New York*, 591 So. 2d 929 (Fla. 1992).
  - *In re Standard Jury Instructions in Civil Cases*, 2010 WL 727521 at *55 (Fla. March 4, 2010).
  - *Brookins v. Goodson*, So. 2d 110, 114-15 (Fla. 4th DCA 1994).

- *Are punitive damages recoverable?*

  - *See* Fla. Stat. § 624.155(5).

Burden of Proof:

What is the legal standard required to prove bad faith in a first party case?

- Fla. § 624.155 and proof of violation(s) by a preponderance of the evidence.
- Florida Standard Jury Instructions MI3.
- *State Farm Mutual Auto Insurance Company v. Laforet*, 658 So.2d 55 (Fla. 1995).
- *Hack v Janes*, 878 So.2d 440, 444 (Fla. 5th DCA 2004).

Is there a separate legal standard that must be met to recover punitive damages?

- Fla. Stat. § 768.72(2)'s requirement that a party establish entitlement to an award of punitive damages by clear and convincing evidence.
- *Pozzi Windows Co. v. Auto-Owners Ins. Co.*, 429 F.Supp.2d 1311 (S.D. Fla. 2004).

Is evidence of a general business practice required evidence to prevail on a bad faith claim?

- *Howell-Demarest v. State Farm Mut. Auto. Ins. Co.*, 673 So.2d 526 (Fla. 4th DCA 1996).
- *Dodrill v. Nationwide Mutual Fire Insurance Company*, 491 S.E. 2d 1 (W.Va. 1997).
- *Jackson v. State Farm Mutual Automobile Insurance Co.*, 600 S.E. 2d 346 (W. Va. 2004).
- *Ingalls v. Paul Revere Life Insurance Co.*, 561 N.W. 2d 273 (N.D. 1997).
- *Jablonski v. St. Paul Fire and Marine Ins. Co.*, 2009 WL 2252094 (M.D. Fla. 2009).
- *Shannon R. Ginn Construction Co. v. Reliance Insurance Co.*, 51 F.Supp.2d 1347 (S.D. Fla. 1999).

Is expert testimony admissible? On what issues?

- *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1143, 1148 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).
- *Berges v. Infinity Ins. Co.*, 896 So.2d 665 (Fla. 2004).
- *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998 (9th Cir. 2004).
- *Industrial Fire and Casualty Co. v. Stroud*, 488 So.2d 600 (Fla. 4th DCA 1986).

Is a bad faith claim viable if a coverage decision has been determined to be correct?

- *Trafalgar at Greenacres, Ltd. v. Zurich American Insurance Company*, Case No. 4D11-1376 (Fla. 4th DCA (Sept. 5, 2012).
- *Saewitz v. Lexington Ins. Co.*, 133 Fed. Appx. 695, 699 (11th Cir. 2005).

Procedure:

- *What is the statute of limitations for bringing a bad faith suit?*

  - "In Florida, a bad faith claim is an action ex contractual." "Accordingly, when an insurer under such a policy contract undertakes to defend an action against the insured and becomes involved in negotiations for settlement, the law imposes the duty that it act therein in good faith. It follows that the cause of action for an 'excess,' where one arises from bad faith, is bottomed on the contract, and that the nature of an action thereon is ex contractual rather than in tort." *N. Am. Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325 (Fla. Dist. Ct. App. 4th Dist. 1996).

- *Will a bad faith claims be dismissed or stayed pending the resolution of the underlying claims?*

    - The Statute of Limitations for a cause of action for a breach of contract is 5 years. Fla. Stat. § 95.11(2)(b)

- *Can bad faith claims be severed for trial from the underlying claim?*

    - 60 day rule: If a claim of bad faith is made within 5 years from the accrual of the alleged bad faith action (not 5 years from the incident that gave rise to the insurance claim) then the insured must still give the insurer 60 notice to cure any alleged bad faith.

- *Under what circumstances, if any, will the compensatory and punitive damages claims be bifurcated?*

    - As a condition precedent to bringing a civil suit against an insurer under Fla. Stat. § 624.155, the person filing suit must give 60 days' written notice of the violation to the Department of Insurance and the insurer. The notice must be on a form provided by the Department, and must specifically state the statutory provision—including the specific language of the statute—allegedly violated by insured, the facts and circumstances giving rise to the violation, the name of any individual involved in the violation, and a reference to any specific policy language relevant to the violation. Finally, the notice must include a statement that notice is given to perfect the right to pursue the civil remedy authorized by Fla. Stat. § 624.155.

Harvey v. GEICO Gen. Ins. Co., 259 So. 3d 1, 3 (Fla. 2018)

- This case involves the application of the law of bad faith regarding an insurer's fiduciary obligation to protect its insured from a judgment that exceeds the limits of the insured's policy.
- Explain factual history.
- Controversial 4-3 decision in which Chief Justice Canady dissented stating "the majority's decision to reinstate the jury verdict muddies the waters between negligence and bad faith and bolsters 'contrived bad faith claims.'" He further stated that the majority opinion adopted a negligence standard "in all but name."
- Interpretation of Harvey going forward: two schools of thought: (1) this is an expansion of bad faith liability in Florida that will likely lead to an onslaught of contrived bad faith litigation or; (2) it confirms that Florida's law on bad faith lacks bright lines, and a third-party bad faith case can rarely be decided in state court at the summary judgment stage.
- Regardless of where you stand, the best practice remains that insurers should strive to follow sound claim handling practices in all respects.

Climate Change Litigation and Liability Insurance Claims

American College of Coverage Counsel
2019 Law School Symposium
Nova Southeastern University, Shepard Broad College of Law

Fort Lauderdale, FL
November 1, 2019

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I. Introduction

This paper discusses the potential legal and factual issues arising from third-party insurance claims asserting liability for damages because of climate change, particularly in the context of commercial general liability and environmental impairment policies, including commonly implicated provisions, exclusions, and other coverage and claims handling issues. In Part II, this paper identifies emerging trends in climate change litigation, including the increased prevalence of third-party liability claims. Part III discusses coverage issues unique to commercial liability and environmental impairment policies, and Part IV offers some practical insights into best-practice for managing risk and proper claims handling. Part V concludes.

II. Emerging Trends in Climate Change Claims

Regardless of any scientific or political dispute concerning the causes or existence of climate change, climate change litigation presents unique challenges for the insurance industry globally. We have already seen an increased prevalence of first-party insurance claims arising out of severe weather events, particularly in southern and coastal regions of the United States. For example, in response to Hurricane Katrine, which destroyed more than 200,000 homes and is estimated to be responsible for between $75 billion to more than $150 billion in damage,[1] insurers paid more than $45 billion in insured losses,[2] including more than $16 billion in loss paid on more than 150,000 flood insurance claims.[3] In 2017 alone, Hurricanes Harvey, Maria, and Irma caused more than $300 billion in damage,[4] and the total insurable loss from those storms remains uncertain.

Although, historically, climate change related claims have presented in the context of first-party property coverage, third-party liability claims seeking compensation from major carbon producers are beginning to take center stage. In the early 2000s, a small number of high profile climate change cases were litigated against oil, gas, and electric companies. Although their suits were high profile, these plaintiffs universally encountered procedural and substantive hurdles that were fatal to their claims.[5] Enthusiastic plaintiffs have not been discouraged by early precedent, however, and some courts have already begun to tear down those procedural barriers.[6] Governmental entities, commercial manufacturers, fossil fuel emitters, land developers, and livestock farmers, among others, may face the ire of third-party claimants

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1 R. Brent Cooper, *Hurricanes Katrina and Rita: Effect on Rating and Underwriting, IRMI*, May 2006, https://www.irmi.com/articles/expert-commentary/hurricanes-katrina-and-rita-effect-on-rating-and-underwriting; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION OFFICE FOR COASTAL MANAGEMENT, HURRICANE COSTS, https://coast.noaa.gov/states/fast-facts/hurricane-costs.html (last visited September 10, 2019).

2 Robert D. Allen et al., *Emerging Issues: Global Warming Claims and Coverage Issues*, DEFENSE COUNSEL JOURNAL, January 2009, at 15.

3 Cooper, *supra* note 1.

4 Hurricane Costs, *supra* note 1.

5 Geetanjali Ganguly, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 843 (2018), *available at* https://academic.oup.com/ojls/article/38/4/841/5140101.

6 *Id*.

alleging that those insureds are responsible for damages caused by their contribution to climate change.

The nature of climate change claims presents difficult challenges for insurers. Who has standing to bring a valid climate change claim, and how can that claimant prove that a particular insured is liable for damage allegedly caused by that insured's contribution to climate change? When did the alleged damage actually occur, and how can that loss be allocated between multiple insurers? These questions are not novel, however, and the existing landscape of applicable law can help guide insurers better understand the risks commonly associated with this new species of claim.

III. Liability Coverage Questions: CGL and EIL Policies

Third-party liability claims may potentially implicate coverage under commercial general liability (CGL) and environmental impairment liability (EIL) policies. Generally speaking, CGL policies insure against accidental "bodily injury" and "property damage," and EIL policies insure against "bodily injury" and "property damage" that was caused by a "pollution condition." These common policy forms provide a useful template for understanding the lens through which climate change claims should be managed. In particular, an insurer's evaluation of its rights and obligations under a standard CGL or EIL policy often turns on (1) whether the insured is legally obligated to pay for the claimant's damage, (2) whether the damage was caused by an occurrence, (3) whether the damage occurred during the applicable policy period, (4) whether any other insurers are liable for the loss, and (5) whether any exclusions apply.[7]

(1) Is the insured legally obligated to pay for the damage?

Under both CGL and EIL policies, an insurer agrees generally to indemnify its insured against covered losses that the insured becomes legally obligated to pay. A typical CGL policy, for example, contains the following insuring agreement, which states:

> **SECTION I – COVERAGES**
> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**

[7] This paper references various provisions that are contained within standard form policies. We emphasize, however, that although examination of this language is useful for developing a broad understanding of these issues, insurers should rely on the terms and conditions of the policy applicable to a particular claim. Manuscript policies and policies issued by surplus lines insurers, in particular, may contain significantly different language than that used in standard forms.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury"[8] and "property damage"[9] to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverage **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**.

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

(1) This "bodily injury" or "property damage" is caused by an occurrence that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(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 received notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

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[8] CGL and EIL policies typically define "bodily injury" as physical injury, sickness, disease, mental anguish, or emotional distress sustain by any person, including death.

[9] CGL and EIL policies typically define "property damage" as physical injury to tangible property, including all resulting loss of use of that property, and loss of use of tangible property that is not physically injured.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1**. of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or to any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

By comparison, EIL policies often contain numerous insuring agreements extending various coverages, including the following, which, in relevant part, states:

SECTION I – COVERAGES

A. Insuring Agreements:

* * *

1. Bodily Injury And Property Damage Resulting From Pollution Conditions

We will pay those sums you become legally obligated to pay for "bodily injury", "property damage" or "defense costs" resulting from covered "pollution conditions"[10] first occurring during the policy period or

[10] EIL policies typically define "pollution condition" as the discharge, dispersal, seepage, migration, release, or escape of "pollutants," which are usually defined as "any solid, liquid, gaseous, biological or thermal irritants or contaminants, including but not limited to smoke, vapors, soot, fumes, acids, alkalis, chemicals, hazardous substances, petroleum hydrocarbons, waste materials, including medical, infectious and pathological waste, legionella pneumophilia, electromagnetic fields, 'lower-level radiotactive waste' and 'mixed waste' materials, at

> subsequent to the retroactive date shown in the Declarations at, on, under or migrating from a "covered location". "Claims" for "bodily injury", "property damage" or "defense costs" must be first made against you and reported to us in writing during the policy period or any applicable extended reporting period, provided that the "claim" is covered by this Coverage Form and arises from "pollution conditions" that commenced before the end of the policy period.

Essentially, a liability insurer has no obligation to indemnify an insured unless a claimant is able to prove that the insured is legally obligated to pay for the claimant's damages. In grappling with climate change cases, courts have consistently identified two threshold barriers to the claimant's ability to prove its claim: standing and causation.

(a) Standing

A claimant cannot prove that an insured is liable for its damages if the claimant does not have actually standing to bring the suit.[11] Historically, Plaintiffs seeking new regulations requiring commercial polluters to curb greenhouse gas emissions have been unable to sustain claims against federal regulatory agencies, especially in establishing the minimum standard of justiciability.[12] The Supreme Court first addressed the issue of standing in *Massachusetts v. E.P.A.* in which it held that petitioners had standing to challenge an EPA order denying a rulemaking petition regarding the regulation of greenhouse gases.[13] However, the Supreme Court's decision on standing depended on the "special solicitude" of a single petitioner, the Commonwealth of Massachusetts, to protect its quasi-sovereign interests, leaving the question of standing as it relates to private claims largely unanswered.[14]

In 2009, the United States Court of Appeals for the Second Circuit endeavored to apply the *Massachusetts* ruling in the context of claims against private companies. In *Connecticut v.*

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levels in excess of those naturally occurring. Waste includes materials to be recycled, reconditioned or reclaimed."

[11] "Article III, § 2, of the Constitution limits the federal judicial power to the adjudication of 'Cases' and 'Controversies.' If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so. Standing to sue is part of the common understanding of what it takes to make a justiciable case." Massachusetts v. E.P.A., 549 U.S. 497, 535 (2007) (Roberts, Scalia, Thomas, and Alito, JJ., dissenting).

[12] *See id.* ("Apparently dissatisfied with the pace of progress on this issue in the elected branches, petitioners have come to the courts claiming broad-ranging injury, and attempting to tie that injury to the Government's alleged failure to comply with a rather narrow statutory provision. I would reject these challenges as nonjusticiable. Such a conclusion involves no judgment on whether global warming exists, what causes it, or the extent of the problem. Nor does it render petitioners without recourse. This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts."); *see* People of State of California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); *see* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012); *see* Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010).

[13] *Massachusetts*, 549 U.S. at 497.

[14] *Id*. at 520.

Am. Elec. Power Co., eight states, a city, and three land trusts sued six electric power companies that operated fossil-fuel-fired power plants in twenty states, seeking abatement of defendants' ongoing contribution to the public nuisance of global warming.[15] Defendants moved to dismiss plaintiffs' claims on grounds that they did not "have standing to sue on account of global warming."[16] The *Connecticut* court evaluated plaintiffs' standing both under the doctrine of *parens patriae*, which controlled the Supreme Court's decision in *Massachusetts v. E.P.A.*, and more broadly under Article III's case-or-controversy requirement.[17] The court, ultimately concluding that all plaintiffs had standing to maintain their actions, set out the following, three-part standard:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[18]

In applying the test to these plaintiffs, the *Connecticut* court found (1) that plaintiffs' alleged future injury was sufficient to constitute an injury-in-fact, (2) that by alleging that defendants' emissions contributed to their injuries, plaintiffs' future injuries were fairly traceable to the defendants' conduct, and (3) that, even though defendants' carbon emissions had global effects, the magnitude of plaintiffs' injuries would be decreased if the court imposed a remedy requiring that defendants' reduced their emissions.[19]

Although *Connecticut* recognized potential standing for various public and quasi-public plaintiffs other than because of the "special solicitude" recognized in *Massachusetts v. E.P.A.*, few cases discuss the standing of solely private plaintiffs to bring a climate change claim against private defendants. However, the United States District Court for the District of Oregon tackled that exact question in *Nw. Envtl. Def. Ctr. v. Owens Corning Corp.*[20] In *Owens Corning*, several private environmental groups brought a claim against a single, private manufacturer of foam insulation for violation of the federal Clean Air Act.[21] The defendant manufacturer moved to dismiss plaintiffs' claims for lack of standing.[22] Applying the same three-part test from

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[15] Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011); *see Connecticut*, 564 U.S. at 411-14 (citing preemption of federal statute).

[16] *Connecticut*, 582 F.3d at 319.

[17] *Id*. at 334.

[18] *Id*. at 339 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)) (cleaned up).

[19] *See generally id.* at 332-49 (outlining the basis for the court's holding on standing).

[20] Nw. Envtl. Def. Ctr. v. Owens Corning Corp., 434 F. Supp.2d 957 (D. Or. 2006).

[21] *Id*.

[22] *Id*.

Connecticut, the court held that plaintiffs' had standing to maintain their claims because they satisfied the injury-in-fact, fairly traceable, and redressability requirements.[23]

Later, in 2015, a coalition of young climate change activists filed suit against the United States in the United States District Court for the District of Oregon, seeking an order compelling the federal government to "phase-down CO_2 emissions . . . develop a natural plan to restore Earth's energy balance, and implement that national plan so as to stabilize the climate system."[24] In November 2016, the district court denied the government's motion to dismiss for lack of jurisdiction and for failure to state a claim, concluding that "the world has suffered" because federal courts "too often have been cautious and overly deferential in the arena of environmental law" and that, even "when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government."[25] The Supreme Court, on November 2, 2018, denied the government's requests to stay the suit and allowed the 9th Circuit proceedings to continue.[26]

Although lack of standing has historically proven fatal for claimants asserting climate change claims, courts are increasingly recognizing the justiciability of these claims against public and private entities alike. Demonstrating standing is but the first requirement to show that an insured is liable for a claimant's alleged damages, however. Once it has been established that a claimant has standing to maintain a climate change claim against an insured, claimants must also prove that the insured actually caused their damages.

(b) Causation

Moving forward, proving causation, by and large, will be the most important issue controlling potential coverage for third-party liability claims involving climate change. Demonstrating a link between the defendant-insured's conduct and the climate-related harm alleged is essential for claimants to prove causation. Claimants must be able to actually show that a particular insured's carbon emissions produced an effect on the climate sufficient to cause an individual claimant's particular loss. But courts may be reluctant to accept climate change as a legal and proximate cause of a plaintiff's injury. Following Hurricane Katrina, for example, the United States District Court for the Southern District of Mississippi expressed an extreme aversion to plaintiffs' claim because of the evidentiary issues inherent in climate change claims:

> I foresee daunting evidentiary problems for anyone who undertakes to prove, by a preponderance of the evidence, the degree to which global warming is caused by the emission of greenhouse gasses; the degree to which the actions of any

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[23] *Id*. at 971.

[24] Complaint at 7, Juliana, et al. v. United States, et al., No. 6:15-cv-01517 (D. Or. Aug. 12, 2015).

[25] Juliana v. United States, 217 F. Supp.3d 1224, 1262-63 (D. Or. 2016).

[26] Robert Barnes & Brady Dennis, *Supreme Court Refuses to Block Young People's Climate Lawsuit Against U.S. Government*, THE WASHINGTON POST, Nov. 2, 2018, *available at* https://www.washingtonpost.com/politics/courts_law/supreme-court-refuses-to-block-kids-climate-lawsuit-against-us-government/2018/11/02/34bd7ee6-d7af-11e8-83a2-d1c3da28d6b6_story.html?arc404=true.

> individual oil company, any individual chemical company, or the collective action of these corporations contribute, through the emission of greenhouse gasses, to global warming; and the extent to which the emission of greenhouse gasses by these defendants, through the phenomenon of global warming, intensified or otherwise affected the weather system that produced Hurricane Katrina.[27]

This attitude reflects the prevailing view that demonstrating causation in the climate change context is virtually impossible. Any theory through which plaintiffs may meet their burden of causation would likely be so far reaching that it would be rejected by many courts. But while there is no precedent for proving that a commercial insured actually caused a claimant's climate change related damages, future advances in technology may help claimants overcome causation challenges in the climate change context.[28] In this respect, climate change litigation largely mirrors the development of other bodies of mass tort litigation that historically faced similar obstacles related to causation, including, for example, asbestos litigation. Early asbestos claimants frequently encountered the problem that they had been exposed to asbestos many years prior to presenting symptoms of disease. They were unable to prove with precision how much exposure they received from any particular defendant's product, and courts struggled to formulate causation rules in light of those issues. Novel expert testimony and scientific advances eventually helped courts develop a framework to address the issue of causation in that context. Generally, causation depends upon the test used by the specific jurisdiction to prove an actual causal connection between the defendant's conduct and the resulting harm. However, the prevailing rule now requires that toxic tort plaintiffs show that the actions of one or more individual defendant were a substantial factor in causing their injury.[29]

Although a claimant's inability to prove causation has historically been seen as the death knell for climate change claims, some courts have demonstrated an increasing willingness to recognize causation in this context as public attitudes shift and the science used to support climate change claims continues to evolve. Recent trends suggest that the threshold barriers of standing and causation will alone be insufficient for an insured to escape liability in climate change claims. In light of this shifting landscape, insurers must be prepared to grapple with traditional insurance coverage issues in the context of these new claims.

(2) Was the damage caused by an occurrence?

CGL and certain other environmental policies generally apply only to accidental injury. CGL policies, for example, require that a claimant's alleged "bodily injury" or "property damage"

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[27] Comer v. Nationwide Mut. Ins., No. 1:05 CV 436 LTD RHW, 2006 WL 1066645, at *4 (S.D. Miss. Feb. 23, 2006).

[28] In 2014, *Climate Change* published a study that calculated a percentage figure for the individual contribution of various major polluters with respect to more than two-thirds of all anthropogenic climate change. That study also showed that more than half of those polluters' total contribution to climate change was after 1988, further dissolving the difficulties in tracing the roots of climate change injury. *See generally* Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010*, 122 CLIMATE CHANGE 229 (2014).

[29] *See, e.g.*, Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986).

be caused by an "occurrence," which is traditionally defined as "an accident, including continuous or repeated exposure to the same general harmful conditions." The same requirement is typically included in insuring agreements for contractors pollution liability coverage, which requires that damages for "bodily injury" or "property damage" resulting from a "pollution condition" be caused by an "occurrence." EIL policies, by comparison, usually do not require that the claimant's injury be caused by an "occurrence." Many claimants asserting liability against insureds for damages allegedly arising out of climate change concern an insured's intentional emissions as part of their standard business practices, posing the question: Can a claim sounding in climate change ever involve accidental injury?

Consider, for example, the view embodied by the United States District Court for the Southern District of Mississippi in *U.S. Fid. & Guar. Co. v. T.K. Stanley, Inc.*[30] *T.K. Stanley* concerned whether a defendant's emission of hydrogen sulfide gas as part of its regular wastewater disposal was an "occurrence" that caused plaintiff's alleged injuries.[31] Before suit was filed, state regulators advised the defendant to take corrective measures to control its hydrogen sulfide gas emissions, but the defendant failed to comply.[32] The court ultimately held that because the defendant failed to take necessary corrective measures, the defendant's release of the hydrogen sulfide gas was an intentional act and therefore did not constitute an "occurrence" under the policy.[33] The court reasoned:

> [T]he focus of the occurrence definition is on whether the act is expected or intended, and not whether the resulting damage is expected or intended . . . . The question of intent does not relate to whether the defendant intended to harm the plaintiff but rather to whether the defendant intended to take the action that caused the harm . . . . [I]t is clear that [the insured's] act of releasing [pollutants] . . . was not an accident, and hence was not an occurrence within the policy definition.[34]

Under this rule, insurers have a strong argument that there is no coverage for "property damage" or "bodily injury" caused by an insured's intentional emissions of chemicals or pollutants. However, most jurisdictions do not determine whether there has been an "occurrence" by evaluating the insured's intent with respect to the act causing the harm, e.g. an industrial manufacturer's emission of greenhouse gases. Instead, most other states evaluate whether an injury was caused by an "occurrence" by focusing on whether the damage itself was accidental.

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[30] U.S. Fid. & Guar. Co. v. T.K. Stanley, Inc., 764 F. Supp. 81 (S.D. Miss. 1991)); *see also* Sheehan Constr. Co., Inc. v. Continental Cas. Co., 935 N.E.2d 160 (Ind. 2010); *see also* Navigators Specialty Ins. Co. v. Moorefield Constr., Inc., 6 Cal. App. 5th 1258, 1278 (Cal. Ct. App. 2016) (finding no coverage for damage to concrete slab where insured made intentional decision to install tiles that exceed moisture vapor emission rate as such intentional conduct did not constitute an accident).

[31] *T.K. Stanley*, 764 F. Supp. at 81.

[32] *Id*.

[33] *Id*. at 84.

[34] *Id*. at 82-84.

Many jurisdictions hold that damage is caused by an "occurrence," or is accidental, if from the viewpoint of the insured, it is not the natural and probable consequence of the action or occurrence which produced the injury.[35] For example, in *Mid-Century Ins. Co. of Tex. v. Lindsey*, a young boy was climbing into a truck through its back window and, in doing so, accidentally discharged buckshot from a shotgun that struck an individual in an adjacent vehicle.[36] The court reasoned that the only intentional act at issue was the young boy attempting to gain entry to the vehicle.[37] Because the discharge of the shotgun and plaintiff's resulting injury were not foreseeable by the insured, any "bodily injury" was caused by an "occurrence."[38]

Other states determine whether an injury was caused by an "occurrence" by evaluating whether the resulting injury or damage was expected or intended by the injured party, rather than by the insured.[39] A Louisiana Court of Appeal faithfully applied this approach in *Sova v. Cove Homeowner's Ass'n, Inc.*[40] In *Sova*, the plaintiff sued his homeowners association for improperly placing a lien on his home in enforcing violations of certain subdivision restrictions.[41] Plaintiff sought to recover damages for his mental anguish as a result of the association's intentional harassment.[42] The *Sova* court concluded that because plaintiff had actual knowledge of the subdivision restrictions, plaintiff could not "validly claim that enforcement of the restrictions and

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[35] *See* Mid-Century Ins. Co. of Tex. v. Lindsey, 997 S.W.2d 153, 155 (Tex. 1999) (holding that injury or damage is "accidental" if, from the viewpoint of the insured, the damage is not the natural and probable consequence of the action or occurrence which produced the damage); *see* State Farm Fire & Casualty Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998) (finding the term "accident" encompasses not only accidental events but also injuries or damages neither expected nor intended from the standpoint of the insured; thus, unintentional or unexpected injury or damage from the insured's intentional acts is an accident); *see* High Country Associates v. New Hampshire Ins. Co., 647 So. 2d 474 (N.H. 1994) (finding an "accident" means "circumstances, not necessarily a sudden and identifiable event, that were unexpected or unintended from the standpoint of the insured"); *see* Med. Malpractice Joint Underwriting Ass'n of Rhode Island v. Charlesgate Nursing Ctr., L.P., 135 A.3d 998, 1005 (R.I. 2015) ("The plain and ordinary meaning of the term 'accident' as 'an unintended and unforeseen injurious occurrence' from the perspective of the insureds"); *see* Lee Builders, Inc v. Farm Bureau Mut. Ins. Co., 137 P.3d 486 (Kan. 2006) (finding an occurrence is "an undersigned, sudden and unexpected event, usually of an afflictive or unfortunate nature" and the dispositive issues is "whether the resulting damage, not the act performed that led to the damage was intentionally caused by the insured.").

[36] *Lindsey*, 997 S.W.2d at 154.

[37] *Id*.

[38] *Id.* at 155-56.

[39] *See* American Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., 707 S.E.2d 369 (Ga. 2011); *see* Brosnahan Builders, Inc. v. Harleysville Mut. Ins. Co., 137 F. Supp.2d 517 (D. Del. 2001) (finding that an "occurrence" or "accident" is "an event happening without human agency, or if happening through human agency, an event, which under circumstances, is unusual and not expected by the person to whom it happens"); *see* Sova v. Cove Homeowner's Ass'n, Inc., 102 So. 3d 863, 872 (La. App. 1st Cir. 9/7/12) (citing Knight v. L.H. Bossier, Inc., 118 So. 2d 700 (La. App. 1st Cir. 1960)) (holding that an event that is unforeseeable and unexpected by the person acted on or affected by the event); *see* Hawkeye-Security Ins. Co. v. Vector Constr. Co., 460 N.W.2d 329 (Mich. Ct. App. 1990) (finding an accident "may be anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected by the person injured or affected thereby-that is takes place without the insured's foresight or expectation and without design or intentional causation on his part.").

[40] *Sova*, 102 So. 3d 863.

[41] *Id*. at 865.

[42] *Id*. at 870.

assessment of fines and penalties against him was unexpected or unforeseeable."[43] The court reasoned that because Louisiana jurisprudence holds an accident to be "an event that is unforeseeable and unexpected by the person acted on or affected by the event," the plaintiff's alleged damages were not caused by an "occurrence."[44]

Accordingly, when considering whether a climate change claimant's alleged damages were caused by an "occurrence," insurers should understand the importance of the role that local law plays in making that determination.

(3) When did the damage occur?

In addition to the requirement that damage be caused by an "occurrence," the insuring agreements in CGL and many pollution liability policies mandate that the "bodily injury" or "property damage" occur during the policy period. EIL policies, by comparison, generally include an insuring agreement that requires the "bodily injury" or "property damage" resulting from "pollution conditions" to first occur[45] during the policy period. Determining when the claimant's alleged injury actually took place is an extremely important aspect of evaluating coverage in the context of any claim. But because climate change claims typically involve injuries resulting from an insured's emissions or other contributions to climate change over a long period of time, it can be difficult to assess when the claimant's alleged damage actually occurred. Although climate change claims present some interesting conceptual challenges regarding the timing of alleged damage, courts addressing this question in the context of various other long latency injury claims have developed various "trigger" theories to resolve the issue.

(a) The Injury-in-Fact Theory

A majority of jurisdictions have adopted the "injury-in-fact" approach.[46] Under this theory, coverage is triggered on the date when the damage actually occurs even if the damage has not been discovered or become manifest.[47]

(b) The Manifestation Theory

Under the manifestation theory, damage occurs when the damage manifests itself or when the claimant discovers the damage.[48] Some jurisdictions have adopted the manifestation theory particularly with respect to long latency property damage claims.[49] Under the

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[43] *Id*. at 872.

[44] *Id*.

[45] EIL policies are "claims made" meaning that the claim must be made against the insured and reported to the insurer during the policy period, or an extended reporting period.

[46] *See* Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co., 267 S.W.3d 20, 25 (Tex. 2008).

[47] *See id*. at 25, n.22.

[48] Korossy v. Sunrise Homes, Inc., 94-473 (La. App. 5th Cir. 3/15/95), 653 So. 2d 1215, 1225, *writs denied*, 95-1522, 1536 (La. 9/29/95), 660 So. 2d 878.

[49] *See* Mangerchine v. Reaves, 10-1052 (La. App. 1st Cir. 3/25/11), 63 So. 3d 1049, 1058.

manifestation theory, property damage occurs when it manifests, regardless of when the act from which it resulted occurred.

(c) The Exposure Theory

The exposure theory, by comparison, holds that damage occurs upon first exposure to the harmful condition. Some jurisdictions have adopted this approach when dealing particularly with long latency diseases like asbestosis, explaining that, although the insurance industry "doubtless did not foresee the extent of the liability problem asbestosis cases would present," the exposure theory represents "both a literal construction of the policy language and the construction that maximize coverage."[50]

(4) How is liability between insurers allocated?

Due to its nature, a climate change claim may implicate multiple policies because the injury or damage is continuous over several years. Long-tail liability claims arise from circumstances involving continuous or progressive injury over a period of time. Because long-tail claims may extend over multiple years, may implicate multiple policies, and often involve significant sums, the concept of allocation among multiple responding policies is of immense importance to both insureds and their insurers. Allocation becomes an issue any time that more than one policy may respond to a risk, where the loss fits into more than one category of insurance, or where an insured is held liable for both covered and non-covered claims. Proper allocation of loss may result in an insurer having no liability for certain claims. The primary standards applied by courts in determining the allocation of loss between multiple policies include (1) joint and several liability, (2) pro-ration by years, and (3) pro-ration by years and limits.[51]

Allocation by joint and several liability is the theory typically asserted by policyholders. Under this theory, policyholders utilize the "all sums" language of the policy to select a single insurer of a triggered policy to provide the initial indemnity obligation.[52] The selected insurer then becomes liable for the policy limits that it is legally obligated to pay, which may include any amount for "bodily injury" or "property damage" that could have also occurred outside of that

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[50] *See* Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1223 (6th Cir. 1980).

[51] Although there are a number of allocation methods besides these, they have been discarded or are only utilized by a slim minority. Depending upon the jurisdiction, the allocation scheme will be determined by the particular language of the applicable policy or stands on previous case law. *Compare* Keyspan Gas East Corporation v. Munich Reinsurance America, Inc., 96 N.E.3d 113 (N.Y. 2018) ("[W]e have not adopted a strict pro rata or sums allocation rule. Rather, the method of allocation is governed foremost by the particular language of the relevant insurance policy"), *with* EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, 934 A.2d 517, 526-27 (N.H. 2007) ("[W]e need not select a particular method of pro-ration in this case, [but] we observe that in future cases, trial courts should, where practicable apply the pro-ration by years and limits method").

[52] *See* Keene Corp. v. Insurance Co. of North America, 667 F.2d 1049 (D.C. Cir. 1981). *See also* J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 508 (Pa. 1993) (applying allocation by joint and several liability, citing standard language in the policy's insuring agreement).

policy period.[53] Then, the onus is on the selected insurer to pursue cross-claims against other carriers whose policies were also exposed.[54] In *Keene Corp. v. Insurance Co. of North America*,[55] for example, the court held that once a particular CGL policy is triggered, the insurer is required to fully indemnify the policyholder for the entire loss up to its policy limits even though part of the injury may have occurred during another policy period or while the policyholder was uninsured.[56] The court concluded that because each policy issued from the date of initial asbestos inhalation until the date of manifestation had been triggered, each insurer had an obligation to provide the policyholder with full coverage.[57]

Another allocation method utilized is pro-ration by years, alternatively known as "time on the risk." This theory rejects the interpretation that the "all sums" language in standard liability policies obligates the carrier to exhaust policy limits for losses that occurred outside the policy period.[58] Under this theory, each triggered policy bears a share of the total damages proportionate to the number of years it was "on the risk," relative to the total number of years of triggered coverage.[59] The Sixth Circuit evaluated the pro rata by years approach in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, where it held that indemnification and defense costs should be split among all of the insurance companies that were on the risk while the injured victim was exposed to asbestos.[60] Courts in a number of jurisdictions have adopted this approach based on a belief that public policy demands a more equal approach given the nature of the harm.[61]

Other jurisdictions apply a slightly different rule of pro-ration by years and limits. Recognizing that pro-ration by years could result in a policy with comparatively low limits being disproportionately liable for the same amount as a policy with much greater limits, some courts have modified the basic pro rata by years standard.[62] As the name suggests, the pro rata by years and limits model allocates insurers' indemnity obligations based on both the number of years a particular policy is "on the risk" *and* that policy's limits of liability.[63] Each insurer's liability is

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53 *Keene*, 667 F.2d at 1049.

54 *Id*.

55 *Id*. at 1034. A number of courts have come to rely on Keene as the guiding authority for applying allocation on a joint and several basis. *See* In re Viking Pump, Inc., 52 N.E.3d 1144, 1150 (N.Y. 2016); *see* State of California v. Continental Ins. Co., 281 P.3d 1000, 1007 (Cal. 2012); *see* Plastics Eng'g Co. v. Liberty Mut. Ins. Co., 759 N.W.2d 613, 626 (Wis. 2009); *see* Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835, 840 (Ohio 2002); *see* Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 491 (Del. 2001); *see* American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 855 (Tex. 1994).

56 *Id*. at 1038.

57 *Id*. at 1050.

58 *Forty-Eight Insulations*, 633 F.2d at 1224.

59 *Id*.

60 *Id*.

61 *See* Boston Gas Co. v. Century Indem. Co., 910 N.E.2d 290, 310 (Mass. 2009) (holding that pro rata by years is not only consistent with the policy language but also "serves important public policy objectives"); *see* EnergyNorth, 934 A.2d at 517; *see also* Public Serv. Co. of Colorado v. Wallis & Cos., 986 P.2d 924, 940 (Colo. 1999).

62 *See* Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 993 (N.J. 1994).

63 *Id*. at 994.

determined by comparing its particular exposure to the total exposure assumed by all insurers under the applicable policies, yielding a percentage that is then applied to the amount of loss the policyholder sustained.[64] In a seminal case, *Owens-Illinois, Inc. v. United Ins. Co.*, the Supreme Court of New Jersey looked to public policy for guidance when it found that the applicable insurance policies failed to consider long latency claims involving mass torts.[65] Motivated principally by the efficient use of resources in response to mass torts, the *Owens-Illinois* court found the straight line progression in the pro rata by years model to be inappropriate, instead holding that allocation among insurers should be "on the basis of the extent of the risk assumed."[66]

By way of example, the Texas Supreme Court's decision in *American Physicians Insurance Exchange v. Garcia* offers a comprehensive discussion concerning the proper allocation of indivisible injuries across multiple policy periods.[67] The *Garcia* court reasoned:

> If a single occurrence triggers more than one policy, covering different policy periods, then different limits may have applied at different times. In such a case, the insured's indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured's limit was highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage. Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights.[68]

The Texas Supreme Court has also more recently addressed the indivisible nature of property damage, as discussed in *Garcia*, in *Lennar Corp. v. Markel American Insurance Co*.[69] In *Lennar*, the insurer was found liable for damage that occurred before its period due because of both the "practically impossible" task of segregating the damage and because of the reallocation mechanisms made available by *Garcia.*[70] The *Lennar* court accordingly established a theory of vertical, as opposed to horizontal, exhaustion—essentially the opposite of a pro rata approach.[71] Notwithstanding, the Texas Supreme Court stated that an insurer who pays on an insured's behalf keeps its equitable subrogation and contribution rights, potentially leaving the insurer with functionally the same outcome as under the pro rata approach.[72]

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[64] *See id.* (providing a sample calculation).

[65] *See Id.* at 991-92 (observing that the traditional techniques of contract interpretation cannot produce a coherent result).

[66] *Id*. at 993.

[67] *Garcia*, 876 S.W.2d at 842.

[68] *Id*. at 855.

[69] Lennar Corp. v. Markel American Insurance Co., 413 S.W.3d 750 (Tex. 2013).

[70] *Id*. at 758.

[71] *See id.* at 759.

[72] *See id*.

Like with any long latency claim, how much damage occurred and when is an extremely important inquiry in properly assessing an insurer's exposure, particularly when the insurer is entitled to offset from insurers that issued policies applicable to the same loss. Each of the primary methods of allocation discussed here is frequently applied in other contexts, and while their application specifically in the context of climate change is untested, there is little reason to doubt that courts will follow established insurance coverage jurisprudence even in unfamiliar cases.

(5) Concurrent Causation

An insured is only entitled to recover damages that the policy covers. When covered and non-covered perils combine to cause an insured's loss, it is important to look to the jurisdiction's rule on concurrent causation. Anti-concurrent causation clauses, which are most often found preceding exclusions in first-party property policies, apply to preclude coverage when excluded and covered perils combine to cause the same loss. Typical anti-concurrent causation clauses state:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Anti-concurrent causation clauses may be relevant in assessing coverage for climate change related claims depending on the particular damage alleged. Generally, those states acknowledging anti-concurrent causation clauses as valid have cited respect for the freedom of contract by enforcing unambiguous policy language. By contrast, some states, including California and North Dakota, have found that the statutorily embodied doctrine of efficient primary cause—applied by many jurisdictions as a matter of common law—preempts anti-concurrent causation clauses.[73] Relatedly, the Supreme Courts of both Washington[74] and Virginia[75] found that an insurer could not contract around the common law doctrine of efficient proximate cause, holding that the reasonable expectation of insureds takes precedence over the principle of freedom to contract.

By way of example, the Texas Supreme Court has held that concurrent causation exists, and that an exclusion subject to an anti-concurrent causation clause applies, when excluded and covered events combine to cause a loss and the two causes cannot be separated.[76] In that case, an insurer would have no duty to provide coverage.[77] However, when a covered and an excluded

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[73] *See id*. at 29-30; *compare* Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704 (Cal. 1989), *and* W. Nat. Mut. Ins. Co. v. Univ. of N. Dakota, 643 N.W.2d 4 (N.D. 2002), *with* JAW The Pointe, LLC v. Lexington Insurance Company, 460 S.W.3d 597 (rejecting the common law doctrine of efficient proximate cause in favor of the insurance contract's unambiguous language, including its anti-concurrent causation clause).

[74] Safeco Ins. Co. of Am. v. Hirschmann, 773 P.2d 413 (Wash. 1989).

[75] Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1 (W. Va. 1998).

[76] *JAW the Pointe*, 460 S.W.3d at 609 (citing Utica Nat. Ins. Co. of Tex. v. Am. Indem. Co., 141 S.W.3d 198, 204 (Tex.2004)).

[77] *Id*.

event each independently cause a loss, separate and independent causation exists, and the insurer must pay for covered loss despite any exclusionary language.[78] It is the insured's burden to segregate covered and non-covered damages.[79]

In the Texas case of *JAW The Pointe, LLC v. Lexington Insurance Company*, a hurricane caused both covered wind damage and uncovered flood damage to the claimant's apartment building, which together combined to cause enforcement of city ordinances that ultimately required the claimant to demolish and rebuild its property.[80] The applicable policy's anti-concurrent causation clause excluded coverage for loss in connection with demolishing and rebuilding apartment building in order to comply with city ordinances. The policy covered the cost of complying with city ordinances, but the coverage applied only if the policy covered the property damage that triggered the enforcement of the ordinances, and, pursuant to the anti-concurrent causation clause, the policy did not cover damage caused by the hurricane, as the policy excluded flood damage, which was a concurrent cause of the damage to the building. The Texas Supreme Court accordingly upheld the exclusion.

(6) Do any exclusions apply?

Certain exclusions may be particularly relevant to evaluating potential coverage for climate change claims. The treatment of these issues is ultimately state-specific and often turns on the particular facts of the case and the precise language of the applicable policy.

(a) The Pollution Exclusions

Pollution exclusions, in particular, will almost always be implicated by the allegations in a typical liability claim involving damages because of climate change. Pollution exclusions broadly apply to preclude coverage for damage caused by a pollutant. The two most common types include "absolute" and "total" pollution exclusions. The standard "absolute" pollution exclusion states:

> This insurance does not apply to:
>
> **f. (1)** "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

[78] *Id*.

[79] *See e.g.*, Dallas National Insurance Company v. Calitex Corp., 458 S.W.3d 210 (Tex. App.–Dallas, 2015).

[80] *JAW The Pointe*, 460 S.W.3d at 609.

(a) At or from any premises you own, rent or occupy;

(b) At or from any site or location used by or for you for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) Any loss, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

By comparison, a typical "total" pollution exclusion states:

Exclusion f. under Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability is replaced by the following:

This insurance does not apply to:

f. Pollution

(1) "Bodily injury" or "property damage" which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants;" or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants."

Texas law embodies the majority rule regarding the application of pollution exclusions. The Texas Supreme Court has held that "total" or "absolute" pollution exclusions are clear and unambiguous.[81] Texas courts have held that similar "absolute" pollution exclusions bar coverage for all injuries caused by exposure to pollutants that have been dispersed, discharged, or released in some fashion that causes exposure.[82] For example, a federal court applying Texas law held that coverage for residents' alleged injury from exposure to well water contaminated with toxic and hazardous substances, including benzene, was barred by the absolute pollution exclusion in the applicable CGL policy.[83] The court upheld the exclusion as a bar to coverage even though the underlying suits against the company alleged various theories of liability, including negligence.[84] The court found that the residents' claims fell within the "absolute" pollution exclusion because these claims arose out of discharge of pollutants that escaped from a well operated and tested by the company.[85] Other jurisdictions, by comparison, have found that pollution exclusions apply strictly to environmental pollution.[86] In either case, pollution exclusions may potentially apply, at least in part, to alleged damages arising out of an insured's purported contribution to climate change.

(b) The Expected or Intended Exclusion

As discussed above, many climate change claims will involve damages purportedly caused by an insured's intentional acts carried out in the regular course of the insured's business. Many

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[81] CBI Indus., Inc. v. National Union Fire Ins. Co., 907 S.W.2d 517 (Tex. 1995) (holding that policyholder was not permitted to conduct discovery into drafting history of pollution exclusion where policy language was unambiguous). In Louisiana, on the other thand, the pollution exclusion has been judicially limited to apply only to traditional environmental pollution on the basis of an insured's reasonable expectations. *See* Doerr v. Mobil Oil Corp., 00-0947 (La. 12/19/00), 774 So. 2d 119, 135.

[82] *See e.g.,* Hamm v. Allstate Ins. Co., 286 F.2d 790 (N.D. Tex. 2003) (holding that an insurer had no duty to defend claim of exposure to noxious fumes released within building during remodeling); *see also* Zaiontz v. Trinity Universal Ins. Co., 87 S.W.2d 565 (Tex. App. – San Antonio 2002, pet. denied) (insurer had no duty to defend claim of injury due to exposure to substances released from fire extinguisher on airplane).

[83] Northbrook Indem. Ins. Co. v. Water Dist. Mgmt. Co., Inc., 892 F. Supp. 170, 171 (S.D. Tex. 1995).

[84] *Id*.

[85] *Id*.

[86] *Doerr*, 774 So. 2d at 135 (finding "that the total pollution exclusion was neither designed nor intended to be read strictly to exclude coverage for all interactions with irritants or contaminants of any kind" and that its "general purpose . . . is to exclude coverage for environmental pollution") (internal quotations and citations removed).

liability policies, including standard CGL policies, include an exclusion for damage expected or intended from an insured's standpoint. For example, the standard Expected or Intended Injury exclusion in CGL policies states:

> This insurance does not apply to:
>
> **a. Expected Or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

Whether an Expected or Intended Injury exclusion applies to a claimant's alleged damage depends upon the jurisdiction. Under the majority rule, as embodied by Texas law, injury is expected or intended by an insured when "circumstances confirm that the resulting damage was the natural and expected result of the insured's actions, that is, was highly probable."[87] The exclusion applies when the insured intends injury resulting from its actions, not merely to intentional conduct itself.[88] It is presumed that an insured intended injury in cases of intentional torts.[89] However, the exclusion does not apply to damage arising out of the insured's negligent or grossly negligent conduct.[90] In these jurisdictions, an Expected or Intended Injury exclusion would not likely apply to alleged damage arising out of climate change because, even if the insured intended its purported contribution to climate change, it is very unlikely that the insured actually intended any resulting damage to the claimant. As discussed above, however, other jurisdictions evaluate whether damage is intended by evaluating whether the insured intended the underlying conduct resulting in damages.[91] In those jurisdictions, an Expected or Intended Injury exclusion may preclude coverage for damage allegedly caused by climate change even if the insured intended only the underlying pollution activity. Because the Expected or Intended Injury exclusion, and other similar exclusions, have been applied in such drastically different ways by different courts, understanding the law of the relevant jurisdiction as it applies to coverage for allegedly intentional injury is imperative.

(c) Known Conditions

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[87] Mid-Continent Cas. Co. v. BFH Min., Ltd., No. CIV.A. H-14-0849, 2015 WL 2124767, at *3 (S.D. Tex. May 6, 2015) (citing Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 9 (Tex. 2007)).

[88] *See* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 828 (Tex. 1997) (recognizing that a deliberate act can result in accidental damage); *see also* Dallas Nat. Ins. Co. v. Sabic Americas, Inc., 355 S.W.3d 111, 120 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

[89] *Lamar*, 242 S.W.3d at 9.

[90] *See* Philadelphia Indem. Ins. Co. v. Stebbins Five Companies, No. CIV.A. 302CV1279M, 2004 WL 210636, at *4 (N.D. Tex. Jan. 27, 2004) (citing Am. Home Assur. Co. v. Safway Steel Products Co., Inc., A Div. of Figgie Intern., Inc., 743 S.W.2d 693, 701, n. 8 (Tex. App.—Austin 1987, writ denied)).

[91] *See, e.g.*, *T.K. Stanley*, 764 F. Supp. at 81-84.

Many third-party claimants may allege that an insured knew that its actions have caused damage. The insuring agreement in a typical CGL policy bars coverage if, before the applicable policy period, an insured knew that any "bodily injury" or "property damage" had already occurred. Similarly, EIL policies usually include a "Known Conditions" exclusion, which provides that the policy does not apply to any "claim" or "loss caused by, arising out of, or in any way related to pollution conditions," including any subsequent continuation or resumption of or changes in such "pollution conditions," that existed prior to the policy period or that were known to any insured at any time before the inception of the policy period. In claims where the claimant has alleged that the insured had pre-policy knowledge of damage that continued into the policy period, an insurer should evaluate whether a known conditions provisions in the applicable policy precludes coverage.

In Texas, for example, the known conditions provision requires that the insured actually have knowledge of the alleged damage.[92] This provision also precludes coverage only if (1) the insured with pre-policy knowledge of the damage is an insured under Paragraph 1 of Section II – Who Is An Insured, which includes generally the Named Insured and its downstream members, partners, and managers or (2) if an "employee" authorized to give or receive notice of a claim had pre-policy knowledge of the damage. Texas courts have strictly applied this requirement, "invoking the principle that contracts must be interpreted in a way that gives meaning to every term."[93] In evaluating its duty to defend, however, an insurer may not disclaim coverage if the insured allegedly had knowledge of only some, and not all, of the damage at issue.[94]

IV. Claims Handling and Risk Management

A typical climate change claim will likely be factually and legally complex, and it is possible that multiple local, state, and federal agencies may ultimately become involved in any associated litigation. When handling these complex climate change claims, there are several strategies that insurers should keep in mind to ensure that the claims are properly investigated and administered.

(1) Establish the Scope of All Available Coverage.

The early stages of claims handling are in many ways the most important, particularly when an insurer anticipates that there may be a significant coverage issue. From the outset, insurers should work with their insureds to identify any and all coverages that might be available

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[92] Bitco Gen. Ins. Corp. v. Monroe Guar. Ins. Co., No. SA18CV00325FBESC, 2019 WL 3459248, at *7 (W.D. Tex. July 31, 2019) (finding that evidence demonstrating the existence of a harmful condition does not impute knowledge of that condition).

[93] Am. Guarantee & Liab. Ins. Co. v. United States Fire Ins. Co., 255 F. Supp.3d 677, 692 (S.D. Tex. 2017), *aff'd sub nom.* Satterfield & Pontikes Constr., Inc. v. United States Fire Ins. Co., 898 F.3d 574 (5th Cir. 2018).

[94] Bain Enterprises LLC v. Mountain States Mut. Cas. Co., 267 F. Supp. 3d 796, 812 (W.D. Tex. 2016) (finding that, although the insured was aware of some alleged damage, it was unclear whether all damage alleged was related to the damage of which the insured had pre-policy knowledge and holding that the insurer therefore had a duty to defend).

to the insured and to confirm that any other insurers have been put on notice of the claim. In the climate change context, the most relevant types of coverages will include commercial liability and environmental liability policies, including environmental impairment and contractors pollution liability policies. Insurers should also know that in some jurisdictions, including, for example, Texas, they may not have a right of subrogation or contribution against other insurers with respect to an insurer's own indemnity payments.[95] The Texas Supreme Court has held that an insurer who fully indemnifies an insured cannot recover a pro rata contribution or seek subrogation from a non-paying insurer despite the standard "other insurance" clause in CGL policies.[96] In addition, it is unclear, based on recent case law from the Fifth Circuit and the Austin Court of Appeals whether there is also a right to seek subrogation or contribution from other carriers of any defense costs that an insurer believes it is overpaying due to another carrier's refusal to participate in the defense.[97]

(2) Identify Your Jurisdiction.

Insurance coverage law differs from jurisdiction to jurisdiction, sometimes dramatically. An insurer evaluating coverage under a CGL or EIL policy will certainly encounter a number of policy provisions, standard or otherwise, that have been implicated by the claim. Pollution exclusions and exclusions related to hazardous materials could very well apply to preclude coverage in a climate change claim. But because different jurisdictions have interpreted and applied many common policy provisions in such different ways, understanding the applicable law of the relevant jurisdiction is essential for an insurer to properly evaluate potential coverage for any given claim.

(3) Handling Multiple Claims

Climate change claims may involve claims from multiple parties for damages that exceed the total available limits of applicable insurance. Various state and federal remedies exist to ensure that an insurer acting in good faith is not held liable for more than the amount of loss insured. In Texas, for example, the *Soriano* Doctrine protects insurers faced with multiple claims and insufficient insurance proceeds. *Texas Farmers Insurance Company v. Soriano*[98] sets forth a relatively clear standard for cases involving multiple claimant settlement demands:

> [W]hen faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims. Such an approach, we believe, promotes settlement of lawsuits and encourages claimants to make their claims promptly.[99]

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[95] *See* Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765 (Tex. 2007).

[96] *Id.*

[97] *Compare* Trinity Univ. Ins. Co. v. Employers Mut. Cas. Co., 592 F.3d. 687 (5th Cir. 2010), *with* Truck Insurance Exchange v. Mid-Continent Cas. Co., 320 S.W.3d (Tex. App.—Austin 2010).

[98] 881 S.W.2d 312 (Tex. 1994).

[99] *Id*. at 314.

The "reasonableness" examination focuses solely on the merits of the settled claim. In the abstract, if the insurer determines that a purported *Stowers*[100] demand is (1) for a covered claim, (2) within policy limits, and (3) one that an ordinarily prudent insurer would accept, then *Soriano* may protect the insurer from subsequent claims alleging that the insurer failed to protect its insured from a judgment in excess of the limits of insurance.[101]

An insurer might also consider, if available, a federal or state interpleader action to manage multiple claims. An interpleader action is an equitable remedy that enables a neutral stakeholder, usually an insurance company or a bank, to shield itself from liability for paying over the stake to the wrong party.[102] If the party seeking interpleader satisfies the interpleader requirements, it may seek dismissal from the action.[103] The district court will then make a determination of the respective rights of the claimants.[104] In an interpleader action, the district court may also enter an order restraining the claimants from instituting any proceeding affecting the property until further order of the court.[105]

A stakeholder may bring an interpleader action under Federal Rule of Civil Procedure 22 or under 28 U.S.C. § 1335. In the absence of federal question jurisdiction, a Rule 22 action requires independent diversity jurisdiction, with complete diversity between the stakeholder and all claimants.[106] This requires *complete* diversity—not among claimants, but as between the interpleader plaintiff on one side and all claimants on the other.[107] In contrast, section 1335 actions provide independent jurisdiction and require only minimal diversity.[108] Further, a section 1335 stakeholder must actually deposit the funds into the court's registry to maintain the action.[109]

In Texas, Rule 43 of the Texas Rules of Civil Procedure authorizes a party faced with competing claims to property in its possession to join all claimants in one lawsuit and deposit the disputed property into the registry of the court. A party is entitled to interpleader relief if three elements are met: (1) it is either subject to, or has reasonable grounds to anticipate, rival claims to the same funds, (2) it has not unreasonably delayed filing its action for interpleader, and (3) it

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[100] *See generally* G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929) (imposing an extracontractual duty on insurers requiring generally that they accept reasonable settlement offers within policy limits).

[101] *Stowers*, 15 S.W.2d at 544; State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38, 41 (Tex. 1998).

[102] Underwriters Group, Inc. v. Clear Creek Indep. Sch. Dist., No. CIV.A. G-05-334, 2006 WL 1852254, *3 (S.D. Tex. June 30, 2006).

[103] *Id*.

[104] Rhoades v. Casey, 196 F.3d 592, 600 (5th Cir. 1999).

[105] *Id*.

[106] Chaucer Corporate Capital, No. 2 Ltd. v. Vill. Contractors, Inc., No. CIV.A. 09-2701, 2010 WL 3702609 (S.D. Tex. Sept. 15, 2010).

[107] *See* Travelers Ins. Co. v. First Nat'l Bank of Shreveport, 675 F.2d 633, 637, n.9 (5th Cir. 1982).

[108] *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

[109] *Chaucer*, 2010 WL 3702609 at *3.

has unconditionally tendered the funds into the registry of the court.[110] When insurers receive notice of adverse bona fide claims, they are not required to act as judge and jury or to pay one claim and risk liability on the other. Instead, if a reasonable doubt exists in law or fact as to whom the proceeds belong, an insurer should interplead them and let the courts decide.[111] By interpleading the funds, the defendant obtains a discharge of liability of the competing claims.[112]

In aid of its jurisdiction in the matter of interpleader, the court may enjoin the prosecution of an action or the enforcement of a judgment that relates to the subject matter of the interpleader.[113] Furthermore, a claimant who opts out of the interpleader action may not maintain a subsequent claim for the interpleaded property.[114]

Texas Courts have yet to apply Rule 43 interpleader in the context of an insurer faced with multiple valid claims that, together, exceed policy limits. However, insurers in Texas regularly use interpleader actions under Rule 43 to settle disputes among claimants.[115] Moreover, "Texas courts have uniformly held that an insurer will not be liable for statutory penalties or attorney's fees for interpleading insurance proceeds due to conflicting claims."[116]

(4) Dealing with Regulatory Bodies and the Press

Inevitably, some climate change claims will involve the press, as well as local, state, and federal regulatory bodies. In both cases, insurers should be careful to protect both their own interests and the interests of their insureds. Insurers, where appropriate, can direct members of the press to emergency officials or to defense counsel. Moreover, when dealing with regulatory bodies and other government officials, while insurers certainly should cooperate within the bounds of their legal obligations, they should also be mindful to protect any information that is confidential or privileged as to the insurer and its insureds. Knowledgeable local counsel or defense counsel can help in anticipating and addressing relevant issues. Any insurer that does not have general protocols in place for corresponding with the press or regulatory agencies should work with its legal counsel to prepare such protocols so as to not be caught off-guard.

V. Conclusion

[110] Young v. Gumfory, 322 S.W.3d 731 (Tex. App.—Dallas 2010).

[111] State Farm Life Ins. Co. v. Martinez, 216 S.W.3d 799 (Tex. 2007).

[112] Heggy v. American Trading Employee Retirement Account Plan, 123 S.W.3d 770, 775 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

[113] *See* Rochelle v. Pac. Exp. Co., 120 S.W. 543 (Tex. Civ. App. 1909, no writ). Gillespie v. Citizens Nat. Bank of Weatherford, 97 S.W.2d 310 (Tex. Civ. App. Texarkana 1936); Van Slyck v. Dallas Bank & Trust Co., 45 S.W.2d 641 (Tex. Civ. App. Dallas 1931).

[114] *See* Petro Source v. 3-B Rattlesnake Refining, 905 S.W.2d 371, 378-379 (Tex. App.—El Paso 1995, writ denied).

[115] *See, e.g.*, Cable Communications Network, Inc. v. Aetna Casualty & Surety Co., 838 S.W.2d 947, 950–51 (Tex. App.—Houston [14th Dist.] 1992, no writ).

[116] *Id*. (citing Holmquist v. Occidental Life Ins. Co. of Calif., 536 S.W.2d 434, 437 (Tex.Civ.App.—Houston [14th Dist.] 1976, writ ref'd n.r.e)).

Although climate change claims present some unique challenges for insurers, the apparent novelty of these claims has often already been addressed within the broader framework of insurance coverage law. However, insurers should still be aware of the pitfalls that climate change claims potentially present, and they should understand the full breadth of their potential obligations. Fortunately, the existing framework of insurance coverage law provides ample guidance for understanding this new species of claim. Some questions remain unanswered, and the lack of total clarity will inevitably invite unwanted coverage disputes. But, in light of the existing tools at their disposal, insurers are well-positioned to properly handle these claims.

COLUMBIA LAW SCHOOL

SABIN CENTER FOR CLIMATE CHANGE LAW

U.S. CLIMATE CHANGE LITIGATION IN THE AGE OF TRUMP: YEAR TWO

By Dena P. Adler

June 2019

The Sabin Center for Climate Change Law develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the legal profession and the public with up-to-date resources on key topics in climate law and regulation. It works closely with the scientists at Columbia University's Earth Institute and with a wide range of governmental, non-governmental and academic organizations.

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About the Author: Dena P. Adler is a Postdoctoral Research Scholar at Columbia Law School and a Climate Law Fellow at the Sabin Center for Climate Change Law. The author would like to thank the Sabin Center's Executive Director Michael Burger for his edits and feedback throughout development of the report. This paper draws heavily on the Sabin Center's Deregulation Tracker and the U.S. Climate Change Litigation Database maintained by the Sabin Center and Arnold & Porter. The author also thanks Sabin Center Senior Fellow Jessica Wentz and Legal Writer Margaret Barry for their work maintaining the Deregulation Tracker and U.S. Climate Change Litigation databases respectively.

EXECUTIVE SUMMARY

More than two and a half years into the Trump Administration, no climate change-related regulatory rollback brought before the courts has yet survived legal challenge. Nevertheless, climate change is one arena where the Trump Administration's regulatory rollbacks have been both visible and real. The Administration has delayed and initiated the reversal of rules that reduce greenhouse gas (GHG) emissions from stationary and mobile sources; sought to expedite fossil fuel development, including in previously protected areas; delayed or reversed energy efficiency standards; undermined consideration of climate change in environmental review and other decisionmaking; and hindered adaptation to the impacts of climate change. However, the Trump Administration's efforts have met with constant resistance, with those committed to climate protections bringing legal challenges to many, if not most, of the rollbacks.

This paper seeks to provide a landscape level view of how litigation is shaping climate change law and policy during the Trump Administration. To this end, it categorizes and reviews dozens of climate change cases filed during 2017 and 2018 to shed light on how litigation is counterbalancing—and at times complementing—the Trump Administration's efforts to undermine climate change protections. The analysis focuses specifically on "climate change cases," defined as cases that raise climate change as an issue of fact or law. From the U.S. Climate Change Litigation database, maintained by the Sabin Center for Climate Change Law and Arnold & Porter, this analysis identified 159 climate change cases from 2017 and 2018 pertaining to federal climate change policy. **To analyze climate change litigation from 2017-2018, this paper sorted cases into five categories:**

1. **Defending Obama Administration Climate Change Policies & Decisions;**
2. **Demanding Transparency & Scientific Integrity from the Trump Administration;**
3. **Integrating Consideration of Climate Change into Environmental Review & Permitting;**
4. **Advancing or Enforcing Additional Climate Protections through the Courts; and**

5. **Deregulating Climate Change, Undermining Climate Protections, or Targeting Climate Protection Supporters.**

The first four categories are "pro" climate protection cases—if their plaintiffs or petitioners are successful they will uphold or advance climate change protections. The fifth category contains "con" cases—if their filing party or parties are successful, these cases will undermine climate protections or support climate policy deregulation. 129 of the reviewed cases were "pro" climate protection and 30 were "con."

Top-Level Highlights from the Analysis

- ***Lawsuits Advancing and Upholding Climate Protections Exceeded Those Opposing Climate Protections*:** The pro cases outweigh the con cases roughly 4:1 (81% to 19%). The pro cases are represented in shades of blue and the con cases are depicted in orange.

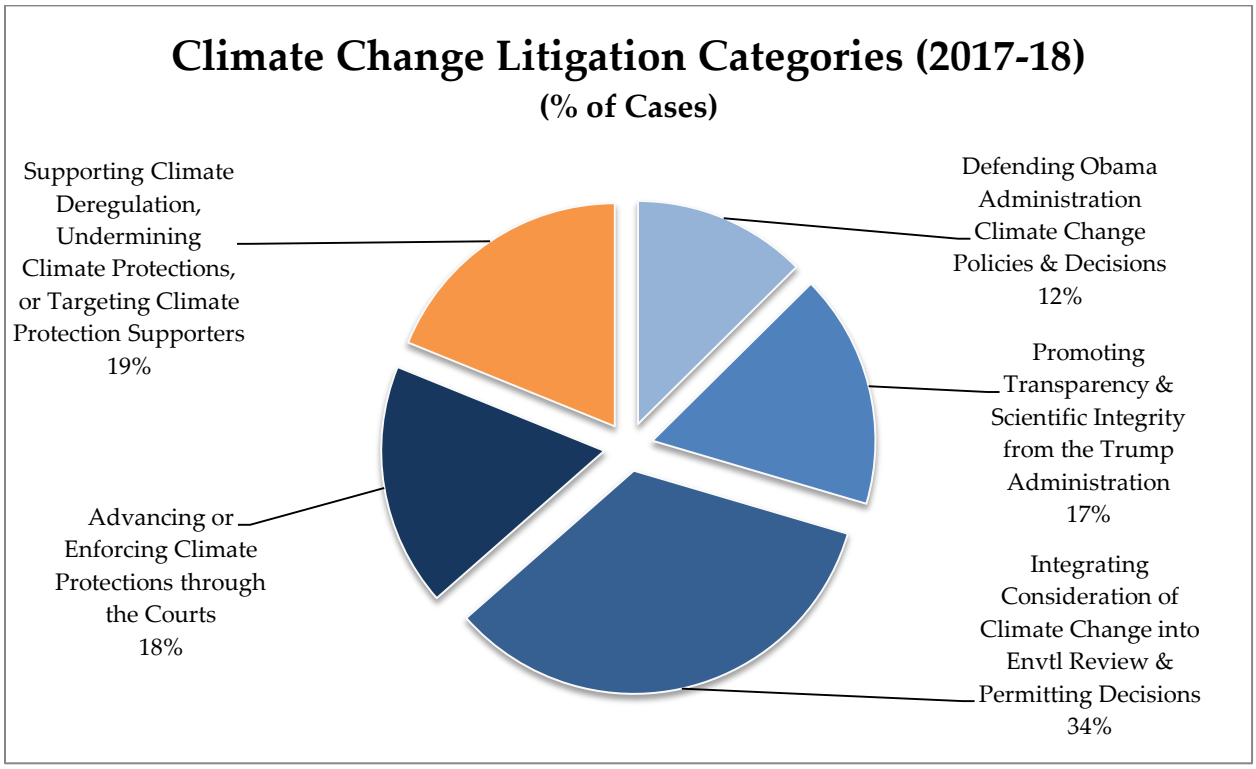

Figure 1: Cases were assigned to a single category. Blue indicates "pro" cases in favor of climate-related protections and orange indicates "con" cases opposing climate-related protections.

- ***Direct Defense of Obama Administration Climate Policies Is Supplemented by a Wide Range of Other Lawsuits Supporting Climate Protections*:** Twenty of the 129 pro climate cases (16%) concerned "Defending Obama Administration Climate Change Policies & Decisions." The other 109 pro cases concerned transparency, environmental review and permitting, or advancing other climate protections. These cases reflect trends in climate change litigation that pre-date the Trump Administration, such as enforcing obligations to consider climate change effects under the National Environmental Policy Act (NEPA). They also indicate new developments, such as a surge of municipalities suing fossil fuel companies for damages related to their GHG emissions under different tort law claims and a suite of Freedom of Information Act (FOIA) lawsuits seeking transparency from the Trump Administration.
- ***About a Fifth of Cases Sought to Undermine Climate Protections, But Fewer of These Cases Were Filed in 2018 Than 2017*:** Roughly one-fifth (19%) of reviewed cases sought to advance climate change deregulation, undermine climate protections, or attack supporters of climate protections. These challenges ranged from petitions to review Obama Administration climate rules to contestations over state-level denials of environmental permits for fossil fuel infrastructure to charges of defamation against critics of the fossil fuel industry. The number of these cases declined in 2018—only seven of the thirty cases in this category were filed in 2018.
- ***The Distribution of Suits Shifted Between 2017 to 2018*:** In 2018, (as compared to 2017), fewer suits were filed in the categories of defending Obama Administration climate policies and undermining climate protections. The number of cases related to environmental review and permitting held steady, but increased as a percentage of the annual dataset. The number of cases promoting transparency and advancing or enforcing climate protections increased. These litigation changes appear at least partially responsive to underlying opportunities to challenge current and previous administration policies.

Key Court Developments on Major Trump Administration Efforts to Delay or Reverse Climate Change Policies

- ***Thus Far, the Courts Have Not Upheld Any Attempts by the Trump Administration to Delay or Roll Back Regulatory Climate Protections*:** These cases have been struck down, voluntarily dismissed, or are still pending a final decision. In 2017-2018, a dozen cases were filed that raised climate change as an issue of fact or law and concerned delay or suspension of climate-related rules. Five of these cases have resulted in a judicial decision against the Trump Administration (of which one has an appeal pending). Five pressured the Trump Administration to end the delay at issue in the lawsuit, and were then dismissed or otherwise allowed to lapse prior to a decision on the merits. Two are pending. These cases are building a body of precedent that clarifies limitations on the executive branch's ability to destabilize duly promulgated regulations, to act without regard to proper procedure, and to make decisions that lack an evidentiary basis.
- ***Courts Have Halted Trump Administration Policies to Promote Fossil Fuel Extraction on Public Lands and in Public Waters for Inadequate Environmental Review and Executive Overreach*:** Courts found that the Trump Administration violated requirements of environmental review in its attempt to reverse a moratorium for coal leasing on federal lands and issue a new permit for the Keystone XL pipeline. Another court decision vacated a reversal of the Obama Administration's drilling ban on leasing in parts of the Atlantic and Arctic Oceans, finding the administration acted beyond its authority under the relevant statute. These cases uphold precedent that the Trump Administration cannot shirk statutory obligations to conduct environmental review, administrative law requirements to justify a change in policy, or promote fossil fuel extraction beyond the limits of its statutory authorities to act.

The Parties & Their Legal Claims

- ***NGOs, Sub-National Governments, and Industry Actors Were Far and Away the Most Frequent Plaintiffs and Petitioners*:**
    - Pro cases brought by NGOs represent more than half (99/159 cases or 52%) of the reviewed climate change litigation. Looking within the pro category, NGOs brought 77% of the pro litigation items. A handful of national and international environmental NGOs were involved in more than half (64%) of all pro cases, but many more local, regional, and national NGOs played a role in climate litigation. Municipal, state, and tribal government entities were plaintiffs or petitioners in 25% of pro cases, including actions from more than a dozen states.
    - Industry actors, (primarily private companies and trade groups), brought 16% of total cases and 70% of con cases. These numbers do not include conservative think tanks closely aligned with industry interests—such groups were plaintiffs in 27% of con cases.
- ***EPA and DOI Were the Most Frequent Defendants*:** The federal government is the defendant in a vast majority of cases (79% of reviewed cases filed in 2017 and 2018, see Part 3 for details on this figure). While more than a dozen federal entities were sued, nearly half (46%) of the climate cases filed against federal defendants in 2017 challenged the DOI, EPA, their respective sub-entities, and/or their officials.
- ***Claims Employed a Variety of Laws with Frequent Use of Environmental Statutes*:** Claims fell under a variety of administrative, statutory, constitutional, and common law. Eighty-two cases involved federal environmental statutes and at least one of four major environmental statutes—the Clean Air Act (CAA), the Clean Water Act (CWA), the Endangered Species Act (ESA), and NEPA—played a role in eighty-one of those cases. Seventy-two cases involved the Administrative Procedure Act and another thirty-two involved FOIA.

The Trump Administration's efforts to bypass the requirements of administrative and statutory law to delay and expedite reversal of climate change policies have fared poorly in court thus far. Nonetheless, the ultimate fate of the underlying policies remains uncertain. In 2018 and 2019, the Trump Administration's efforts to repeal and replace Obama Administration climate change policies through notice and comment rulemaking continue to progress. As these rules are finalized, more climate change litigation will likely seek to enforce the substantive judicial standards for deregulation. As these and other cases develop, the courts will continue to be an important arena for enforcing administrative, statutory, and other legal obligations and preventing the establishment of agency precedent that flouts these requirements.

CONTENTS

1. INTRODUCTION

More than two and a half years into the Trump Administration, no climate change-related regulatory rollback brought before the courts has yet survived legal challenge.[1] Nevertheless, climate change is one arena where the Trump Administration's regulatory rollbacks have been both visible and real. The Administration has delayed and initiated the reversal of rules that reduce greenhouse gas (GHG) emissions from stationary and mobile sources; sought to expedite fossil fuel development, including in previously protected areas; delayed or reversed energy efficiency standards; undermined consideration of climate change in environmental review and other decisionmaking; and hindered adaptation to the impacts of climate change.[2] In total, the Sabin Center's U.S. Climate Deregulation Tracker identifies a total of 94 actions taken by the executive branch in 2017 and 2018 to deregulate climate change.[3] These actions correspond to at least two dozen climate-related protections "on the way out under Trump."[4] If the Trump Administration is successful in its efforts to reduce six major rules affecting some of the largest sources of GHG emissions from power plants, vehicles, the oil and

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[1] *See infra* Part 4.1. *See also* NYU Institute for Policy Integrity, *Round-Up Trump-Era Deregulation in the Courts*, (updated April 22, 2019), *available at* https://policyintegrity.org/deregulation-roundup#fn-4-a.

[2] *See infra* Part 2.1. S*ee also* Jessica Wentz and Michael Gerrard, *Persistent Regulations: The Trump*

[3] The deregulation tracker includes 117 total actions across federal government for 2017 through 2018 of which 24 were congressional actions, including President Trump's approval of a Congressional Review Act (CRA) resolution. The above count of 94 actions includes President Trump's CRA approval and the other 93 deregulatory actions taken by the executive branch. These 64 actions do not reflect a corresponding number of rule rollbacks. Some actions, like E.O. 13783, contain multiple deregulatory actions. In other cases, multiple actions may advance rollback of the same, single rule; for example, the tracker includes at least seven deregulatory actions from 2017 that affect the Clean Power plan. The Sabin Center for Climate Change Law, *U.S. Climate Deregulation Tracker*, *available at* http://columbiaclimatelaw.com/resources/climate-deregulation-tracker/ (last visited May 3, 2019)(hereafter "climate deregulation tracker").

[4] Nadja Popvich, Livia Albeck-Ripka, and Kendra Pierre-Louis, *78 Environmental Rules on the Way Out Under Trump*, N.Y TIMES, *available at* https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html?_r=1 (updated Jun. 3, 2019) (listing 84 climate and environmental rules on the way out under the Trump Administration). Some deregulatory actions affect multiple rules or in other cases it takes multiple deregulatory actions to rollback a single rule. Hence, the clarification concerning that at least two dozen climate rules are affected.

gas sector, and landfills, it could allow an additional 209 million metric tons of CO_2 equivalent to be released annually by 2025.[5]

Donald Trump is not the first President to wage war against regulation, generally, or to seek to roll back newly established environmental protections, in particular. President Ronald Reagan famously sought to undermine a suite of environmental statutes established in the decade before his first term,[6] in many instances the very same statutes governing the climate regulations now under fire.[7] However, the Reagan Administration's environmental agenda was brought to a "stalemate" by several critical factors, including a Democrat-controlled Congress, court challenges, and public pressure.[8] Although President Trump enjoyed a Republican-controlled Congress in his first two years of office that did little to curtail the Administration's anti-climate agenda, and public pressure from anyone outside the fossil fuel industry seems to have had little impact on the Administration's climate policy, the courts have already functioned as a check on the deregulatory push, overreaches of executive authority, and failures to fulfill statutory obligations.

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[5] The State Energy & Environmental Impact Center, *Climate & Health Showdown in the Courts: State Attorneys General Prepare to Fight* (NYU Law School, Mar. 2019), *available at* https://www.law.nyu.edu/sites/default/files/climate-and-health-showdown-in-the-courts.pdf.

[6] *See* Maxine Joselow, *Why Trump Outpaced Reagan on Regulatory Rollbacks*, Greenwire (Nov.10, 2017), https://www.eenews.net/greenwire/2017/11/10/stories/1060066245; CHRISTOPHER SELLERS ET AL., ENVIRONMENTAL DATA & GOVERNANCE INITIATIVE, THE EPA UNDER SIEGE: TRUMP'S ASSAULT IN HISTORY AND TESTIMONY (Jun. 2017), *available at* https://envirodatagov.org/wp-content/uploads/2017/06/Part-1-EPA-Under-Siege.pdf.

[7] *See* Richard Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 85-90 (2001), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1149&context=facpub (describing the Reagan Administration's attack on environmental statute and other environmental law developments during the 1980s).

[8] *Id.*, Philip Shabecoff, *Reagan and Environment: To Many, a Stalemate*, N.Y TIMES, Jan. 2, 1989, *available at* http://www.nytimes.com/1989/01/02/us/reagan-and-environment-to-many-a-stalemate.html?pagewanted=all.

New Presidential administrations have always advanced and disassembled the policy regimes of their predecessors.[9] Yet, the principles and statutes governing administrative law, applied by judges reviewing agency action, check the agencies of new administrations from reversing existing policies unless an agency reasonably justifies its action,[10] observes proper procedures for public input,[11] and fulfills its statutory obligations. Though courts are deferential to agencies' policy decisions and interpretations of ambiguous statutes they do not grant them "unbridled discretion."[12] Already, courts have blocked multiple Trump Administration attempts to roll back climate change regulations through illegal stays and delays—the courts have not upheld a a single one of the twelve cases concerning delay or suspension of climate-related rules reviewed for this analysis on the merits.[13] Five of these cases have resulted in a judicial decision against the Trump Administration (of which one has an appeal pending). Five pressured the Trump Administration to end the delay at issue in the lawsuit, and were then dismissed or otherwise allowed to lapse prior to a decision on the merits. Two matters remain pending. Courts have also checked the Trump Administration's efforts to promote fossil fuel extraction on public lands and in public waters when those actions violated statutory obligations for environmental review, failed administrative law requirements to justify a change in policy, or overreached executive authority. These decisions have affected policies attempting

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[9] STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON (1997)(discussing cycles of authority through presidential history).

[10] *See e.g.*, F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 537, 129 S. Ct. 1800, 1823, 173 L. Ed. 2d 738 (2009)("Congress passed the Administrative Procedure Act (APA) to ensure that agencies follow constraints even as they exercise their powers. One of these constraints is the duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation."); Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 968 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1509, 194 L. Ed. 2d 585 (2016)("Elections have policy consequences. But, *State Farm* teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.").

[11] *See* the Administrative Procedure Act (APA) § 3, 5 U.S.C. § 553.

[12] *See* Fox Television Stations, Inc., 556 U.S. at 536("[I]f agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.") (Internal citation omitted).

[13] *Infra* Part 4.1.

to reopen federal lands to coal leasing, reopen oil and gas leasing in previously protected areas of the Arctic and Atlantic Oceans, and reverse denial of a permit for the Keystone XL pipeline.

The full scope of climate change litigation extends far wider than these efforts to undermine climate regulation and reverse Obama Administration climate policies. More than one hundred cases filed in the U.S. in 2017-2018 raised claims concerning either the impacts of climate change or reducing GHG emissions.[14] From the U.S. Climate Change Litigation database maintained jointly by the Sabin Center for Climate Change Law and Arnold & Porter, 159 climate change cases were identified as pertinent to federal deregulation of climate change policy during the first two years of the Trump Administration and selected for analysis in this paper.[15] Many of these cases concern environmental review and permitting decisions for individual programs and projects that cumulatively shape national climate policy. Some seek to increase transparency and expose allegedly illegal workings within the federal government. Still others seek to fill the void of federal climate change leadership—a "litigate-to-mitigate"[16] strategy.

Of course, there are limitations on the extent and manner in which the courts can constrain deregulation. Rulings on illegal stays and delays do not permanently halt deregulation, even if they do force it through the required legal process of notice and comment rulemaking and subject it to judicial review. In 2018, agencies began the process of proposing repeals and replacement rules—or at least signaling their intent to do so—for a number of rules that the courts prevented the administration from rolling back through illegal delay and suspension tactics. Additionally, the courts can also be a tool for deregulation; industry and its

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[14] *See Sabin-AP U.S. Climate Change Litigation Database*, http://climatecasechart.com/us-climate-change-litigation/ (last visited May 1, 2019) (listing 206 litigation matters filed in 2017-2018). The number may change as cases are consolidated in the courts and consequently combined into single entries in the database or additional items are added. As discussed in Part 3.1, 11 "cases" in the database that did not constitute litigation were removed from this analysis. (A similar screening was not conducted for 2016.)

[15] *Infra* Part 3.1 for further details on how these cases were selected for the data set.

[16] *See e.g.*, Jonathan Watts, *'We should be on the offensive' – James Hansen calls for wave of climate lawsuits* (Nov. 17, 17), THE GUARDIAN, *available at* https://www.theguardian.com/environment/2017/nov/17/we-should-be-on-the-offensive-james-hansen-calls-for-wave-of-climate-lawsuits.

allies have sought review of additional existing climate protections, sued their critics, and challenged permit denials for fossil development and infrastructure, especially pipelines. Further, once administrative processes produce new rules and finalize repeals, climate change litigation will almost certainly shift to ensure adequate procedures and substantive reasoning underlie the rules and that the rules fulfill statutory obligations. Still, such litigation is not ripe until agency actions are finalized, and courts cannot halt deregulation that falls within the bounds of agency discretion and procedurally complies with the law.[17] Meanwhile, beyond the regulatory arena; NGOs, cities, states, and tribes continue to challenge dozens of other executive and agency actions to reduce climate protections, expand development of fossil fuel resources on public lands and in federal waters, advance construction of fossil fuel infrastructure, undermine climate science, and reduce consideration of climate impacts on vulnerable species and the environment.

This paper seeks to give shape to the current moment in climate litigation, categorizing and reviewing dozens of climate change cases filed during 2017-2018 to understand how litigation countered—and at times courted—the influx of climate change deregulation during the first two years of the Trump administration.[18] It further seeks to situate these regulatory legal batters within the wider context of how litigation is shaping climate change law. The paper identifies and discusses five major categories:

1. Defending Obama Administration Climate Policies & Decisions,
2. Demanding Transparency & Scientific Integrity from the Trump Administration,
3. Integrating Consideration of Climate Change into Environmental Review & Permitting,
4. Advancing or Enforcing Additional Climate Protections through the Courts, and

[17] *E.g., Vermont Yankee v. NRDC* (1978) (holding that courts cannot impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good."). For further discussion *see also infra* Part 2.B.

[18] This study relies on the compilation of cases in the Sabin-AP U.S. Climate Change Litigation Database maintained by the Sabin Center and Arnold & Porter, and it employs the same definition of "climate change case" used there.

5. Deregulating Climate Change, Undermining Climate Protections, or Targeting Climate Protection Supporters.

The first four categories are "pro" climate cases—if their plaintiffs or petitioners are successful they will uphold or advance climate change protections. The fifth category contains "con" cases—if their filing party or parties are successful, these cases will undermine climate protection. To understand how federal climate change litigation is shaping national climate policy in the absence of federal leadership, this paper looks across and within these categories to further examine: 1) who are the litigants are, 2) what laws they are utilizing, 3) the issues they are shaping, and 4) how they are faring in the courts thus far.

This account of the first two years of climate change litigation in the Trump Administration proceeds in four parts. First, Part 2 reviews the scope of federal climate change deregulatory activity in 2017-2018. Part 3 summarizes the methodology underlying the paper and provides an overarching picture of recent U.S. climate change litigation. It reviews the major categories of response, the parties occupying the federal climate change law field by challenging and defending climate change deregulation, and the laws and sectors in which these cases occur. Part 4 provides a deeper analysis of each category of litigation response, reviewing the primary issues and progress of cases in each category. The paper concludes with a brief review of the outcomes of climate change litigation in 2017-2018.

2. THE TRUMP ADMINISTRATION'S DEREGULATION OF CLIMATE CHANGE

The Trump Administration's effort to deregulate climate change is remarkable in its attempted wholesale reversal of an administrative regime established by the President's immediate predecessor. The Obama Administration ushered in the first major wave of climate change regulation, developing and implementing a systematic approach to reducing GHG emissions and enhancing adaptation to climate impacts.[19] The Obama Administration recorded over 100 climate, energy, and environmental accomplishments along these lines.[20] As described below, the Trump Administration has undertaken a program to systematically delay, revise, revoke, and otherwise undo President Obama's signature climate change achievements, through both systemic deregulation of which climate change protections are a casualty and specific efforts to dismantle climate change regulations.[21] (For a summary of the Obama Administration's climate policy accomplishments and the Trump Administration's climate-related rollbacks from 2017 see the "U.S. Climate Change Litigation in the Age of Trump: Year One" Report Part 2.)[22] This section updates the previous year's report with a summary of

[19] President Obama's 2013 Climate Action Plan summarizes some of the more modest progress of his first term and lays out the more ambitious climate change agenda of his second term to cut carbon pollution, prepare the U.S. for the impacts of climate change, and lead international efforts on climate change. THE WHITEHOUSE, THE PRESIDENT'S CLIMATE ACTION PLAN (Jun. 2013), https://perma.cc/SB7B-PEKG (revoked), Laws prior to the Obama Administration did reduce GHG emissions by promoting energy efficiency and conservation, renewable energy, and fuel economy standards, e.g., EPCA and EISA, but this is substantially different than the regulatory regime initiated by the Obama Administration. Compare the Climate Action Plan with the policies of the Clinton Administration, *see e.g.*, Amy Royden, *U.S. Climate Change Policy Under President Clinton: A Look Back*, 32 GOLDEN GATE U. L. REV. 415, note 4-5 (2002), *available at* http://digitalcommons.law.ggu.edu/ggulrev/vol32/iss4/3.

[20] THE WHITEHOUSE, THE RECORD: PRESIDENT OBAMA ON CLIMATE & ENERGY (Jan. 9, 2017), *available at* https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/achievements/theRecord_climate_0.pdf [hereinafter *The Record*].

[21] *See e.g.*, N.Y. Times, *supra* note 4; Climate Deregulation Tracker, *supra* note 3.

[22] Dena Adler, U.S. Climate Change Litigation in the Age of Trump: Year One (Sabin Center for Climate Change Law, Columbia Law School, Feb. 14, 2018), *available at*

continued climate-related deregulatory activity undertaken by the Trump Administration in 2018.[23]

In 2018, the Trump Administration continued to advance its deregulatory agenda, including a concentrated effort to rollback climate protections and expedite fossil fuel development. These efforts largely implement the agenda set by Executive Order 13783, titled "Promoting Energy Independence and Economic Growth," which Trump issued in March 2017 directing agencies to: 1) roll back key Obama-era climate rules that limit GHG emissions from major sources, 2) eliminate guidance for integrating the costs and impacts of climate change into their reviews, and 3) remove barriers to fossil fuel development.[24] The 2018 rollbacks are discussed in the context of these three major objectives.

2.1 Rollbacks of Key Obama-Era Climate Rules that Limit GHG Emissions

In 2017, the Trump Administration attempted to roll back Obama-era climate rules to limit GHG emissions through a series of delays outside of the notice and comment rulemaking process which is required to repeal, delay, or replace rules established through that process. The courts have yet to uphold any of the attempted delays brought before them and have struck down several. However, litigation over several key finalized Obama-era climate rules remains held in abeyance and implementation of the Clean Power Plan to limit GHG emissions from existing power plants remains stayed. In 2018, agencies shifted away from their extralegal delay

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https://academiccommons.columbia.edu/doi/10.7916/d8-dg03-cm33 (hereafter "Climate Litigation Report Year One").

[23] This section summarizes data and analysis in the Climate Deregulation Tracker, *supra* note 3, and draws language directly from the tracker with the author's permission. For a full analysis of climate deregulation during the Trump Administration, *see* Jessica Wentz and Michael Gerrard, *Persistent Regulations: The Trump Administration's Unfinished Business in Repealing Federal Climate Protections* (prepared by the Sabin Center for Climate Change Law for the Climate Leadership Council, forthcoming Jun. 2019).

[24] Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 30, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-03-31/pdf/2017-06576.pdf.

tactics and began to propose rules through notice and comment to repeal, withdraw, replace, or update Obama-era climate rules. These rules include:

- The "Affordable Clean Energy" Rule: An Environmental Protection Agency (EPA) proposed rule to regulate CO_2 from existing power plants which is far less stringent than the Clean Power Plan and revisions to new source review standards for power plants.[25]
- Weakened GHG Limitations for New Coal Plants: The EPA proposed to weaken the new source performance standard (NSPS) establishing CO_2 emission standards for new coal-fired power plants.[26]
- Repeal of Key Provisions of the Methane Waste Rule: The Bureau of Land Management (BLM) published a final rule repealing key provisions of the Methane Waste Prevention Rule and re-instating earlier regulations.[27]
- Revisions to Methane New Source Performance Standards for Oil & Gas Sector: The EPA published proposed revisions to its New Source Performance Standards (NSPS) for controlling methane and other emissions from the oil and natural gas sector, which include significant changes to the leak detection and repair requirements for sources in this sector.[28]

[25] Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44746 (Aug. 31,2018), *available at* https://www.govinfo.gov/app/details/FR-2018-08-31/2018-18755.

[26] Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 83 Fed. Reg. 65424 (December 20, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-12-20/2018-27052.

[27] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49184 (Sept. 28, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-09-28/2018-20689.

[28] Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration, 83 Fed. Reg. 52056 (Oct. 15, 2018), *available at* https://www.govinfo.gov/content/pkg/FR-2018-10-15/pdf/2018-20961.pdf.

- Delay of Compliance Timeframe for GHG Guidelines at Municipal Solid Waste Landfills: The EPA proposed to postpone the deadline for state plans issued pursuant to the GHG emission guidelines for MSW landfills from May 30, 2017 to August 29, 2019.[29]
- Weakened Clean Car Standards: The EPA and the National Highway Traffic Safety Administration (NHTSA) issued a proposal to weaken the greenhouse gas emission and fuel economy standards for light-duty vehicles Model Years 2021-2026 and withdraw the mid-term evaluation issued by the Obama Administration that no change to the standards was warranted.[30]
- Updated Renewable Fuel Standards: The EPA proposed an update to Renewable Fuel Standard Program for the years 2019 and 2020.[31]
- Repeal of GHG Metric for Measuring Highway Performance: The Federal Highway Administration repealed regulations establishing performance standards for state and regional highway projects. The regulations required, among other things, state and regional highway planners receiving federal funding to tally and report anticipated greenhouse gas emissions from vehicles traveling on their roads.[32]

As repeals and new rules are finalized they become ripe for challenge and are in turn becoming the subject of climate litigation as discussed in Part 4.1 of this report.

[29]Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 83 Fed. Reg. 54527 (Oct. 30, 2018), *available at* https://www.govinfo.gov/content/pkg/FR-2018-10-30/pdf/2018-23700.pdf.

[30] The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42986 (August 24, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-08-24/2018-16820.

[31] Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, 83 Fed. Reg. 32024 (Jul. 10, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-07-10/2018-14448.

[32] National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program, 83 Fed. Reg. 24920 (May 31, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-05-31/2018-11652.

2.2 Eliminate Guidance for Integrating the Costs and Impacts of Climate Change into Agency Reviews

Executive Order 13783 also disbanded the Interagency Working Group on the Social Cost of Carbon, rejected further use of the social cost metrics to help monetize and estimate the range of public health and other costs associated with emissions of carbon, methane, and nitrous oxide, and revoked the Council on Environmental Quality (CEQ)'s guidance on climate change and National Environmental Policy Act (NEPA) reviews. In this vein, several 2018 rollbacks continued to undermine consideration of climate science, impacts, and costs in agency decision-making, including:

- Proposal to Restrict Use of Science in Rulemaking: The EPA issued a proposal which would restrict the EPA, when issuing regulations, to relying only on scientific research for which the underlying data has been made available to the general public.[33]
- Advance Notice of Proposed Rulemaking on Cost-Benefit Analysis: The EPA issued an advance notice of a proposed rulemaking to "clarify" the agency's approach to cost-benefit analysis. The proposed rulemaking has implications for how the EPA will weigh costs and benefits in future climate regulations.[34]
- Advance Notice of Proposed Rulemaking on Changes to NEPA Regulations: The CEQ issued an Advance Notice of Proposed Rulemaking seeking public comments on potential revisions to update the NEPA regulations.[35]

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[33] Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18768 (April 30, 2018), *available at* HTTPS://WWW.GOVINFO.GOV/CONTENT/PKG/FR-2018-04-30/PDF/2018-09078.PDF.

[34] Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process, 83 Fed. Reg. 27524 (Jun. 13, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-06-13/2018-12707.

[35] Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28591 (Jun. 20, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-06-20/2018-13246. This update provides no explicit discussion of climate change, but the administration may use the NEPA regulatory update to modify or limit the extent to which climate change-related considerations are addressed in NEPA review.

- Proposed Changes to ESA Regulations Which Could Curtail Consideration of Future Climate Change Impacts on Species: The U.S. Fish & Wildlife Service (USFWS) issued proposed changes to its Endangered Species Act (ESA) regulations which include provisions that would limit the extent to which USFWS can rely on future climate change impacts as a basis for determining whether a species should be listed as a "threatened species" under the ESA.[36]

2. 3 Remove Barriers to Fossil Fuel Development

The Trump Administration has also made a concentrated effort to expand fossil extraction on public lands and in public waters. Complementing Executive Order 13783, at the end of April 2017, President Trump issued another order titled "Implementing an America-First Offshore Energy Strategy"(the Offshore Energy Order"). This order further removed barriers for fossil fuel development to establish a national policy "to encourage energy exploration and production, including on the Outer Continental Shelf," revoked presidential memoranda withdrawing certain areas of the Outer Continental Shelf in Alaska and along the Atlantic Coasts from leasing pursuant to Outer Continental Shelf Lands Act (OCSLA), and issued a variety of other directives to promote fossil fuel development in federal waters.[37] In 2018, several agencies made changes to policies and plans that implemented and supplemented efforts to expand fossil fuel extraction on federal lands and in federal waters:

- BLM Amends Management Plans to Open 9 Million Acres of Sage Grouse Habitat to Drilling and Mining: The BLM amended six resource management plans (RMPs) in the

[36] Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (Jul. 25, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-07-25/2018-15810; 83 Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, Fed. Reg. 35174 (Jul. 25, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-07-25/2018-15811; Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35178 (Jul. 25, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-07-25/2018-15812.

[37] Exec. Order No. 13795, 82 Fed. Reg. 20815 (May 3, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-05-03/pdf/2017-09087.pdf.

western U.S. to remove protections for the sage grouse. The revisions lift restrictions on mineral development on approximately 9 million acres of sage grouse habitat, opening these areas for oil and gas leasing and other extractive uses.[38]

- USFS Announces Regulations to Streamline Oil and Gas Permitting in National Forests: The U.S. Forest Service (USFS) published an advance notice of proposed rulemaking in which it is seeking comment on how it should modify existing regulations to streamline and expedite the issuance of oil and gas permits on national forest lands.[39]
- BLM Internal Policy to Streamline Oil and Gas Permitting: The BLM issued an instruction memorandum aimed at streamlining oil and gas development by eliminating the use of Master Leasing Plans—a tool used by the Obama Administration to protect sensitive landscapes from oil and gas drilling.[40]

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[38] Notice of Availability of the Oregon Proposed Resource Management Plan Amendment and Final Environmental Impact Statement, 83 Fed. Reg. 63524 (Dec. 10, 2018), *available at https://www.govinfo.gov/app/details/FR-2018-12-10/2018-26701;* Notice of Availability of the Wyoming Proposed Resource Management Plan Amendment and Final Environmental Impact Statement, 83 Fed. Reg. 63525 (Dec. 10, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-12-10/2018-26700; Notice of Availability of the Idaho Proposed Resource Management Plan Amendment and Final Environmental Impact Statement, 83 Fed. Reg. 63529 (Dec. 10, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-12-10/2018-26702; Notice of Availability of the Northwest Colorado Proposed Resource Management Plan Amendment and Final Environmental Impact Statement, 83 Fed. Reg. 63523 (Dec. 10, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-12-10/2018-26699; Notice of Availability of the Utah Greater Sage-Grouse Proposed Resource Management Plan Amendment and Final Environmental Impact Statement, Utah, 83 Fed. Reg. 63527 (Dec. 10, 2018), *available at* https://www.govinfo.gov/app/details/FR-2018-12-10/2018-26698; Notice of Availability of the Nevada and Northeastern California Greater Sage-Grouse Proposed Resource Management Plan Amendment and Final Environmental Impact Statement (Dec. 10, 2018), 83 Fed. Reg. 63528, *available at* https://www.govinfo.gov/app/details/FR-2018-12-10/2018-26703.

[39] Advance Notice of Proposed Rulemaking on Oil and Gas Resources Regulations; Request for Comment, 83 Fed. Reg. 46458 (Sept. 13, 2018), *available at* https://www.govinfo.gov/content/pkg/FR-2018-09-13/pdf/2018-19962.pdf.

[40] Bureau of Land Management, BLM Updating Oil and Gas Leasing Reform—Land Use Planning and Lease Parcel, Instruction Memorandum No. 2018-034 (02/01/2018), *available at* https://www.blm.gov/policy/im-2018-034.

- Proposed Oil and Gas Leasing Program in Arctic Refuge: The BLM is proposing to open up to 1.5 million acres of the Arctic National Wildlife Refuge for oil and gas drilling.[41]
- Proposed Expansion of Offshore Oil and Gas Drilling Program for 2019-2024: The Department of the Interior (DOI) proposed a new National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024, which would make over ninety-percent of the outer continental shelf available for oil and gas development.[42]

In the first few months of 2019, the Trump Administration has continued to undermine climate protections. In February, the Department of Energy (DOE) issued a proposal to repeal regulations that expanded energy efficiency standards to apply to a greater quantity of light bulbs.[43] In March, President Trump issued a pair of executive orders that expedite the approval of energy infrastructure and cross-border infrastructure—both policies that affect pipeline approvals.[44] In May, the BLM published a draft environmental assessment concluding that reinstating the coal leasing program on federal lands will have no significant environmental effects.[45]

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[41] The Department of the Interior, Coastal Plain Oil and Gas Leasing Draft Environmental Impact Statement, DOI-BLM-AK-0000-2018-0002-EIS (Dec. 2018), *available at* https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=102555&dctmId=0b0003e8810d09e5.

[42] Notice of Availability of the 2019-2024 Draft Proposed Outer Continental Shelf Oil and Gas Leasing Program and Notice of Intent To Prepare a Programmatic Environmental Impact Statement, 83 Fed. Reg. 829 (Jan. 8, 2018), *available at* https://www.govinfo.gov/content/pkg/FR-2018-01-08/pdf/2018-00083.pdf.

[43] Energy Conservation Program: Energy Conservation Standards for General Service Lamps, 82 Fed. Reg. 7322, 82 Fed. Reg. 7276 (April 1, 2019), *available at* https://www.govinfo.gov/content/pkg/FR-2019-04-01/pdf/2019-06265.pdf.

[44] Promoting Energy Infrastructure and Economic Growth, Exec. Order No. 13868, 84 Fed. Reg. 15495 (Apr. 15, 2019), *available at* https://www.govinfo.gov/content/pkg/FR-2019-04-15/pdf/2019-07656.pdf; Issuance of Permits With Respect to Facilities and Land Transportation Crossings at the International Boundaries of the United States, Exec. Order No. 13867, 84 Fed. Reg. 15491 (Apr. 15, 2019), *available at* https://www.govinfo.gov/content/pkg/FR-2019-04-15/pdf/2019-07645.pdf.

[45] Bureau of Land Management, Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal, DOI-BLM-WO-WO2100-2019-0001-EA (May 22, 2019), *available at* https://eplanning.blm.gov/epl-front-office/projects/nepa/122429/173355/210563/Lifting_BLM_Coal_Leasing_Pause_EA.pdf.

While the Trump Administration's climate deregulation may set a high-water mark, incoming Presidential administrations have commonly sought to distinguish their policy from that of their predecessors. The law provides a set of tools to moderate these transitions, constraining the activities of different actors in different contexts to different extents. On the one hand, Presidents enjoy a large degree of discretion and face very few procedural requirements for certain decisions that set policy direction for the executive branch—provided those decisions fall within the President's constitutional or statutory powers.[46] On the other hand, federal agency actions are subject to both the statutes that delegate agencies' regulatory authority and the Administrative Procedure Act (APA), including its requirements for meaningful public participation in rulemaking[47] and "formulat[ing] policies that can be justified by neutral principles and a reasoned explanation."[48] While agencies enjoy a great degree of flexibility in reversing guidance documents, administrative law more tightly governs how an agency can reverse or modify final rules or regulations.[49] For a summary of the judicial standards applied to deregulatory activities affecting final rules or regulations see Climate Litigation Report Year One Part 2.2. Some scholars have already begun to analyze how the Trump Administration's rollbacks and subsequent litigation is shaping expectations for presidential authority and administrative law.[50]

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[46] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[47] The Administrative Procedure Act (APA) § 3, 5 U.S.C. § 553.
[48] F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 537 (2009). For an extensive discussion of the standards of review and the procedural requirements on deregulation, see BETHANY DAVIS NOLL AND DENISE GRAB, DEREGULATION: PROCESS AND PROCEDURES THAT GOVERN AGENCY DECISIONMAKING IN AN ERA OF ROLLBACKS, Institute for Policy Integrity (Nov. 2017), *available at* http://policyintegrity.org/files/publications/Energy_Law_Journal_Deregulation_DG_BDN.pdf.
[49] Of course, agencies can undo the rules of their predecessors, but they must do so within the scope of the law. Sprint Corp. v. FCC, 315 F.3d 369, 373-374 (D.C. Cir. 2003).
[50] *See e.g.*, Bulman-Pozen "Administrative States: Beyond Presidential Administration" (forthcoming); Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. (forthcoming 2019); Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651 (2019)(discussing courts' remedial options in instances of what the authors term "regulatory slop" to describe agencies flouting the rules of administrative law).

3. OVERVIEW OF CLIMATE CHANGE LITIGATION IN THE FIRST TWO YEARS OF THE TRUMP ADMINISTRATION

This analysis takes stock of how climate change litigation has countered—and at times courted—climate deregulation in the first two years of the Trump Administration. However, the scope of domestic climate change litigation extends well beyond suits over deregulation. Climate change litigation shapes national climate policy in a variety of ways, encompassing not only recent rollbacks of federal climate policy, but also environmental review and permitting decisions that incrementally and cumulatively shape the law.[51] In fact, claims concerning "procedural monitoring, impact assessment, and information reporting," have composed a dominant volume of climate change litigation matters in the United States for years.[52] During the first two years of the Trump Administration, litigants have also sought to advance further climate protections through the courts in the face of federal inaction. Recognizing that not all of the Trump Administration deregulatory climate actions are judicially ripe for direct review and that climate change litigation shapes policy through a variety of avenues, this paper identifies five major ways that climate litigation is influencing climate change law during the Trump Administration.

3.1 Defining and Categorizing National Climate Change Litigation During the Trump Administration

This analysis reviewed cases collected in the "U.S. Climate Change Litigation Database" maintained through a partnership of the Sabin Center for Climate Change Law and the law firm Arnold & Porter ("Sabin-AP U.S. Climate Change Litigation database"). The database includes only cases that explicitly discuss GHG emissions or climate change impacts in relation to their

[51] David Markell and J.B. Ruhl, *An Empirical Assessment of Climate Change In The Courts: A New Jurisprudence Or Business As Usual?*, 64 FLA. L. REV. 15, 31, 41-46,57-65 (2012).
[52] *Id*. at 16-18.

claims. Other cases unquestionably have important impacts on reducing GHG emissions and adapting to the effects of climate change—for example, litigation concerning mercury and other non-GHG emissions from power plants, coal ash discharge rules, and royalty rates for federal coal, oil and gas—but these cases are not included unless climate change is an issue of fact or law. Thus, for instance, lawsuits challenging President Trump's decision to shrink National Monuments, effectively opening protected areas to increased fossil fuel development, are discussed narratively, but they are not included in the data set. In contrast, lawsuits challenging leasing for fossil fuel extraction on public lands that explicitly raise a claim concerning failure to account for the direct or indirect impacts of climate change or GHG emissions are included in the data set.

The data set of 159 cases reviewed for this analysis was assembled in the following way. First, a preliminary review was conducted of all state and federal "climate cases" contained in the Sabin-AP database and filed in 2017 or 2018.[53] From that database of 206 litigation matters filed in 2017 and 2018, 154 cases were selected for the dataset based on their relevance to issues of federal climate change law and policy. These 206 litigation matters were winnowed to 154 relevant cases for the following reasons. Twelve cases were removed because they involved only administrative actions or pre-litigation proceedings. Another 37 cases were removed from the data set because they primarily concerned state policies.[54] Two were removed because their

[53] Sabin-AP U.S. Climate Change Litigation Database *supra* note 14. The Sabin-AP database lists 206 cases as filed in 2017 and 2018 as of April 12, 2019. This number may shift as cases are subsequently consolidated or added. While possible that additional matters meet the definition of "climate case" used in this study, this study limited itself to cases in that database. Note also that "[t]he term "cases" in the U.S. chart comprises more than judicial and quasi-judicial administrative actions and proceedings. Other types of "cases" contained in the chart include rulemaking petitions, requests for reconsideration of regulations, notices of intent to sue (in situations where lawsuits were not subsequently filed), and subpoenas. In addition, one case may involve multiple complaints or petitions that have been consolidated, and the entry for a single case may include multiple decisions at the trial and appellate levels.

[54] These cases included such matters as state environmental plans, laws, and environment review. While an uptick in these cases could be a likely response to federal deregulation, this analysis focuses on cases that more directly shape and affect federal climate law and policy.

climate nexus arose only in the context of a consent decree concerning settlement of other legal action.[55] Cases in state courts or adjudicatory bodies were only included in the data set if they involved federal law or common law claims regarding national scale actions.[56] While many more state-level efforts unarguably play a critical role in shaping a national climate response, this analysis focuses on the trends common to climate litigation at the federal level. One additional case was removed from the data set for irrelevance and concerned a scientist challenging a journal where his work was published. Appendix B contains a full list of the 2017 and 2018 cases in the Sabin-AP database but removed from the data set reviewed in this paper.

Five cases in the Sabin-AP database that were filed before 2017 were added to the data set because they involved litigation which pivoted in response to Trump Administration deregulatory activity.[57] In each of these cases, an agency that had previously defended an Obama-era rule sought abeyance of the litigation so that the Trump Administration could review the rule. While not creating a new docket, in each case a new action related to deregulation was filed that effectively constituted a "new case" for the analysis. Since these cases concern new deregulatory efforts in the courts to reverse Obama-era climate-related rules, this analysis would be remiss without including this litigation.

Collectively, the above criteria resulted in the final data set of 159 cases: 73 filed in 2018, 81 filed in 2017, and 5 filed previously. A full list of cases reviewed for this analysis is available

[55] One concerned a citizen suit against owner-operators of power plant in Pennsylvania who agreed to cease combustion of coal by the end of 2028, except during certain "Emergency Action" events as part of the consent decree. The other concerned a Clean Air Act enforcement action against a natural gas processing plant in Illinois for alleged violations regarding fugitive emissions of volatile organic compounds (VOCs), but the mitigation activities to be undertaken will result in a reduction of carbon dioxide emissions. See Appendix B for further information.

[56] The common law claims included in the analysis concern alleged tort liability and fraud of companies operating at the national scale and which in most cases raises legal issues concerning a federal response, or lack thereof, to climate change.

[57] For list of cases see chart 6 in Appendix A. These suits concern the Clean Power Plan, new source performance standards for power plants, performance standards and emissions limits for landfills, and GHG emissions and fuel efficiency standards for medium- and heavy-duty engines, and new source performance standards for the oil and gas sector.

in Appendix A. Each case was categorized as one of five major responses to climate change deregulation:

1. **Defending Obama Administration Climate Policies & Decisions:** In these cases, litigants challenge a revocation, delay, or other rollback of a climate change-related policy or decision. The vast majority concern defense of Obama Administration decisions.
2. **Demanding Transparency & Scientific Integrity from the Trump Administration:** These cases undermine climate change deregulation by filing challenges under FOIA and similar state laws to illuminate the Trump Administration's activities to reduce climate change protections and/or reveal actions that may be illegal or unethical.
3. **Integrating Consideration of Climate Change into Environmental Review and Permitting:** These argue for greater consideration of climate change impacts or the effects of GHG emissions in adjudications over environmental permits, species listing/delisting under the Endangered Species Act, and/or other environmental review of individual projects. It also includes integrating consideration of climate change into agency policies, programs, and plans related to environmental review and permitting, but it does not include challenges to major climate-related rules or decisions of the Obama Administration (which are categorized as "defending existing climate-related policies & decisions.")
4. **Advancing or Enforcing Additional Climate Protections through the Courts:** These cases advance climate change protection through a mechanism other than the three more specific "pro" categories. Many advance novel theories involving constitutional law, common law, and statutory interpretation or implementation. A few seek to compel regulation or reporting not completed in the Obama-era.
5. **Deregulating Climate Change, Undermining Climate Protections, or Targeting Climate Protection Supporters:** This category encompasses any "con" climate litigation matters that if successful would support climate change deregulation,

reduce climate protections generally or at the project-level, and/or target climate protection supporters through FOIA or other means.

Cases were sorted according to the effect of their climate-related claims.[58] While described as "responses," some of these cases may very well have occurred even in the absence of the Trump Administration's deregulatory activities. A significant amount of climate litigation pre-dated the Trump Administration to challenge climate-related policies, fossil fuel extraction and infrastructure project approval, and consideration of climate change impacts during previous administrations. These categories are meant to describe how litigation not only responds, but more broadly interacts with the Trump Administration's efforts to undermine and remove climate change policies and protections.

Every categorization scheme suffers trade-offs between aggregation and detail. This categorization does not seek to replicate the granularity of previous climate litigation empirical studies,[59] but instead seeks to explain top-level developments in how litigation interfaces with climate change deregulation during the first two years of the Trump Administration. As noted earlier, the focus of the categorization is not based purely on the substance of the claim, but on how the cases will affect climate change deregulation—either positively or negatively—if the filing party is successful. The first four categories deal with "pro" cases that, if the plaintiffs/petitioners are successful, will positively affect climate protections and/or oppose climate change deregulation. The fifth category deals with the "con" cases which if the filing party is successful will support deregulation, undermine climate protections, or create a chilling influence on climate protection supporters. The "pro" or "con" distinction is based on the

[58] For example, California's challenge to the border wall is categorized in environmental review and permitting because its climate claim relates to a NEPA challenge. See Chart 3, Appendix A.
[59] *E.g.*, Markell and Ruhl (2012).

objective of the filing party or parties and whether their success would support or undermine climate-related protections.[60]

To better explain how litigants are attempting to shape climate change law and policy in the absence of federal leadership, cases were further categorized according to their: (1) dominant sector, (2) category of plaintiff, (3) defendant, (4) adjudicatory body, (5) principal law(s) at issue, and (6) current status. This categorization is available in Appendix A for all cases reviewed in the analysis. For cases involving multiple litigants or claims, all litigant types and principal laws at issue were counted. Accordingly, the counts of claims and parties in the data tables of Part 3.2 exceed the total number of cases in the data set. One particularly thorny accounting issue concerns delineating what counts as a single case. Cases that were consolidated or related prior to April 1, 2019 were counted as a single case. If a particular claim is being considered by both an agency adjudicatory body and a federal court that is also counted as a single case, e.g. a challenge to a pipeline authorization before both FERC and a federal court. This allows the data to more accurately represent the distribution of substantive issues, but less accurately represent the total volume of original cases filed.

3.2 Primary Features of the Climate Change Litigation Response to Deregulation

This section provides an overview of the defining features of how litigation has responded to climate change deregulation. It answers the following questions:

[60] Markell and Ruhl (2012) at 66 make a similar distinction between "pro" and "con" cases, noting "what we refer to as "pro" and "anti" cases, with "pro" cases having the objective of increasing regulation or liability associated with climate change and "anti" cases being aimed in the opposite direction." One particularly difficult categorization concerned the five pre-2017 cases. Each of these cases represented an original suit to rollback Obama-era climate rules. However, they were included in this paper because of how their 2017 developments reflected a response to climate change deregulation. Thus, this paper uses these 2017 developments as the baseline for analysis. These five abeyance motions are categorized within "Supporting Deregulation" because they represent an agency's effort to ice Obama-era rules and better enable review, repeal, and/or replacement outside the courts.

1. How do these cases respond to climate change deregulation?
2. Who are the litigants shaping the deregulation response?
3. What is the substance of the litigation?

3.2.1 How Do These Cases Respond to Climate Change Deregulation?

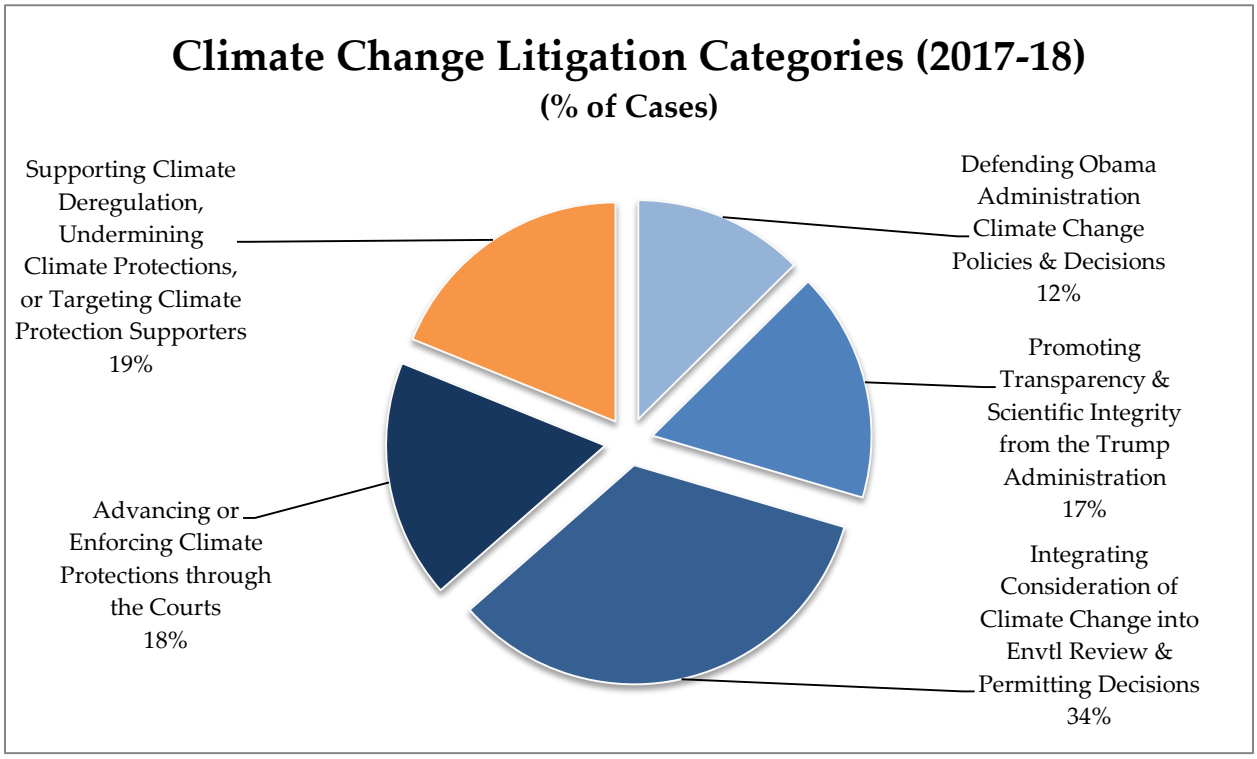
As noted above, the climate change cases revealed five major categories. Four of these categories worked in favor of climate change protections, the "pro" cases, and are demarcated with blue wedges in Figure 1. Figure 1 depicts the "con" cases in orange—these cases seek to lessen climate change protections. Looking across the full dataset of 2017-2018 cases, the pro cases outweigh the con cases roughly 4:1 (81% pro cases to 19% con cases). From 2017 to 2018 the proportion of con cases declined—con cases represented 27% of the suits filed in 2017, but only 10% of the cases filed in 2018. The high proportion of pro cases reflects a strong defensive effort from climate protection advocates responding to deregulation, but may underrepresent the field of ongoing con litigation filed prior to 2017 to challenge the Obama Administration's policies as well as the defensive actions of industry intervening in pro suits. The decline in con case filings from 2017 to 2018 at least partially reflects that in 2017, litigants were still challenging in-progress or established climate policies of the Obama Administration. Nevertheless, in 2018, litigants continued to file con cases that appealed permitting decisions, solicited information through FOIA, and pressured plaintiffs challenging the fossil fuel industry's activities.

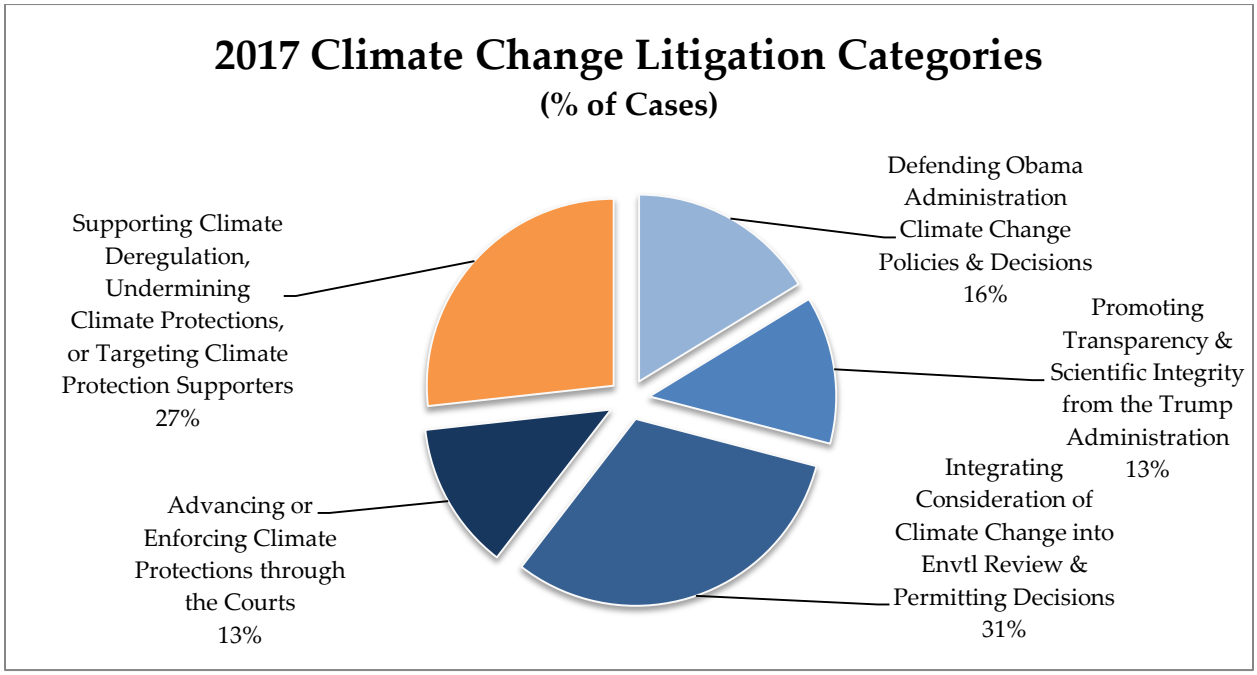
The distribution of litigation seeking to advance, defend, and enforce climate protections indicates a wide-ranging response to federal deregulation and inaction. Only 16% of pro cases filed over the two-year period directly challenged rollbacks and delays of climate-related protections and only about 8% of 2018 cases fell into this category of direct defense. The drop-off reflects challenges to the 2017 wave of delays and suspensions the Trump Administration attempted to enact without going through the mandated notice and comment rulemaking process. In 2018, there were fewer of these delay actions to challenge, but also few deregulatory actions that had completed the notice and comment process and were ripe to challenge as final

agency actions. As more repeals and rules are anticipated to be finalized in 2019-20, there may be another uptick in these direct defense actions. However, the fact that the defense suits represent only a small portion of the pro litigation is indicative of the broader suite of opportunities to challenge the Trump Administration's climate policy—or lack thereof. Pro litigants have responded to deregulation and inaction by: 1) filing cases that promote transparency & scientific integrity, 2) requiring agencies to uphold their legal obligations to consider climate change as part of environmental review, and advancing other climate-related protections. These indirect efforts represent both long-standing and new trends. For example, environmental review has represented a significant portion of climate litigation prior to the Trump and even Obama Administrations.[61] Conversely, FOIA claims appear to be growing—both in the pro and con categories. Thirty-two of the fifty-five FOIA cases in the Sabin-AP database were filed in 2017 or 2018.[62] From 2017 to 2018 there were increases in both the number of suits involving FOIA and the number of suits advancing or enforcing climate protections. These upticks suggest litigants' seeking avenues to promote climate action through the courts despite a limited set of opportunities for direct defense of rollbacks. While the proportion of cases in the environmental review and permitting category increased from 2017-2018, the number of cases was static. Section 4 discusses each major category and its subcategories in greater detail.

[61] Sabin-AP U.S. Climate Change Litigation Database *supra* note 14. The Sabin-AP U.S. Climate Change Litigation Database, which contains cases that raise climate change as an issue of fact or law, shows a steady trend of suits involving environmental review claims under NEPA. Over the past decade, the database contains the following counts of NEPA litigation matters by year: 2008 (12), 2009 (9), 2010 (10), 2011 (15), 2012 (7 cases), 2013 (13 cases), 2014 (20 cases), 2015 (14 cases), 2016 (30 cases), 2017 (24 cases), 2018 (24 cases).

[62] *Id*.


Climate Change Litigation Categories (2017-18)
(% of Cases)
Supporting Climate Deregulation, Undermining Climate Protections, or Targeting Climate Protection Supporters 19%
Defending Obama Administration Climate Change Policies & Decisions 12%
Promoting Transparency & Scientific Integrity from the Trump Administration 17%
Advancing or Enforcing Climate Protections through the Courts 18%
Integrating Consideration of Climate Change into Envtl Review & Permitting Decisions 34%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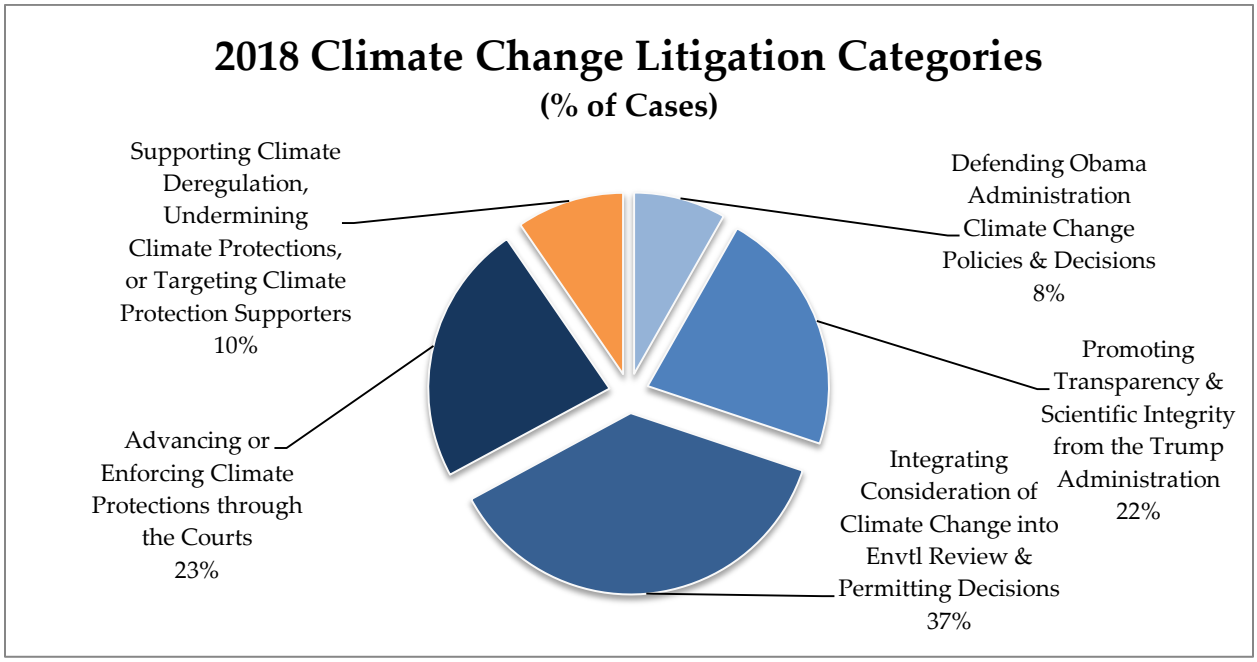

Figures 1a-c: Cases were assigned to a single category. Blue indicates "pro" cases in favor of climate-related protections and orange indicates "con" cases opposing climate-related protections. The final 2017-18 data set contained 159 cases, the 2018 dataset contained 73 cases, and the 2017 dataset contained 86 cases (inclusive of the 5 abeyance actions discussed previously. See Part 4 for further description of the cases assigned to each category.

3.2.2 Who Are the Litigants?

Plaintiffs/Petitioners filed 129 pro and 30 con cases in the dataset of 2017-2018 cases. Pro cases brought by NGOs represent more than half (99/159 cases or 62%) of the total climate litigation filed in 2017 and 2018. Looking within the pro category, NGOs brought 77% of the pro litigation items. A handful of national and international environmental NGOs were involved in more than half (64%) of all pro cases. Municipal, state, and tribal government entities were plaintiffs or petitioners in 25% of pro cases which included actions from more than a dozen different states.

Industry actors (private companies and trade groups) brought 16% of total cases (25/159) and 70% of con cases (21/30). These numbers do not include conservative think tanks closely aligned with industry interests—such groups were plaintiffs in 27% of the con NGO cases. Even still, these figures may not fully capture the full influence of industry actors because 1) industry intervenes in a large volume of cases (and those interveners were not tracked in this

analysis), and 2) industry filed challenges to Obama-era climate rules prior to 2017. As noted above, pre-2017 filings are only included where new abeyance activity in the docket during 2017 brings new climate deregulation efforts into the case.

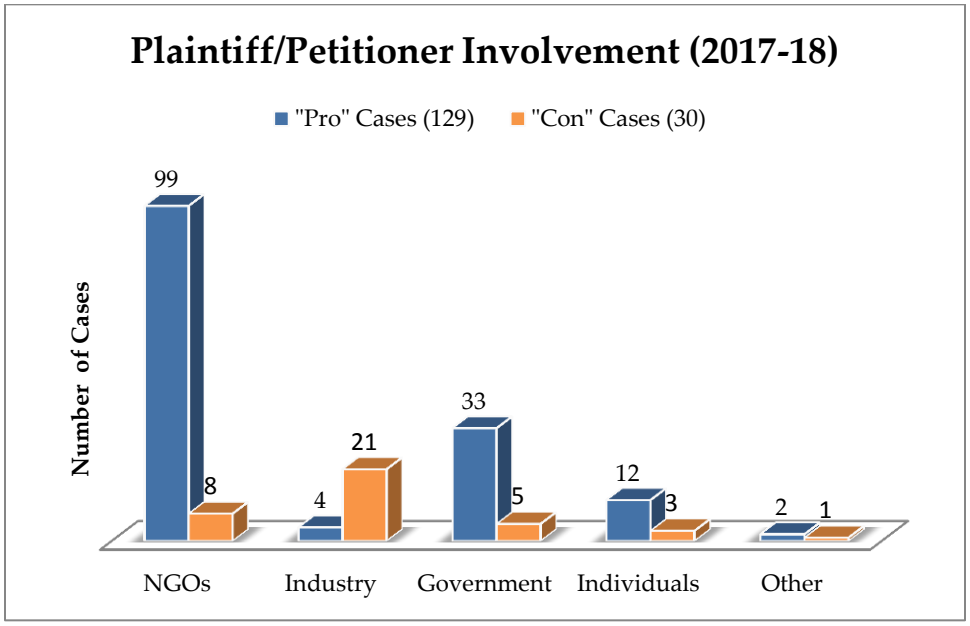

Figure 2: See Appendix A for data underlying figure. The numbers add up to more than the total number of cases because there are multiple parties in many of the cases. For the five pre-2017 cases included because of the abeyance actions taken in 2017, both the government party moving for the abeyance action and the original plaintiffs/petitioners in the case supporting the abeyance motion were counted as "plaintiffs/petitioners." This was done on the basis that the "abeyance" action was the development that motivated inclusion of the case in the data set of 2017-18 cases.

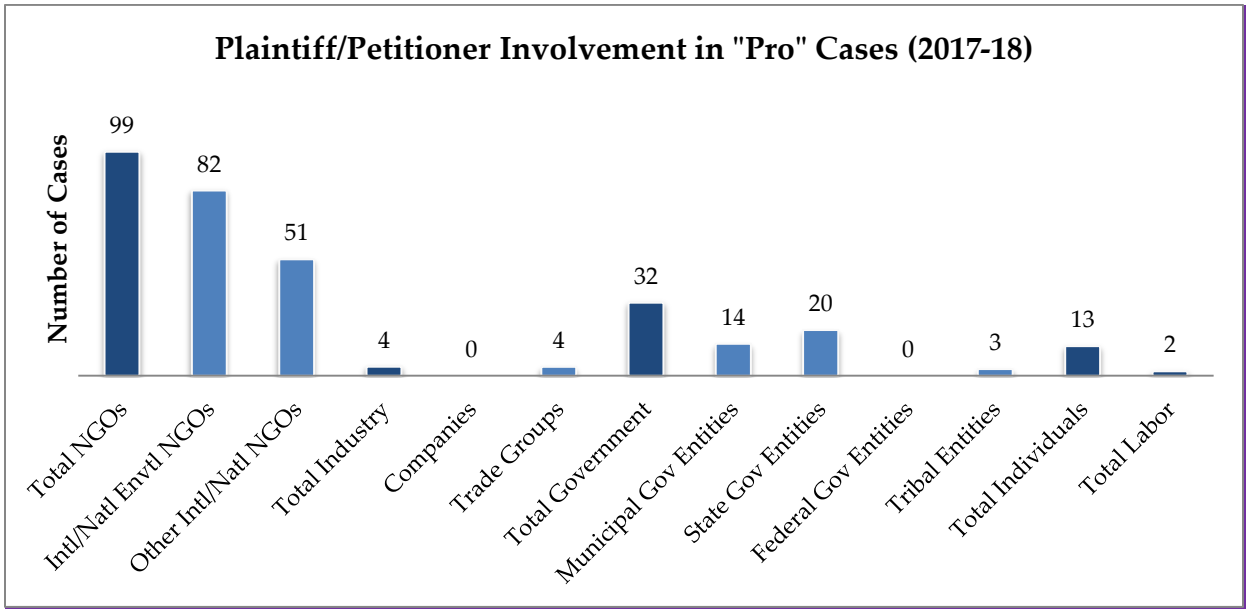

Figure 3: See Appendix A for data underlying figure. The numbers add up to more than the total number of cases because there are multiple parties in many of the cases.

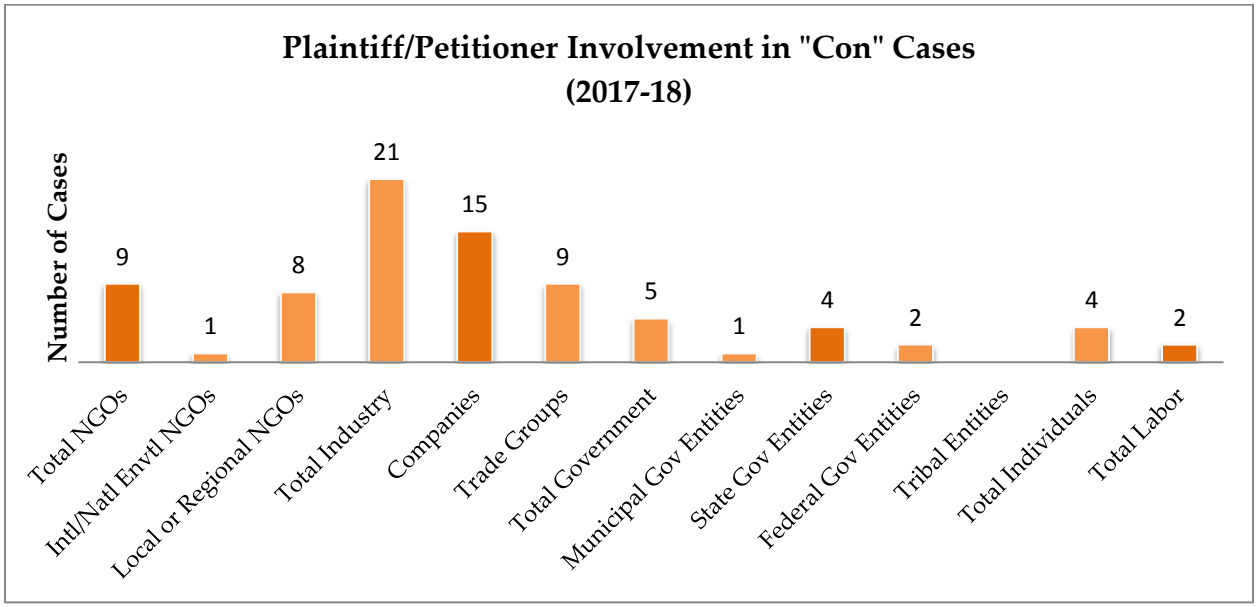

Figure 4: See Appendix A for data underlying figure. The numbers add up to more than the total number of cases because there are multiple parties in many of the cases. For the five abeyance actions taken in 2017, both the government party moving for the abeyance action and the original plaintiffs/petitioners in the case supporting the abeyance motion were counted as "plaintiffs/petitioners." This was done on the basis that the government "abeyance" action was the new development motivating inclusion of the case in the data set of 2017 cases, but the original plaintiffs/petitioners are involved in pressing the case and the abeyance action forward.

The federal government is the defendant in a vast majority of the cases filed in 2017 and 2018 (79% or 122/154, not including the abeyance cases because of the complex nature of categorizing the defendants for those cases). Cases against federal government officials in their official capacities were categorized as against the official's respective agency or department. While more than a dozen federal entities were sued, nearly half of the cases (46% or 71/154, not including the abeyance cases) against federal defendants challenged the DOI, EPA, their respective sub-entities, and/or their officials. Defendants also include local and state-level government entities, industry, and critics of fossil fuel companies. Among industry defendants, roughly 85% of these cases were against fossil fuel companies or pipeline developers—this encompasses the wave of suits filed by local and state government actors against fossil fuel companies for climate change-induced damages. The abeyance cases are pulled out as a separate bar since the original defendant was the Obama Administration EPA, and while the EPA is still listed as the defendant in these cases, they are now working to challenge the rules in these cases rather than defend them, aligning their behavior more closely with the petitioners.

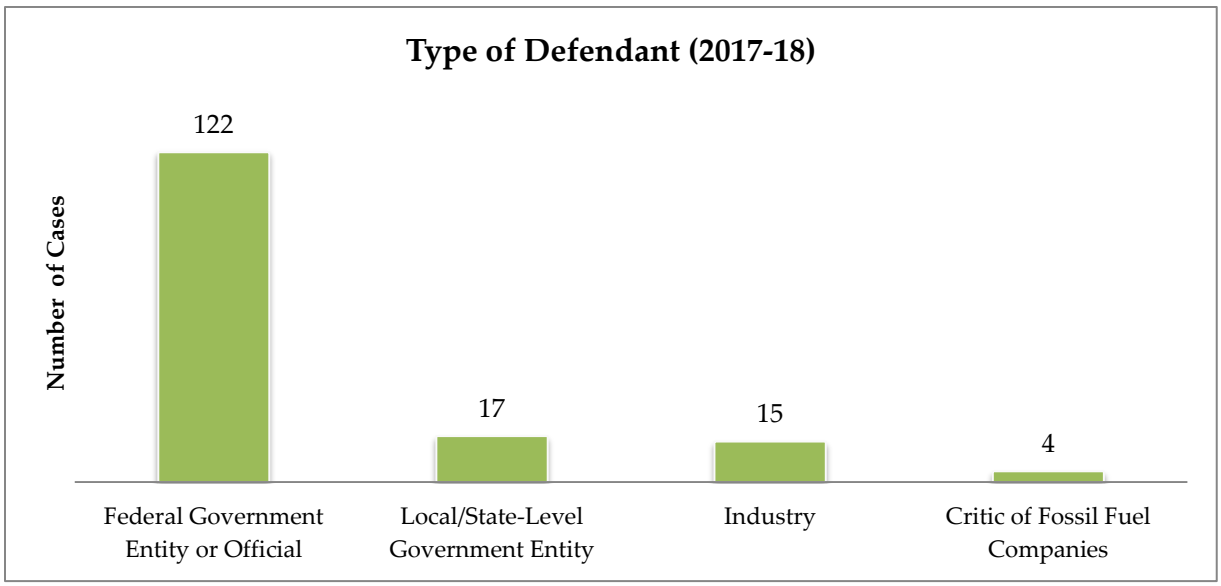

Figure 5: See Appendix A for data underlying figure. Abeyance actions are counted separately because of the complexities of categorizing the defendants as the government parties shifted stance after the election. In these cases the original government defendants are now playing a role more akin to petitioners by filing the motion for abeyance. A few cases involved multiple categories of defendant.

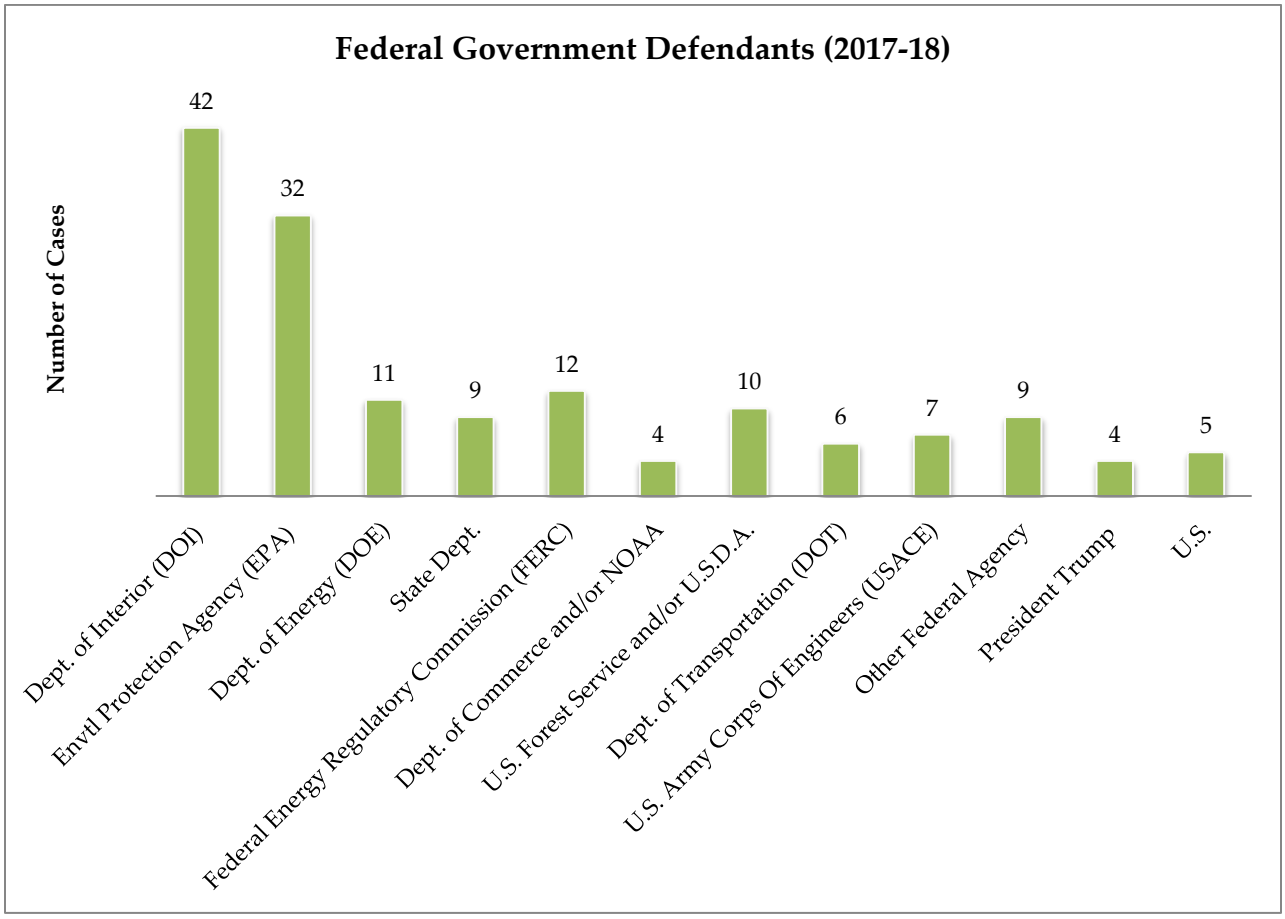

Figure 6: See Appendix A for data underlying figure. Each category includes suits against officials employed by the indicated government entity and subdivisions of that government entity. Many cases involved multiple defendants.

3.2.3 What is the Substance of the Litigation?

Climate litigation covered a wide spread of sectors in 2017-2018. The volume of cases concerning "fossil fuel extraction and infrastructure" or "climate, land, water, and wildlife" reflects in part the higher volume of adjudications over individual projects in these areas than in other sectors. Though the small number of cases concerning broad standards for transportation, power plant, and landfill emissions have the potential to influence an extensive quantity of GHG emission reductions. Thus, the volume of cases in each sector should not be read as indicative of the impact each sector has on climate change law and policy. Cases were assigned to a single dominant sector. All FOIA and other records-related cases were all grouped within

the "government records or communications" sector even if they concerned an underlying substantive topic area to better distinguish these suits from other types of claims.

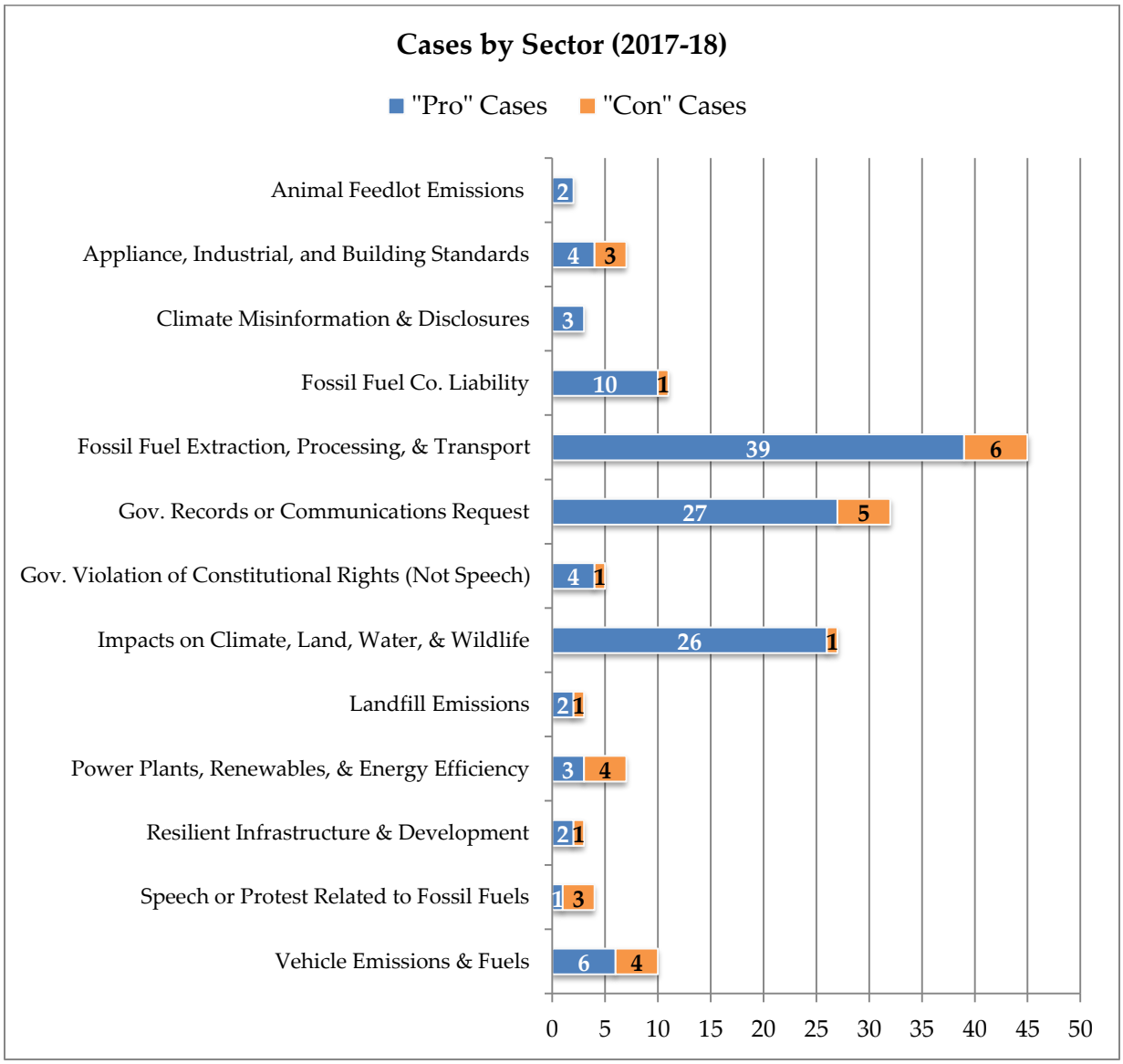

Figure 7: See Appendix A for data underlying figure. Each case was assigned a single dominant sector.

A vast majority of cases raised issues under federal environmental statutes and administrative law, often in combination. Eighty-two cases involved federal environmental statutes and at least one of four major environmental statutes—the Clean Air Act (CAA), the Clean Water Act (CWA), the Endangered Species Act (ESA), and the National Environmental

Policy Act (NEPA)—played a role in eighty-one of those lawsuits. Additional environmental statutes were also involved in these cases. Again the exact distribution of cases does not indicate proportional influence. Many of the NEPA decisions concern individual project and permitting decisions and the relatively large share of Clean Water Act (CWA) cases is at least partially attributable to a set of NEPA challenges to state-level CWA permitting decisions for fossil fuel projects. The preponderance of NEPA and CAA "pro" cases help explain the attacks on those statutes by those who seek to advance climate change deregulation. However, climate change protection proponents continue to push for incorporation of climate change considerations throughout a wide variety of federal environmental, natural resources, and energy law as well as raising claims under administrative, constitutional, and common law.

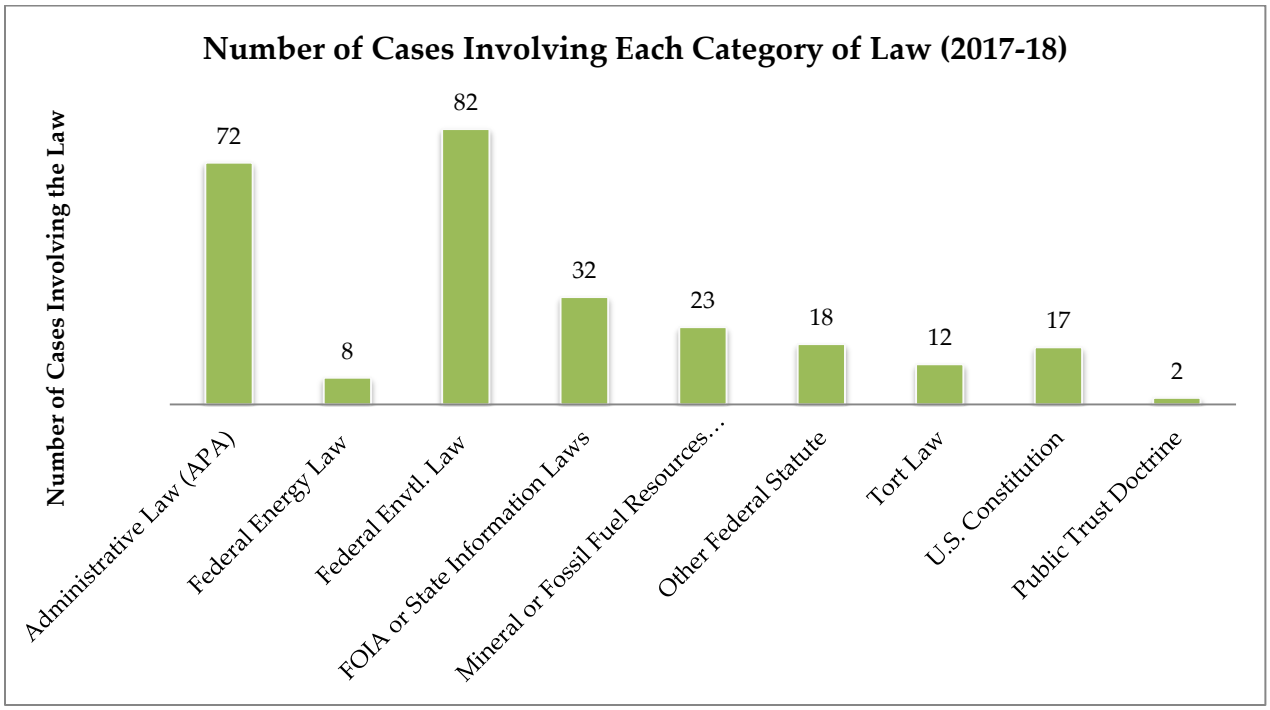

Figure 8: See Appendix A for data underlying figure. Laws were counted if they played a significant role in the case even if a claim was not brought specifically under that law. Many cases involved multiple laws. Again these numbers reflect cases that also raise federal questions of law so there may be additional suits concerning only state law that raise issues of tort law or public trust doctrine, but are not in the dataset.

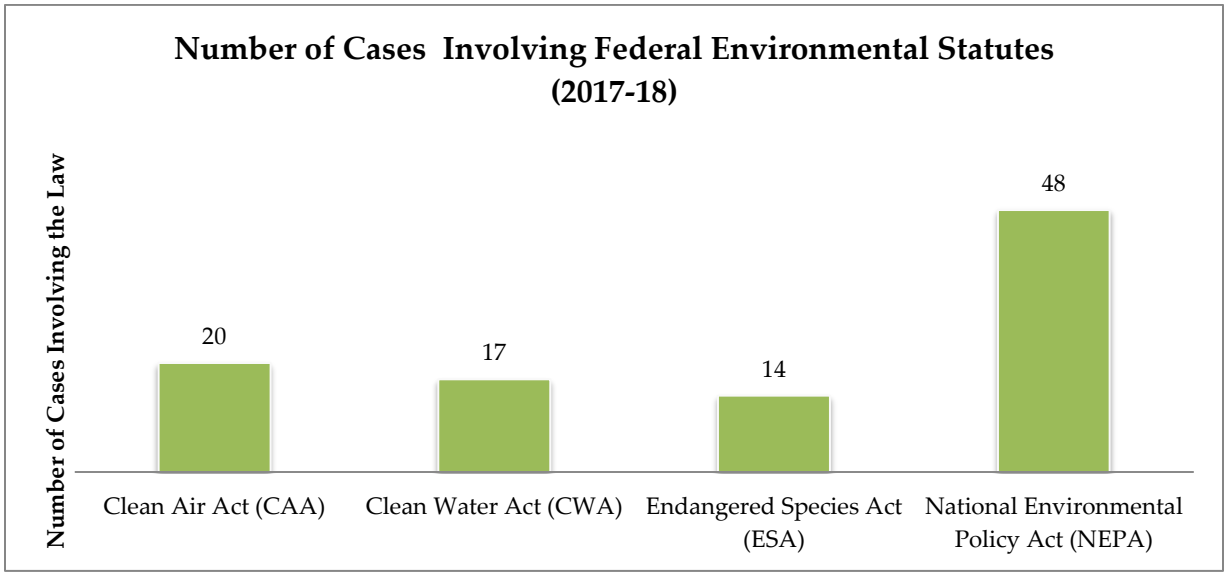

Figure 9: See Appendix A for data underlying figure. Counts represent number of cases involving a given law. Many cases involved multiple laws.

4. ANALYSIS OF MAJOR CATEGORIES IN CLIMATE CHANGE LITIGATION IN 2017-18

This section unpacks each of the five key climate change litigation categories in greater detail. It includes a brief overview of what cases constitute each category, summarizes the involved parties and laws, identifies subcategories, and provides a brief update on the progress of the litigation in each category. The discussion indicates where certain developments are specific to cases filed in 2017 or 2018 rather than common across both years. Footnotes in this section provide hyperlinks to the relevant case profile pages in the Sabin-AP U.S. Climate Change Litigation database.[63] These profiles contain relevant case documents and are regularly updated with new case developments. While significant climate litigation decisions handed down in 2018 and early 2019 but filed pre-2017 are not part of the dataset, they are discussed for their potential influence on pending litigation.

4.1 Defending Obama Administration Climate Policies & Decisions

About 12% of cases in the data set defend federal climate change protections established by the Obama Administration and targeted for rollback by the Trump Administration. These cases were brought primarily by municipal and state-level entities and environmental, public health, and government watchdog groups. In 2017, these took two primary tacks to defend climate policies in response to two types of rollbacks. One vein of cases contested the Trump Administration's wave of efforts to delay climate regulation through stays, suspensions, inaction, and other means without going through notice and comment rulemaking or meeting other legal obligations to justify a shift in policy. Some of these cases reacted to active announcement by agencies to delay policies, while others prodded agency inaction to publish delayed rules or put them into effect. A smaller subset of 2017 cases challenged non-regulatory

[63] In some places, case summary information is drawn directly from the Sabin-AP U.S. Climate Change Litigation database.

actions by the executive branch that are not subject to notice and comment rulemaking. These cases argued that the administration had acted beyond its constitutional and statutory legal authorities. For example, these cases sought to overturn Trump Administration policies that reversed a moratorium on federal coal leasing and opened previously protected areas to offshore drilling through executive order.

In 2018, litigation began to pivot in response to changing rollback strategies and the quantity of litigation in this category decreased overall. As the Trump Administration began to finalize repeals of Obama-era climate regulations through notice and comment rulemaking at the very end of 2017 and into 2018, these "final agency actions" were challenged under administrative and statutory law. Since agencies have begun to propose replacement rules for various climate policies in 2018, this type of suit will likely increase as replacement rules are finalized and become ripe for challenge. The Trump Administration continued a few climate-related regulatory rollbacks outside of notice and comment rulemaking, but they took a different tactic than the delay efforts of 2017, instead stating in a memorandum and the Federal Register that specific climate measures would not be enforced. Additional suits filed in 2018 maintained pressure on the Administration by challenging these attempts to suspend enforcement of policies as well as challenging a policy withdrawal that claimed it was not a final agency action because it was intended to initiate rulemaking for a replacement regulation. Additionally, one suit continued the pattern of direct challenge to non-regulatory executive branch actions that reversed Obama Administration policies.

By the Numbers:

- *Total Count*: The data set includes 14 cases meeting the above criteria from 2017 and another 6 from 2018.[64] Of the 2017 cases, about two-thirds involve delays or suspensions and the other third concern revocations, withdrawals, or new action that directs regulatory rollback. Of the six 2018 cases, two concerned attempts to suspend enforcement of policies, and four

[64] See Appendix A for list of cases.

challenged repeals or decisions to reverse policies, including two repeals that were finalized through the notice and comment process.

- *Plaintiffs/Petitioners*: The cases were brought by: state-level government entities (12), national or international environmental NGOs (12), local and regional organizations (7), municipalities (3), a tribe (2), and a union (1). Often cases included a combination of NGO and local, state, or tribal government plaintiffs. NGOs and local/state/tribal government entities were plaintiffs in thirteen of these suits, roughly two-thirds of this category of suits. .
- *Defendants*: Defendants include President Trump (2) and federal agencies, their sub-entities and officials: DOE (3), EPA (5), DOI (2), the State Department (3), and the Department of Transportation (DOT)(3).
- *Laws*: These cases involved: the APA (15), the CAA (5), the NEPA (5), public lands and natural resources law (including the OCSLA, the Federal Land Policy & Management Act (FLPMA), the Mineral Leasing Act (MLA), and the Federal Oil & Gas Royalty Management Act)(4), the Energy Conservation Act (ECA)(2), the Energy Policy & Conservation Act (EPCA)(1), the Energy Independence & Security Act (EISA)(1), the ESA and the Migratory Bird Treaty Act & Golden Eagle Protection Act (1), the CWA (1), the National Historic Preservation Act (1), and the U.S. Constitution (1). Looking specifically at the 2018 cases, roughly half involved the CAA and roughly half involved a combination of APA, NEPA, and public lands and natural resources laws.

Issues Raised:

- *Presidential Authority:* A few cases filed in 2017 claim that deregulatory actions were taken by President Trump outside of his allocated powers. One suit argues that the 2-for-1 Order violates the Take Care clause and the Separation of Powers doctrine which means the Order exceeds the President's constitutional authority.[65] Another suit argues that in purporting to open up areas of the Arctic and Atlantic oceans for oil and gas leasing that were formerly

[65] Public Citizen, Inc. v. Trump, No. 1:17-cv-00253, (D.D.C. filed Feb. 8, 2017).

protected by President Obama, the Offshore Energy Executive Order exceeds the statutory authority delegated to the President under the Outer Continental Shelf Lands Act (OCSLA).[66]

- *The Regulatory Freeze, Suspensions, and Other Delay Tactics:* Several 2017 suits challenge withdrawal, delay, and failure to publish final or draft final standards after the regulatory freeze took effect. These include standards related to energy efficiency of appliances and industrial equipment,[67] energy efficiency of manufactured housing,[68] a metric to measure GHG emissions from highways,[69] and penalties for violations of fuel economy standards.[70] In 2018, lawsuits challenged EPA's further attempts to suspend enforcement of policies through memorandum and notice in the Federal Register. These efforts included a "No Action Assurance" memorandum in which EPA provided assurance that it would not enforce its greenhouse gas emissions and fuel efficiency standards for trucks against small manufacturers of "glider" vehicles and kits,[71] notice it would not apply a rule limiting use of HFC's until it could complete rulemaking addressing a vacated portion of the existing rule,[72] and a withdrawal of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for

[66] League of Conservation Voters v. Trump, No. 3:17-cv-00101, (D. Alaska, vacated Mar. 29, 2019).
[67] Natural Resources Defense Council v. Perry, No. 18-15380 (9th Cir., stay granted Apr. 11, 2018). (challenging failure to publish final energy efficiency standards for five categories of appliances and industrial equipment); New York v. U.S. Department of Energy, No. 17-918 (2d. Cir., filed Mar. 31, 2017) (challenging delay of effective date for final energy conservation standards for ceiling fans).
[68] Sierra Club v. Perry, No. 1:17-cv-02700 (D.D.C., filed Dec. 18, 2017) (challenging failure to promulgate energy efficiency standards for manufactured housing under statutory and administrative law). The draft final standards at issue were withdrawn after the regulatory freeze.
[69] Clean Air Carolina v. U.S. Department of Transportation, No. 1:17-cv-5779 (S.D.N.Y., filed Jul. 31, 2017) (challenging delays and/or suspension of a performance metric to track GHG emissions from on-road mobile sources on the national highway system); People of State of California v. U.S. Department of Transportation, No. 4:17-cv-05439 (N.D. Cal., filed Sept. 20, 2017) (bringing a similar challenge to the same metric). The metric was part of a final rule published just before the Regulatory Freeze and became subject to it.
[70] Natural Resources Defense Council, Inc. v. National Highway Traffic Safety Administration, No. 17-2780, (2d Cir., rule vacated Jun. 29, 2018) (challenging delay of effective date for rule raising civil penalties for violations of fuel economy standards).
[71] Environmental Defense Fund v. EPA, No. 18-1190 (D.C. Cir., dismissed Aug. 22, 2018).
[72] Natural Resources Defense Council v. Wheeler, No. 18-1172 (D.C. Cir., filed Jun. 26, 2018).

Model Year 2022–2025 Light-Duty Vehicles issued by the Obama Administration upon a Trump Administration finding that these standards were too strict.[73]

- *Standards for Methane Emissions:* In 2017, several suits challenge stays and postponement of compliance dates for Obama Administration rules that reduce emissions of methane, arguing that these actions violate the APA and/or the CAA. These include challenges to the EPA's administrative stays of rules to reduce methane emissions from new oil and gas sector sources[74] and landfills[75] as well as BLM's multiple postponements of the effective date for its rule to limit methane waste during natural gas production on federal and tribal lands ("the methane waste rule").[76] In 2018, an additional suit challenged the repeal of the methane waste rule.[77]
- *Challenge to Agency Repeals of Climate Policies:* In 2018, litigation promptly challenged repeals or withdrawals of climate-related policies finalized after notice and comment rulemaking. These challenges concerned rules related to regulation of hydraulic fracturing on federal and tribal lands,[78] the methane waste rule,[79] and mid-term greenhouse gas emissions

[73] California v. EPA, No. 18-1114 (D.C. Cir. filed May 1, 2018).
[74] Clean Air Council v. Pruitt, 862 F.3d 1, 4 (D.C. Cir. 2017).
[75] Natural Resources Defense Council v. Pruitt, No. 17-1157, (D.C. Cir. dismissed Feb. 1, 2018).
[76] California v. U.S. Bureau of Land Management, Nos. 17-cv-03804-EDL, 17-cv-3885-EDL (N.D. Cal. vacated Oct. 4, 2017) (challenging a Jun. 15 Federal Register notice that purported to "to postpone the compliance dates for certain sections of the Rule."). The court vacated this postponement as outside of BLM's authority under the APA and in violation of the APA's notice and comment rulemaking procedures. The BLM has appealed this decision. California v. U.S. Bureau of Land Management, No. 3:17-cv-03804 (N.D. Cal. appeal filed Dec. 4, 2017). The BLM has also proceeded to try and postpone compliance dates through the notice and comment rulemaking. The final rule which would delay the most of the compliance dates under the rule by one year was subsequently challenged, plaintiffs were granted a preliminary injunction barring the government from enforcing the delay. California v. U.S. Bureau of Land Management, No. 3:17-cv-07186 (N.D. Cal., order Feb. 22, 2018). The government appealed the injunction, but then voluntarily dismissed the appeal. California v. U.S. Bureau of Land Management, No. 18-15711 (Ninth Cir. dismissed Jun. 26, 2018).
[77] California v. Zinke, No. 3:18-cv-05712 (N.D. Cal., filed Sept. 18, 2018).
[78] California v. U.S. Bureau of Land Management, No. 4:18-cv-00521 (N.D. Cal., filed Jan. 24, 2018).
[79] California v. Zinke, *supra* note 77.

limitations for light-duty vehicles model year 2022–2025 (clean car standards).[80] Each of these suits raised claims under the APA, including arguments that an agency action contradicted the record, lacked reasoned analysis, or failed to offer a reasoned explanation for a policy reversal. The first two cases also included claims under the NEPA regarding inadequate consideration of climate change as well as claims under the FLPMA and the MLA. The case concerning clean car standards brought claims under the APA.

- *Fossil Fuel Development and Infrastructure:* A number of suits filed in 2017 and 2018 challenge agency actions that advanced major fossil fuel development, including approval of the Keystone XL pipeline[81] as well as lifting the coal moratorium on federal lands and ending environmental review of the federal coal program.[82] The Keystone XL litigation relies on the NEPA, ESA, APA, and other wildlife statutes. The coal moratorium cases concern the NEPA, CWA, and APA. These suits concerning major reversals of Obama Administration policies track similar patterns discussed in the environmental review and permitting cases later in this report.

Key Developments:

While a number of these cases are still pending or pending on appeal, the courts have struck down Trump Administration rollbacks of climate policies when those cases have progressed to a judicial decision on the merits. None of the Trump Administration climate policy rollbacks have been upheld on the merits thus far. The Trump Administration has suffered additional losses in several cases which were voluntarily dismissed after the Trump Administration published a withheld rule or stopped delaying a rule from taking effect.

[80] California v. EPA, No. 18-1114 (D.C. Cir., filed May 1, 2018).
[81] Indigenous Environmental Network v. United States Department of State, No. 4:17-cv-00029 (D. Mont., filed Mar. 27, 2017) (bringing challenges under NEPA, ESA, and the APA); Rosebud Sioux Tribe v. U.S. Department of State, No. 4:18-cv-00118 (D. Mont., filed Sept. 10, 2018) (bringing challenges under NEPA, APA, and the National Historic Preservation Act).
[82] Citizens for Clean Energy v. U.S. Department of Interior, No. 4:17-cv-00030 (D. Mont., filed Mar. 29, 2017).

Looking more broadly at the scope of litigation challenging Trump Administration rollbacks, (not exclusively climate-related litigation), the NYU Institute for Policy Integrity found the Trump Administration was unsuccessful in 37/39 matters.[83] Looking more specifically at the climate cases, a similar trend tracks across the cases.

- *Regulatory Delay Cases*: The Trump Administration has not won a single one of the twelve cases concerning delay or suspension of climate-related rules. Five of these cases have resulted in a judicial decision against the Trump Administration (of which one has an appeal pending). Five pressured the Trump Administration to end the delay at issue in the lawsuit, and were then dismissed or otherwise allowed to lapse prior to a decision. Collectively, this litigation has prevented extralegal delays of climate protections and carved out a new body of legal precedent confirming the illegality of executive branch efforts to delay a previous administration's policies by means unauthorized by law. However, this litigation does not prevent the Trump Administration from pursuing legal avenues to reverse climate policies. Many of the rule delays reversed through litigation concern climate policies that are now being targeted through for delay, repeal, or replacement through the legally authorized process of notice and comment rulemaking.
    - **5 Court Decisions Ruled Against the Trump Administration's Delays Related to Methane Waste Rule,[84] NSPS for the Oil & Gas Sector,[85] Energy Efficiency Standards,[86] and Increases in Civil Penalties for CAFE Standards Violations[87]:**

[83] NYU Institute for Policy Integrity, *Round-Up Trump-Era Deregulation in the Courts* (updated April 22, 2019), *available at* https://policyintegrity.org/deregulation-roundup#fn-4-a.
[84] *Supra* note 80.
[85] Clean Air Council v. Pruitt, 862 F.3d 1, 4 (D.C. Cir. 2017). The D.C. Circuit Court of Appeals ruled that the U.S. Environmental Protection Agency (EPA) lacked authority to administratively stay portions of new source performance standards for the oil and gas sector and a rehearing en banc was denied, it signaled that extralegal delays beyond the notice and comment process would not be upheld.
[86] Natural Resources Defense Council v. Perry, No. 18-15380 (9th Cir., stay granted Apr. 11, 2018). An effort to delay final rules through a failure to publish them in the Federal Register has not fared well either. A federal district court ordered the U.S. Department of Energy to publish energy conservation standards adopted in December 2016 that had never taken effect because DOE failed to publish them in

These losses may partially explain subsequent agency choices to let delays lapse and be dismissed or to pursue delays through other avenues such as attempted suspensions of enforcement or rulemaking as discussed below.

- **5 Other Defeats of Trump Administration Delays & Suspensions Related to GHG Highway Metrics, Energy Efficiency Standards for Ceiling Fans, Truck Glider Kits, and Methane Emissions from Landfills:** Some litigation results occurred outside of the court room. Prodded by litigation, the DOE withdrew its stay and published notice putting energy efficiency standards for ceiling fans into effect at the end of September 2017.[88] In response to two other lawsuits, DOT published notice putting the metric for GHG emissions from highways into effect.[89] However, DOT also promptly published notice that it would repeal this metric.[90] EPA withdrew and promised not to enforce a "no action assurance" memorandum that provided assurance that EPA would not enforce greenhouse gas emission and fuel efficiency standards against small manufacturers of glider kits and vehicles. Subsequently, the court granted a motion to dismiss on mootness.[91] After being sued for delaying emissions standards for landfills, EPA allowed the delay to expire and withdrew

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violation of a non-discretionary duty under statute. The Ninth Circuit has stayed the order pending appeal.

[87] Natural Resources Defense Council, Inc. v. National Highway Traffic Safety Administration, No. 17-2780, (2d Cir., rule vacated Jun. 29, 2018). The Second Circuit granted summary vacateur of delays affecting CAFE standards upon a finding of no legal authority to issue the delays.

[88] Energy Conservation Program: Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 23723, *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-05-24/pdf/2017-10633.pdf.

[89] National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program, 82 Fed. Reg. 45179, *available at* http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170928_docket-417-cv-05439_Federal-Register-notice.pdf.

[90] National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program, 82 Fed. Reg. 46427, *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-10-05/pdf/2017-21442.pdf.

[91] Environmental Defense Fund v. EPA, No. 18-1190 (D.C. Cir., dismissed Aug. 22, 2018).

plans for further delays. Environmental groups then agreed to voluntary dismissal by stipulation.[92]

- **2 Suits Still Pending on Efficiency Standards for Manufactured Housing[93] and EPA's pre-rulemaking Determination That Obama Administration Greenhouse Gas Standards for Vehicles Were Too Stringent.[94] Thus far, the suit concerning efficiency standards for manufactured housing has survived a motion to dismiss.** Several challenges were filed against the withdrawal of the mid-term greenhouse gas emissions limitations for light-duty vehicles model year 2022–2025 continues which were consolidated and have now proceeded to briefing.

- *Non-Regulatory Executive Action Cases:* The few cases challenging executive orders or other non-regulatory actions are either still pending or resulted in losses for the Trump Administration.
  - **Obama-Era Offshore Drilling Ban Reinstated:** In March 2019, the U.S. District Court for the District of Alaska vacated a provision of the president's 2017 executive order on offshore drilling, reinstating Obama-era prohibitions on leasing in parts of the Arctic and Atlantic oceans.[95] The judge ruled that the President exceeded his authority because OCSLA only authorized the President to close areas to offshore drilling—not to also reopen them to drilling. The government will likely appeal, but this decision may be a pre-cursor for similar arguments raised in lawsuits challenging the Trump Administration reversing National Monument protections for Bears Ears and Escalante under the Antiquities Act.
  - **Reversal of Coal Moratorium Halted for Further Environmental Review:** In April 2019, the U.S. District Court for the District of Montana found on summary

[92] Natural Resources Defense Council v. Pruitt, No. 17-1157, (D.C. Cir. dismissed Feb. 1, 2018).
[93] Sierra Club v. Perry, No. 1:17-cv-02700 (D.D.C., filed Dec. 18, 2017).
[94] California v. EPA, No. 18-1114 (D.C. Cir. filed May 1, 2018).
[95] League of Conservation Voters v. Trump, No. 3:17-cv-00101, (D. Alaska Mot. for Summ. J. Mar. 29, 2019).

judgment that the government had violated environmental review requirements under NEPA by reversing the Obama Administration's moratorium on coal leasing on federal lands.[96] This ruling does not prohibit the reversal, but does compel DOI to conduct some further level of environmental review and provide good reasons if it opts to do a lesser review under a finding of no significant impact.

- **Keystone XL Permit Reversal Frozen:** The Ninth Circuit Declined to Lift Injunction Barring Keystone XL Construction and Preconstruction Activities after a Montana federal district court enjoined such activities pending the U.S. Department of State's completion of additional environmental review.[97] The district court found that the Department of State violated the National Environmental Policy Act (NEPA) and Administrative Procedure Act when it reversed the Obama administration's denial of a cross-border permit for the pipeline without providing a reasoned explanation for disregarding the Obama administration's factual findings concerning climate change and the U.S.'s role in contributing to and addressing climate change.[98] On March 29, 2019, however, President Trump issued a new presidential permit authorizing the pipeline's construction and revoking the March 2017 permit that is the subject of the lawsuit.[99]
- **2-for-1 Rule:** The lawsuit concerning the 2-for-1 rule is still pending, having been once dismissed for lack of standing, revived by an amended complaint, and then

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[96] Citizens for Clean Energy v. U.S. Department of Interior, No. 4:17-cv-00030 (D. Mont. order Apr. 19, 2019).

[97] Indigenous Environmental Network v. United States Department of State, No. 18-36068 (9th Cir., Mot. for a stay pending appeal denied Mar. 15, 2019).

[98] Indigenous Environmental Network v. United States Department of State, No. 18-36068 (9th Cir., order Nov. 08, 2018).

[99] Presidential Permit (Mar. 29, 2019), *available at* https://www.whitehouse.gov/presidential-actions/presidential-permit/. Following issuance of the new permit, the government and TransCanada asked the Ninth Circuit to order dismissal of the challenge to the 2017 permit, arguing that President Trump's revocation of the 2017 presidential permit rendered the plaintiffs' claims moot. A new suit was filed to challenge the 2019 permit. Indigenous Environmental Network v. Trump, No. 4:19-cv-00028 9D. Mont., filed Apr. 5, 2019).

surviving a motion to dismiss for lack of standing.[100] However, the court fell short of finding the plaintiffs to have standing, not finding the plaintiffs had demonstrated that any rule blocked by the order affected them. The case "currently sits in a liminal state" as the court cannot consider the merits without determining that it had jurisdiction. Meanwhile, in April 2019, attorneys general from California, Oregon and Minnesota challenged the 2-for-1 rule in a new suit.[101] Their suit may fare better against standing challenges based on their status representing the public.

- *Regulatory Repeal or Withdrawal Cases:* The three cases concerning repeals or withdrawals of climate policy that passed through notice and comment rulemaking all currently remain pending without any lower court decisions.[102] However, a couple of other recent suits suggest the Administration may have a difficult time justifying the basis for its repeals under the APA. In a suit challenging the one-year delay of the methane waste rule, (also established by notice and comment rulemaking), a federal district court granted plaintiffs' motions for preliminary injunction upon finding that BLM's reasoning for delaying the rule was "untethered to evidence contradicting the reasons for implementing the Waste Prevention Rule" and that plaintiffs were therefore likely to prevail on the merits.[103] The suit was voluntarily dismissed after the expiration of the delay so there was not a final ruling on the merits. In April 2019, the Trump Administration had its first repeal struck down in a lawsuit concerning rules for valuing oil, gas, and coal produced on federal lands.[104] The judge ruled that the repeal violated the APA and the agency "must provide 'a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered

[100] Public Citizen, Inc. v. Trump, No. 1:17-cv-00253, (D.D.C., granted Mot. to dismiss and for Summ. J. Feb. 8, 2019).
[101] California v. Trump, No. 1:19-cv-00960 (D.D.C., filed Apr. 4, 2019).
[102] *Supra* note 78-80.
[103] California v. U.S. Bureau of Land Management, No. 3:17-cv-07186 (N.D. Cal., order Feb. 22, 2018).
[104] California v. U.S. Department of Interior, No. 4:17-cv-05948-SBA (N.D. CA filed Jun. 25, 2018).

by the prior policy.'"[105] These suits suggest that at least BLM has failed to prioritize compliance with the rules of administrative laws in its haste to rollback climate policies.

4.2 Demanding Transparency & Scientific Integrity from the Trump Administration

A second vein of litigation pressures government agencies for higher levels of transparency and scientific integrity. These cases represent 17% of the cases in the data set. They were brought under the Freedom of Information Act (FOIA) primarily by environmental groups. In 2017, they largely sought to shine light on climate change denial, unethical, and/or potentially illegal climate-related activity within the Trump Administration. Documents obtained through these suits have been released by NGO plaintiffs to show a lack of substance behind climate change denying statements of administrators and to expose industry ties. In 2018, this trend has continued, but a greater number of suits seek records related to specific climate policy rollbacks. Some of these suits request substantive information underlying a policy decision, but most commonly these suits request communications between the Administration and industry in regard to the rollback. Access to the information released from these suits allows the public to better understand the nature of these rollbacks, the Administration's activities, and external influence potentially affecting the administration's decision-making. Additionally, several of these rollbacks are being directly litigated, thus the public information released from these requests could be relevant to ongoing legal actions.

By the Numbers:

- *Total Count*: The data set includes 27 cases meeting the above criteria.[106] Eleven were filed in 2017 and 16 in 2018.

[105] *Id*. at 17 (internal citations omitted).
[106] See Appendix A for list of cases.

- *Plaintiffs/Petitioners*: Cases were brought primarily by environmental groups (21). Additional actors filing this type of suit were government watchdog groups (4), the State of California (1), and a former federal employee (1).
- *Defendants*: FOIA violation suits involved more than a dozen different divisions or subdivisions of the administration, its agencies, and officials, including DOI, EPA, DOE, DOT, FERC, the State Department, National Ocean & Atmospheric Agency (NOAA), OMB, Bureau of Land Management, Department of Justice (DOJ), U.S. Fish & Wildlife Service (USFWS), and USFS. DOI and EPA received the most challenges with DOI, its sub-entities, and officials receiving 9 and EPA and its officials receiving 12. A few additional suits were filed under state information laws, but were excluded from the dataset as beyond the scope of its parameters.

Issues Raised:

- *Scott Pruitt's Potentially Illegal, Unethical, or Anti-Science Actions:* FOIA lawsuits from 2017 sought information revealing whether EPA Administrator Scott Pruitt was acting unethically, illegally, and/or in a manner to advance climate denial.[107] A Sierra Club suit secured 24,000 pages of EPA, emails, and call logs that it reported to reveal to "culture of corruption" and industry ties in Pruitt's EPA.[108] Pruitt resigned in June 2018, about a month after the release of the Sierra Club documents and other media coverage of a long list of

[107] California v. EPA, No. 1:17-cv-01626 (D.D.C., filed Aug. 11, 2017) (requesting records related to compliance with federal ethics requirements for appointing an interim authority when Administrator Pruitt needs to recuse himself or is disqualified from a matter); Sierra Club v. EPA, No. 1:17-cv-01906 (D.D.C., filed Sept 18, 2017) (requesting records "to shed light on secretive and potentially improper efforts by Mr. Pruitt and his core political team to nullify critical, lawful EPA regulations and policies"); Public Employees for Environmental Responsibility v. EPA, No. 1:17-cv-00652 (D.D.C. order Jun. 1, 2018) (requesting records underlying Administrator Pruitt's statements on a televised interview that disputed the role of human activity in causing climate change which the complaint alleged "stand in contrast to the published research and conclusions of the EPA").

[108] Sierra Club, "Pruitt Exposed: Sierra Club Secures 24,000 Pages of EPA Emails, Call Logs and Documents," (May 7, 2018), *available at* https://www.sierraclub.org/press-releases/2018/05/pruitt-exposed-sierra-club-secures-24000-pages-epa-emails-call-logs-and.

controversies. A report by the Inspector General corroborated unethical practices, finding Pruitt and his staff wasted nearly $124,000 on "excessive" premium travel arrangements and recommending Pruitt and the others involved pay back the money.[109]

- *Unethical Agency Practices and Inappropriate Industry Influence*: Influence over decision-making was a particular focus in several 2018 cases. These cases included three filed by Sierra Club in regard to communications between EPA and DOI officials with external stakeholders.[110]
- *General Climate Science Denial and Suppression:* In 2017, litigants sought to reveal unethical or illegal behavior more widely within the administration through FOIA requests for records related to such matters as reassigning an employee who advocated for addressing climate change,[111] and communications between a federal agency and the transition team including what might reveal a secret, climate-denying member of the transition team.[112] Other cases requested records on directives or communications related to removing the words "climate

[109] U.S. EPA OFFICE OF INSPECTOR GENERAL, ACTIONS NEEDED TO STRENGTHEN CONTROLS OVER THE EPA ADMINISTRATOR'S AND ASSOCIATED STAFF'S TRAVEL: REPORT NO. 19-P-0155 (May 16, 2019), *available at* https://www.epa.gov/sites/production/files/2019-05/documents/_epaoig_20190516-19-p-0155.pdf.

[110] Sierra Club v. EPA, No. 3:18-cv-02372 (N.D. Cal., filed Apr. 19, 2018)(seeking communications from seven new hires who each "lack prior experience or expertise in environmental protection and instead has a strong connection with anti-EPA organizations, companies, or politicians."); Sierra Club v. EPA, No. 4:18-cv-03472 (N.D. Cal., order issued Dec. 26, 2018)(seeking external communications and meeting records for EPA staff that Sierra Club alleged had "troubling ties to polluting industries."); Sierra Club v. U.S. Department of Interior, No. 4:18-cv-00797 (N.D. Cal., filed Feb. 6, 2018)(seeking disclosure of external communications of Department of the Interior officials).

[111] Clement v. U.S. Department of Interior, No. 1:17-cv-02451 (D.D.C., filed Nov. 14, 2017) (requesting records related to a former DOI employee's reassignment to a position he had no experience for after he raised the alarm regarding climate change threats to Alaskan communities and opportunities for the federal government to address those threats).

[112] Sierra Club v. EPA *supra* note 110; Natural Resources Defense Council v. U.S. Environmental Protection Agency, 1:17-cv-04084 (S.D.N.Y., filed May 31, 2017) (requesting records of certain federal agencies' communications with the Trump transition team); Protect Democracy Project, Inc. v. U.S. Department of Energy, No. 1:17-cv-00779 (D.D.C., Mot. for Summ. J. granted in part and den. in part Sept. 17, 2018) (seeking Trump transition team questionnaires regarding climate change).

change" from formal communications,[113] potentially biased objectives in a grid reliability study from DOE,[114] and on the decision to disband the review committee for the National Climate Assessment.[115] In 2018, this trend continued with suits seeking information related to the preparation and production of an "overdue" climate action report,[116] EPA instructions to employees about discussing their work publicly,[117] controlling EPA personnel participation in public events,[118] and communications with the Heartland Institute over scientists who might participate in a "Red Team/Blue Team" to put climate science under review.[119]

- *Industry Influence Over Specific Climate-Related Policy Rollbacks:* In 2018, lawsuits focused more narrowly on securing information related to rollbacks or inaction on specific climate-related policies including: U.S. aircraft emission standards,[120] the Methane Waste Prevention Rule,[121] and greenhouse gas and fuel efficiency standards for light- and medium-duty vehicles and for heavy-duty trailers.[122]

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[113] Center for Biological Diversity v. U.S. Department of Interior, No. 1:17-cv-0974 (D.D.C., filed May 23, 2017) (requesting directives and communications related to removal of climate change-related words from formal agency communications); Sierra Club v. EPA, *supra* note 110 (seeking records related to the withdrawal of "formerly prominent information about climate change—a phenomenon that, the scientific consensus warns, gravely impacts public health and the environment, but that tends to pressure Mr. Pruitt's supporters in the fossil fuel industry to reduce carbon emissions"—from the EPA website).
[114] Sierra Club v. U.S. Department of Energy, No. 3:17-cv-04663 (N.D. Cal., filed Aug. 14, 2017)(requesting documents related to the objectivity of the U.S. Department of Energy's study of U.S. electricity markets and the reliability of the electrical grid).
[115] Center for Biological Diversity v. National Oceanic and Atmospheric Administration, No. 1:17-cv-02031 (D.D.C. filed Oct. 3, 2017) (seeking records related to the termination of the Advisory Committee for the Sustained National Climate Assessment).
[116] Center for Biological Diversity v. U.S. Department of State, No. 1:18-cv-02139 (D.D.C. filed Sept. 16, 2018)
[117] Ecological Rights Foundation v. EPA, 3:18-cv-00394 (N.D. Cal. filed Jan. 18, 2018)
[118] Public Employees for Environmental Responsibility v. EPA. 1:18-cv-00271 (D.D.C. filed Feb. 6, 2018).
[119] Southern Environmental Law Center v. EPA, 3:18-cv-00018 (W.D. Va. filed Mar. 15, 2018).
[120] Center for Biological Diversity v. U.S. Department of State, 1:18-cv-02139 (D.D.C. filed Sept. 16, 2018).
[121] Environmental Defense Fund v. Department of the Interior, 1:18-cv-01116 (D.D.C. filed May 10, 2018).
[122] Environmental Defense Fund v. U.S. Department of Transportation, 1:18-cv-03004 (D.D.C. filed Dec. 19, 2018).

- *Technical or Scientific Information Underlying Policy Choices with Negative Climate Impacts:* Other 2018 cases sought substantive information underlying policy choices with negative climate impacts, including: two cases concerning subsidies for coal and nuclear-based power[123] and another case concerning vehicle emissions.[124]
- *Fossil Fuel Policy Development & Fossil Fuel Industry Influence:* In 2017, environmental groups requested information related to coal policy on federal land[125] and a secretarial order to increase onshore oil, gas, and mineral development.[126] In 2018, similar suits sought information on developing oil & gas leasing in the Arctic National Wildlife Refuge[127] and implementation of the Trump Administration's Executive Order 13783, "Promoting Energy Independence and Economic Growth."[128]

Key Developments:

While more difficult to gauge success of lawsuits filed in this category, many of the 2017 and 2018 FOIA suits have now produced documents which have exposed industry influence over policy decisions, unethical conduct by officials, and obfuscation of climate science. For example, the Sierra Club illuminated industry ties and controversial expenditures by the Pruitt EPA by securing 24,000 pages of EPA emails and call logs that it reported to reveal a "culture of corruption" in Pruitt's EPA. This information joined the steady drumbeat of media coverage of unethical behavior in Pruitt's EPA that preceded his resignation. FOIA suits can also reveal the lack of support behind statements of climate denial by administration officials and provide

[123] Sierra Club v. U.S. Department of Energy, No. 4:18-cv-04715 (D.D.C., filed Aug. 6, 2018); Union of Concerned Scientists v. U.S. Department of Energy, No. 1:18-cv-02615 (D.D.C., filed Nov. 13, 2018).
[124] Natural Resources Defense Council v. EPA, No. 1:18-cv-11227 (S.D.N.Y., filed Dec. 3, 2018).
[125] Center for Biological Diversity v. U.S. Bureau of Land Management, No. 1:17-cv-01208 (D.D.C. filed Jun. 20, 2017) (seeking BLM to release documents related to the federal coal program).
[126] WildEarth Guardians v. U.S. Department of the Interior Office of the Secretary, No. 1:17-cv-02512 (D.D.C., filed Nov. 20, 2017) (seeking DOI to release records related to Secretarial Order on onshore mineral leasing program).
[127] Defenders of Wildlife v. U.S. Department of the Interior, No. 18-cv-2572 (D.D.C., filed Nov. 8, 2018).
[128] Wilderness Society v. U.S. Department of Interior, No. 1:18-cv-01089 (D.D.C., filed May 9, 2018).

important clarification to the public. In response to a FOIA suit filed by the Public Employees for Environmental Responsibility seeking information underlying Administrator Pruitt's statement that human actions were not the primary driver of climate change, EPA handed over only one document which offered no basis for his statement.[129] The Environmental Defense Fund has posted documents received through a number of FOIA requests and lawsuits which provide the public and media access to climate information removed from government websites, communications between agency officials and polluting industries, and agency records concerning climate policy rollbacks.[130] In some cases FOIA lawsuits concern policy rollbacks that are later litigated on their substance, such as the rollbacks of the methane waste rule.[131] This may become a more common event as more rollbacks are pursued through notice and comment rulemaking.

4.3 Integrating Climate Change into Environmental Review & Permitting

Even before the Trump Administration took office, integrating climate change into federal environmental decision-making composed a major share of climate change litigation[132] and arguably would have continued to do so regardless of who assumed the Presidency. A similar number of cases were filed in 2017 and 2018 in this category, but these suits constitute a greater percentage of the suits filed in 2018. These cases encompass requirements to consider the direct and indirect GHG emissions of a federal project, policy, or decision; the impacts

[129] *See* Public Employees for Environmental Responsibility, "EPA Comes up Empty in Search for Climate Denial Science: Press Release" (Oct. 11, 2018), *available at* https://www.peer.org/news/press-releases/epa-comes-up-empty-in-search-for-climate-denial-science.html.

[130] *See* Environmental Defense Fund, "Promoting Government Transparency," (last update Mar. 2019), *available at* https://www.edf.org/climate/promoting-government-transparency.

[131] *See Id*.; "Environmental Defense Fund, EDF, Allies File Lawsuit Challenging Trump Administration Attack on Methane Waste Standards: Press Release," (Oct. 1, 2018), *available at* https://www.edf.org/media/edf-allies-file-lawsuit-challenging-trump-administration-attack-methane-waste-standards.

[132] *See* Ruhl & Markell (2012) at 31, 41-46, 57-65.

climate change might have on an agency action and the environmental consequences that might flow from them; and the ways in which projected changed conditions attributable to climate change are factored into agency analyses and decisions. These obligations stem from federal environmental statutes and natural resource laws, especially NEPA, CWA, CAA, and ESA. Many of these cases concern individual projects, such as approval of a pipeline, but other decisions, like national standards for shellfish permits, are more systemic. This set of cases composes 34% of the data set.

This set of cases reflects an ongoing series of "background battles" that cumulatively shape national climate change law and policy. This section summarizes only the cases seeking to enhance consideration of climate change impacts and GHG emissions (the "pro" cases). (See Category 5: Deregulating & Undermining Climate Protections for the "con" cases.) Collectively, these cases play out many of the concerns that the Obama Administration attempted to further integrate into climate change law through the CEQ's NEPA guidance; the estimates for the Social Cost of Carbon, Nitrous Oxide, and Methane ("social cost metrics"); and requiring agencies to review their rules in light of climate change adaptation. These cases do not directly challenge the withdrawal of CEQ's NEPA guidance or the social cost metrics, but the content of the rollbacks permeate a number of these cases. Consequently, the outcomes of these cases have bearing on the efficacy of these rollbacks.

These cases also challenge the implementation of the Trump Administration's Executive Orders and other actions promoting an expansion of fossil fuel development. In some cases, these lawsuits complement direct challenges to an Executive Order. For example, NGOs challenged the BOEM's decision to approve an offshore oil and gas development and production plan in the Beaufort Sea, a decision authorized by an executive order that opened that area up to drilling (which is itself subject to litigation). In some cases these suits may be the only avenue to challenge changes in agency practice or policy. For example, FERC has shifted its expectation for measurement of greenhouse gas emissions associated with a project—a

change in practice carried out—and challenged—in regard to decisions on individual projects because no overarching regulatory proposal has been put forward for challenge.[133]

Cases in the environmental review and permitting category discuss climate change in two overarching ways. One set of cases raises questions around how climate change will impact a federal project/decision or the species/environment affected by that project/decision ("climate impacts cases"). For example, a coastal transportation project may be susceptible to sea level rise or a species may be cumulatively impacted by a mine and drought conditions expected to worsen due to climate change. Climate impact cases chiefly involve decisions related to water, public lands, wildlife, and infrastructure vulnerability. Another set of cases concern GHG emissions associated with projects, especially projects related to oil & gas leasing, pipeline development, and other fossil fuel extraction and infrastructure construction-related projects ("GHG emissions cases"). The cases concerning GHG emissions primarily involve development of fossil fuel industry related infrastructure. Some cases concerned both climate impacts and GHG emissions.

Recent decisions demonstrate an uphill battle of influencing the law incrementally through these suits. In a few emerging decisions concerning oil & gas development on public land, courts have upheld NEPA requirements to consider greenhouse gas emissions in several ways, remanding at least one analysis, but have not yet vacated any agency decisions on these grounds. The D.C. Circuit has upheld a series of FERC authorizations for pipeline and natural gas-related projects despite petitions that these projects do not adequately assess greenhouse gas emissions associated with the projects. Many of the other types of environmental review decisions remain pending.

By the Numbers:

- *Total Count*: A total of 54 cases fell into this category, 27 cases filed in 2017 and 27 cases filed in 2018.

[133] *Infra* note 145.

- *Plaintiffs/Petitioners*: Cases were brought by local and regional NGOs—including local environmental groups (36); international or national environmental NGOs (36); municipal, state, or tribal entities (2); and commercial trade groups (3).
- *Defendants*: Defendants were largely federal entities including: Dept. of Interior and its sub-entities including BLM, USFWS, and Office of Surface Mining & Reclamation (23); Federal Energy Regulatory Commission (FERC)(10); U.S. Army Corps of Engineers (USACE)(6); EPA (3); USDA/USFS (6); the Department of Transportation (2); Federal Emergency Management Agency (FEMA)(1); U.S. Department of Homeland Security (1); U.S. Customs and Border Protection (1); and the federally-owned Tennessee Valley Authority (1). Three suits included state agency defendants and two suits were against pipeline developers.
- *Laws:* Cases involved: the NEPA (40), the APA (32), the CWA or other federal water law (10), the Natural Gas Act (NGA)(13), the ESA (11), Coastal Zone Management Act (CZMA)(3), the CAA (1), and the Ocean Dumping Act (1), FLPMA (4), Mining and Minerals Policy Act of 1970 (1), Stock Raising Homestead Act (1), Las Cienegas National Conservation Area Act (1), Forest Service Organic Act or National Forest Management Act (3), and the Pipeline Safety Act (1), the public trust doctrine (1), the Stafford Disaster Relief and Emergency Assistance Act of 1988 (1), and the National Historic Preservation Act (2), the Regulatory Flexibility Act (1), Outer Continental Shelf Lands Act (1), the Rivers & Harbors Act (1), the Wild & Scenic Rivers Act (1), the Marine Mammal Protection Act (1), the Internal Revenue Code (1), and the Fifth Amendment (1).

Issues Raised:

- *Impacts on Endangered and Other Vulnerable Species Act:* Litigants challenged the government's failure to adequately assess climate change impacts on species protected under the Endangered Species Act (ESA) and other vulnerable species. These included challenges to

ESA delisting decisions,[134] determinations that listing is not warranted,[135] failure to respond to petitions for listing,[136] failure to designate critical habitat,[137] and inadequate recovery plans.[138] These suits alleged inadequate consideration of the effects of climate change on species and at least some paired administrative law challenges for unjustified agency changes in position. Other cases stem from decisions related to mining,[139] dams,[140] oil and gas leasing,[141] or management regimes[142] which together with climate change have cumulative impacts on listed or vulnerable species. Some of these lawsuits specifically concern fossil fuel extraction activities contributing to climate change, such as a suit contesting the sale of oil and gas leases within and affecting sage-grouse habitat, alleging,

[134] Crow Indian Tribe et al v. United States of America et al., No. 9:17-cv-00089 (D. Mont., delisting rule vacated and remanded Sept. 24, 2018)(challenging delisting of Yellowstone grizzly distinct population segment).
[135] Center for Biological Diversity v. Zinke, No. 3:18-cv-00064 (D. Alaska, filed Mar. 8, 2018)(challenging determination that listing of Pacific walrus as endangered or threatened was not warranted with claims under the APA and ESA for failure to explain change in position and account for the latest science on projected loss of sea ice due to climate change).
[136] Center for Biological Diversity v. Zinke, No. 1:18-cv-00862 (D.D.C., filed Apr. 12, 2018)(seeking to compel determination on 2013 petition to list the Tinian monarch as endangered or threatened).
[137] Friends of Animals v. U.S. Fish & Wildlife Service, No. 1:18-cv-01544 (D. Colo., settlement agreement reached Dec. 21, 2018)(seeking to compel the U.S. Fish and Wildlife Service to designate critical habitat for the western distinct population segment of the yellow-billed cuckoo).
[138] WildEarth Guardians v. Zinke, No. 4:18-cv-0004 (D. Ariz., mot. to dismiss granted in part and den. In part, Mar. 30, 2019)(challenging recovery plan for Mexican wolves).
[139] Idaho Conservation League v. U.S. Forest Service, No. 1:18-cv-00504 (D. Idaho, filed Nov. 13, 2018) (challenging to approval of a mining exploration project including an alleged violation to provide "quantitative or detailed information" to support the conclusion that the project and threats posed by climate change, fire suppression, and other factors would not have measurable cumulative effects on whitebark pine).
[140] Save the Colorado v. Semonite, No. 1:18-cv-03258 (D. Colo., filed Dec. 19, 2018).
[141] Center for Biological Diversity v. U.S. Forest Service, No. 2:17-cv-00372 (S.D. Ohio, filed May 2, 2017) (challenging authorization of oil and gas leasing in the Wayne National Forest).
[142] Center for Biological Diversity v. Ross, No. 1:18-cv-00112 (D.D.C, filed Jan. 18, 2018) (alleging that authorization and management of lobster fishery violated federal law due to impacts on North American right whales).

among other things, a failure to address likely climate change impacts to the sage-grouse and its habitat.[143]

- *Pipelines & Other Fossil Fuel Infrastructure:* Fifteen of the cases in this category concerned pipelines or natural gas infrastructure. Among other claims, litigants alleged inadequate consideration of GHG emissions and climate impacts as part of environmental review under NEPA in approval of natural gas pipelines and other fossil fuel infrastructure projects.[144] Such cases often involve challenges to FERC's authorization of projects that are then challenged in court. One issue contested is how a 2017 D.C. Circuit decision requiring quantification of downstream emissions[145] for a pipeline project will be applied to other project determinations.[146] They have also been a battleground where FERC has attempted to shift its policy so that less consideration and quantification of greenhouse gas emissions will be necessary.[147] Some have also been a battleground between state entities seeking to halt

[143] Western Watersheds Project v. Zinke, No. 1:18-cv-00187 (D. Idaho, mot. for preliminary injunction granted, Sept. 21, 2018).

[144] *See e.g.,* In re Atlantic Coast Pipeline, LLC, No. 18-1224 et al. (D.C. Cir. 2018)(challenging to FERC approval of the Atlantic Coast natural gas pipeline); Appalachian Voices v. Federal Energy Regulatory Commission, No. 18-1114 (4th Cir., appeal dismissed and stay den. Mar. 21, 2018)(challenging to FERC approval of the Atlantic Coast natural gas pipeline); Delaware Riverkeeper Network v. Federal Energy Regulatory Commission, No. 18-1128 (D.C. Cir., filed May 9, 2018)(challenging FERC approval of PennEast Pipeline project).

[145] Sierra Club v. Fed. Energy Regulatory Comm'n, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (holding that FERC's "EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.").

[146] Birckhead v. Federal Energy Regulatory Commission, No. 18-1218 (D.C. Cir., filed Aug. 8, 2018)(challenging FERC authorization of project involving construction and replacement of natural gas compression facilities).

[147] *See* Otsego 2000, Inc. v. Federal Energy Regulatory Commission, No. 18-1188 (D.C. Cir., dismissed May 9, 2019)(asserting that FERC acted arbitrarily and capriciously in departing from D.C. Circuit precedent requiring FERC to evaluate greenhouse gas emissions from fossil fuel production and transportation projects). The case was dismissed for lack of jurisdiction and the court did not rule on the merits. For more detailed analysis of how upstream and downstream greenhouse gas emissions must be considered during environmental review see Michael Burger and Jessica Wentz, *Evaluating the Effect of Fossil Fuel Supply Projects on Greenhouse Gas Emissions and Climate Change Under NEPA* (forthcoming 2019, draft on file with the author).

the pipeline and FERC's authorization.[148] In addition to NEPA and APA arguments, a suit concerning the Bayou Bridge Pipeline project in Louisiana also raised arguments regarding climate impacts on the project and environment, alleging that the Corps' "public interest" review pursuant to the Clean Water Act and Rivers and Harbors Act did not adequately consider floodplains and coastal loss impacts and asserting that Executive Order 11988 required the Corps to "consider alternatives to avoid adverse effects and incompatible development in the floodplains."[149]

- *Oil & Gas Leasing*: Eleven cases in this category concerned oil & gas leasing or other development. These included cases concerning offshore and onshore extraction. In regard to offshore development, one suit challenged federal actions authorizing oil and gas development project in the Beaufort Sea offshore of Alaska with claims under NEPA, APA, OCSLA, and the ESA[150] and another concerned Gulf offshore leases with claims under NEPA and APA.[151] The Beaufort case raised claims related both to inadequate consideration of greenhouse gas emissions and to impacts of a changing climate on vulnerable species. A variety of challenges related to inadequate consideration of greenhouse gas emissions were brought under NEPA and APA to contest oil and gas lease sales across large areas of public

[148] In re Valley Lateral Project, No. 17-3770, 17-3503 (NYSDEC 2017). NYSDEC asserted that FERC's environmental review of the project was insufficient in light of recent D.C. Circuit case law requiring consideration of downstream GHG emissions. FERC denied the request to reopen the record and stay or hold a rehearing and stay. In re Millennium Pipeline Co., No. CP16-17-000 (FERC, rehearing and stay den. Nov. 16, 2017). The 2nd Circuit denied a petition for review. New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission, No. 17-3503, 17-3770 (2d. Cir. 2017)(finding NYSDEC had waived its authority to deny a CWA permit irrespective of the GHG question).

[149] Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers, No. 18-30257 (5th Cir., preliminary injunction vacated Jul. 6, 2018).

[150] Center for Biological Diversity v. Zinke, No. 18-73400 (9th Cir., filed Dec. 17, 2018).

[151] Gulf Restoration Network v. Zinke, No. 1:18-cv-01674 (D.D.C., filed Jul. 16, 2018).

lands in the National Petroleum Reserve–Alaska,[152] and public lands in Western Colorado,[153] Colorado and Utah,[154] and Montana.[155]

- *Water & Wildfire-Related Management Decisions:* Several cases filed in 2017 alleged failure to adequately consider how climate change would reduce water availability or quality, typically under NEPA or the CWA. The claims concern integration of climate change considerations into agency practice, e.g. when issuing national shellfish permits[156] and updating the USACE's Master Water Control Manual for federal dams.[157] In 2018, litigants filed a suit challenging U.S. Forest Service plan to reduce wildfire risk.[158]
- *State Interests in Federal Climate Consideration:* In 2017, state government entities argued federal agencies' decisions failed to consider future resilience projects or climate impacts affecting state-level entities.[159] In 2017, California further challenged the Trump Administration's border wall for violating NEPA, CZMA, and other statutory law.[160]
- *Infrastructure Resilience*: Several 2018 cases concerned inadequate consideration of the impacts of climate change on infrastructure under NEPA and other statutes. These cases

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[152] Natural Resources Defense Council, Inc. v. Zinke, No. 3:18-cv-00031 (D. Alaska, order Dec. 6, 2018); Northern Alaska Environmental Center v. U.S. Department of the Interior, No. 3:18-cv-00030 (D. Alaska, order Dec. 6, 2018).
[153] Wilderness Workshop v. U.S. Bureau of Land Management, No. 1:18-cv-00987 (D. Colo., filed Apr. 26, 2018).
[154] Rocky Mountain Wild v. Zinke, No. 1:18-cv-02468 (D. Colo., filed Sept. 27, 2018).
[155] WildEarth Guardians v. U.S. Bureau of Land Management, No. 4:18-cv-00073 (D. Mont., filed May 15, 2017).
[156] Center for Food Safety v. U.S. Army Corps of Engineers, No. 2:17-cv-01209 (W. D. Wash., filed Aug. 10, 2017).
[157] National Wildlife Federation v. U.S. Army Corps of Engineers, No. 1:17-cv-00772 (D.D.C., filed Apr. 27, 2017).
[158] Klamath-Siskiyou Wildlands Center v. Grantham, No. 2:18-cv-01604 (E.D. Cal., filed Oct. 16, 2018).
[159] *See e.g.*, Regents of University of California v. Federal Emergency Management Agency, No. 3:17-cv-03461 (N.D. Cal., stipulation entered Nov. 8, 2017) (challenging FEMA's failure to renew wildfire mitigation grants); Rosado v. Pruitt, No. 1:17-cv-04843 (E.D.N.Y., filed Aug. 17, 2017) (challenging decision approving ocean-dumping site in the Long Island Sound).
[160] In re Border Infrastructure Environmental Litigation, Nos. 18-55474, 18-55475, 18-55476 (9th Cir., affirmed Feb. 11, 2019)(affirming summary judgment for Department of Homeland Security in challenge to waivers for construction of border wall projects in California).

include challenges to federal allocation for a passenger railroad in Florida,[161] a resiliency analysis for Railroad Bridge in Connecticut,[162] and a proposal for a Colorado dam.[163]

Key Developments:

While many of these cases are still pending, recent decisions offer some information on how these different types of cases are shaping climate change law by creating precedent to consider climate change impacts and greenhouse gas emissions, but may not ultimately stop a project and are also subject to various procedural limitations.[164] All decisions discussed below concern cases filed in 2017 or 2018 from the underlying dataset unless explicitly noted otherwise.

- *Oil & Gas Leasing*: Two federal court decisions from early 2019 on oil and gas leasing upheld legal obligations for agencies to consider greenhouse gas emissions during environmental review. A Colorado District Court recently found that BLM failed to comply with NEPA by not taking a hard look at the reasonably foreseeable indirect impacts from combustion of oil and gas, but deferred a final ruling on the remedies until further briefing is received.[165] Another recent decision concerning Wyoming leases, (which was not part of the dataset because it was filed in 2016), resulted in a decision from the D.C. District Court to remand the environmental review back to the agency upon a finding that the review failed to take a

[161] Martin County, Florida v. U.S. Department of Transportation, No. 1:18-cv-00333 (D.D.C., filed Feb. 13, 2018)(alleging federal defendants did not take a hard look at the project's environmental impacts under NEPA, including adverse environmental impacts from sea level rise).
[162] Norwalk Harbor Keeper v. U.S. Department of Transportation, No. 3:18-cv-00091 (D. Conn., filed Jan. 18, 2018)(contending that the defendant agencies had failed to consider the reasonable alternative of a fixed bridge that would promote resiliency to climate change and severe weather events, and particularly to heatwaves).
[163] Save the Colorado v. Semonite, No. 1:18-cv-03258 (D. Colo., filed Dec. 19, 2018)(alleging failure to take a hard look at how climate change will likely affect the ability of the project (as compared to other alternatives) to satisfy Denver Water's stated purpose and need).
[164] For a full analysis of changing legal requirements concerning greenhouse gas emissions accounting, see Burger & Wentz (forthcoming 2019), *supra* note 147.
[165] Citizens for a Healthy Community v. U.S. Bureau of Land Management, No. 1:17-cv-02519 (D. Colo. order Mar. 27, 2019).

"hard look" at downstream GHG emissions or consider the cumulative impacts of the emissions. The court enjoined issuance of these leases and remanded the reviews to the agencies to cure the defects, but did not vacate the agency's determination.[166] These cases demonstrate the courts' role in upholding legal requirements under NEPA to consider greenhouse gas emissions—even in light of the Trump Administration's attempts to undermine these requirements—and capacity to slow down the development of fossil fuel resources on federal lands, but still may choose to not vacate an agency's decision and can only enforce the procedural requirements of NEPA to give a hard look to these issues. Recent decisions concerning environmental review of oil and gas development in the NPR-A were found to be time-barred[167] or not necessary prior to site specific analysis.[168]

- *Pipeline & Natural Gas Infrastructure*: A complicated web of litigation surrounds proposed pipeline projects so these decisions are not necessarily fully representative of how the projects fare in court, but the recent climate-related decisions have met challenges under FERC and the courts. FERC has authorized projects and then denied rehearing in several petitions raising arguments around the adequacy of greenhouse gas emission considerations for the Atlantic Bridge Project,[169] the Mountain Valley Pipeline Project,[170] and the PennEast Project.[171] Two of these authorizations have been upheld by the D.C. Circuit and one is still pending before that court. Another challenge to FERC authorization for a natural gas compressor station project in New York (the New Market Project), marked FERC's policy departure including estimates of upstream and downstream GHG emissions in its pipeline

[166] WildEarth Guardians v. Zinke, No. 1:16-cv-01724 (D.D.C., order Mar. 19, 2019).
[167] Natural Resources Defense Council, Inc. v. Zinke, No. 3:18-cv-00031 (D. Alaska, order Dec. 6, 2018).
[168] Northern Alaska Environmental Center v. U.S. Department of the Interior, No. 3:18-cv-00030 (D. Alaska, order Dec. 6, 2018).
[169] Town of Weymouth v. Federal Energy Regulatory Commission, No. 17-1135 (D.C. Cir., pet. for review den. Dec. 27, 2018)(upholding FERC approval of Atlantic Bridge Project).
[170] Appalachian Voices v. Federal Energy Regulatory Commission, No. 18-1114 (4th Cir., appeal dismissed and stay den. Mar. 21, 2018)(upholding FERC approval for Mountain Valley Pipeline and rejecting claims regarding review of downstream emissions).
[171] Delaware Riverkeeper Network v. Federal Energy Regulatory Commission, No. 18-1128 (D.C. Cir., filed May 9, 2018)(challenging FERC approval of PennEast Pipeline project).

orders, but was recently dismissed by the D.C. Circuit for lack of jurisdiction.[172] A Fourth Circuit challenge to FERC authorization of the Atlantic Coast pipeline alleging inadequate greenhouse gas emissions review was scrapped as premature as the FERC petition for rehearing was still pending.[173] A few cases challenging issuance of CWA permits were also unsuccessful.[174]

- *Other Infrastructure*: The Ninth Circuit affirmed a decision of the federal district court for the Southern District of California upholding waivers of environmental requirements granted by the Department of Homeland Security for construction of certain border wall projects in California.[175]
- *Endangered & Vulnerable Species*: An Idaho federal court granted a preliminary injunction to plaintiffs and ordered BLM to apply 2010 procedures to oil and gas lease sale procedures in sage-grouse habitat.[176] While precedent does support consideration of climate change impacts in the ESA cases, climate does not appear to have been the major determining factor in vacating the grizzly bear delisting[177] and another suit concerning designation of critical

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[172] Otsego 2000, Inc. v. Federal Energy Regulatory Commission, *supra* note 147.

[173] Appalachian Voices v. Federal Energy Regulatory Commission, *supra* note 170.

[174] The Third Circuit denied a pair of lawsuits related to state permitting under the CWA and Pennsylvania law for a natural gas pipeline. Delaware Riverkeeper Network v. Secretary of Pennsylvania Department of Environmental Protection No. 17-1533 (3d. Cir., Pet. Den. Aug. 30, 2017); Delaware Riverkeeper Network v. U.S. Army Corps of Engineers, No. 17-1506 (3d. Cir., Pet. Den. Aug. 23, 2017). In another case, the Second Circuit upheld FERC's denial to reopen the record on a natural gas pipeline passing through New York, ruling that NYSDEC waived the right to deny a CWA permit (rather than on climate grounds). New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission, *supra* note 148.

[175] In re Border Infrastructure Environmental Litigation, Nos. 18-55474, 18-55475, 18-55476 (9th Cir., affirmed Feb. 11, 2019). The district court found that the defendants had not violated any "clear and mandatory" obligations under the laws granting the waivers of requirements under the NEPA, ESA, and CZMA, and that in the absence of any such violations there was a jurisdictional bar to hearing any non-constitutional claims. The court rejected all of the plaintiffs' constitutional claims.

[176] Western Watersheds Project v. Zinke, No. 1:18-cv-00187 (D. Idaho, mot. for preliminary injunction granted, Sept. 21, 2018).

[177] Crow Indian Tribe et al v. United States of America et al., No. 9:17-cv-00089 (D. Mont., delisting rule vacated and remanded Sept. 24, 2018)(challenging delisting of Yellowstone grizzly distinct population segment).

habitat for amphibians was dismissed on lack of standing.[178] A lawsuit to compel designation of critical habitat for the yellow-billed cuckoo went to settlement.[179]

4.4 Advancing or Enforcing Climate Protections through the Courts

Municipalities, states, citizens, and nonprofits also shape the law and public discourse through affirmative litigation to advance climate change protections. These suits include innovative claims under state common law, the public trust doctrine, and the federal constitution. In particular, a wave of common law suits against fossil fuel companies for money damages can shape the public discourse and lead companies to pursue climate regulation in exchange for limiting their liability from such suits. Other suits in this category include administrative and statutory claims to prompt new regulation or to compel performance of reporting or legal obligations under existing climate law that are not currently being executed. If successful, these may also net or contribute to additional climate protection. While at least some of these suits may have occurred in the absence of the Trump Administration's deregulation, they are arguably strongly motivated by and take on added significance in regard to the void of federal climate leadership. Even when unsuccessful in the courtroom, they can affect public perception of the climate crisis and prod climate action. These cases represent 18% of the data set and grew as percentage of the cases between 2017 and 2018.

By the Numbers:

- *Total Count*: This category contained 28 cases.[180] Eleven filed in 2017 and 17 filed in 2018.

[178] California Cattlemen's Association v. U.S. Fish & Wildlife Service, No. 1:17-cv-01536 (D.D.C. dismissed for lack of jurisdiction Mar. 27, 2019).
[179] Friends of Animals v. U.S. Fish & Wildlife Service, No. 1:18-cv-01544 (D. Colo., settlement agreement reached Dec. 21, 2018).
[180] See Appendix A for a list of the cases.

- *Petitioners/Plaintiffs*: These cases were brought by municipalities (10), states/tribes (3), private citizens (7), national or international environmental NGOs (7), local/regional NGOs (6).
- *Defendants*: The defendants for these cases included a higher percentage of private companies than other categories: almost half were against companies (13/28). Amon company defendants there were fossil fuel companies (11), a utility (1), and an aerospace company. Cases against federal government entities (12) included the EPA (7), the United States (2), DOE (1), and President Trump (2), DOI (1), DoD (1), USDA (1), USACE (1), and the DoT (1). State and local government defendants include the State of Colorado (1), City of Thornton, Colorado (1), and Connecticut officials (1).
- *Laws*: These cases were brought under state tort law (12), the CAA (5), the CWA (3), the EISA (1), securities law (2), the public trust (2), other federal statutory law (4), the U.S. Constitution (6), and the APA (5).

Issues Raised:

- *Suits Against Fossil Fuel Companies for Damages Caused by Their GHG Emissions:* Thirteen counties and cities across the United States sued major fossil fuel companies under a variety of common law and state statutory claims, seeking money damages for companies' continued production of GHG emissions they knew posed climate change harms to citizens.[181] As of May 2019, these municipal suits have been consolidated or related into 7 suits.[182] These municipal suits pursued a variety of state law claims including: public

[181] While suits raising only claims under state statutory law are not included in the dataset, the defense of these cases raised issues under federal common law and other questions under federal law. The lower court decisions in two of these cases were determined based on questions of federal law. Since federal law questions are integral to the pending decisions in these cases, it puts them within the scope of this analysis of cases shaping federal climate change law and policy.

[182] Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc., No. 1:18-cv-01672 (D. Colo. notice of removal filed June 29, 2018); City of New York v. BP p.l.c., No. 18-2188 (2d. Cir. appeal filed Jul. 6, 2018); City of Oakland v. BP p.l.c., No. 18-16663 (9th Cir. appeal filed Sept. 4, 2018); County of

nuisance, strict liability for failure to warn, strict liability for design defect, private nuisance, negligence, negligent failure to warn, unjust enrichment, and trespass.[183] Baltimore and Boulder also alleged violation of state consumer protection acts. All suits sought some form of compensatory damages, including attorneys' fees, punitive damages, and disgorgement of profits. Oakland, San Francisco, Baltimore, and King County each sought funding for adaptation programs to mitigate local harms of climate change. Several suits also sought injunctions to abate the harms. Building on the wave of municipal suits, in 2018, Rhode Island became the first state to file a similar suit[184] and the Pacific Coast Federation of Fisherman's Association became the first trade group.[185]

- *Investor & Shareholder-Related Lawsuits:* In 2018, lawsuits also sought to clarify responsibilities for companies to communicate climate-related risks and plans including a securities class action against a utility company in Southern California alleging misrepresentations regarding exposure to wildfire risk[186] and an action by the New York Attorney General alleging a fraudulent scheme by Exxon Mobil Corporation to deceive investors about the company's management of risks posed by climate change regulation.[187] New York City also sued to compel an aerospace company to include New York City

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Santa Cruz v. Chevron Corp., 18-16376 (9th Cir., consolidated Aug. 20, 2018)(consolidating appeal of remand order for claims from the county and municipality of Santa Cruz with claims from San Mateo, Marin, and Imperial Beach); King County v. BP p.l.c., No. 2:18-cv-00758 (W.D. Wash., stayed Oct. 17, 2018); Mayor & City Council of Baltimore v. BP p.l.c., No. 1:18-cv-02357 (D. Md. consent order for temporary stay Apr. 22, 2019). For more discussion of these cases *see* Michael Burger and Jessica Wentz, *Holding Fossil Fuel Companies Accountable for Their Contribution to Climate Change: Where Does the Law Stand?*, (Bulletin of the Atomic Scientists, 2018), *available at* http://columbiaclimatelaw.com/files/2018/11/Burger-Wentz-2018-11- Holding-fossil-fuel-companies-accountable-fortheir-contribution-to-climate-change.pdf.

[183] Different suits pursued different combinations of these claims.

[184] Rhode Island v. Chevron Corp., No. 1:18-cv-00395 (D.R.I. filed July 13, 2018)(alleging impairment of public trust resources and violations of the State Environmental Rights Act in addition to tort claims).

[185] Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp., No. 3:18-cv-07477 (N.D. Cal. notice of removal filed Dec. 12, 2018).

[186] Barnes v. Edison International, No. 2:18-cv-09690 (C.D. Cal., filed Nov. 16, 2018).

[187] People of the State of New York v. Exxon Mobil Corporation, No. 452044/2018 (N.Y. Sup. Ct., filed Oct. 24, 2018).

Pension Funds' Shareholder Proposal for Greenhouse Gas Management Plan in its proxy materials.[188]

- *Compel Additional GHG Standards through Statutory Claims:* In 2017, environmental and other NGOs sued EPA for a response to 2009 petition requesting that concentrated animal feeding operations be regulated under the Clean Air Act as sources of air pollution.[189] Also in 2017, Sierra Club filed an action to compel EPA to submit reports on the Renewable Fuel Standard program.[190] In 2018, California and other states sought to compel EPA to implement and enforce emission guidelines for existing municipal solid waste landfills.[191] Also in 2018, a coalition of state and municipal entities also sought to regulate methane from existing oil and gas sources.[192] Both of these 2018 suits also alleged mandatory duties under the CAA.
- *Clean Water Act Updates Including Statutory Claims for Failure to Adapt*: Several suits have also sought to update the Clean Water Act to reflect a changing climate. A 2018 lawsuit challenged the U.S. Army Corps of Engineers' decision to reject a recommended change to the "high tide line" used by the Seattle District to determine the scope of its Section 404 jurisdiction.[193] Another 2018 suit filed by Center for Biological Diversity sought to compel EPA to list Oregon coastal waters as impaired by ocean acidification.[194] These join the "failure to adapt" case filed by the Conservation Law Foundation in 2017, alleging that a fossil fuel company violated its Clean Water Act permits by failing to prepare its energy infrastructure for the foreseeable impacts of climate change.[195]

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[188] New York City Employees' Retirement System v. TransDigm Group, Inc., No. 1:18-cv-11344 (S.D.N.Y., settled Jan. 18, 2019).
[189] Humane Society of United States v. Pruitt, 1:17-cv-01719 (D.D.C. filed Aug. 23, 2017).
[190] Sierra Club v. Wheeler, No. 1:17-cv-02174 (D.D.C., agreeing to partial consent decree Jan 30, 2019).
[191] California v. EPA, No. 4:18-cv-03237 (N.D. Cal., order May 6, 2019).
[192] New York v. Pruitt, No. 1:18-cv-00773 (D.D.C., filed Apr. 5, 2018).
[193] Sound Action v. U.S. Army Corps of Engineers, No. 2:18-cv-00733 (W.D. Wash., mot. to dismiss den. Feb. 5, 2019).
[194] Center for Biological Diversity v. EPA, No. 6:18-cv-02049 (D. Or., filed Nov. 27, 2018).
[195] Conservation Law Foundation, Inc. v. Shell Oil Products US, No. 1:17-cv-00396 (D. R. I. filed Aug. 28, 2017). A recent ruling for a similar case found that CLF does have standing for present and imminent "injuries to its members' aesthetic and recreational interests. The U.S. District Court for the District of

- *Rights of Nature and Right to Wilderness:* A 2018 suit made novel claims against the federal government alleging violations of a constitutional right to wilderness and seeking an order requiring the government to prepare and implement a remedial plan to mitigate climate change impacts.[196] This suit join a 2017 "rights of nature" case seeking rights for the Colorado River and alleging the impacts of climate change as one of the risks faced by the river.[197]
- *Public Trust:* Public trust arguments are an important element of innovative litigation seeking to advance climate change law. New suits were filed in 2017 and 2018 at the state level, but were outside the scope of this analysis since they raised no federal arguments.[198] The *Juliana* suit concerned a federal public trust doctrine continued to wind a complicated path through the courts in 2018.[199] Meanwhile, public trust arguments were also layered into the 2018 Rhode Island suit filed against fossil fuel companies and an unsuccessful 2017 suit alleging that federal officials and government entities violated due process and the public trust doctrine by advancing regulatory rollbacks that increase the frequency and intensity of climate change.[200]

Massachusetts found that CLF has standing to sue for present and imminent "injuries to its members' aesthetic and recreational interests in the Mystic River." However, the court also separated out a component of the lawsuit finding that CLF lacks standing "for injuries that allegedly will result from rises in sea level, or increases in the severity and frequency of storms and flooding, that will occur in the far future, such as in 2050 or 2100."

[196] Animal Legal Defense Fund v. United States, No. 6:18-cv-01860 (D. Or., filed Oct. 22, 2018).

[197] Colorado River Ecosystem v. State of Colorado, No. 1:17-cv-02316 (D. Colo dismissed Dec. 4, 2017).

[198] *See* Appendix B.

[199] Juliana v. United States, No. 18-36082 (9th Cir., oral argument heard Jun. 4, 2019).

[200] Clean Air Council v. United States, No. 2:17-cv-04977 (E.D. Pa. dismissed Feb. 19, 2019). The Clean Air Council and two children filed a federal lawsuit asserting claims of due process and public trust violations against the United States, the president, the Department of Energy, Secretary of Energy Rick Perry, the Environmental Protection Agency (EPA), and EPA Administrator Scott Pruitt. This case bears some similarity to the more well-known *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), but it is distinct in its specific focus on deregulatory activity.

- *Other Constitutional Claims:* In 2017 and 2018, citizens and NGO plaintiffs have brought a few other constitutional challenges to advance climate change policies. Several of these arguments have been quickly dismissed or settled.[201]

Key Developments:

Many of these cases are still pending, but early decisions indicate that some of these strategies are more effective for advancing and enforcing climate protections than others. Several constitutional claims have been dismissed and while several of the suits against fossil fuel companies for damages from their GHG emissions remain pending, there have been two rulings against plaintiffs from federal district courts. Suits to compel agencies to fulfill statutory obligations have made more initial progress. New York City's five public pension funds also succeeded in getting an aerospace company to include their shareholder proposal requesting that the company adopt a management plan for greenhouse gas emissions in its proxy materials.[202] Further discussion of emerging successes and setbacks in common law, statutory, and constitutional suits follows below:

- *Suits Against Fossil Fuel Companies for Damages Caused by Their GHG Emissions:* Of the suits filed against fossil fuel companies for damages stemming from their GHG emissions, the San Francisco/Oakland and New York suits were dismissed by two different district

[201] *See* Holmquist v. United States, No. 2:17-cv-00046 (E.D. Wash. dismissed Jul. 14, 2017). In this lawsuit, several citizens "who live or work in Spokane filed a lawsuit against the United States alleging that the Interstate Commerce Commission Termination Act of 1995 (ICCTA) was unconstitutional to the extent that it preempted local prohibitions on rail transportation of fossil fuels;" Willmeng v. City of Thornton, No. 1:18-cv-02636 (D. Colo., stipulation filed Oct. 20, 2018);(arguing that Colorado city and its mayor violated the First Amendment for blocking two residents' comments about hydraulic fracturing); de Mejias v. Malloy, No. 2:18-cv-00817 (D. Conn., Defs. Mot. Summ. J. granted Oct 25, 2018)(challenging Connecticut's transfer of funds collected from ratepayers and held by utilities for clean energy and energy efficiency purposes to Connecticut's General Fund.) Now appealed before the Second Circuit.

[202] New York City Employees' Retirement System v. TransDigm Group, Inc., No. 1:18-cv-11344 (S.D.N.Y., settled Jan. 18, 2019).

courts.[203] In light of the transboundary nature of the problem and the need for a broad-scale comprehensive solution, both courts ruled that any nuisance claims arose under federal common law and would be displaced by the Clean Air Act. Both decisions were appealed and the appeals remain pending. The San Mateo and Santa Cruz suits were remanded to state court and the defendants' appeals of the remand orders were consolidated, where some speculate the cases could fare better, and that remand has been appealed.[204] The King County suit has been stayed pending the appeal of the dismissal of the San Francisco/Oakland suit[205] and the Baltimore suit parties agreed to temporarily stay any remand order.[206] In the Boulder suit, plaintiffs have filed a motion to remand the case to state court.[207]

- *Suits to Compel Compliance with Statutory Obligations:* Plaintiffs have found some early success in these suits. A federal court found on summary judgment that EPA failed to fulfill mandatory duties to implement and enforce emission guidelines for existing municipal solid waste landfills.[208] An agreement was also reached that will compel report production to resolve a citizen suit alleging EPA failed to prepare timely reports on the renewable fuel standard program.[209] Another action to compel EPA to move forward with methane regulations for existing sources in the oil and gas sector continues to progress and an action to compel EPA to respond to a 2009 petition requesting that concentrated animal feeding operations be regulated as sources of air pollution was dismissed by stipulation of the parties.

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[203] City of New York v. BP p.l.c., No. 18-2188 (2d. Cir. appeal filed Jul. 6, 2018); City of Oakland v. BP p.l.c., No. 18-16663 (9th Cir. appeal filed Sept. 4, 2018).
[204] County of Santa Cruz v. Chevron Corp., 18-16376 (9th Cir., consolidated appeals of remand orders Aug. 20, 2018).
[205] King County v. BP p.l.c., No. 2:18-cv-00758 (W.D. Wash., stayed Oct. 17, 2018).
[206] Mayor & City Council of Baltimore v. BP p.l.c., No. 1:18-cv-02357 (D. Md. consent order for temporary stay of any remand order Apr. 22, 2019).
[207] Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc., No. 1:18-cv-01672 (D. Colo. notice of removal filed June 29, 2018).
[208] California v. EPA, No. 4:18-cv-03237 (N.D. Cal., order May 6, 2019).
[209] Sierra Club v. Wheeler, No. 1:17-cv-02174 (D.D.C., agreeing to partial consent decree Jan 30, 2019).

- *Constitutional Suits:* Several of the constitutional suits have been quickly dismissed or settled. Two cases brought by citizens, including one pro se claim against more than 120 defendants for failure to address climate change, were dismissed.[210] The case arguing for the rights of the Colorado River was also dismissed.[211] A federal lawsuit asserting claims of due process and public trust violations against the United States, the president, the Department of Energy, Secretary of Energy Rick Perry, the Environmental Protection Agency (EPA), and EPA Administrator Scott Pruitt for deregulatory activities was also dismissed.[212] Federal claims were dismissed without prejudice in a case concerning Connecticut's transfer of funds collected from ratepayers and held by utilities for clean energy and energy efficiency purposes to Connecticut's General Fund.[213] While not resulting in a decision on the merits, plaintiffs were more successful in a free speech lawsuit. Two Colorado residents who wrote about the dangers of hydraulic fracturing on their mayor's official Facebook page and were subsequently blocked from posting on the page filed a First Amendment lawsuit against the City of Thornton, Colorado, and its mayor pro tem. They were successful in getting a stipulation entered agreeing to unblock them from the mayor's official Facebook page.[214]

4.5 Deregulating Climate Change, Undermining Climate Protections, or Targeting Climate Protection Supporters

Representing 19% of the data set, this category of cases encompasses the different types of climate change cases that undermine climate change protections and advance or assist climate change deregulation. These include petitions to put Obama-era climate rules under review, requests to put litigation over Obama-era climate rules on hold while an agency reviews the rule, requests for records related to the Obama Administration's climate policies, and legal

[210] Lindsay v. Republican National Committee, No. 3:17-cv-00123 (W.D. Wisc. dismissed Oct. 2, 2017); Holmquist v. United States, No. 2:17-cv-00046 (E.D. Wash. dismissed Jul. 14, 2017).
[211] Colorado River Ecosystem v. State of Colorado, No. 1:17-cv-02316 (D. Colo dismissed Dec. 4, 2017).
[212] Clean Air Council v. United States, No. 2:17-cv-04977 (E.D. Pa. dismissed Feb. 19, 2019).
[213] de Mejias v. Malloy, No. 2:18-cv-00817 (D. Conn., Defs. Mot. Summ. J. granted Oct 25, 2018). An appeal is pending before Second Circuit.
[214] Willmeng v. City of Thornton, No. 1:18-cv-02636 (D. Colo., stipulation filed Oct. 20, 2018).

challenges against critics of the fossil fuel industry. It also includes cases challenging the denial of fossil fuel development permits for climate-related reasons (the opposite of cases in Category 3: Integrating Climate Change into Environmental Review and Permitting). Largely brought by a variety of industry plaintiffs—including individual companies, trade groups, and conservative think tanks—these cases not only support deregulation already underway by the Trump Administration, but drive agencies to undertake additional rollbacks. Several also concern EPA's efforts to pause litigation over Obama-era rules and thus use the courts to facilitate the current administration's review and deregulation.

These cases declined in 2018. Most likely this is due to the fact that the Obama-era policies have largely already been litigated or rolled back. New suits in this category targeted local officials and lawyers involved in the municipal suits seeking damages from fossil fuel companies for harms from their GHG emissions and state-level denial of permits to develop a coal terminal. They also included FOIA lawsuits concerning Obama and Trump Administration activities.

By the Numbers:

- *Total Count*: The data set includes 7 cases filed in 2018, 18 cases filed in 2017, and an additional 5 cases filed pre-2017. (As noted above, the only continuing cases considered are those where litigation has pivoted to address new acts from the Trump Administration to delay, weaken, modify, or rescind the rules or agencies failing to appeal remand of rules).
- *Plaintiffs/Petitioners*: These cases came predominantly from industry voices in fossil fuel-intensive sectors including from private companies either individually or in coalition (13), trade groups (4), conservative think tanks (5), private citizens (3), and a state-level entity (1). The five pre-2017 cases put into abeyance by Pruitt's EPA involve industry trade groups (5), companies (3), states (3), conservative think tanks (2), U.S. Chamber of Commerce (2), and others as petitioners.

- *Defendants*: The defendants in the 25 cases filed in 2017 and 2018 included federal agency defendants at the EPA (5), the Dept. of State (4), DOI (2), Treasury (1), and DOE (1). Others challenged state-level entities (8), municipal officials or their lawyers (2), critics of the fossil fuel industry (2), and a university that allegedly restricted speech of citizens who were advocating in favor of fossil fuels (1). EPA's motions to hold cases in abeyance are opposed by states, cities, and environmental NGOs that intervened in support of EPA's original regulations. (The defendants in the abeyance actions were not counted in the above figures because of how this litigation pivoted in 2017 to have the agencies cease defending the rules—see note in Part 3.2.2.)
- *Laws*: The eighteen cases from 2017 fall under several categories. They involved the U.S. Constitution (9), FOIA (5), the CAA (5), the APA (3), the CWA (3), the NGA (2), the federal energy statute (EISA, EPCA, or other)(2), the ESA or other wildlife law (2), the NEPA (2), the Racketeer Influenced and Corrupt Organizations Act (RICO)(1), other statutory law (3), a defamation action under common law (1), and an abuse of process claim under common law (1). The five cases filed pre-2017 each involved the EPA filing motions for abeyance in 2017 to pause litigation over Obama-era rules while the current administration reviews the rules. These cases involved the CAA (5), the APA (2), and the EISA (1).

Issues Raised:

- *Petitions for Review of Obama Administration Greenhouse Gas Emissions Standards*: In 2017, Industry actors, including trade groups and affected companies, petitioned EPA for review or reconsideration of rules concerning energy efficiency standards for lamps,[215] refrigerant standards,[216] GHG and fuel efficiency standards for light-duty vehicles,[217] and renewable

[215] National Electrical Manufacturers Association v. United States Department of Energy, 17-1341 (4th Cir. dismissed Jul. 10, 2017).
[216] National Environmental Development Association's Clean Air Project v. EPA, No. 17-1016 (D.C. Cir. filed Jan. 17, 2017).
[217] Alliance of Automobile Manufacturers v. EPA, No. 17-1086 (D.C. Cir. dismissed Mar. 29, 2017).

fuel standards.[218] Subsequently, the administration has taken action on three out of the four standards.[219]

- *FOIA Actions Seek Obama Administration Records*: Additional FOIA suits were filed in 2018 by the Competitive Enterprise Institute seeking records related to international climate change negotiations[220] and the Institute for Energy Research seeking domestic climate disclosures.[221] These joined 2017 FOIA suits also seeking information on international climate negotiations and associated interactions with external stakeholders (see Climate Litigation Report Year One for more information).
- *Attack Critics of the Fossil Fuel Industry*: Fossil fuel companies took legal action against their critics. In 2018, Exxon Mobil Corporation targeted municipal officials and their lawyers, seeking pre-suit depositions and documents in anticipation of potential claims of abuse of process, conspiracy, infringement of Exxon's rights in connection with California municipalities' climate change lawsuits seeking damages from fossil fuel companies for the harms caused by GHG emissions of those companies' products.[222] These joined a 2017 suit under the Racketeer Influenced and Corrupt Organizations Act (RICO) against Greenpeace International and other environmental activist groups who protested the Dakota Access Pipeline[223] and a defamation action against John Oliver for statements on the Last Week Tonight show.[224]

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[218] Coffeyville Resources Refining & Marketing, LLC v. EPA, 17-1044 (D.C. Cir., filed Feb. 9, 2017).
[219] *Supra* Part 2.1.
[220] Competitive Enterprise Institute v. U.S. Department of State, No. 1:18-cv-00276 (D.D.C., filed Feb. 7, 2018).
[221] Institute for Energy Research v. U.S. Department of the Treasury, No. 1:18-cv-01677 (D.D.C. filed Jul. 17, 2018).
[222] In re Exxon Mobil Corp., No. 02-18-00106-CV (Tex. App., filed Apr. 9, 2018)(filing appeal).
[223] Energy Transfer Equity, L.P. v. Greenpeace International, No. 1:17-cv-00173 (D.N.D. filed Aug. 22, 2017) (alleging that defendants are part of "a network of putative not-for-profits and rogue eco-terrorist groups who employ patterns of criminal activity and campaigns of misinformation to target legitimate companies and industries with fabricated environmental claims").
[224] Marshall County Coal Co. v. Oliver, No. 5:17-cv-00099-JPB (N.D. W. Va. remand granted Aug. 10, 2017). Alleged defamatory statements included remarks that Mr. Murray had no evidence to support his declaration that an earthquake was responsible for a lethal mine collapse, and remarks that Mr. Murray

- *Freeze Litigation over the Obama Administration Climate Rules*: In 2017, the EPA asked the courts to put litigation concerning major Obama Administration climate-related rules on hold while the current administration reviewed the rules.[225] In the case of the litigation over the Clean Power Plan, these abeyances are coupled with a judicial stay,[226] freezing the rule from taking effect and putting the EPA in violation of its statutory obligations under the CAA.[227].
- *Contest Denials of State Permits for Fossil Fuel Infrastructure*: In 2017, companies sought to advance their fossil fuel-related infrastructure projects by contesting state-level entities' permitting decisions and authorities.[228] In 2018, two new suits were filed by a coal terminal developer who was denied permits by Washington State.[229] Combined with the "pro" cases

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and Murray Energy "appear to be on the same side as black lung." Such cases could have a chilling effect on fossil fuel critics.

[225] *See* National Waste & Recycling Association v. EPA, No. 16-1371 (D.C. Cir. filed Oct. 27, 2016) (concerning EPA's emission guidelines for municipal solid waste landfills); North Dakota v. EPA , No. 15-1381(D.C. Cir. filed Oct. 23, 2015) (concerning EPA's performance standards for GHG emissions from new, modified, and reconstructed power plants); Truck Trailer Manufacturers Association, Inc. v. EPA, No. 16-1430 (D.C. Cir. filed Dec. 22, 2016) (concerning GHG emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles); West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015) (concerning EPA's Clean Power Plan). American Petroleum Institute v. EPA, No. 13-1108 (D.C. Cir. filed Dec. 16, 2014) (concerning new source performance standards for oil and gas sector).

[226] W. Virginia v. E.P.A., 136 S. Ct. 1000, 194 L. Ed. 2d 17 (2016).

[227] In its August 2017 order to hold the case in abeyance for another 60 days, the court noted both the EPA's "affirmative statutory obligation to regulate greenhouse gases," and that the "[c]ombined with this court's abeyance, the stay has the effect of relieving EPA of its obligation to comply with that statutory duty for the indefinite future." West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015).

[228] *See e.g.*, In re Constitution Pipeline Co., No. CP18-5 (FERC denied Jan. 11, 2018) (alleging that NYDEC waived jurisdiction by failing to act within in a reasonable time to review a water quality permit application for a proposed natural gas pipeline in New York, the Constitution Pipeline); Millennium Bulk Terminals-Longview, LLC v. Washington State Department of Ecology (Wash. Super. Ct. filed Oct. 24, 2017) (challenging denial of a water quality permit for a coal terminal); In re Millennium Bulk Terminals - Longview, LLC Shoreline Permit Applications, No. S17-17c (Wash. SHB filed Dec. 4, 2017) (challenging a Cowlitz County Hearing Examiner's denial of a shoreline permit application for a coal terminal).

[229] Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology, No. 18-2-00994-08 (Wash. Super. Ct., filed Sept. 6, 2018); Lighthouse Resources Inc. v. Inslee, No. 3:18-cv-05005 (W.D. Wash., stayed pending state court action Apr. 11, 2019). These both concern a Washington coal export terminal which the state denied permits. *Id*.

in the section on environmental decision-making, these cases are part of an ongoing battle playing out among fossil fuel infrastructure builders, state agencies responsible for water quality and other environmental permits, and federal agencies authorizing fossil fuel infrastructure projects. (Again, the only cases included in the data set were those where climate change was an issue of fact or law and so this is not a full representation of recent litigation over fossil fuel infrastructure development.)

- *Potential Liability for Climate Adaptation in Decisionmaking*: In 2018, a developer challenged the Virginia Beach City Council's denial of a rezoning application for a residential development on the basis that the developer failed to provide a stormwater analysis that accounted for 1.5 foot sea level rise and based on other flooding concerns.[230] The developer asserted that the defendants' actions were arbitrary and capricious, ultra vires, and in violation of developer's Equal Protection rights.

Key Developments:

While several cases remain pending, these suits have undermined climate protections in a few key ways.

- *Review of Rules to Limit GHG Emissions:* Of the four petitions for rule review filed in 2017, two petitions have been withdrawn. One petition was withdrawn after the EPA agreed to review the Obama Administration's Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation.[231] The other, a petition for review of energy efficiency standards for lamps, was voluntarily dismissed upon the agreement of alternative means of resolution by

[230] Argos Properties II, LLC v. City Council for Virginia Beach, No. CL18002289-00 (Va. Cir. Ct., dismissed Apr. 24, 2019)(dismissing denial of application for residential development in flood-prone area).
[231] *See* documents available in case chart. Alliance of Automobile Manufacturers v. EPA, No. 17-1086 (D.C. Cir. dismissed Mar. 29, 2017).

the parties.[232] Though not part of the data set, another petition before the EPA resulted in that agency's proposal to repeal the application of fuel efficiency standards for medium- and heavy-duty engines and vehicles to "gliders."[233] Five cases involving Obama-era climate rules that were filed prior to 2017 remain held in abeyance. Two cases filed in 2017 concerning renewable fuel standards and an expansion of a ban on HFC's progressed after being held in abeyance. The expansion of the HFC ban was vacated on the same logic that the underlying HFC ban was vacated.[234]

- *Attacks on Critics:* The RICO suit against Dakota Access Pipeline Protestors was dismissed. A few of the cases concerning individual projects or attacks on fossil fuel critics have also progressed. The suit against a university for allegedly restricting speech was dismissed[235] and the defamation action against John Oliver and others was remanded to state court.[236]
- *Pipeline & Infrastructure Project Developments:* Plaintiffs have had mixed initial success in attempting to overturn state-level denials of permits for pipelines. The Second Circuit declined to rehear a decision upholding New York's Denial of water quality certificate for the Constitution Pipeline and the Supreme Court declined to grant certiorari. However, the permit issue remains live because claims concerning the timeliness of the water quality permit were dismissed by the Second Circuit because they were under the jurisdiction of the D.C. Circuit. On February 28, 2019, the D.C. Circuit granted a FERC motion for voluntary remand of another case contesting the timeliness of New York's determination on a water quality certification for the Constitution Pipeline which FERC wanted to reconsider in light

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[232] *See* documents available in case chart. National Electrical Manufacturers Association v. United States Department of Energy, No. 17-1341 (4th Cir. dismissed Jul. 10, 2017).
[233] Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, 82 Fed. Reg. 53442 (Nov. 16, 2017) (to be codified at 40 C.F.R. Pts. 1037 and 1068), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-11-16/pdf/2017-24884.pdf.
[234] Mexichem Fluor, Inc. v. EPA, No. 17-1024 (D.C. Cir., order Apr. 5, 2019).
[235] Turning Point USA (TPUSA) v. Macomb Community College, No. 2:17-cv-12179 (E.D. Mich. dismissed Nov. 13, 2017).
[236] Marshall County Coal Co. v. Oliver, No. 5:17-cv-00099-JPB (N.D. W. Va. remand granted Aug. 10, 2017).

of *Hoopa Valley Tribe v. FERC*.[237] In another case concerning the Valley Lateral Project, another New York pipeline project, the Northern District of New York granted a pipeline company's request for a preliminary injunction barring NYSDEC from enforcing stream disturbance and freshwater wetlands permitting requirements to prevent the company from beginning construction on a pipeline. The court found that the company had demonstrated irreparable harm and a strong likelihood of success on the merits of the argument that the federal Natural Gas Act preempted state permitting requirements. A third case is still pending which challenges the Washington Department of Ecology's denial of a water quality certificate for coal export terminal in Washington.

- *ESA Delisting*: Federal Court Upheld Denial of Petition to Remove Golden-Cheeked Warbler from Endangered Species List.[238]
- *Potential Liability for Climate Adaptation Decisionmaking:* A Virginia trial court reportedly ruled on April 24, 2019 that the Virginia Beach City Council properly denied a developer's application to build a residential development in an area prone to flooding, but a written order was not available for review at time of publication.[239]

[237] Constitution Pipeline Co. v. Federal Energy Regulatory Commission, No. 18-1251 (D.C. Cir., mot. for voluntary remand granted Feb. 28, 2019).
[238] General Land Office of State of Texas v. U.S. Fish & Wildlife Service, No. 1:17-cv-00538 (W.D. Tex., order Feb. 6, 2019).
[239] Argos Properties II, LLC v. City Council for Virginia Beach, No. CL18002289-00 (Va. Cir. Ct., dismissed Apr. 24, 2019)(dismissing denial of application for residential development in flood-prone area).

5. CONCLUSION

In its first two years, the Trump Administration set a high-water mark for climate change deregulation, but extralegal rollbacks and other attempts to undermine climate protections by overreaching executive authority, violating statutory requirements for environmental review, or flouting administrative law have been constrained by the courts through vigilant litigation. While litigants use the courts as a tool to both maintain and erode climate protections, the vast majority (81%) of the 159 cases reviewed for this analysis were "pro" climate change protections; that is, they sought to enforce or advance policies or other efforts to mitigate the effects of climate change. While a handful of environmental NGOs with national or international missions were involved in more than half (64%) of all "pro" climate protection cases, a diverse suite of state-government entities, municipalities, private citizens, local and regional groups, and other NGOS collectively brought the Trump Administration's climate policy activities before judicial review. Claims ranged across administrative, statutory, constitutional, and common law.

Climate change litigation directly challenged deregulation through lawsuits over delays, postponements, revocations, and other regulatory rollbacks of climate policies. Twenty of the 129 "pro" climate cases, (16% of the "pro" cases), fell into this category of defending Obama Administration climate change policies and decisions. In 2017-2018, a dozen cases were filed that raised climate change as an issue of fact or law and concerned delay or suspension of climate-related rules. Five of these cases have resulted in a judicial decision against the Trump Administration (of which one has an appeal pending). Five pressured the Trump Administration to end the delay at issue in the lawsuit, and were then dismissed or otherwise allowed to lapse prior to a decision on the merits. Two are pending. These cases are building a body of precedent that clarifies limitations on the executive branch's ability to destabilize duly promulgated regulations, to act without regard to proper procedure, and to make decisions that lack an evidentiary basis. None of the cases in the dataset concerning a revocation of climate regulations or implementation of weakened climate regulation had advanced to judicial or

other resolution by May 2019, but three cases concerning repeals or withdrawals of climate policy that passed through notice and comment rulemaking remain pending without any lower court decisions.

Courts have also checked the Trump Administration's efforts to promote fossil fuel extraction on public lands and in public waters when those actions violated statutory obligations for environmental review, failed administrative law requirements to justify a change in policy, or overreached executive authority. These decisions have affected policies attempting to reopen federal lands to coal leasing, reopen oil and gas leasing in previously protected areas of the Arctic and Atlantic Oceans, and reverse denial of a permit for the Keystone XL pipeline. Further, climate change litigation extends much more broadly than suits directly challenging the reversal of Obama Administration climate policies. Another 109 cases supported climate change protection through less direct means including: filing FOIA lawsuits to defend transparency and science within the Trump Administration, enforcing requirements to consider climate change during environmental review, and advancing novel legal arguments for new and additional climate protections. Many of these cases remain pending or have appeals pending in May 2019, but already cases have produced documents under FOIA, upheld obligations to consider climate change during environmental review, and statutory obligations to implement and enforce regulations for CO_2, methane, and other emissions from existing landfills. A few other suits have upheld responsibilities to consider climate change during environmental review.

Additionally, roughly one-fifth (19%) of reviewed cases advanced climate change deregulation, undermined climate protections, or attacked supporters of climate protections. These challenges ranged from petitions to review Obama Administration climate rules to contestations over state-level denials of environmental permits for fossil fuel infrastructure to charges of defamation against critics of the fossil fuel industry.

The Trump Administration's efforts to bypass the requirements of administrative and statutory law to delay and expedite reversal of climate change policies have fared poorly in

court thus far. Nonetheless, the ultimate fate of the underlying policies remains uncertain. In 2018 and 2019, the Trump Administration's efforts to repeal and replace Obama Administration climate change policies through notice and comment rulemaking continue to progress. As these rules are finalized, more climate change litigation will likely seek to enforce the substantive judicial standards for deregulation. As these and other cases develop, the courts will continue to be an important arena for enforcing administrative, statutory, and other legal obligations and preventing the establishment of agency precedent that flouts these requirements.

APPENDIX A: CASES REVIEWED IN THE ANALYSIS

The cases included in the data set are listed below and grouped by their trend categorization. The case summaries are taken from the Sabin-AP U.S. Climate Change Litigation database available at http://climatecasechart.com/us-climate-change-litigation/. Case status is not provided because this information is constantly evolving.

Defending Obama Administration Climate Policies & Decisions (2017)						
Case	**Court**	**Plaintiff or Petitioner Type**	**Defendant**	**Principal Federal Law(s)**	**Sector**	**Summary**
California v. U.S. Bureau of Land Management	N.D. Cal.	State Government Entity, Intl/Natl Environmental NGO, Local or Regional Group	BLM, DOI	Administrative Procedure Act (APA), Federal Land Policy and Management Act (FLPMA), Federal Oil and Gas Royalty Management Act, National Environmental Policy Act (NEPA), Mineral Leasing Act (MLA)	Fossil Fuel Extraction & Transport	Challenge to a U.S. Bureau of Land Management rule postponing compliance dates for Waste Prevention Rule for one year.
California v. U.S. Bureau of Land Management	N.D. Cal.	State Government Entity	BLM	Administrative Procedure Act (APA)	Fossil Fuel Extraction & Transport	Challenge to U.S. Bureau of Land Management decision to postpone compliance dates for waste prevention rule.
Citizens for Clean Energy v. U.S. Department of Interior	D. Mont.	Tribe, State Government Entity, Intl/Natl Environmental NGO, Local or Regional Group	DOI, BLM	Administrative Procedure Act (APA), Clean Water Act (CWA), National Environmental Policy Act (NEPA)	Fossil Fuel Extraction & Transport	Challenge to lifting of moratorium on federal coal leasing and cessation of programmatic environmental review of leasing program.

Clean Air Carolina v. U.S. Department of Transportation	S.D.N.Y.	Intl/Natl Environmental NGO, Local or Regional NGO, Other Intl/Natl NGO	Federal Highway Administ-ration	Administrative Procedure Act (APA)	Vehicle Emissions & Fuels	Challenge to Federal Highway Administration's indefinite suspension of greenhouse gas performance measure for highway system.
Clean Air Council v. Pruitt	D.C. Cir.	Intl/Natl Environmental NGO	EPA	Administrative Procedure Act (APA), Clean Air Act (CAA)	Fossil Fuel Extraction & Transport	Challenge to EPA's administrative stay of portions of the 2016 new source performance standards for sources in the oil and gas sector.
Indigenous Environmental Network v. United States Department of State	D. Mont.	Intl/Natl Environmental NGO, Local or Regional Group	Dept. of State, FWS	Administrative Procedure Act (APA), Bald and Golden Eagle Protection Act, Endangered Species Act (ESA), National Environmental Policy Act (NEPA), Migratory Bird Treaty Act	Fossil Fuel Extraction & Transport	Challenge to Trump administration approval of a presidential permit for the Keystone XL pipeline.
League of Conservation Voters v. Trump	D. Alaska	Intl/Natl Environmental NGO, Local or Regional Group	President Trump, DOI, Dept. of Commerce	Outer Continental Shelf Leasing Act (OCSLA)	Fossil Fuel Extraction & Transport	Challenge to executive order reversing President Obama's withdrawal of lands in the Atlantic and Arctic Oceans from future oil and gas leasing.
Natural Resources Defense Council v. Perry	N.D. Cal.	Municipal Government Entity, State Government Entity	DOE	Administrative Procedure Act (APA), Energy & Conservation Act, Federal Register Act	Appliance, Industrial, and Building Standards	Challenge to U.S. Department of Energy's failure to publish final energy efficiency standards.

Natural Resources Defense Council, Inc. v. Perry	2d Cir.	Municipality, State Government Entity, Intl/Natl Envtl NGO	DOE	Administrative Procedure Act (APA), Energy Policy & Conservation Act	Appliance, Industrial, and Building Standards	Challenge to the U.S. Department of Energy's decisions to delay the effective date for ceiling fan energy efficiency standards.
Natural Resources Defense Council v. Pruitt	D.C. Cir.	Intl/Natl Environmental NGO, Local or Regional Group	EPA	Administrative Procedure Act (APA), Clean Air Act (CAA)	Landfill Emissions	Challenge to EPA's administrative stay of performance standards and emission guidelines for municipal solid waste landfills.
Natural Resources Defense Council, Inc. v. National Highway Traffic Safety Administration	2d Cir.	Intl/Natl Environmental NGO, State Government Entity	NHWTSA, DOT	Administrative Procedure Act (APA), Energy Conservation Act	Vehicle Emissions & Fuels	Challenge to delay of effective date for rule increasing civil penalties for violations of CAFE standards.
People of State of California v. U.S. Department of Transportation	N.D. Cal.	State Government Entity	DOT, FHWA	Administrative Procedure Act (APA)	Vehicle Emissions & Fuels	Challenge to delays and suspension of greenhouse gas performance measures for the national highway system.
Public Citizen, Inc. v. Trump	D.D.C.	Intl/Natl Environmental NGO, Other Intl/Natl NGO, Union	President Trump	Administrative Procedure Act (APA), Constitutional (Take Care Clause, Separation of Powers)	Government Violation of Constitutional Rights	Challenge to President Trump's executive order on "Reducing Regulation and Controlling Regulatory Costs" as well as interim guidance for the order's implementation.

Sierra Club v. Perry	D.D.C.	Intl/Natl Environmental Group	DOE	Administrative Procedure Act (APA), Energy Independence & Security Act (EISA)	Appliance, Industrial, and Building Standards	Action to compel issuance of energy efficiency standards for manufactured housing.

Defending Obama Administration Climate Policies & Decisions (2018)						
Case	**Court**	**Plaintiff or Petitioner Type**	**Defendant**	**Principal Federal Law(s)**	**Sector**	**Summary**
California v. EPA	D.C. Cir.	Local/Regional Gov Entity	EPA	Clean Air Act (CAA)	Vehicle Emissions & Fuels	Challenges to EPA determination to withdraw its Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles because the standards appeared to be too stringent.
California v. U.S. Bureau of Land Management	N.D. Cal.	Local/Regional Gov Entity, Intl/Natl Envtl NGO, Local/Regional NGO	BLM, DOI	APA, FLPMA, MLA, NEPA , Indian Mineral Leasing Act (IMLA)	Fossil Fuel Extraction, Processing, & Transport	Challenge to BLM's repeal of 2015 regulations governing hydraulic fracturing on federal and tribal lands.
California v. Zinke	N.D. Cal.	Intl/Natl Envtl NGO, Local/Regional Gov Entity	BLM, DOI	APA, NEPA, MLA, FLPMA	Fossil Fuel Extraction, Processing, & Transport	Challenge to BLM's repeal of key provisions of the 2016 Waste Prevention Rule for oil and gas development on public and tribal lands.
Environmental Defense Fund v.	D.C. Cir.	Intl/Natl Envtl NGO,		Clean Air Act (CAA)	Vehicle Emissions &	Challenge to EPA "no action assurance"

EPA		Local/Regional Gov Entity			Fuels	memorandum that provided assurance that EPA would not enforce greenhouse gas emission and fuel efficiency standards against small manufacturers of glider kits and vehicles.
Natural Resources Defense Council v. Wheeler	D.C. Cir.	Intl/Natl Envtl NGO, Local/Regional Gov Entity	EPA	Clean Air Act (CAA)	Appliance, Industrial, and Building Standards	Challenge to EPA's decision to suspend the 2015 final rule prohibiting or restricting certain uses of HFCs under Clean Air Act's safe alternatives policy.
Rosebud Sioux Tribe v. U.S. Department of State	D. Mont.	Local/Regional Gov Entity (Tribes)	State Dept.	APA, NEPA, National Historic Preservation Act	Fossil Fuel Extraction, Processing, & Transport	Challenge to presidential permit for Keystone XL pipeline.

Demanding Transparency & Scientific Integrity from the Trump Administration (2017)						
Case	**Court**	**Plaintiff or Petitioner Type**	**Defendant**	**Principal Federal Law(s)**	**Sector**	**Summary**
California v. EPA	D.D.C.	State Government Entity	EPA	Freedom of Information Act (FOIA)	Government Records or Communications Request	Freedom of Information Act lawsuit to compel disclosure of records concerning EPA's process to ensure that Administrator Scott Pruitt was in compliance with federal ethics regulations and obligations with respect to participation in rulemaking.
Center for Biological Diversity v. National Oceanic and Atmospheric Administration	D.D.C.	Intl/Natl Environmental NGO	NOAA, DOC	Freedom of Information Act (FOIA)	Government Records or Communications Request	Action to compel disclosure of records regarding the termination of the Advisory Committee for the Sustained National Climate Assessment.
Center for Biological Diversity v. U.S. Bureau of Land Management	D.D.C.	Intl/Natl Environmental NGO	BLM	Administrative Procedure Act (APA), Freedom of Information Act (FOIA)	Government Records or Communications Request	Action seeking to compel BLM to respond to Freedom of Information Act request for documents related to the federal coal program.
Center for Biological Diversity v. U.S. Department of Interior	D.D.C.	Intl/Natl Environmental NGO	DOI, EPA, DOE, State Dept.	Administrative Procedure Act (APA), Freedom of Information Act (FOIA)	Government Records or Communications Request	Freedom of Information Act lawsuit to compel disclosure of directives and communications regarding removal of climate change-related words from formal agency communications.

Center for Media & Democracy v. Hunter	Okla. Sup. Ct.	Other NGO	Pruitt/Hunter (Attorney General of OK)	Oklahoma Open Records Act	Government Records or Communications Request	Action to compel response by Oklahoma attorney general to Open Records Act request for documents regarding industry ties of attorney general Scott Pruitt.
Natural Resources Defense Council v. U.S. Environmental Protection Agency	S.D.N.Y.	Intl/Natl Environmental NGO	EPA, FDA, NOAA, OMB, DOI, BLM, Bureau of Reclamation, USFWS, Office of Surface Mining, Reclamation, & Enforcement, USFS, DOJ	Freedom of Information Act (FOIA)	Government Records or Communications Request	Action to compel production of communications between certain federal agencies and Trump transition team.
Project Democracy Project, Inc. v. U.S. Department of Energy	D.D.C.	Other Intl/Natl NGO	DOE	Freedom of Information Act (FOIA)	Government Records or Communications Request	Action to compel response to Freedom of Information Act request to the U.S. Department of Energy seeking Trump transition team questionnaires regarding climate change.
Public Employees for	D.D.C.	Intl/Natl Environmental	EPA	Freedom of Information Act	Government Records or	Action to compel a response by EPA to a Freedom of

Environmental Responsibility v. EPA		NGO		(FOIA)	Communications Request	Information Act request regarding remarks about climate change made by EPA Administrator Scott Pruitt in a televised interview.
Sierra Club v. EPA	D.D.C.	Local/Regional	EPA	Administrative Procedure Act (APA), Freedom of Information Act (FOIA)	Government Records or Communications Request	Action to compel EPA to disclose senior officials' external communications.
Sierra Club v. U.S. Department of Energy	N.D. Cal.	Intl/Natl Environmental Group	DOE	Freedom of Information Act (FOIA)	Government Records or Communications Request	Freedom of Information Act action to compel disclosure of documents related to the U.S. Department of Energy's study of U.S. electricity markets and the reliability of the electrical grid
WildEarth Guardians v. U.S. Department of the Interior Office of the Secretary	D.D.C.	Intl/Natl Environmental Group	DOI	Freedom of Information Act (FOIA)	Government Records or Communications Request	Freedom of Information Act lawsuit against Department of the Interior to compel production of records related to Secretarial Order on onshore mineral leasing program

Demanding Transparency & Scientific Integrity from the Trump Administration (2018)

Case	Court	Plaintiff or Petitioner Type	Defendant	Principal Federal Law(s)	Sector	Summary
Center for Biological Diversity v. U.S. Department of State	D.D.C.	Intl/Natl Envtl NGO	State Dept.	APA, FOIA	Government Records or Communications Request	Freedom of Information Act lawsuit seeking Department of State records regarding U.S. Climate Action Report.

Center for Biological Diversity v. U.S. Department of State	D.D.C.	Intl/Natl Envtl NGO	State Dept., FAA, EPA	APA, FOIA	Government Records or Communications Request	Freedom of Information Act lawsuit seeking to compel disclosure of records regarding aircraft emissions standards and U.S. participation in the 2016 International Civil Aviation Organization (ICAO) carbon dioxide rulemaking process.
Columbia Riverkeeper v. U.S. Department of Energy	D. Or.	Local/Regional Envtl NGO	DOE	APA, FOIA	Government Records or Communications Request	Freedom of Information Act lawsuit seeking disclosure of documents related to proposed methanol refinery.
Defenders of Wildlife v. U.S. Department of the Interior	D.D.C.	Intl/Natl Envtl NGO	USFWS, DOI, BLM	FOIA	Government Records or Communications Request	Freedom of Information Act lawsuit seeking documents about plans for fossil fuel development on the Coastal Plain of the Arctic National Wildlife Refuge.
Ecological Rights Foundation v. EPA	N.D. Cal.	Intl/Natl Envtl NGO	EPA	FOIA	Government Records or Communications Request	Freedom of Information Act lawsuit seeking EPA disclosure of directives to EPA employees since beginning of Trump administration concerning public communications about EPA work and review of EPA work by political appointees.
Environmental Defense Fund v. Department of the Interior	D.D.C.	Intl/Natl Envtl NGO	DOI, BLM	FOIA	Government Records or Communications Request (Fossil fuel extraction &	Freedom of Information Act lawsuit seeking disclosure of documents related to efforts to roll back Bureau of Land Management's Waste Prevention

					transportation)	Rule.
Environmental Defense Fund v. U.S. Department of Transportation	D.D.C.	Intl/Natl Envtl NGO	DOT	FOIA	Government Records or Communications Request (Transportation)	Freedom of Information Act lawsuit seeking U.S. Department of Transportation officials' calendars and correspondence related to proposed and anticipated actions to roll back greenhouse gas and fuel efficiency standards for vehicles.
Natural Resources Defense Council v. EPA	S.D.N.Y.	Intl/Natl Envtl NGO	EPA	FOIA	Government Record or Communications request (Vehicle Emissions)	Freedom of Information Act lawsuit seeking records related to the U.S. Environmental Protection Agency's model for assessing the cost and effectiveness of greenhouse gas emission standards.
Public Employees for Environmental Responsibility v. EPA	D.D.C.	Intl/Natl NGO	EPA	FOIA	Government Records or Communications Request (climate science or scientist participation)	Freedom of Information Act lawsuit seeking to compel EPA to disclose records regarding policies put in place and other measures taken after EPA cancelled scientists' and consultant's participation in Rhode Island climate change conference.
Sierra Club v. EPA	N.D. Cal.	Intl/Natl Envtl NGO	EPA	FOIA	Government Records or Communications Request (Paris Agreement/anti climate lobbying)	Freedom of Information Act lawsuit seeking to compel disclosure of communications between EPA employees hired at the beginning of the Trump administration and the EPA

						Administrator or external parties.
Sierra Club v. EPA	N.D. Cal.	Intl/Natl Envtl NGO	EPA	FOIA	Government Records or Communications Request (unethical fossil fuel influence)	Freedom of Information lawsuit seeking external communications and meeting records for EPA staff that Sierra Club alleged had "troubling ties to polluting industries."
Sierra Club v. U.S. Department of Energy	D.D.C.	Intl/Natl Envtl NGO	DOE	FOIA	Government Records or Communications Request (power plants)	Freedom of Information Act lawsuit seeking correspondence and other documents related to the U.S. Department of Energy's alleged efforts to bail out the coal and nuclear industries
Sierra Club v. U.S. Department of Interior	N.D. Cal.	Intl/Natl Envtl NGO	DOI	FOIA	Government Records or Communications Request	Freedom of Information Act lawsuit seeking disclosure of external communications of Department of the Interior officials.
Southern Environmental Law Center v. EPA	W.D. Va.	Local/Regional Envtl NGO	EPA	FOIA	Government Records or Communications Request	Freedom of Information Act lawsuit seeking EPA communications with Heartland Institute regarding potential red team/blue team climate science exercise and other matters.
Union of Concerned Scientists v. U.S. Department of Energy	D.D.C.	Intl/Natl Envtl NGO	DOE, FERC	FOIA	Government Records or Communications Request	Freedom of Information Act lawsuit seeking correspondence and other records related to potential federal coal and nuclear subsidies.
Wilderness	D.D.C.	Intl/Natl Envtl	DOI	APA, FOIA	Government	Freedom of Information Act

Society v. U.S. Department of Interior		NGO			Records or Communications Request	lawsuit seeking documents related to the Interior Department's implementation of President Trump's executive order on energy independence.

Integrating Consideration of Climate Change into Environmental Review & Permitting (2017)						
Case	**Court**	**Plaintiff or Petitioner Type**	**Defendant**	**Principal Federal Law(s)**	**Sector**	**Summary**
Allegheny Defense Project v. Federal Energy Regulatory Commission; In re Transcontinental Gas Pipe Line Company, LLC	D.C. Cir.; FERC	Intl/Natl Environmental NGO	FERC	National Environmental Policy Act (NEPA), Natural Gas Act	Fossil Fuel Extraction & Transport	Challenge to FERC approval of the Atlantic Sunrise natural gas pipeline expansion project in Pennsylvania and other locations on East Coast.
Appalachian Voices v. Federal Energy Regulatory Commission	D.C. Cir.	Intl/Natl Environmental Group, Local or Regional Group	FERC	National Environmental Policy Act (NEPA), Natural Gas Act (NGA), National Historic Preservation Act (NHPA)	Fossil Fuel Extraction & Transport	Challenge to FERC order approving Mountain Valley Pipeline extending from West Virginia to Virginia.
Bair v. California Department of Transportation	N.D. Cal.	Intl/Natl Envtl NGO, Local/Regional NGO, Individuals	Local/State Gov Entity	APA, NEPA, Wild and Scenic Rivers Act, Declaratory Judgment Act	Impacts on Land, Water, & Wildlife	Challenge to highway widening project in state park in California.
Bay.org d/b/a The Bay Institute v. Zinke	N.D. Cal.	Intl/Natl Environmental NGO, Local or Regional Group	DOI & FWS	Administrative Procedure Act (APA), Endangered Species Act (ESA)	Impacts on Land, Water, & Wildlife	Challenge to biological opinion issued for water diversion project in California.
California Cattlemen's Association v. U.S. Fish & Wildlife Service	D.D.C.	Trade Associations	DOI, USFWS	APA, ESA, Regulatory Flexibility Act	Impacts on Land, Water, & Wildlife	Challenge to designation of critical habitat in California for three amphibian species.

Center for Biological Diversity v. EPA	N.D. Cal.	Intl/Natl Environmental NGO, Local or Regional Group	EPA	Clean Air Act (CAA)	Power Plants, Renewables, and Energy Efficiency	Action to compel EPA to respond to petition seeking objection to Title V permit for natural gas plant in California.
Center for Biological Diversity v. U.S. Bureau of Land Management	D. Nev.	Intl/Natl Environmental NGO	BLM	Administrative Procedure Act (APA), National Environmental Policy Act (NEPA)	Fossil Fuel Extraction & Transport	Challenge to oil and gas lease sale in Nevada.
Center for Biological Diversity v. U.S. Fish & Wildlife Service	D. Ariz.	Intl/Natl Environmental NGO	FWS	Administrative Procedure Act (APA), Endangered Species Act (ESA)	Impacts on Land, Water, & Wildlife	Challenge to biological opinion for copper mine in Arizona.
Center for Biological Diversity v. U.S. Forest Service	S.D. Ohio	Intl/Natl Environmental NGO, Local or Regional Group	USFS, BLM	Administrative Procedure Act (APA), National Environmental Policy Act (NEPA)	Fossil Fuel Extraction & Transport	Challenge to authorization of oil and gas leasing in the Wayne National Forest.
Center for Food Safety v. U.S. Army Corps of Engineers	W.D. Wash.	Other NGO	USACE	Administrative Procedure Act (APA), Clean Water Act (CWA), National Environmental	Impacts on Land, Water, & Wildlife	Challenge to U.S. Army Corps of Engineers' renewal of a nationwide permit to cover shellfish aquaculture in Washington State.

				Policy Act (NEPA)		
Citizens for a Healthy Community v. U.S. Bureau of Land Management	D. Colo.	Intl/Natl Envtl NGO, Local/Regional NGO	BLM, DOI, USDA	NEPA	Impacts on Land, Water, & Wildlife	Challenge to federal actions authorizing oil and gas development in the Bull Mountain Unit in the Colorado River basin.
Columbia Riverkeeper v. Pruitt	W.D. Wash.	Regional or Local Group, Industry Trade Group	EPA	Administrative Procedure Act (APA), Clean Water Act (CWA)	Impacts on Land, Water, & Wildlife	Lawsuit alleging that EPA violated the Clean Water Act by failing to issue a total maximum daily load (TMDL) for temperature pollution in the Columbia and Snake Rivers in Oregon and Washington.
Crow Indian Tribe et al v. United States of America et al	D. Mont.	Tribe, Intl/Natl Environmental NGO, Other Intl/Natl NGO	DOI, FWS	Administrative Procedure Act (APA), Endangered Species Act (ESA)	Impacts on Land, Water, & Wildlife	Challenge to designation of a Greater Yellowstone Ecosystem grizzly bear distinct population segment (DPS) and a related determination that the DPS was recovered and did not qualify as endangered or threatened under the Endangered Species Act.
Delaware Riverkeeper Network v. Secretary of Pennsylvania Department of Environmental Protection	3d. Cir.	Local or Regional Group	State: PA Dept. of Environmental Protection	Natural Gas Act, Pennsylvania Dam Safety and Encroachment Act	Fossil Fuel Extraction & Transport	Challenge to Pennsylvania permits for interstate natural gas pipeline project.
Delaware Riverkeeper Network v. U.S. Army	3d Cir.	Local or Regional Group	USACE	Administrative Procedure Act	Fossil Fuel Extraction &	Challenge to Clean Water Act permits for natural gas interstate

Corps of Engineers				(APA), Clean Water Act (CWA), National Environmental Policy Act (NEPA), Natural Gas Act	Transport	pipeline project.
High Country Conservation Advocates v. U.S. Forest Service	D. Colo.	Intl/Natl Environmental NGO, Local or Regional Group	DOI, BLM, USDA, USFS	Administrative Procedure Act (APA), National Environmental Policy Act (NEPA)	Fossil Fuel Extraction & Transport	Challenge to federal approvals of underground coal mine expansion.
In re Atlantic Coast Pipeline, LLC	FERC	Local or Regional Group	FERC	National Environmental Policy Act (NEPA), the Natural Gas Act	Fossil Fuel Extraction & Transport	Challenge to approvals for natural gas pipeline project running through West Virginia, Virginia, and North Carolina.
In re: Border Infrastructure Environmental Litigation	9th Cir.	State Government Entity	U.S., Dept. of Homeland Security, U.S. Customs and Border Protection	Administrative Procedure Act (APA), Coastal Zone Management Act, National Environmental Policy Act (NEPA)	Impacts on Land, Water, & Wildlife	Challenge to waivers for construction of border wall projects in California.
National Wildlife Federation v. U.S. Army Corps of Engineers	D.D.C.	Environmental Groups and Local or Regional Group	USACE	Administrative Procedure Act (APA), National Environmental	Impacts on Land, Water, & Wildlife	Challenge to approval of update to the Master Water Control Manual for federal dams and reservoirs in the Apalachicola-

				Policy Act (NEPA), the Water Resources Development Act, Fish and Wildlife Coordination Act		Chattahoochee-Flint River Basin.
New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission	FERC; 2d Cir.	State Government Entity	FERC	Clean Water Act (CWA), National Environmental Policy Act (NEPA), Natural Gas Act	Fossil Fuel Extraction & Transport	Proceeding before FERC to obtain authorization for natural gas pipeline project in New York.
Regents of University of California v. Federal Emergency Management Agency	N.D. Cal.	State Government Entity	FEMA	Administrative Procedure Act (APA), National Environmental Policy Act (NEPA), Stafford Disaster Relief and Emergency Assistance Act of 1988	Impacts on Land, Water, & Wildlife	Challenge to termination of wildfire mitigation grants in Bay Area in California.
Rosado v. Pruitt	E.D.N.Y.	State Government Entity	EPA	Administrative Procedure Act, Coastal Zone Management Act, Ocean Dumping Act	Impacts on Land, Water, & Wildlife	Challenge to EPA's designation of an ocean dumping site in Long Island Sound.
Save the Colorado v. U.S. Bureau of	D. Colo.	Intl/Natl Environmental	BLM, USACE	Administrative Procedure Act	Impacts on Land,	Challenge to approvals for project facilitating diversion of water

Reclamation		NGO, Local or Regional Group		(APA), Clean Water Act (CWA), National Environmental Policy Act (NEPA)	Water, & Wildlife	from Colorado River.
Save the Scenic Santa Ritas v. U.S. Forest Service	D. Ariz.	Intl/Natl Environmental Group, Local or Regional Group	USFS	Administrative Procedure Act (APA), Clean Water Act (CWA), Federal Lands Policy Management Act (FLPMA), Federal Reserved Water Rights Doctrine, Forest Service Organic Act, Las Cienegas National Conservation Area Act, Mining and Minerals Policy Act of 1970, National Environmental Policy Act (NEPA), Public Trust Doctrine, Stock Raising Homestead Act	Impacts on Land, Water, & Wildlife	Challenge to approvals for copper mine in Arizona.
Sierra Club v. Federal Energy Regulatory	D.C. Cir.	Local/Regional	FERC	National Environmental	Fossil Fuel Extraction &	Challenge to natural gas pipeline project between Ohio and

Commission				Policy Act (NEPA), Natural Gas Act	Transport	Michigan.
Town of Weymouth v. Federal Energy Regulatory Commission	FERC, D.C. Cir.	Intl/Natl Envtl NGO, Local/Regional NGO, State/Local Gov Entity	FERC	NEPA, NGA, CZMA	Fossil fuel extraction & transport	Challenge to FERC's approval of the Atlantic Bridge Project, which includes natural gas pipeline and compression facilities in New York, Connecticut, and Massachusetts.
WildEarth Guardians v. Zinke	D. Mont.	Intl/Natl Environmental Group, Local or Regional Group	DOI & Office of Surface Mining Reclamation & Enforcement	Administrative Procedure Act (APA), National Environmental Policy Act (NEPA)	Fossil Fuel Extraction & Transport	Challenge to mining plan modification for Montana coal mine.

Integrating Consideration of Climate Change into Environmental Review & Permitting (2018)						
Case	**Court**	**Plaintiff or Petitioner Type**	**Defendant**	**Principal Federal Law(s)**	**Sector**	**Summary**
Appalachian Voices v. Federal Energy Regulatory Commission	4th Cir.	Intl/Natl Envtl NGO, Local Envtl NGO, Other Local NGO	FERC	National Environmental Policy Act (NEPA), Natural Gas Act	Fossil Fuel Extraction, Processing, & Transport	Challenge to Federal Energy Regulatory Commission's authorization of the Atlantic Coast natural gas pipeline.
Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers	5th Cir.	Intl/Natl Envtl NGO, Local Envtl NGO; Trade Industry Group	USACE	APA (National Environmental Policy Act (NEPA), Clean Water Act (CWA), Rivers and	Fossil Fuel Extraction, Processing, & Transport	Challenge to U.S. Army Corps of Engineers permits and authorizations for crude oil pipeline in Louisiana.

				Harbors Act, Executive Order 11988		
Birckhead v. Federal Energy Regulatory Commission	D.C. Cir.	Individuals	FERC	NEPA	Fossil Fuel Extraction, Processing, & Transport	Challenge to FERC approval of project involving construction and replacement of natural gas compression facilities in West Virginia, Kentucky, and Tennessee.
Center for Biological Diversity v. Ross	D.D.C.	Intl/Natl Envtl NGO, Other NGO	Dept. of Commerce, NOAA, NMFS	APA, ESA, MMPA	Impacts on Land, Water, & Wildlife	Lawsuit alleging that authorization and management of lobster fishery violated federal law due to impacts on North American right whales.
Center for Biological Diversity v. Tennessee Valley Authority	N.D. Ala.	Intl/Natl Envtl NGO, Local/Regional NGO	TVA	APA, NEPA	Power Plants, Renewables, and Energy Efficiency	Challenge to Tennessee Valley Authority's changes to rate structure, which plaintiffs alleged would discourage investment in renewable energy and energy efficiency.
Center for Biological Diversity v. Zinke	D. Alaska	Intl/Natl Envtl NGO	USFWS, DOI	APA, ESA	Impacts on Land, Water, & Wildlife	Lawsuit challenging the determination that the listing of the Pacific walrus as endangered or threatened was not warranted.
Center for Biological Diversity v. Zinke	D.D.C.	Intl/Natl Envtl NGO	USFWS, DOI	APA, ESA	Impacts on Land, Water, & Wildlife	Action to compel determination on 2013 petition to list the Tinian monarch as endangered or threatened.
Center for Biological Diversity v. Zinke	9th Cir.	Intl/Natl Envtl NGO	USFWS, BOEM, DOI	APA, ESA, NEPA, OCSLA	Fossil Fuel Extraction, Processing, &	Challenge to federal actions authorizing oil and gas development project in the

					Transport	Beaufort Sea offshore of Alaska.
Dakota Rural Action v. U.S. Department of Agriculture	D.D.C.	Intl/Natl Envtl NGO, Local/Regional NGO	USDA, Farm Service Agency	APA, NEPA	Animal Feedlots	Lawsuit challenging the U.S. Department of Agriculture Farm Service Agency (FSA) rule that categorically excluded FSA funding of medium-sized concentrated animal feeding operations from NEPA review.
Delaware Riverkeeper Network v. Federal Energy Regulatory Commission	D.C. Cir.	Local/Regional Envtl NGO	FERC	NEPA, NGA	Fossil Fuel Extraction, Processing, & Transport	Challenge to FERC authorization of PennEast Pipeline project.
Friends of Animals v. U.S. Fish & Wildlife Service	D. Colo.	Intl/Natl Envtl NGO	DOI,USFWS	ESA	Impacts on Land, Water, & Wildlife	Lawsuit to compel the U.S. Fish and Wildlife Service to designate critical habitat for the western distinct population segment of the yellow-billed cuckoo.
Gulf Restoration Network v. Zinke	D.D.C.	Intl/Natl Envtl NGO, Local/Regional Envtl NGO	DOI	APA, NEPA	Fossil Fuel Extraction, Processing, & Transport	Action challenging federal government's decisions to hold offshore oil and gas lease sales.
Idaho Conservation League v. U.S. Forest Service	D. Idaho	Local/Regional Envtl NGO	USFS	APA, NEPA, National Forest Management Act (NFMA), Forest Service Organic Act)	Impacts on Land, Water, & Wildlife	Challenge to approval of a mining exploration project.
In re Appalachian Voices	4th Cir.	Intl/Natl Envtl NGO, Local/Regional NGO	Industry (pipeline company)	Natural Gas Act	Fossil Fuel Extraction, Processing, & Transport	Petition seeking to stay order of Federal Energy Regulatory Commission authorizing the Atlantic Coast natural gas

						pipeline project.
In re PennEast Pipeline Co.	FERC	Local/Regional Envtl NGO	Industry (pipeline company)	Constitution (Fifth Amendment—Takings), NEPA, CWA, Natural Gas Act, National Historic Preservation Act (NHPA)	Fossil Fuel Extraction, Processing, & Transport	Request for rehearing of authorization for natural gas pipeline from Pennsylvania to New Jersey and related facilities
Klamath-Siskiyou Wildlands Center v. Grantham	E.D. Cal.	Local/Regional Envtl NGO	USFS	APA, NEPA, National Forest Management Act (NFMA)	Impacts on Land, Water, & Wildlife	Lawsuit challenging U.S. Forest Service plan to reduce wildfire risk.
Martin County, Florida v. U.S. Department of Transportation	D.D.C.	Local/Regional Gov Entity, Local/Regional NGO	DOT	NEPA, Internal Revenue Code	Resilient Infrastructure & Development	Challenge to federal allocation for passenger railroad in Florida.
Natural Resources Defense Council, Inc. v. Zinke	D. Alaska	Intl/Natl Envtl NGO	DOI, BLM	APA, NEPA	Fossil Fuel Extraction, Processing, & Transport	Challenge to oil and gas lease sales in National Petroleum Reserve–Alaska.
Northern Alaska Environmental Center v. U.S. Department of the Interior	D. Alaska	Intl/Natl Envtl NGO, Local/Regional Envtl NGO	DOI, BLM	APA, NEPA	Fossil Fuel Extraction, Processing, & Transport	Challenge to decision to lease lands in National Petroleum Reserve–Alaska for oil and gas drilling.
Norwalk Harbor Keeper v. U.S. Department of Transportation	D. Conn.	Local/Regional NGO, Individuals	DOT, FTA, Local/State Gov Entity	APA, NEPA	Resilient Infrastructure & Development	Challenge to environmental review for railroad bridge replacement project in Norwalk, Connecticut, alleging failure to conduct adequate resiliency analysis.

Otsego 2000, Inc. v. Federal Energy Regulatory Commission	D.C. Cir.	Local/Regional Envtl NGO, Individuals	FERC	APA, NEPA, NGA	Fossil Fuel Extraction, Processing, & Transport	Challenge to FERC authorization of natural gas infrastructure project in New York.
Rocky Mountain Wild v. Zinke	D. Colo.	Intl/Natl Envtl NGO, Local/Regional Envtl NGO	DOI, BLM	APA, NEPA, FLPMA	Fossil Fuel Extraction, Processing, & Transport	Challenge to 121 oil and gas leases in and around the Uinta Basin in northwestern Colorado and northeastern Utah.
Save the Colorado v. Semonite	D. Colo.	Intl/Natl Envtl NGO, Local/Regional Envtl NGO	USACE, DOI, USFWS	APA, CWA, ESA, NEPA	Impacts on Land, Water, & Wildlife	Challenge to dam project in Boulder County in Colorado.
Western Watersheds Project v. Zinke	D. Idaho	Intl/Natl Envtl NGO, Local/Regional Envtl NGO	DOI, BLM	APA, NEPA, FLPMA	Impacts on Land, Water, & Wildlife	Challenge to sale of oil and gas leases within and affecting sage-grouse habitat and to related Bureau of Land Management guidance.
WildEarth Guardians v. U.S. Bureau of Land Management	D. Mont.	Intl/Natl Envtl NGO, Local/Regional Envtl NGO individuals)	DOI, Local/State Gov Entity	NEPA	Fossil Fuel Extraction, Processing, & Transport	Challenge to environmental reviews conducted for oil and gas lease sales on public lands in Montana.
WildEarth Guardians v. Zinke	D. Ariz.	Intl/Natl Envtl NGO, Local/Regional Envtl NGO	DOI, USFWS	APA, ESA	Impacts on Land, Water, & Wildlife	Challenge to recovery plan for Mexican wolves.
Wilderness Workshop v. U.S. Bureau of Land Management	D. Colo.	Intl/Natl Envtl NGO	DOI, BLM	APA, NEPA	Fossil Fuel Extraction, Processing, & Transport	Challenge to federal approval of 53 oil and gas lease parcels on public lands in the Upper Colorado River Basin in western Colorado.

Advancing and Enforcing Climate Protections (2017)						
Case	**Court**	**Plaintiff or Petitioner Type**	**Defendant**	**Principal Federal Law(s)**	**Sector**	**Summary**
Adorers of the Blood of Christ v. Federal Energy Regulatory Commission	E.D. Pa.; Third Circuit	Religious Order	FERC	Natural Gas, Religious Freedom Reformation Act	Fossil Fuel Extraction & Transport	Action brought by religious order of Roman Catholic women that owned property in Pennsylvania to challenge FERC's authorization of natural gas pipeline that would pass through the property.
City of Oakland v. BP p.l.c.	Cal. Super. Ct., N.D. Cal., 9th Cir.	Municipality	Industry (Fossil Fuel Companies)	Tort Law (Public Nuisance)	Fossil Fuel Co. Liability	Public nuisance actions brought separately by City of Oakland and City of San Francisco against fossil fuel companies.
Clean Air Council v. United States	E.D. Pa.	Intl/Natl Environmental NGO, Citizens	U.S., DOE, EPA, Trump	Constitutional (5th Amendment), Public Trust Doctrine	Government Violation of Constitutional Rights	Lawsuit against United States and other federal defendants asserting constitutional claims to block deregulatory actions by Trump administration.
Colorado River Ecosystem v. State of Colorado	D. Colo.	Local or Regional Group	State of CO	Other Statutory	Impacts on Land, Water, & Wildlife	Action seeking judicial declaration that Colorado River ecosystem is a "person" possessing rights.
Conservation Law Foundation, Inc. v. Shell Oil Products US	D.R.I.	Local or Regional Group	Industry (Fossil Fuel Company)	Administrative Procedure Act (APA), Clean Water Act (CWA)	Fossil Fuel Co. Liability	Citizen suit alleging that Shell Oil violated the Clean Water Act by failing to prepare a bulk storage and

						fuel terminal in Providence, Rhode Island, for climate change impacts.
County of San Mateo v. Chevron Corp.	9th Cir., N.D. Cal., Cal. Super. Ct., Bankr. E.D. Mo.	Municipality	Industry (Fossil Fuel Companies)	Tort Law (Public Nuisance, Private Nuisance, Strict Liability for Failure to Warn, Strict Liability for Design Defect, Negligence, Negligent Failure to Warn, and Trespass)	Fossil Fuel Co. Liability	Actions by California municipalities seeking damages from fossil fuel companies for sea level rise.
County of Santa Cruz v. Chevron Corp.	Cal. Super. Ct., N.D. Cal., 9th Cir.	Municipality	Industry (Fossil Fuel Companies)	Tort Law (Public Nuisance, Private Nuisance, Strict Liability Based on Failure to Warn and Design Defect, Negligence, and Trespass)	Fossil Fuel Co. Liability	Lawsuits filed by City and County of Santa Cruz alleging that fossil fuel companies caused climate change-related injuries.
Holmquist v. United States	E.D. Wash.	Citizens	U.S.	Constitution (Ninth Amendment, Interstate Commerce Commission Termination Act of 1995	Fossil Fuel Extraction & Transport	Challenge to Interstate Commerce Commission Termination Act of 1995 preemption of local prohibitions on rail transportation of fossil fuels.
Humane Society of United States v.	D.D.C.	Intl/Natl Environmental	EPA	Administrative Procedure Act (APA),	Animal Feedlot Emissions	Action to compel EPA to respond to 2009 petition

Pruitt		NGO, Other Intl/Natl NGO, Local or Regional Group		Clean Air Act (CAA)		requesting that concentrated animal feeding operations be regulated as sources of air pollution.
Lindsay v. Republican National Committee	W.D. Wis.	Citizen	120 defendants including President Trump, Trump Administration Cabinet Officials, Republican National Committee	Constitutional and Other Statutory	Government Violation of Constitutional Rights	Lawsuit alleging that defendants including President Trump, cabinet officials, other Republican officials, and other individuals violated plaintiff's rights through numerous policy and other actions, including the failure to act on global warming.
Sierra Club v. Wheeler	D.D.C.	Intl/Natl Environmental Group	EPA	Clean Air Act (CAA), Energy Independence & Security Act (EISA)	Vehicle Emissions & Fuels	Action to compel EPA to submit reports on the Renewable Fuel Standard program's environmental and resource impacts and to complete an "anti-backsliding" study.

Advancing and Enforcing Climate Protections (2018)

Case	Court	Plaintiff or Petitioner Type	Defendant	Principal Federal Law(s)	Sector	Summary
Animal Legal Defense Fund v. United States	D. Or.	Intl/Natl Envtl NGO, Individuals	United States, DOI, Dept. of Ag, EPA, Dept. of Defense	U.S. Constitution (First Amendment, Fourth Amendment, Ninth Amendment,	Gov. Violation of Constitutional Rights (Not	Claims against the federal government alleging violations of a constitutional right to wilderness and

				Fifth Amendment—Due Process, Fourteenth Amendment—Due Process)	Speech)	seeking order requiring the government to prepare and implement a remedial plan to mitigate climate change impacts.
Barnes v. Edison International	C.D. Cal.	Individuals	Industry (Utility)	Other Federal Statute (Securities Act of 1933/Securities Exchange Act of 1934)	Climate Misinformation and Disclosures	Securities class action against utility company in Southern California alleging misrepresentations regarding exposure to wildfire risk.
Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.	D. Colo.	Local/Regional Gov Entity	Industry (Fossil Fuel Companies)	Clean Air Act (CAA); Tort Law (Nuisance, Trespass, Conspiracy); State Law (Unjust Enrichment, Colorado Consumer Protection Act)	Fossil Fuel Co. Liability	Action by Colorado local governments seeking damages and other relief from fossil fuel companies for climate change harms.
California v. EPA	N.D. Cal.	Local/Regional Gov Entity	EPA	Clean Air Act (CAA)	Landfill Emissions	Action to compel EPA to implement and enforce emission guidelines for existing municipal solid waste landfills.
Center for Biological Diversity v. EPA	D. Or.	Intl/Natl Envt NGO	EPA	APA, CWA	Impacts on Land, Water, & Wildlife	Lawsuit alleging that EPA violated Clean Water Act by failing to identify waters off the coast of Oregon as impaired by ocean acidification.
City of New York v.	2d Cir.	Local/Regional	Industry (Fossil	State Law (Public and	Fossil Fuel Co.	Action brought by New

BP p.l.c.		Gov Entity	Fuel Companies)	Private Nuisance, Trespass)	Liability	York City against fossil fuel companies seeking damages for climate change-related injuries.
de Mejias v. Malloy	D. Conn.	Local/Regional Envtl NGO, Other NGO; Individuals	Local/State Gov Entity	Constitutional Law (Fourteenth Amendment—Equal Protection, Contracts Clause); State Law (Connecticut General Statutes-Public Service Companies, Connecticut Sales and Use Tax Statute, Promissory Estoppel, Connecticut State Constitution)	Power Plants, Renewables, & Energy Efficiency	Challenge to Connecticut's transfer of funds collected from ratepayers and held by utilities for clean energy and energy efficiency purposes to Connecticut's General Fund.
King County v. BP p.l.c.	W.D. Wash.	Local/Regional Gov Entity	Industry (Fossil Fuel Company)	Tort Law (Common law: Nuisance, Trespass)	Fossil Fuel Co. Liability	Public nuisance and trespass action brought by King County in Washington State against fossil fuel companies seeking funding of climate change adaptation program
Mayor & City Council of Baltimore v. BP p.l.c.	D. Md.	Local/Regional Gov Entity	Industry (Fossil Fuel Company)	Tort Law (Nuisance, Negligence, Trespass, Strict Liability), Maryland Consumer Protection Act	Fossil Fuel Co. Liability	
New York City Employees' Retirement System	S.D.N.Y.	Local/Regional Gov Entity	Industry (Aerospace Company)	Securities Act of 1933/Securities Exchange Act of 1934	Climate Misinformation and	Lawsuit by New York City pension funds to compel aerospace company to

v. TransDigm Group, Inc.					Disclosures	include climate change-related shareholder proposal in its proxy materials.
New York v. Pruitt	D.D.C.	Local/Regional Gov Entity	EPA	APA, Clean Air Act (CAA)	Fossil Fuel Extraction, Processing, & Transport	Action to compel EPA to promulgate emission guidelines for methane from existing sources in the oil and gas sector.
Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp.	N.D. Cal.	Industry Trade Group (Commercial Fishing Association)	Industry (Fossil Fuel Company)	Tort Law (Nuisance, Negligence, Strict Liability)	Fossil Fuel Co. Liability	Action by a commercial fishing industry trade group to hold fossil fuel companies liable for adverse climate change impacts to the ocean off the coasts of California and Oregonthat resulted in "prolonged closures" of Dungeness crab fisheries.
People of the State of New York v. Exxon Mobil Corporation	N.Y. Sup. Ct.	Local/Regional Gov Entity	Industry (Fossil Fuel Company)	Tort Law (Fraud), State Claims (New York Martin Act, New York Executive Law § 63(12))	Climate Misinformation and Disclosures	Action alleging fraudulent scheme by Exxon Mobil Corporation to deceive investors about the company's management of risks posed by climate change regulation.
Rhode Island v. Chevron Corp.	D.R.I.	Local/Regional Gov Entity; Intl/Natl Envtl NGO, Tribal Envtl NGO, Regional Envtl NGO	Industry (Fossil Fuel Company)	Tort Law (Common Law-Nuisance, Common Law—Negligence, Common law—Trespass, Common law–Strict Liability), State	Fossil Fuel Co. Liability	State of Rhode Island lawsuit seeking to hold fossil fuel companies liable for causing climate change impacts that adversely affect Rhode Island and jeopardize State-owned or -operated

				Claims (Rhode Island Constitution, Public Trust Doctrine, Rhode Island State Environmental Rights Act)		facilities, real property, and other assets.
Sound Action v. U.S. Army Corps of Engineers	W.D. Wash.	Local/Regional Envtl NGO	USACE	APA, CWA	Impacts on Land, Water, & Wildlife	Lawsuit challenging the U.S. Army Corps of Engineers decision to reject a recommended change to the "high tide line" used by the Seattle District to determine the scope of its Section 404 jurisdiction.
WildEarth Guardians v. Chao	D. Mont.	Intl/Natl Envtl NGO	Fed Gov (DOT, Pipeline and Hazardous Materials Safety Administration)	MLA	Fossil Fuel Extraction, Processing, & Transport	Lawsuit alleging that the Department of Transportation and Pipeline and Hazardous Materials Safety Administration unlawfully failed to cause annual examinations of oil and gas pipelines on public lands.
Willmeng v. City of Thornton	D. Colo.	Individuals	Local/State Gov (Municipal)	Constitution (First Amendment)	Speech or Protest Related to Fossil Fuels	First Amendment lawsuit brought by two Colorado residents against Colorado city and its mayor pro tem for blocking their comments about hydraulic fracturing.

Deregulating, Undermining Climate Protections, or Targeting Climate Protections Supporters (2017)						
Case	**Court**	**Plaintiff or Petitioner Type**	**Defendant**	**Principal Federal Law(s)**	**Sector**	**Summary**
Alliance of Automobile Manufacturers v. EPA	D.C. Cir.	Industry Trade Group	EPA	Administrative Procedure Act (APA), Clean Air Act (CAA)	Vehicle Emissions & Fuels	Challenge to Obama administration's Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation
American Bird Conservancy v. Disbrow	D.D.C.	Local or Regional Group, Other National NGO	DOI, USFWS, U.S. Air Force; State-Level Entity (Ohio Air National Guard)	Administrative Procedure Act (APA), Bald and Golden Eagle Protection Act, Endangered Species Act (ESA), National Environmental Policy Act (NEPA), Migratory Bird Treaty Act	Power Plants, Renewables, & Energy Efficiency	Challenge by two bird conservation groups to a wind turbine project sponsored by the Ohio Air National Guard at Camp Perry in Ottawa County, Ohio.
Coffeyville Resources Refining & Marketing, LLC v. EPA	D.C. Cir.	Industry (Refineries and Energy Companies)	EPA	Clean Air Act (CAA)	Vehicle Emissions & Fuels	Challenge to EPA's final Renewable Fuel Standards for 2017 and Biomass-Based Diesel Volume for 2018.

Constitution Pipeline Co. v. Federal Energy Regulatory Commission	D.D.C., FERC	Industry (Pipeline Company)	NY State Dept. of Environmental Conservation	Clean Water Act (CWA), Natural Gas Act	Fossil Fuel Extraction & Transport	Petition seeking declaratory order that the New York State Department of Environmental Conservation had waived jurisdiction over water quality certificate for interstate natural gas pipeline project.
Competitive Enterprise Institute v. U.S. Department of State	D.D.C.	Conservative NGO	Dept. of State	Freedom of Information Act (FOIA)	Government Records or Communications	Action to compel production of U.S. Department of State officials' correspondence regarding climate negotiations.
Competitive Enterprise Institute v. U.S. Department of State	D.D.C.	Conservative NGO	Dept. of State	Freedom of Information Act (FOIA)	Government Records or Communications	Freedom of Information Act lawsuit filed against the Department of State seeking correspondence of two employees' regarding the Paris Agreement.
Electric Power Supply Association v. Star	N.D. Ill. ; 7th Cir.	Industry (Companies), Industry Trade Group, Citizens, Municipality	State: Director of the Illinois Power Agency	Constitutional: (Fifth Amendment, Commerce Clause, Supremacy Clause), Illinois Future Energy Jobs Act	Power Plants, Renewables, and Energy Efficiency	Challenge to Illinois law that created a Zero Emissions Credit program allegedly to support uneconomic nuclear plants.
Energy &	D.D.C.	Conservative NGO	Dept. of State	Freedom of	Government	Action to compel disclosure of

Environment Legal Institute v. United States Department of State				Information Act (FOIA)	Records or Communications	State Department communications regarding climate change negotiations with China
Energy Transfer Equity, L.P. v. Greenpeace International	D.N.D.	Industry (Pipeline Developer)	Environmental Group and Citizens	Racketeer Influenced and Corrupt Organizations (RICO)	Speech or Protest Related to Fossil Fuels	Racketeer Influenced and Corrupt Organizations (RICO) action by Dakota Action Pipeline developers against Greenpeace and other organizations.
Ergon-West Virginia, Inc. v. EPA	4th Cir.	Industry (Fossil Fuel Company)	EPA	CAA, Energy Policy Act of 2005	Vehicle Emissions & Renewable Fuels	Challenge to EPA's denial of a small refinery exemption from the Renewable Fuel Standard program.
General Land Office of State of Texas v. U.S. Fish & Wildlife Service	W.D. Tex	Local or State Gov Entity	USFWS, DOI	ADA, ESA, NEPA	Impacts on Land, Water, & Wildlife	Lawsuit challenging continued listing of golden-cheeked warbler as an endangered species.
Marshall County Coal Co. v. Oliver	W. Va. Cir. Ct., N.D. W. Va.	Industry (Coal Companies and Coal Executive)	Citizen, Company	Tort Law (Defamation)	Speech or Protest Related to Fossil Fuels	Defamation action brought by coal companies and coal executive for statements made on the television show Last Week Tonight with John Oliver.
Mexichem Fluor, Inc. v. EPA	D.C. Cir.	Industry(HFC Manufacturer)	EPA	Clean Air Act (CAA)	Appliance, Industrial, and	Challenge to 2016 rule expanding the scope of 2015

					Building Standards	regulations that classified hydrofluorocarbons (HFCs) and HFC blends as unacceptable for certain uses pursuant to the Significant New Alternatives Program (SNAP) under Clean Air Act Section 612.
Millennium Bulk Terminals-Longview, LLC v. Washington State Department of Ecology	Wash. PCHB	Industry (Coal Developer)	State Agency: WA Dept. of Ecology	Clean Water Act (CWA), Constitution (Supremacy Clause, Commerce Clause, Fourteenth Amendment)	Fossil Fuel Extraction & Transport	Administrative appeal of denial of application for water quality certification for coal terminal in Washington State.
Millennium Bulk Terminals-Longview, LLC v. Washington State Department of Ecology	Wash. Super. Ct.	Industry (Coal Developer)	State Agency: WA Dept. of Ecology	Clean Water Act (CWA), Constitution (Supremacy, Fourteenth Amendment)	Fossil Fuel Extraction & Transport	Challenge to denial of water quality certificate for coal terminal.
Millennium Pipeline Co. v. Seggos	N.D.N.Y.	Industry (Pipeline Company)	State Agency: NY Dept. of Envtl Conservation	Constitution (Supremacy Clause), Natural Gas Act	Fossil Fuel Extraction & Transport	Action seeking declaratory judgment that federal law preempted state environmental permitting requirements for gas pipeline project and also seeking to enjoin enforcement of state permitting requirements to

						interfere with project.
National Electrical Manufacturers Association v. United States Department of Energy	4th Cir.	Industry Trade Group	DOE	Energy Policy and Conservation Act (EPCA), Energy Independence & Security Act (EISA)	Appliance, Industrial, and Building Standards	Challenge to energy efficiency standards for lamps.
National Environmental Development Association's Clean Air Project v. EPA	D.C. Cir.	Industry Trade Group	EPA	Clean Air Act (CAA)	Appliance, Industrial, and Building Standards	Challenge to EPA's updates to refrigerant management requirements.
Turning Point USA (TPUSA) v. Macomb Community College	E.D. Mich.	Citizens	University	Constitutional (1st Amendment, 14th Amendment)	Speech or Protest Related to Fossil Fuels	Lawsuit brought by students against community college alleging that the college violated the students' free speech and equal protection rights by barring them from engaging in expressive activity to promote fossil fuels without prior approval.

Deregulating, Undermining Climate Protections, or Targeting Climate Protections Supporters (2018)

Case	Court	Plaintiff or Petitioner Type	Defendant	Principal Federal Law(s)	Sector	Summary
Argos Properties II, LLC v. City	Va. Cir.	Industry (Developer)	Local/State	U.S. Constitution (Fourteenth	Resilient Infrastructure &	Developer's lawsuit challenging City of Virginia

Council for Virginia Beach	Ct.		Gov Entity	Amendment—Equal Protection), Virginia Planning, Subdivision of Land and Zoning Law	Development	Beach's denial of application to rezone property for residential development on the grounds that the developer failed to account for sea level rise in its stormwater analysis.
Competitive Enterprise Institute v. U.S. Department of State	D.D.C.	Conservative NGO	State Dept.	FOIA	Government Records or Communications Request	Freedom of Information Act lawsuit seeking Department of State records regarding international climate change negotiations
In re Exxon Mobil Corp.	Tex. App.	Industry (Fossil Fuel Company)	Local/State Gov Entity	Constitution (First Amendment), State Law (Common Law - Abuse of Process, Texas Constitution)	Fossil Fuel Co. Liability	Exxon Mobil Corporation petition seeking pre-suit depositions and documents in anticipation of potential claims of abuse of process, conspiracy, infringement of Exxon's rights in connection with California municipalities' climate change lawsuits.
Institute for Energy Research v. U.S. Department of the Treasury	D.D.C.	Conservative NGO	Treasury Dept.	FOIA	Government Records or Communications Request	Freedom of Information Act lawsuit seeking to compel the Department of the Treasure to respond to request for correspondence regarding climate change financial disclosures.
Lighthouse	W.D.	Industry (Company)	Local/State	Constitution	Fossil Fuel	Action against Washington

Resources Inc. v. Inslee	Wash.		Gov Entity	(Commerce Clause, Supremacy Clause), Other Stat (Interstate Commerce Commission Termination Act of 1995 (ICCTA), Ports and Waterways Safety Act)	Extraction, Processing, & Transport	State officials for allegedly taking unlawful actions to block coal export terminal.
Millennium Bulk Terminals Longview, LLC v. Washington State Department of Ecology	Wash. Super. Ct.	Industry (coal export developer)	Local/State Gov Entity	CWA, Constitutional (Fourteenth Amendment—Equal Protection, Fourteenth Amendment—Due Process), State Claims	Fossil Fuel Extraction, Processing, & Transport	Lawsuit challenging Washington Department of Ecology's denial of water quality certification for coal export terminal and alleging denial was based on improper grounds.
The Two Hundred v. California Air Resources Board	Cal. Super. Ct.	Individuals	Local/State Gov Entity	Constitution (Fourteenth Amendment—Equal Protection, Due Process), Federal Housing Act; State Claims	State GHG Reduction Measures	Lawsuit alleging that provisions of 2017 scoping plan under the Global Warming Solutions Act are unlawful, unconstitutional, and exacerbate poverty.

Cases Filed Prior to 2017 and Held in Abeyance in 2017						
Case	**Court**	**Plaintiff/Petitioner Type**	**Defendant**	**Principal Federal Law(s)**	**Sector**	**Summary**
American Petroleum Institute v. EPA	D.C. Cir.	State Government Entity, Industry Trade Group or Association	EPA	Clean Air Act (CAA)	Fossil Fuel Extraction & Transport	Challenge to new source performance standards for oil and gas sector.
National Waste & Recycling Association v. EPA	D.C. Cir.	Industry Trade Group, Private Companies	EPA	Clean Air Act (CAA)	Landfill Emissions	Challenge to emission guidelines for municipal solid waste landfills.
North Dakota v. EPA	D.C. Cir.	Industry Trade Group or Association, Industry (Companies), Conservative NGO, States, Chamber of Commerce, and Others	EPA	Clean Air Act (CAA)	Power Plants, Renewables, and Energy Efficiency	Challenge to EPA's performance standards for greenhouse gas emissions from new, modified, and reconstructed power plants.
Truck Trailer Manufacturers Association, Inc. v. EPA	D.C. Cir.	Industry Trade Group	EPA	Clean Air Act (CAA), Energy Independence & Security Act (EISA)	Vehicle Emissions & Fuels	Challenge to greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles.
West Virginia v. EPA	D.C. Cir.	State Government Entity, Industry (companies and utilities), Industry Trade Group, Union, the U.S. Chamber of Commerce, Conservative NGO	EPA	Administrative Procedure Act (APA), Clean Air Act (CAA)	Power Plants, Renewables, and Energy Efficiency	Challenge to EPA's final Clean Power Plan rule.

APPENDIX B: LITIGATION MATTERS NOT INCLUDED IN THE ANALYSIS

These tables contain cases and other legal matters that were excluded from the dataset because they were either 1) focused on state or local law, 2) irrelevant to deregulation, or 3) not litigation matters before a court. The case summaries are taken from the Sabin-AP U.S. Climate Change Litigation database available at http://climatecasechart.com/us-climate-change-litigation/.

Cases Primarily of State or Local Significance (2017)	
Case	**Summary**
Alliance for the Great Lakes v. Illinois Department of Natural Resources	Challenge to authorization of diversion of water from Lake Michigan by the Metropolitan Water Reclamation District of Greater Chicago.
California Sportfishing Protection Alliance v. California Department of Water Resources	Challenge under CEQA to the WaterFix diversion project for the San Francisco Bay-Delta estuary.
Center for Biological Diversity v. City of San Bernardino Municipal Water Department	Lawsuit Filed Challenging Water Project in San Bernardino. Center for Biological Diversity and San Bernardino Valley Audubon Society filed a lawsuit challenging the California Environmental Quality Act (CEQA) review for the "Clean Water Factory Project" approved by the City of San Bernardino. The petition alleged that the project would divert up to 22 million gallons of treated water per day from the Santa Ana River. The petition asserted numerous failures in the environmental review for the project, including a failure to adequately disclose, analyze, and mitigate the project's significant and cumulative impacts to air quality and greenhouse gas emissions.
Citizens for a Responsible Caltrans Decision v. California Department of Transportation	Challenge to highway interchange project in San Diego.
Citizens for the Regents Road Bridge, Inc. v. City of San Diego	Group Challenged San Diego's Removal of Bridge Project from Planning Document. A nonprofit group filed a lawsuit challenging the CEQA review for the City of San Diego's removal of a bridge project from a community plan. The group said that the CEQA review failed to adequately disclose and analyze environmental impacts, including significant adverse impacts on greenhouse gas emissions.
Cleveland National Forest Foundation v. County of San	Challenge to the Forest Conservation Initiative Amendment to the San Diego

Diego	County general plan.
Columbia Pacific Building Trades Council v. City of Portland	Challenge to Portland zoning amendments restricting fossil fuel terminals.
Columbia Riverkeeper v. Cowlitz County	Challenge to permits for methanol manufacturing and shipping facility.
Energy & Environmental Legal Institute v. Attorney General of New York	Action to compel production of New York attorney general's correspondence with Vermont attorney general using private email account.
Harris County v. Arkema, Inc.	Proceeding by Texas county alleging that chemical manufacturer that operated facility that flooded and where chemicals ignited during Hurricane Harvey violated local floodplain regulations and state air and water laws.
In re Millennium Bulk Terminals – Longview, LLC Shoreline Permit Applications	Challenge to denial of shoreline permits for proposed coal terminal.
Mission Hills Heritage v. City of San Diego	Challenge to the City of San Diego's approval of a community plan update.
National Audubon Society v. Humboldt Bay Harbor, Recreation & Conservation District	Challenge to environmental review for expansion of shellfish aquaculture area in Humboldt Bay.
New England Power Generators Association v. Massachusetts Department of Environmental Protection	Challenge to Massachusetts regulations establishing emissions limits for electricity generating facilities.
Sierra Club v. California Public Utilities Commission	Challenge to inclusion of fossil fuel-fired resources in distributed energy procurement program.
Sierra Club v. County of San Diego	Challenge to the Forest Conservation Initiative Amendment to the San Diego County general plan.
Sinnok v. Alaska	Lawsuit contending that Alaska state Climate and Energy Policy violated youth plaintiffs' rights under the state constitution.

Cases Irrelevant to National Deregulation for Other Reasons (2017)

Case	Summary
Jacobson v. National Academy of Sciences	Action brought by scientist against journal and another scientist in connection with publication of article critiquing plaintiff-scientist's work.

Database Items Not Yet Before a Court (2017)	
Case	**Summary**
Letter from American Democracy Legal Fund to Comptroller General of the United States Requesting Pruitt Investigation	Request for investigation into whether EPA Administrator Scott Pruitt's communications were misuse of appropriated funds.
Petition to List the Giraffe Under the Endangered Species Act	Request to list the giraffe under the Endangered Species Act.
Petition for Rulemaking Seeking Amendment of Locomotive Emission Standards	Rulemaking petition to EPA from California Air Resources Board seeking more stringent emission standards for locomotives and locomotive engines.
Petition for Reconsideration of Application of the Final Rule Entitled "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2 Final Rule" to Gliders	Petition seeking reconsideration of application of greenhouse gas and fuel efficiency standards for medium- and heavy-duty engines and vehicles to "gliders" (i.e., certain types of rebuilt vehicles).
Center for Biological Diversity, Notice of Violations for Hilcorp's Pipeline Leak in the Cook Inlet, Alaska	Threatened legal action in connection with leaking natural gas pipeline in the Cook Inlet off the Alaskan coast.
Clean Air Act Notice of Intent to Sue for Failure to Establish Guidelines for Standards of Performance for Methane Emissions from Existing Oil and Gas Operations	Threatened lawsuit against EPA for failing to regulate methane emissions from existing oil and gas sources.
Notice of Intent to Sue EPA for Failure to Promulgate Emission Guidelines for Methane and VOC Emissions from the Oil and Gas Sector	Threatened litigation against EPA for failing to regulate methane and volatile organic compound emissions from the oil and gas sector.
Petitions Seeking Reconsideration of EPA's 2009 Endangerment Finding for Greenhouse Gases	Rulemaking petitions seeking to undo 2009 endangerment finding for greenhouse gases.
Sierra Club Complaint to EPA Inspector General regarding Violation of Scientific Integrity Policy by Administrator Scott Pruitt	Complaint to EPA inspector general alleging that EPA Administrator Scott Pruitt's statements violated the agency's Scientific Integrity Policy.
Rule 14a-8 No-Action Request from Apple, Inc. Regarding Shareholder Proposal of Sustainvest Asset Management, LLC	Request for no-action response from SEC regarding shareholder proposal asking Apple to produce a report assessing the climate benefits and feasibility of adopting requirements that all retail locations implement a policy to keep store doors closed.
Rule 14a-8 No-Action Request from Apple, Inc.	Request for no-action response from SEC regarding shareholder proposal asking

Regarding Shareholder Proposal of Christine Jantz	Apple to prepare a report evaluating the potential for Apple to achieve net-zero emissions of greenhouse gases.

Cases Primarily of State or Local Significance (2018)

Case	Summary
Aji P. v. State of Washington	Action by young people under 18 years of age claiming that the State of Washington and state agencies and officials violated plaintiffs' rights by creating and maintaining fossil fuel-based transportation and energy systems.
California Fueling, LLC v. Best Energy Solutions & Technology Corp.	Lawsuit alleging conspiracy and fraud by defendants who produced and marketed an additive to reduce nitrogen oxides emissions associated with biodiesel.
California Native Plant Society v. County of San Diego	Challenge to San Diego County approvals for residential and commercial development project.
Center for Biological Diversity v. U.S. Fish & Wildlife Service	Lawsuit seeking to compel designation of critical habitat for western yellow-billed cuckoo.
Competitive Enterprise Institute v. Regents of the University of California	Lawsuit seeking correspondence and other records of UCLA Law School professors in connection with alleged work with outside parties to develop legal cases against opponents of climate change regulation.
Free Market Environmental Law Clinic, PLLC v. Schnare	Lawsuit against founder by limited liability company that pursued freedom of information law requests and litigation in connection with state attorneys general climate change investigations.
Friends of the River v. Delta Stewardship Council	Challenge to amendments to the Delta Plan for long-term management of the Sacramento-San Joaquin Delta.
Hawai'i Solar Energy Association v. Department of Business, Economic Development and Tourism	Challenge to Hawai'i's implementation of a law mandating inclusion of solar water heaters in new single-family homes.
Leach v. Reagan	Challenge to constitutional amendment initiative that would required 50% of all electricity sales to come from renewable energy.
United States v. Aux Sable Liquid Products LP	Clean Air Act enforcement action against natural gas processing plant in Illinois.

Reynolds v. Florida	Action by eight young people asserting that the State of Florida and its agencies and officials violated fundamental rights to a stable climate system under Florida common law and the Florida constitution.
Sierra Club v. City of Fontana	Challenge to City of Fontana's approval of the Southwest Fontana Logistics Project, which involves development of two industrial warehouse buildings totaling approximately 1.6 million square feet on 73.3 acres.
Sierra Club v. County of San Diego	Environmental groups' challenge to San Diego County's Climate Action Plan.
Sierra Club v. Talen Energy Corp.	Citizen suit against owner-operators of power plant in Pennsylvania.
Sierra Club v. County of Tulare	Challenge to San Diego County's approval of residential developments, allegedly without complying with requirements for enforceable measures to mitigate greenhouse gas emissions.
Sierra Club v. County of Tulare	Challenge to environmental review for Animal Confinement Facilities Plan, Dairy Feedlot and Dairy Climate Action Plan, and related actions approved by Tulare County in California to streamline approval process for dairies.
Smith v. Keurig Green Mountain, Inc.	Class Action Filed in California Court Alleging Misrepresentation of Recyclability of Single-Serve Coffee Pods.

BEST PRACTICES: MEDIATING THE INSURANCE COVERAGE AND BAD FAITH CLAIM

American College of Coverage Counsel
2019 Insurance Law Symposium
Nova Southeastern University, Shepard Broad College of Law
Fort Lauderdale, FL
November 1, 2019

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I. The Tripartite Relationship and the Effect of Mediation on Privileges in Insurance Disputes[1]

A. Introduction

An insurance dispute involving numerous parties can create a complex privilege situation. Although an insurer and its insured typically share a common interest in defending against the underlying claim, their interests may diverge at various steps along the way. Coverage disputes and bad faith claims can sour this mutually beneficial relationship. When the team defending the underlying claim turns into adversaries, what happens with the privileged information that the team developed? If any part of the dispute is mediated, the confidentiality rules of mediation add an additional layer of complexity to this question. This section explores the privileges shared between an insurer and its insured and how these privileges are affected by the mediation process, as well as what happens to such confidential information when the parties become adversaries.

B. The Tripartite Relationship, the Common Interest Doctrine, and Ethical Concerns

The tripartite relationship involved in insurance disputes is complex. An insurer and its insured are connected by an insurance contract. When a claim arises against the insured, she will turn to the insurer for coverage. The insurer will then appoint an attorney to defend the insured's case. The attorney is hired and paid for by the insurer, but represents the interests of the insured – while also looking out for the interests of the insurer. Most of the time, this relationship works: the attorney is appointed by the insurer to represent the insured, defends and/or settles the claim, and the relationship ends. *See* Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 267 (1994). However, a coverage or bad faith dispute, or fears of collusion by either the insurer or the insured, can create conflicts of interest. *Id.* Although the insurer and the insured share the common interest of defending against the underlying claim, their interests may diverge with certain monetary considerations, such as whether to settle or fight the claim, keeping payment amounts within the policy limits, or whether the insurer even has a duty to defend. *Id.* If an insurer agreeing to defend the insured reserves its rights as to coverage, this brings up other considerations, such as billing costs, confidentiality as to potential coverage issues by the defense attorney, or whether the insured should retain its own attorney. *Id.* at 270-71. A great deal of the conflict comes down to the defense attorney's duties as to the paying insurer versus the represented insured. *Id.* As the attorney is working for both parties' common interest, it is

[1] This article is not offered as legal advice. Readers should consult qualified counsel about matters discussed herein. The views expressed are those of the authors and not those of Shook, Hardy & Bacon L.L.P. or its clients. The authors would like to thank Gerald T. Albrecht of Albrecht Mediation Services for his invaluable guidance; any mistakes or omissions, however, are the authors' alone.

difficult to determine the scope and importance of the duty the attorney owes to each, especially when their interests begin to diverge. *Id.*

The state of Florida, concerned about such ethical dilemmas, amended its rules of professional conduct to impose guidelines addressing this complex relationship. *See* Rule Reg. Fla. Bar 4-1.8. Defense lawyers must now provide the insured with a "Statement of Insured Client's Rights" upon taking the case as assigned by the insurance company. *Id.* This document informs the insured of its rights in the tripartite relationship and outlines how the claim and litigation will proceed. *Id.* Importantly, the statement explains that although the lawyer may have a duty to inform the insurer of information learned regarding the defense or settlement of the claim, the lawyer must keep confidential any information learned about potential coverage issues between the insurer and the insured. *Id.* This clarifies the balance of the lawyer's duties to both the insurer and the insured, and helps the insured to know the protections and vulnerabilities to which it is exposed in this tripartite relationship. *Id.*

C. Privileges in Bad Faith Claims

The tripartite relationship presents unique problems when bad faith claims arise. The attorney-client privilege in Florida is statutorily protected. Fla. Stat. § 90.502. However, under the common interest doctrine, information regarding the defense and settlement of the claim would not be protected by the attorney-client privilege as between the insurer, the insured, and the defense lawyer, because the insurer and the insured have the common interest of defending the claim. *See* Fla. Stat. § 90.502(4)(e). In insurance bad faith cases between an insured and its insurer, however, the parties that share a common interest become adversaries. The question is, then: what privileges can be invoked by parties against one another in such proceedings? Florida courts have struggled with this question in various scenarios in recent years.

If the insurer and the insured share counsel for defense of the underlying claim, then any communications among any of the three regarding the underlying litigation are discoverable by the insured during a subsequent bad faith claim. *Progressive Exp. Ins. Co. v. Scoma*, 975 So. 2d 461, 466–67 (Fla. Dist. Ct. App. 2007). However, this is limited to the communications that are within the scope of the common interest doctrine. *Springer v. United Servs. Auto. Ass'n*, 846 So. 2d 1234, 1235 (Fla. Dist. Ct. App. 2003). Essentially, the common interest doctrine precludes the application of the attorney-client privilege for materials within the doctrine's scope. *Id.*

The information discoverable by either party in a bad faith claim as such is limited to that which was collected while the parties shared a common interest. *Id.* Thus, an insured is not able to obtain information between its insurer and the insurer's attorney protected by the attorney-client privilege that does not concern the underlying litigation – for example, that concerns coverage issues or a bad faith claim. *Id.* Also, if an insurer or an insured hires its own attorney, it can invoke the attorney-client privilege as to communications with this separate attorney. *Scoma*,

975 So. 2d at 467; *Volpe v. Conroy, Simberg & Ganon, P.A.*, 720 So. 2d 537, 539 (Fla. Dist. Ct. App. 1998).

Material protected by the work product privilege is handled slightly more leniently than that protected by the attorney-client privilege. *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1068-69 (Fla. 2011); *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1129–30 (Fla. 2005). The work product privilege is outlined in Florida's Rules of Civil Procedure, which states that a party can discover documents of the opposing party only if it is necessary to her case and it would be an undue hardship were she not entitled to such discovery. FLA. R. CIV. P. 1.280. In insurance bad faith claims, the Florida Supreme Court has held that material protected by the work-product privilege between the insurer and its counsel up to and including the date of resolution of the underlying litigation is discoverable by the insured, in order to allow her to build her case. *Ruiz*, 899 So. 2d 1129-30. The material that is created after the resolution of the underlying litigation can be discoverable only upon a showing of good cause or after an in-camera inspection by the court. *Id.*

The reasoning behind this distinctive treatment of material protected by the attorney-client privilege versus the work-product doctrine rests on the purpose of both privileges. *Genovese*, 74 So. 3d at 1067-68. The work-product privilege can be overcome if the other party needs the relevant information in order to bring and build its case. *Genovese*, 74 So. 3d at 1068; *Ruiz*, 899 So. 2d at 1129–30. The doctrine focuses on the hardship to the opposing party, rather than the protection of the privilege of the party with the information. *Genovese*, 74 So. 3d at 1067-68. However, the attorney-client privilege is sacred, because it encourages the free flow of communications between attorney and client that is necessary to a productive justice system. *Id.* at 1068-69. Stifling the attorney-client privilege would undermine the security of communication between attorneys and their clients, and thus the efficiency of the judicial process. *Id.*

Although attorney-client privileged information is protected in a bad faith claim, the privilege still can be waived. *Id.* For example, if an insurer in a bad faith dispute asserts a defense based on information protected by the attorney-client privilege, that information's protections are waived under the at-issue doctrine, and the insured has the right to discover the materials. *Id.* The party cannot bring up an issue based upon confidential information, and then argue that the other party cannot dispute it or delve into the issue deeper because of its confidential nature. *Id.* In essence, the party cannot use the confidential information as both a sword and a shield – the confidential nature is waived to the extent needed to meaningfully air and resolve the issue. *See Allstate Ins. Co. v. Levesque*, 263 F.R.D. 663, 667 (M.D. Fla. 2010).

The privileges involved in the tripartite relationship are seemingly precarious and vulnerable to a change in the interests of the parties involved. The insurer-insured team can quickly become adversaries, which leaves each party vulnerable when such privileged information is at stake. The confidentiality of the mediation process adds in yet another privilege to this already complex situation.

D. Mediation in Florida

Florida has developed a number of rules and guidelines to encourage and regulate the practice of mediation as an alternative form of dispute resolution. *See* Fla. Stat. T. V, Ch. 44; Fla. Rules for Certified and Court-Appointed Mediators. The goal of doing so is to not only ensure an ethical mediation process, but also to cultivate public confidence in the mediation system. *See, e.g.*, Fla. R. Med. 10.200.

For example, Florida has developed the Mediator Rules to maintain the integrity of the mediation process and, in particular, the mediators who conduct it. *See* Fla. Rules for Certified and Court-Appointed Mediators. These Rules explain the requirements needed to become a mediator, the standards to which mediators must adhere, and guidelines to ensure the efficiency and ease of carrying out the mediation process. *See id.*

The Rules explain that the goals of mediation as an alternative form of dispute resolution are to create a space of fairness, procedural flexibility, confidentiality, and full disclosure for the parties involved. Fla. R. Med. 10.230. There are a number of Rules that further these objectives, such as the requirement that mediators remain impartial and free of conflicts of interest, that they allow the parties the freedom of self-determination throughout the process, and that they keep the information disclosed throughout the mediation process confidential. Fla. R. Med. 10.310, 10.330-.340, 10.360.

One of these Mediator Rules created the Mediator Ethics Advisory Committee. Fla. R. Med. 10.910. This committee was developed to answer questions regarding the rules and their intended interpretations and interactions with one another. *Id.* Mediators can submit questions to the Committee regarding conflicts of interest, confidentiality concerns, procedural matters, or just general advice regarding the administration of a mediation proceeding. *Id.* The Committee will write an opinion on the issue and post it to its website for the benefit of all mediators in the State. *Id.* Although these opinions cannot be used as a defense in a malpractice proceeding, a mediator's reliance on the opinions can help show compliance with the duty of good faith. *Id.*

Finally, Chapter 44 of the Florida Statutes and Court Rules contains provisions regulating the mediation process. Fla. Stat. T. V, Ch. 44. This Chapter outlines the practice and procedures of the mediation process within the judicial system. *Id.* The heart of this Chapter is the Mediation Confidentiality and Privilege Act, which was designed to protect the integrity of the open-communication style of this dispute resolution. *See* Fla. Stat. §§ 44.401-44.406 (2004).

E. Florida's Mediation Confidentiality and Privilege Act

The requirement of confidentiality during mediation was codified in Florida in the Mediation Confidentiality and Privilege Act. *See id.* This Act defines the scope, duration, and confidentiality requirements of mediations in Florida, as well as civil remedies imposed for

breaches of such confidentiality. *See id.* The Act applies to all mediations, both voluntary and involuntary. Fla. Stat. § 44.402. However, the parties to a mediation can agree in writing that they will not be bound by some or all of the Act's provisions. *Id.*

The Act explains that a mediation begins at the moment of issuance of the order (if court-ordered) or at the moment of agreement of the parties (if voluntary). Fla. Stat. § 44.404. The mediation ends in one of four ways: 1) a settlement agreement, either partial or complete, is signed by the parties; 2) the mediator declares an impasse; 3) the mediation is terminated by court order or statute; or 4) the mediation is terminated either by agreement of the parties or by a party giving notification that it is terminating its participation (in this case, the mediation is only terminated as to this party). *Id.* The beginning and ending of the mediation are important moments, as they define the time in which the Act's confidentiality rules apply. Fla. Stat. § 44.405.

The heart of the Act is Section 44.405: the confidentiality provision. *Id.* It says that all mediation communications (with a few exceptions) are confidential. *Id.* Mediation communications are defined as oral or written statements, or nonverbal conduct intended to convey meaning, made by a mediation participant before or during the mediation and in furtherance of the mediation. Fla. Stat. § 44.403. Any party or real party in interest to the mediation, or any person who attends the mediation in person or by electronic means, is barred from disclosing any mediation communications to anyone other than another mediation participant or a mediation participant's counsel. Fla. Stat. §§ 44.403, 44.405. A party can refuse to testify, and prevent others from testifying, about mediation communications in a subsequent proceeding. Fla. Stat. § 44.405.

Although communications during the mediation are confidential, a signed written agreement resulting from the mediation is not confidential or privileged, unless the parties agree otherwise. Fla. Stat. § 44.405. Also, there is no confidentiality attached to mediation communications: 1) for which confidentiality has been waived by all involved parties; 2) relating to a crime; 3) that require mandatory report; 4) that are needed for a malpractice proceeding; 5) that are used to void or reform a settlement agreement reached during the mediation; or 6) that are used to show professional misconduct. *Id.* If there is a mistake in the settlement agreement that requires the disclosure of confidential mediation information to correct, the needed information will be allowed as an exception to the confidentiality rule. *DR Lakes Inc. v. Brandsmart U.S.A. of W. Palm Beach*, 819 So. 2d 971, 974 (Fla. Dist. Ct. App. 2002). Furthermore, the confidentiality can be waived. If a party discloses or makes a representation about a confidential mediation communication, the party waives the privilege to the extent necessary for the other party to adequately respond. Fla. Stat. § 44.405.

A breach of the confidentiality requirements done knowingly and willfully can be punished with equitable relief, compensatory damages, mediation costs, or other attorney's fees, or even court sanctions (if the mediation is court-ordered). Fla. Stat. § 44.406.

In a mediation between an insured and the third party, even if the insurer is not technically a party to the mediation, it would be considered a real party in interest (because of its interest in the underlying claim involving its insured) and would thus be bound by these confidentiality rules. *Wheeler's Moving & Storage, Inc. v. Vanliner Ins. Co.*, No. 11-80272-CIV, 2012 WL 13018588, at *2 (S.D. Fla. Feb. 14, 2012). This can have implications for subsequent proceedings between the insurer and the insured. *Id.* For example, in the *Wheeler's* case, the insurer refused to defend its insured in an underlying action, and the insured filed a claim against the insurer for breach of contract. *Id.* at *1. The underlying action was mediated, and the insurer sought discovery of information from the mediation that was protected by mediation confidentiality. *Id.* The court ruled that the insurer was entitled to such information because it was a real party in interest to the mediation, and under the Mediation Confidentiality and Privilege Act, confidential mediation communications may be disclosed to a real party in interest. *Id.* at *2. *See also Strong v. GEICO Gen. Ins. Co.*, No. 8:16-CV-1757-T-36JSS, 2017 WL 1006457, at *3 (M.D. Fla. Mar. 15, 2017) (holding that an insured cannot withhold confidential mediation information from its insurer in a bad faith action brought against the insurer when the insurer was also a mediation participant). The mediation of insurance claims adds another privilege consideration to the tripartite relationship involving the insurer, the insured, and the defense attorney.

F. Conclusion

The multiple parties and competing interests involved in insurance disputes can lead to difficult issues. The interests involved in the tripartite relationship affect the privileges allowed between each party involved. If mediation is involved at any stage of the insurance claim, the confidentiality requirements of the mediation process add in yet another layer of complexity. Florida has created guidelines to regulate both the mediation process and the tripartite relationship in efforts to resolve some of these difficult issues. Navigating these privileges is a complicated process, and careful attention must be paid to protect each party's interests along the way.

II. Strategies For Conducting A Successful Coverage Or Bad Faith Mediation

A. Should you mediate your dispute?

Generally speaking, a mediated resolution is preferable to adjudication for a variety of reasons. Mediation can save enormous litigation expense and reduce the burden of litigation on clients. It also enables the parties to control the outcome of this dispute, rather than putting their fate in the hands of a judge or jury who are largely unaware of their circumstances, needs, and goals. Mediation also enables the parties to keep the details and resolution of their dispute confidential. Even if a mediation does not produce a final resolution, it may enable the parties to

clear away subsidiary issues and identify key disputes that can be teed up for judicial resolution, or simply give the parties a clearer understanding of the facts and their opponent's view of the case.

Nevertheless, there may be cases in which some or all of the parties have an interest in establishing the law on issues of continuing importance. Parties may also see value in fighting what they perceive to be abusive nuisance-value claims. While the real number of such disputes is far fewer than often appears initially to be the case, a party sincerely committed to seeing litigation through to judgment for strategic reasons may choose to forgo mediation.

B. When should you mediate your dispute?

Given the potential cost-saving benefits of mediation, it is generally best to mediate as early in the dispute as possible. Still certain conditions must exist before mediation can succeed.

The parties must have sufficient information to be confident they can negotiate an acceptable resolution. If mediation precedes the conclusion of discovery, the mediator can assist the parties in structuring an informal information exchange protected by mediation confidentiality. The parties may exchange written information prior to mediation, and may also present information at a joint mediation session. (Although opening statements advocating the parties' respective positions and demands are of dubious value and may even be counterproductive to the mediation process, relatively neutral presentations of facts, such as the nature, value, and status of the underlying claim, can be very useful.)

The parties may need clarity on specific legal issues as well. For example, choice of law may determine the validity of certain claims or defenses. Substantive issues such as trigger, allocation, and number of occurrences — if unresolved in the governing jurisdiction — may be so pivotal to the outcome that they need to be decided before the parties can negotiate a settlement. The mediator can assist the parties in structuring their process to accommodate limited motion practice, and may even be in a position – with the parties' approval – to encourage the court to entertain such motions while staying other litigation activity that would distract from the mediation process.

Developments in the underlying case may also determine when the coverage and/or bad faith dispute is ripe for mediated resolution. While it is possible to resolve coverage issues relating to indeterminate underlying liabilities on a coverage-in-place basis, there may be elements of the underlying claim that determine coverage and parties may be unwilling to mediate until those issues are determined.

Finally, there may be additional interested parties who need to be brought into, or at least informed of, the mediation. Those parties may need to be contacted and brought up to speed before they can participate productively. In particular, it is essential to notify all potentially

responsible insurers of the claim and to keep them apprised of all settlement efforts, including a mediation.

C. Who should mediate your dispute?

In some cases, the court will appoint a mediator. In all other disputes, the parties must agree on the mediator or, at a minimum, on the process for selecting the mediator. Typically, the parties will exchange lists of proposed mediators and work to identify one who is acceptable to all parties. Even if the parties cannot agree on one individual, they may be able to narrow their respective preferences to candidates acceptable enough to all parties that the final selection may be made by a random process, such as the closing value of a stock index on an agreed date.

The identification of prospective mediators for an individual dispute should be done mindfully. If the mediation's success is likely to turn on the parties' assessments of how a jury will react to the facts, or how a court will likely resolve a pivotal legal issue, then a retired judge may be a good choice. If, however, success is likely to require a balanced compromise among parties' views on complex coverage issues, they may be better served by engaging an experienced coverage attorney working as a professional mediator. In that instance, the parties should assess the prospective mediator's specific experience and areas of knowledge to ensure that she is knowledgeable of the form of coverage at issue. Some disputes may present issues calling for both forms of expertise; in such matters the parties may choose to engage co-mediators.

Finally, do not reflectively reject a mediator suggested by your opponent. If your opponent's candidate is a qualified and capable mediator, she may be exactly the person you want to reality-test your opponent's position on a deal-breaker issue.

D. How should you prepare to mediate your dispute?

Thoughtful, diligent, and detailed preparation is essential to a truly successful mediation. Unprepared parties and mediators may find themselves simply staring at one another across a chasm they have no plan to bridge. Even if they stumble to a tentative agreement, it may founder when they get into the unresolved details of a final settlement.

Counsel should work closely with clients to prepare. Counsel should understand well in advance the client's process and requirements for obtaining settlement authority. This is particularly important for insurer counsel, as their clients generally have detailed authority protocols. Clients often require a written exposure analysis and/or authority request. Even if not required, an exposure analysis is useful in developing mediation goals and strategy.

Once the client, aided by counsel, determines what settlement authority to provide, it must decide whether to share its full authority with counsel prior to mediation session. Doing so

may aid counsel in developing a strategy with that endpoint clearly in view. On the other hand, withholding full authority from counsel may empower her to resist pressure during the mediation. It may position her to say truthfully she cannot make a particular move without obtaining additional authority, and then to couple any additional authority with insistence on movement on other issues.

It is essential that all decision-makers necessary to reach an acceptable agreement are available at least by phone during the mediation. This may include not only client personnel having authority up to the level that might be required to resolve the dispute, but also primary, umbrella, and excess insurers who may be needed to fund a settlement.

Bad faith and extra-contractual claims may necessitate additional preparation and the involvement of additional decision-makers. Such claims typically are not covered by reinsurance but may be covered by the insurer's errors and omissions policy; that carrier must be notified and kept informed if the claim is to be covered. In addition, bad faith and extra-contractual claims may be handled by dedicated extra-contractual claims counsel or by the insurer's legal department. Those counsel must be involved in the preparation for mediation of claims that may be settled on an extra-contractual basis.

Counsel should also prepare a mediation notebook. This notebook should include essential pleadings, key policy terms, other important documents, mediation statements, settlement authority documentation, governing authorities, notes, and either a draft term sheet or a checklist of essential settlement terms. Having these items readily at hand will assist in making the strongest available arguments during the give-and-take of a complicated mediation.

Counsel should go into any mediation with clear goals in mind and a specific plan to attain those goals. This strategy should be built around a vision of what would be a result acceptable to one's own client, while also taking account how to fit that result with the goals of other parties as well. A party entering the mediation with a comprehensive plan is likely to have a strategic advantage over parties who take a more passive approach.

E. How should you prepare your mediator?

Mediators typically request a mediation statement in advance of the joint session. This statement should provide the mediator with the essential factual background to the dispute, identify the central issues, convey the client's position on those issues, recount any settlement discussions to date, and describe the client's requirements for an acceptable resolution. Counsel should think carefully about what to emphasize and what needs to be explained in more detail given the nature of the case and the background of the mediator. For example, it may be necessary to explain crucial coverage issues in greater detail to a mediator who is not deeply experienced with insurance coverage. Even an experienced mediator may benefit from detailed discussion of unusual or complicated coverage issues.

The mediation statement generally is most useful if it is exchanged among the parties; this allows the parties to absorb and process the details of each other's positions and may assist them in meeting reporting requirements and/or obtaining settlement authority. In complex multi-party cases, it may be necessary to circulate separate mediation statements among sub-groups, such as insurers. Confidential information intended only for the mediator can be submitted separately if the parties so agree. Insurers who contest coverage for the underlying claim may choose to describe their coverage defenses in a confidential submission to the mediator so that coverage issues do not influence negotiations between the insured and the claimant.

It is often very useful for the mediator to meet or speak with the respective parties prior to the day of the mediation. The mediator will be interested in following up on questions raised by the mediation statements about the background of the dispute. The mediator also will be interested in exploring the parties' positions and goals, and their perceptions of other parties' positions and goals. These discussions present an important opportunity for counsel to prepare the mediator to address anticipated challenges and obstacles to resolution. Counsel should also take this opportunity to begin outlining for the mediator her desired endgame and a roadmap to get there. Counsel who present themselves to the mediator as fellow problem-solvers, rather than as problems to be solved, are likely to be far more effective in shaping the mediation to produce a favorable outcome.

F. How to conduct the mediation itself.

Communications with the mediator during the mediation session should be guided by the goals and strategy developed at the outset of the process. Offers and counteroffers should point toward the client's desired outcome; by the same token, it is important to pay attention to what another party's moves may signal. Enlist the mediator's assistance in guiding the negotiations away from your client's deal-breakers, but be prepared to help the mediator at critical junctures with a trade-off that may achieve your client's goals without undermining its interests.

Some theatrics are part of every mediation. Counsel may need to express disappointment, frustration, or outrage even at productive proposals. It may make sense to define roles, such as good-cop/bad-cop, among the participants on one's own side. Counsel or clients may reference absent decision-makers to extract a last best offer before calling for approval. Bear in mind, of course, that other parties may be play-acting, too; it is likely that "final offer" is not quite your opponent's bottom line.

Although mediators will try to convey to others only what information parties authorize them to convey, it is best not to depend on this assurance. Highly sensitive information that you would not want other parties to learn under any circumstances probably should not be shared with the mediator unless you know and trust her well. Finally, be prepared to engage with counsel and/or other parties directly if the mediator thinks that is the best way to convey complicated facts or nuanced arguments.

If the mediation produces an acceptable resolution, it is important to document that agreement before leaving the room. Counsel should prepare at least a checklist of key terms, and ideally a draft term sheet, prior to the mediation session; this will ensure that important terms are agreed upon before the parties separate and while the mediator is available to assist with any disagreements. Court-ordered mediations may require that the parties report their agreement to the court, and perhaps to put essential terms on the record; a detailed term sheet will facilitate this process.

Even with a detailed term sheet, it is prudent to complete final settlement documentation as promptly as possible to preserve momentum and head off any buyer's remorse. The mediator should remain available to assist the parties with any disagreements that arise in the course of final documentation.

Privileges: Litigation Immunity, Waiver and Other Roadblocks

American College of Coverage Counsel
2019 Law School Symposium
Nova Southeastern University, Shepard Broad College of Law

Fort Lauderdale, FL
November 1, 2019

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Privileges: Litigation Immunity, Waiver and Other Roadblocks

This paper examines the litigation, attorney-client and work product privileges that often arise in bad faith litigation.

1. Litigation Immunity

"Litigation conduct" is the conduct of an insurer and its lawyers in litigation with a policyholder. The insurer's interaction with its policyholder during litigation often is inextricably entwined with the adjustment of the loss. Policyholders argue that the admission into evidence of an insurer's litigation conduct is evidence of bad faith. If evidence of other post-filing conduct is admissible at the bad faith trial, is an insurer's treatment of the policyholder in the litigation also admissible? If the insurer is adjusting the claim while it is also litigating the claim, do the insurer's interests as a litigant trump the policyholder's interest in the fair resolution of its claim? In response, insurers have relied upon the litigation immunity doctrine to defend against claims of bad faith arising out of conduct during coverage litigation.

a. Continuing Duty of Good Faith

Numerous courts hold that an insurer's duty of good faith continues past the filing of a coverage suit.[1] The seminal case of *White v. Western Title Ins. Co.*, addressed this

[1] *See, e.g., Kafie v. Nw. Mut. Life Ins. Co*., 834 F. Supp. 2d 1354, 1369 (S.D. Fla. 2011) (Altonaga, J.) (the manner in which an insurer handled a claim during a breach of contract action against its insured was both relevant and actionable in a subsequent statutory bad faith action as the insurer's handling of the claim "would seem to be at the very heart of the bad faith action"); *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1527 (11th Cir. 1985) (finding that in a bad faith claim, litigation conduct of insurer was not only relevant, but also admissible); *Home Ins. Co. v. Owens*, 573 So. 2d 343 (Fla. 4th DCA 1990) (same); *Ruiz*, 899 So. 2d at 1121 (noting that the manner in which the insurer litigated and processed the coverage case is "at the heart of the bad faith dispute*"); State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995) (setting forth the factors considered in evaluating a first party bad faith claim, including the manner in which the case was litigated and "the substance of the coverage dispute or the weight and legal authority on the coverage issue"); *Barefield v. DPIC Cos., Inc*., 215 W. Va. 544, 553, 600 S.E.2d 256, 265 (W. Va. 2004); *O'Donnell ex rel. Mitro v. Allstate Ins. Co*., 734 A.2d 901 (Pa. Super. 1999) (bad faith suits may extend to the misconduct of an insurer during the pendency of litigation); *Federated Mut. Ins. Co. v. Anderson*, 297 Mont. 33, 991 P.2d 915 (1999) (insurance company's prosecution of a "meritless appeal" could be used to support a claim for unfair trade practices); *Gooch v. State Farm Mut. Auto. Ins. Co.*, 712 N.E.2d 38 (Ind. App. 1999) (insurance company's litigation conduct admissible in determining whether company made a bad faith attempt to force insured to settle uninsured motorist claim); *Tucson Airport Authority v. Certain Underwriters at Lloyd's, London*, 186 Ariz. 45, 918 P.2d 1063 (Ariz. App. 1996) (wrongful litigation conduct of insurance company toward insured during coverage lawsuit was relevant and admissible to bad faith suit); *Palmer by Diacon v. Farmers Ins. Exchange*, 261 Mont. 91, 121, 861 P.2d 895, 913 (1993) ("In some instances, however, evidence of the insurer's post-filing conduct may bear on the reasonableness of the insurer's decision and its state of mind when it evaluated and denied the underlying claim. Therefore we do not impose a blanket prohibition on such evidence."); *Am. Nat. Prop. & Cas. Co. v. Stutte*, 105 F. Supp. 3d 849, 851 (E.D. Tenn. 2015) ("insurers have a duty to act in good faith,

"continuing bad faith" issue. 710 P.2d 309 (Cal. 1985). In *White*, the trial court permitted the policyholder to introduce evidence of an insurer's litigation and post-filing conduct as evidence of bad faith. The focus of the opinion was the admission during the bad faith trial of the insurer's post-filing, "nuisance value" settlement offers to resolve the policyholder's breach of contract and bad faith claims. *Id.* at 319. The policyholder also argued that the insurer's litigation conduct provided evidence of bad faith, specifically the expense of prosecuting its suit and the insurer's failed motion for summary judgment. *Id.*

The insurer argued that once the policyholder filed suit, they were adversaries, thereby obviating the duty of good faith and fair dealing. *Id.* Although the California Supreme Court acknowledged the issue was one of first impression, it summarily resolved the issue "as a matter of principle" and concluded "the contractual relationship between insurer and the policyholder does not terminate with commencement of litigation." *Id.* at 317. *White* found that a distinction between pre-filing and post-filing conduct would be undesirable because it would encourage insurers to induce early filing of suits.

The insurer raised several arguments against the continuation of the duty of good faith. First, the insurer argued a continuing duty of good faith would make it difficult for the insurer to defend itself. *Id.* at 317. Second, an insurer would be required to reveal all information discovered post-filing that would help a policyholder's claim. *Id.* Third, ethics rules would require attorneys preparing the defense of the bad faith suit to withdraw from the actual trial defense because the preparing attorney may be called as a material witness to the insurer's good faith litigation conduct. *Id.* The *White* court cited three reasons why these concerns did not justify a distinction between pre and post-filing conduct: an insurer should investigate the factual basis of a policyholder's claim before litigation; a court may bifurcate the breach of contract and bad faith trials; and liability for bad faith may often require a factual, case-specific inquiry. *Id.* (internal citations omitted).

Since the *White* decision in 1985, other courts and commentators have generally agreed that even after litigation commences and the insurer and policyholder become legal adversaries, an insurer's duty of good faith continues. The *White* decision offers support for receiving the insurer's litigation conduct as evidence of, or the basis for, bad

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and nothing in this statute or any other applicable law indicates that the duty is severed by litigation. . . . this Court will consider it a matter of common sense: an insurer does not get to unilaterally absolve itself of the duty to treat policy holders fairly by filing a lawsuit."); *Graham v. Gallant Ins. Grp*., 60 F. Supp. 2d 632 (W.D. Ky. 1999) ("there is no question that the duty of good faith by an insurance company is a continuing duty, which continues past the filing of a bad faith complaint against the insurer."); *Sobley v. S. Nat. Gas Co.*, 302 F.3d 325 (5th Cir. 2002) (evidence of post-denial conduct by insurer relevant to establish a claim for bad faith denial of coverage); ***Rottmund v. Cont'l Assurance Co.***, 813 F. Supp 1104, 1109-10 (E.D. Pa. 1992) (finding that under a Pennsylvania statute, similar to Florida's bad faith statute, bad faith conduct during the pendency of a coverage case was actionable); *Krisa v. The Equitable Life Assurance Soc*., 109 F. Supp. 2d 316 (M.D. Pa. 2000) (same); *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co*., No. 02-2116, 2006 WL 1580251 (W.D. Pa. June 2, 2006) (citing *W.V. Realty, Inc. v. Northern Ins. Co*., 334 F.3d 306, 313-14 (3d Cir.2003)) (insurer's conduct during litigation is relevant to bad faith where conduct shows insurer's intent to evade its obligations under the policy); *Cent. Armature Works, Inc. v. Am. Motorists Ins. Co.* 520 F. Supp. 283, 295 (D.D.C. 1980) (failure to reveal true coverage position and defendant's answers to interrogatories under oath, categorically denying that it had a duty to defend plaintiff was admissible as evidence of bad faith to prove punitive damages)

faith. This conduct includes: (1) settlement offers, (2) unreasonable defenses,[2] (3) filing in a particular forum,[3] (4) the filing of responsive pleadings,[4] (6) filing a meritless appeal,[5] (7) conducting discovery,[6] and (8) cross examination of a witness.[7]

Many courts have narrowed the application of *White.* In *Tucson Airport Authority v. Certain Underwriters at Lloyds*, 918 P.2d 1063 (Ariz. App. 1996), the Arizona Court of Appeals applied the *White* distinction, and held that the litigation privilege protected an insurer from a continuing bad faith claim based solely on privileged statements but not the admission of those statements as evidence of bad faith. *Id*. at 1066.

In *Old Republic Ins. Co. v. FSR Brokerage, Inc.,* 95 Cal. Rptr. 2d 583 (Cal. Ct. App. 2000), the California Second District Court of Appeal reversed a judgment for bad faith and dismissed the claim of bad faith. The court found that the absolute litigation privilege protected the insurer because the policyholder's bad faith claim rested solely on allegations made in the insurer's second amended complaint. *Id*. at 598. Accordingly, the court held that the policyholder "failed to state an actionable cause of action for bad faith." *Id*. at 598. *See also California Physician's Service v. Superior Court of San Diego County,* 12 Cal. Rptr. 95, 100 (Cal. App. 1992) ("Defensive pleading, including the assertion of affirmative defenses, is communication protected by the absolute litigation privilege. Such pleading, even though allegedly false, interposed in bad faith, or even asserted for

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[2] *Ingalls v. Paul Revere Life Ins. Group*, 561 N.W.2d 273 (N.D. 1997) (court broadly stated "[a]n insurer's unreasonable defense may evidence bad faith.")); *Journal Publishing Co. v. American Home Ins. Co*., 771 F. Supp. 632 (S.D.N.Y. 1991) (New Mexico law) (Court allowed insured to "introduce evidence of the manner in which defendants have conducted their defense to the extent the such evidence is relevant to the [bad faith claim] in the proposed amended complaint.")

[3] *Sinclair Oil Corp. v. Republic Ins. Co*., 967 F. Supp. 462 (D. Wyo. 1997) (where jurisdiction exists in more than one forum it is not bad faith for an insurer to file in a particular forum)); *Meyer v. National Farmers Union Prop. & Cas. Co.*, 957 F. Supp. 1492, 1503-02 (D.Wyo. 1997) (same)).

[4] *Krisa v. Equitable Life Assurance Society*, 109 F. Supp. 2d 316, 321 (M.D. Pa. 2000) (Court denied insurer's motion to dismiss insured's bad faith claim based on insurer's response to insured's claim with a counterclaim asserting insurance fraud because the insured asserted more than mere discovery violations.)); *California Physician's Service v. The Superior Court of San Diego County,* 12 Cal. Rptr. 2d 95, 98 (Cal. Ct. App. 1992) (refused to allow insured to amend its complaint to add the insurer's assertion of affirmative de fenses as evidence of and an additional breach of the duty of good faith because responsive pleadings are protected by the litigation privilege)); *Homeowner's Ins. Co. v. Owens*, 537 So.2d 343 (Fla. App. 1990) (approved use of insurer's pleadings in breach of contract action to impeach insurer witness in bad faith action); Nies v. National Automobile & Casualty Ins. Co., 245 Cal. Rptr. 518, 522, (Cal. Ct. App. 1988) (responsive pleadings irrelevant to prove initial denial of coverage in bad faith)).

[5] *Federated Mut. Ins. Co. v. Anderson*, 991 P.2d 915 (Mont. 1999), abrogated on other grounds in *Citizens Awareness Network v. Montana Bd. of Envtl. Review*, 2010 MT 10, 355 Mont. 60, 227 P.3d 583 (District Court abused discretion by denying an insured's motion to amend its pleadings to add the insurer's meritless appeal as part of the basis for its bad faith claim).

[6] *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co*., 169 F.3d 43, 47 (1st Cir. 1999) (mere discovery abuse does not constitute bad faith); International Surplus Lines Ins. Co. v. University of Wyoming Research Corp., 850 F. Supp. 1509, 1529 (D. Wyo. 1994) (rejected insured's argument that the insurer counsel's litigation conduct regarding particular bad faith discovery matters was malicious and oppressive)); *O'Donnel v. Allstate Ins. Co*., 734 A.2d 901, 908 (Pa. 1999) (refused to allow the insured to present the insurer's propounding of allegedly frivolous interrogatories and refusal to deny or accept its claim after the insured submitted to a lengthy deposition as evidence of bad faith)).

[7] *Allstate Ins. Co. v. McGory*, 697 So. 2d 1171 (Miss. 1997) (insurer counsel's cross examination of child witness not permitted as basis for bad faith)).

inappropriate purposes, cannot be used as the basis for allegations of ongoing bad faith.")).

b. Litigation Immunity

Critics of *White* and opponents of the admission of the litigation conduct as evidence of bad faith argue that it ignores the "litigation privilege." Litigation immunity, also known as the litigation privilege, is a privilege "based chiefly upon a recognition of the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interests." Restatement (Second) of Torts §584 at 243 (Introductory Note: "Absolute Privilege Irrespective of Consent") (internal quotations omitted). While some jurisdictions require that specific elements be satisfied in order for the privilege to apply, litigation immunity is best described in the Restatement of Law (Second) section 586:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Restatement (Second) of Torts § 586 (1977).

The purpose of the privilege "is to ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgments, and avoid unending litigation." Douglas R. Richmond, *The Lawyer's Litigation Privilege*, 31 AM. J. TRIAL ADVOC. 281, 283 (2007)(citing *Wentland v. Wass*, 25 Cal. Rptr. 3d 109, 115 (Cal. Ct. App. 2005)). Additionally, the litigation privilege requires parties to test evidence at trial, limits collateral attacks on judgments, and encourages settlement. *Id.* (citing *Matsuura v. E.I. Du Pont de Nemours & Co.*, 73 P.3d 687, 693 (Haw. 2003)).

In *Timberlake Construction Co. v. U.S. Fidelity and Guaranty Co*., 71 F.3d 225 (10th Cir. 1995), the insurer challenged the trial court's admission of three items of evidence as bad faith: (1) a letter from the insurer's counsel to one of its adjusters, (2) the insurer's filing of a counterclaim against the policyholder, and (3) the insurer's filing of a motion to join a necessary party. *Id.* at 339. The Tenth Circuit noted the policy implications of admitting litigation conduct as evidence of bad faith:

> Allowing litigation conduct to serve as evidence of bad faith would undermine an insurer's right to contest questionable claims and to defend itself against such claims…. [P]ermitting allegations of litigation misconduct would have a chilling effect on insurers, which could unfairly penalize them by inhibiting their attorneys from zealously and effectively representing their clients within the bounds permitted by law.

Id. at 341. *Timberlake* held that evidence of an insurer's litigation conduct is generally inadmissible. *Id.* at 341. Other courts and commentators have echoed concern over this "chilling effect" on an insurer's right to a zealous and vigorous defense.[8]

Although the interests of the insurer and policyholder must be balanced, their interests are not always mutually exclusive. Admitting evidence of an insurer's litigation conduct does not require wholesale abandonment of the insurer's litigation privileges. Correspondingly, upholding the litigation privilege does not provide the insurer with a license for misconduct.

2. Waiver: Attorney-Client and Work Product

The work product protection and the attorney-client privilege serve different functions, and, in bad faith cases, issues pertaining to their use are commonplace. The former encourages the lawyer's careful and thoughtful preparation for the benefit of the client; the latter promotes the free communication between the client and his or her lawyer. *Hickman v. Taylor*, 329 U.S. 495, 510–511 (1947). However, in bad faith cases, each have different application to their use and exceptions.

a. Per se Waiver Rule

A minority of jurisdictions hold that the attorney-client privilege and work product doctrines do not apply in bad faith cases. The primary reasoning behind this rule is that when the insurer denies a claim, and thereby signals a change in the relationship between policyholder and insurer, courts have often concluded that the insurer's post-denial documents are work product protected, but the prior denial documents are discoverable. *See U.S. Fid. & Guar. Co.*, 630 F. Supp. 2d at 1337; *see also Essex Builders Grp., Inc. v. Amerisure Ins. Co.*, No. 6:04 CV 1838 ORL 22, 2006 WL 1733857, at *2 (M.D. Fla. June 20, 2006); *Harper v. Auto–Owners Ins. Co.*, 138 F.R.D. 655, 663 (S.D. Ind. 1991); *Silva v. Fire Ins. Exch.*, 11 2 F.R.D. 699 (D. Mont. 1986) (first-party bad faith claim can be proved only by showing the manner in which the claim was processed, and the claims file contains the sole source of much of the needed information).

In *Boone v. Vanliner Insurance Co.*, the Ohio Supreme Court held that in a bad faith insurance action "the policyholder is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were

[8] *Graham v. Gallant Ins. Group*, 60 F. Supp. 2d 632, 635 (W. D. Ky. 1999) ("Broad admission of litigation conduct could expand the tort of bad faith beyond its intended scope and impair the right of the insurer to defend itself."); *Sinclair Oil Corp. v. Republic Ins. Co*., 967 F. Supp. 462, 469 (D. Wy. 1997) ("[A]n unwarranted imposition of [bad faith liability to litigation conduct] might have a chilling effect on insurers, which could unfairly penalize them by inhibiting their attorneys from zealously and effectively representing their clients within the bounds permitted by law."); *International Surplus Lines Ins. Co. v. University of Wyoming Research Corp*., 850 F. Supp. 1509, 1529 (D. Wyo. 1994) (Imposition of bad faith liability for litigation conduct "might have a chilling effect on insurers, which could unfairly penalize them by inhibiting their attorneys from zealously and effectively representing their clients within the bounds permitted by law."); Papetti, 60 Geo. Wash. L. Rev. at 1955 ("in many cases, insurers will forego litigating debatable claims because evidentiary use of the [litigation] conduct may lead to liability far beyond the amount of the original policy claim.").

created prior to the denial of coverage." 744 N.E. 2d 154, 158 (Ohio 2001). However, in Ohio, the *Boone* rule does not apply to any privileged communications and/or work product created after coverage is denied. 744 N.E. 2d at 158. This temporal line may make a bright line, but it may not be a defensible one in all cases. The distinction between what is done in the ordinary course of business or in anticipation of litigation is not always dependent on a denial of coverage. Depending on the facts of a particular case, work on a claim file could be in anticipation of litigation even though the claim has not yet been denied. If this is true and an insurer wants to hold back the claim file on this basis, it will have to submit a detailed affidavit to the court that sets forth the facts in support of the "anticipation of litigation" position. *See, e.g., Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 144 F.R.D. 600, 605 (D. Mass. 1992).

b. *Implied Waiver*

Most jurisdictions hold that bad faith litigation is not sufficient on its own to overcome the attorney-client privilege.[9] Rather, these jurisdictions apply various tests in order to determine whether there has been an implied waiver of the attorney-client privilege. There are three general approaches courts have used to determine whether the attorney-client privilege has been impliedly waived: (1) Automatic Waiver; (2) Intermediate Test; and (3) Restrictive Test.

i. Automatic Waiver Rule

The automatic waiver test provides that an insurer waives attorney-client privilege upon the assertion of a claim, counterclaim, or affirmative defense that raises an issue to which otherwise privileged material is relevant. *See FDIC v. Wise*, 139 F.R.D. 168, 170–71 (D. Colo. 1991) (citing cases following this test)*; Independent Prods. Corp. v. Loew's, Inc*., 22 F.R.D. 266, 276–77 (S.D.N.Y. 1958). One such example of an automatic waiver of the attorney-client privilege is the "advice of counsel" defense. Generally, if an insurer pleads the "advice of counsel" defense and actually defends on that basis, then the insurer would be deemed to have waived the attorney-client privilege with regard to that advice because the insurer has placed the advice of counsel "at issue" and, thereby, made it "relevant." See *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851, 863–65 (3d Cir. 1994); *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1069 (Fla. 2011); *Kaarup v. St. Paul Fire & Marine Ins. Co*., 436 N.W.2d 17, 22 (S.D. 1989) (and cases cited therein).

In the context of bad faith defense, an insurer's assertion that it relied on the "advice of counsel" is a valid and effective defense tactic when used appropriately. However, attorneys may be reluctant to employ this defense due to the implications on the attorney-client privilege. When asserting a defense either based in whole or in part on the advice of counsel, the defendants have waived the attorney-client privilege and must

[9] *See, e.g., Dixie Mill Supply Co. v. Cont'l Cas. Co*., 168 F.R.D. 554, 558 (E.D. La. 1996); *Hartford Fin. Servs. Grp. v. Lake County Park & Recreation Bd*., 717 N.E.2d 1232, 1235–36 (Ind. Ct. App. 1999); *Barry v. USAA*, 989 P.2d 1172, 1176 (Wash. Ct. App. 1999); *West Virginia ex rel. Brison v. Kaufman*, 584 S.E.2d 480 (W. Va. 2003).

produce communications, documents, etc. that would normally be privileged and not disclosed over the course of traditional discovery.[10]

The "advice of counsel" defense also gets tricky when applied to adjustors and in-house counsel. In bad faith cases, the line separating business advice from legal advice, or waiver from non-waiver, often blurs. Courts generally agree that confidential communications between in-house counsel and its corporate client (both from the attorney to the client and from the client to the attorney) are privileged to the same extent as communications between outside counsel and its client. *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 70, 704 (N.Y. 1989); *see also National Utility Serv., Inc. v. Sunshine Biscuits, Inc*., 694 A.2d 19, 22 (N.J. Super. Ct., App. Div. 1997) (holding that memorandum at issue was written "as part of the duties of in-house counsel who was retained to provide professional legal advice to the corporation, and the memorandum was prepared in furtherance thereof, [so] it is subject to the attorney-client privilege unless an exception applies").

However, unlike the situation where counsel works for an individual client, in-house counsel in the corporate context may have multiple roles. For example, staff attorneys may also serve as corporate officers, with responsibilities encompassing both business and legal matters. To demonstrate that the communication at issue is privileged, the company has the burden of "'clearly showing'" that in-house counsel provided the particular advice in a legal capacity, rather than as a business advisor. *Ames v. Black Entertainment Tel.*, 1998 WL 812051, at *8 (S.D. N.Y. Nov. 18, 1998) (citation omitted).

For example, policyholders often stated that an insurer's in-house conversation concerning coverage goes to the reason for insurance and to the essence of their dispute with a carrier. *See 1550 Brickell Assocs. v. Q.B.E. Ins. Co.*, 253 F.R.D. 697, 698–99 (S.D. Fla. 2008) (noting that an insurer's ordinary course of business is to investigate claims). Insurers have argued that this line is too far towards disclosure; the company should be able to seek legal advice, even for coverage matters, and keep that advice secret. Yet, "a claims adjustor, manager or examiner [ ] makes the ultimate coverage decision," which is a business decision that strikes at the core of the relationship between policyholder and its insurer. *MI Windows & Doors, LLC v. Liberty Mut. Fire Ins. Co.*, No. 8:14-CV-3139-T-23MAP, 2016 WL 7213270, at *3 (M.D. Fla. Oct. 20, 2016).

Because no specific test exists for distinguishing between protected legal communications and unprotected business or personal communications, a determination

[10] *Flanagan v. Nationwide Property and Casualty Ins. Co*., 2017 WL 3337267, *4 (S.D. Miss. 2017). See, e.g., *Palmer by Diacon v. Farmers Ins. Group*, 261 Mont. 91, 861 P.2d 895(Mont. 1993); *Dion v. Nationwide Mut. Ins. Co*., 185 F.R.D. 288 (D. Mont. 1998); *Vicinanzo v. Brunschwig & Fils, Inc*., 739 F.Supp. 891 (S.D.N.Y. 1990). The privilege will be waived. *Id.* Conversely, if the insurer fails to make full disclosure of attorney-client communications during discovery, it will waive the advice of counsel defense. *Vicinanzo v. Brunschwig & Fils, Inc*., 739 F.Supp. 891 (S.D.N.Y. 1990); *c.f. Cunkling v. Turner*, 883 F.2d 431 (5th Cir. 1989); *Board of Trustees v. CoulterCorp*., 118 F.R.D. 532 (S.D. Fla. 1987); *Wender v. United Servs. Auto. Ass'n*, 434A.2d 1372 (D.C. 1981); *Russell v. Curtin Matheson Scientific, Inc*., 493 F.Supp. 456(S.D. Tex. 1980); *Handgards, Inc. v. Johnson & Johnson*, 413 F.Supp 926 (N.D.Cal. 1976); *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975).

as to whether the privilege applies is a fact-specific one and not always automatic. For example, in *Rossi*, *supra*, New York's highest court, although noting that "not every communication from staff counsel to the corporate client is privileged," found that a memorandum from a corporate staff attorney to a corporate officer containing advice about an imminent defamation action against the company fell within the scope of the attorney-client privilege. *Rossi*, 540 N.E.2d at 705.

ii. The Intermediate Test

The intermediate test is more of a balancing test – balancing the need for discovery with the importance of maintaining the attorney-client privilege. *See Black Panther Party v. Smith*, 661 F.2d 1243, 1267 (D.C. Cir. 1981), vacated without opinion, 458 U.S. 1118 (1982)(applying the balancing test). This approach was first articulated from a 1975 decision from the U.S. District Court for the Eastern District of Washington, *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). This balancing test contains the following elements:

> 1. assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party;
> 2. through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
> 3. application of the privilege would have denied the opposing party access to information that is vital to its defense.

Id. at 581. The court concluded "where these three conditions exist, a court should find that the party asserting [the] privilege has impliedly waived it through his own affirmative conduct." *Id*.

The *Hearn* test is the majority rule.[11] Although the First, Eighth, and District of Columbia Circuits appear to follow a type of "balancing" test that balances the need for the privileged information against the need for maintaining its confidentiality, this balancing test appears to be simply another formulation of the *Hearn* test.[12]

iii. The Restrictive Test

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[11] *Frontier Ref., Inc. v. Gorman-Rupp co.,* 136 F.3d 695 136 F.3d 695, 699-700 (10th Cir. 1998); *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995); *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.*, 176 F.R.D. 269, 272 (N.D. Ill. 1997)(describing Hearn as "the seminal case on 'at issue' waiver"); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1419 (11th Cir. 1994); *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989); *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987).

[12] *See Greater Newburyport Clamshell Alliance v. Pub. Serv. Co. of N.H.*, 838 F.2d 13, 20 (1st Cir. 1988); *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982); *Black Panther Party v. Smith*, 661 F.2d 1243, 1267 (D.C. Cir. 1981), vacated without opinion, 458 U.S. 1118 (1982)(applying the balancing test). *See FDIC v. Wise*, 139 F.R.D. 168, 171–72 (D. Colo. 1991) *cf Trustees of Electrical Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc. ,* 266 F.R.D. 1, 11–12 & n.11 (D.D.C. 2010*)*(criticizing the *Hearn* test).

While the *Hearn* test is often cited as the "leading light of implied waiver jurisprudence," many courts and sources have criticized it on the grounds that it is vague and unpredictable. *See* Kenneth Duvall, *Rules, Standards, and the Attorney-Client Privilege: When the Privilege Is "At-Issue" in the Discovery Rule Context*, 32 N. ILL. U. L. REV. 1, 10 (2011). As a result, some courts have adopted a more restrictive approach. Under the restrictive approach, a litigant waives the attorney-client privilege if, and only if, the litigant directly puts the attorney's advice at issue in the ligation.

In *Rhone*, the court explained that, under the *Hearn* test, "[s]ome decisions have extended the finding of a waiver of the privilege to cases in which the client's state of mind may be in issue in the litigation," allowing "the opposing party discovery of confidential attorney client communications in order to test the client's contentions" solely on the grounds that "the information sought is relevant and should in fairness be disclosed." *Rhone-Poulenc Rorer Inc. v. Home Indem. Co*., 32 F.3d 851, 864 (3d Cir. 1994). Finding such decisions of "dubious validity," the court clarified: "Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue." *Id.* Consequently, the *Rhone* court articulated an alternative approach to assessing implied waiver, holding that a party only places the attorney's advice "at issue" when "the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication." *Id*. at 863.

In *State Farm Mutual Automobile Insurance Co. v. Lee*, 13 P.3d 1169 (Ariz. 2000), an insurer's claims managers testified that the insurer investigated the state of the relevant law through communications with counsel and subjectively believed that they were acting within the law when they denied coverage. Under the *Hearn* analysis employed by the *Lee* court, this placed the extent of the insurer's investigation and the basis for its subjective evaluation at issue and waived the privilege. *Id*. at 1177, 1180.

In *Mendoza v. McDonald's Corp.* 213 P.3d 288 (Ariz. Ct. App. 2009), the Arizona Court of Appeals applied *Lee* and found that a workers' compensation insurer impliedly waived the attorney-client privilege. Notwithstanding *Lee*, the defendant in Mendoza affirmatively asserted that its actions in investigating, evaluating, and paying a personal injury claim, in addition to being objectively reasonable, were subjectively reasonable and taken in good faith. The claim was found to waive the privilege because it implicated the advice and judgment McDonald's received from its counsel. *Id.* at 303. *Mendoza* is also important because it concluded that there is nothing in *Lee* to suggest that an insurer will only be deemed to have implicitly waived the attorney-client privilege when it argues its actions were reasonable based on its subjective evaluation of the law. *Id.* at 302. The *Mendoza* court recognized that at "the heart of *Lee* is a recognition that, in the bad faith context, when an insurer raises a defense based on factual assertions that, either explicitly or implicitly, incorporates the advice or judgment of its counsel, it cannot deny an opposing party the opportunity to discover the foundation of those assertions in order to contest them." *Id*.

In *City of Myrtle Beach v. United National Insurance Co*. No. 4:08-1183-TLW-SVH, 2010 WL 3420044 (D.S.C. Aug. 27, 2010), the court expanded upon *Lee* by finding an implied waiver of the attorney-client privilege based on denials of allegations and affirmative defenses asserted in the answer, not the discovery in the case, as was done in *Lee*. *Id.* at *20–22.

In *Bertelsen v. Allstate Insurance Co*., the South Dakota Supreme Court supplement[ed] the *Hearn* test to emphasize further the importance of protecting the attorney-client privilege." 796 N.W. 2d 685, 703 (S.D. 2011). The court initially stated that "the analysis of this issue should begin with a presumption in favor of preserving the privilege." *Id.* It then asserted that "a client only waives the privilege by expressly or impliedly injecting his attorney's advice into the case." *Id.* Concluding its analysis, the court observed that "a client only waives the privilege to the extent necessary to reveal the advice of counsel he placed at issue." *Id.* The *Bertelsen* court thought that *Lee* went too far. As a result, it felt compelled to reject the *Hearn* approach as not striking "an appropriate balance of the need for discovery with the importance of maintaining the privilege." *Id.* at 703.

The Second Circuit Court of Appeals case of *In Re County* Erie also restricted the use of the *Hearn* test. 546 F.3d 222, 229 (2d Cir. 2008). In *Erie*, the court found that it is not sufficient for a party to make privileged material relevant to the case by pleading a claim, such as bad faith, or affirmative defense, such as good faith. *Id.* The court found that the essential element in finding an "at issue" waiver is reliance on privileged advice in the assertion of the claim or defense. *Id*.; *see also Botkin v. Donegal Mut. Ins. Co*., No. 5:10-cv-00077, 2011 WL 2447939, at *20 (W.D. Va. June 15, 2011)("the principal inquiry should focus upon whether or not the proponent of the privilege is relying upon the privileged communication to prove his or her case"). In short, for there to be a waiver "a party must rely on privileged advice from his counsel to make his claim or defense."

Everest Indem. Ins. Co. v. Rea, 342 P.3d 417 (Ariz. Ct. App. 2015), addressed the attorney-client privilege in a bad faith case subsequent to *Lee*. At issue in the underlying case was plaintiff sub-contractor's allegation that Everest acted in bad faith by entering into a settlement agreement that exhausted the liability coverage of an Owner Controlled Insurance Program to the detriment of the subcontractor. *Id.* at 418. Plaintiff argued that Everest waived the attorney-client privilege by asserting "subjective good faith" as a defense to the bad faith claim and asserted that Everest is required to produce documents containing otherwise privileged communications between Everest and its counsel. *Id.* Everest acknowledged that it did communicate with counsel during the process of deciding to settle, however, it contended that its decision to settle was made in good faith based on Everest's own subjective beliefs concerning the relative merits of the available courses of action. *Id.*

The court held that the attorney-client privilege will typically be waived when an insurer in defending a bad faith case alleges that it acted reasonably in relying on the advice of counsel. *Id.* at 420. In doing so, the insurer puts at issue the advice which it received from counsel. *Id.* The court noted that the assertion of a subjective good faith

defense and the consultation with counsel, without more, did not waive the attorney-client privilege. *Id.*

3. Conclusion

Insurance is an industry where business decisions are often the object of litigation, which blurs the line between privileged and discoverable information. The general lesson to take from the above-cited case law is that each situation will be evaluated differently because the inquiry into waiver is often fact and pleading-specific. As described in this paper, different jurisdictions apply tests of varying strictness to determine whether a carrier has waived privilege, but because each situation is unique, developing universally applicable, bright-line rules and predicting outcomes with certainty is difficult. Policyholders and insurers alike should keep these special privilege rules in mind throughout the claims process and coverage litigation since the outcome of a privilege dispute has the chance to form the basis for bad faith liability and exemplary damage awards.

Experts and their Role in Bad Faith Litigation

American College of Coverage Counsel
2019 Law School Symposium
Nova Southeastern University, Shepard Broad College of Law

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Document (1)

1. *Carithers v. Mid-Continent Cas. Co., 2019 U.S. Dist. LEXIS 117754*
   Client/Matter: 0987188

Carithers v. Mid-Continent Cas. Co.

United States District Court for the Middle District of Florida, Jacksonville Division

July 16, 2019, Filed

Case No. 3:16-cv-988-J-32MCR

Reporter
2019 U.S. Dist. LEXIS 117754 *

HUGH A. CARITHERS and KATHERINE S. CARITHERS, As the assignee of Cronk Duch Miller & Associates, Inc., Cronk Duch Architecture, LLC, Cronk Duch Craftsman, Cronk Duch Partners, LLC, Cronk Duch Holdings, Inc., and Joseph S. Cronk, Plaintiffs, v. MID-CONTINENT CASUALTY COMPANY, Defendant.

Opinion

[*1] ORDER

In a previous insurance coverage case, the Eleventh Circuit held that

insurer Mid-Continent Casualty Company's refusal to defend its insured was

incorrect. In this subsequent ***insurance*** ***bad faith*** action, Defendant Mid-

Continent seeks summary judgment, arguing that although its decision to deny

a defense was incorrect, the greater weight of district court cases at the time

supported its decision, and therefore, that decision cannot constitute bad faith

as a matter of law. In addition to Mid-Continent's Motion for Summary

Judgment, (Doc. 107), this case is also before the Court on Mid-Continent's Motion to Exclude Expert Testimony of Douglas McIntosh, (Doc. 106), and Plaintiffs Hugh and Katherine Carithers' Motion to Compel Discovery, (Doc. 96). The motions have been fully briefed, (Docs. 99; 104; 111; 115; 121; 122; 124; 125), and on May 2, 2019, the Court held a hearing on the motions, the record of which is incorporated herein. (Doc. 126). After the hearing, Mid-Continent filed the Carithers' mediation statement from the underlying action in support of its Motion for Summary Judgment. (Doc. 127). The Carithers, at the Court's direction, responded, (Doc. 131), and then filed a motion **[*2]** to strike the mediation statement. (Doc. 132).

I. BACKGROUND

In 2011, the Carithers filed an action in state court ("Underlying Action") 1against their homebuilder, Cronk Duch, 2 for construction defects in their home. (Doc. 107-1). In August 2011, Cronk Duch tendered the Carithers' amended complaint to its insurance company, Mid-Continent. (Doc. 107-2 at 193). After multiple levels of review, Mid-Continent determined that based on the allegations of the amended complaint, it was not required to defend Cronk

1 Carithers v. Cronk Duch Architecture, LLC, No. 16-2011-CA-2429 (Fla. 4th Cir. Ct. May 10, 2011).

2 In the Underlying Action, the Carithers sued several Cronk Duch entities and Joseph Cronk individually. Unless otherwise noted, the entities and Mr. Cronk will be collectively referred to as Cronk Duch.

2

Duch. (Doc. 107 at 3-4). Cronk Duch then provided Mid-Continent with the third amended complaint, which was reviewed and similarly denied. (Docs. 107 at 5-7; 107-2 at 194-201, 204-205).

The third amended complaint alleged that "[a]ll of the foregoing defects were latent, and were discovered by the Carithers in 2010. They could not have been discovered by reasonable inspection in a prior **[*3]**

year." (Doc. 107-2 at 217). Mid-Continent had insured Cronk Duch beginning on March 9, 2005, with Cronk Duch's last policy expiring on October 6, 2008. (Doc. 50-1 at 3). Relying on the "manifestation" trigger-an insurance coverage legal theory wherein damage does not "occur" until it is evident-Mid-Continent determined that it had no duty to defend Cronk Duch because the damage to the Carithers' home did not "manifest" until after Mid-Continent's final policy had expired. (Doc. 107-2 at 91); see also Doc. 50-1 at 4 ("Based on the pleadings, all of the Plaintiff's loss and damages occurred after the expiration of the last Mid-Continent Casualty policy.").

Cronk Duch hired its own counsel and consented to a judgment in the Underlying Action of $91,872 plus prejudgment interest of $5,856.84 and costs of $524, for a total of $98,252.84. 3 (Docs. 50-2; 50-3 at 5). Cronk Duch then

3The Final Judgment in the Underlying Action contains an error. (Doc. 50-2). The Final Judgment lists the damages for different items and adds them to be $98,872. However, if you add the damages, the correct amount is $91,872.00. This is correctly stated in the subsequent paragraph of the Judgment, which after adding **[*4]** prejudgment

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assigned its claims against Mid-Continent to the Carithers, except for attorney's fees and costs of $12,737.46-the amount Cronk Duch had accrued in defending the Carithers' suit against it. (Doc. 50-3). Hugh Carithers avers that before the consent judgment was entered, he and his wife would have settled for $25,000 or less had Mid-Continent or Cronk Duch ever made such an offer. (Doc. 115-3 at 3).

Under Cronk Duch's assignment of rights, the Carithers sued Mid-Continent for breaching its duty to defend and indemnify, and Mid-Continent removed the action to federal court ("Coverage Action"). Amended Complaint, Carithers v. Mid-Continent Cas. Co. (Coverage Action), No. 3:12-CV-890-J-34TEM (M.D. Fla. Aug. 7, 2012), ECF No. 17. In that case, the Carithers advocated for the injury-in-fact trigger-an alternative insurance coverage legal theory where damage "occurs" when there is actual damage irrespective of when it is discovered-while Mid-Continent argued that the manifestation trigger applied. Coverage Action, 2013 WL 11320043, at *2 (M.D. Fla. Dec. 6, 2013). Judge Magnusson granted the Carithers' motion for summary judgment on the duty to defend, holding that damage "'occurs' at the moment that there is actual damage and the date of discovery **[*5]** is irrelevant." Id. (quotation marks omitted) (quoting Axis Surplus Ins. Co. v. Contravest Constr. Co., 921 F. Supp.

interest and costs, yields a total of $98,252.84. Id.

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2d 1338, 1346 (M.D. Fla. 2012)). After a bench trial on the duty to indemnify,

Judge Magnusson held that the damage occurred in 2005, "almost immediately

after construction was complete," and therefore, Mid-Continent had a duty to

indemnify Cronk Duch. Coverage Action, 2014 WL 11332308, at *2-4 (M.D. Fla.

Mar. 11, 2014). The court entered judgment in favor of the Carithers, with

damages of $98,252.83 and attorney's fees incurred by Cronk Duch of

$13,342.46, both plus prejudgment interest. Judgment, Coverage Action, Doc.

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Mid-Continent appealed the rulings on the duty to defend and indemnify.

The Eleventh Circuit affirmed on the duty to defend, stating:

Given the uncertainty in the law at the time, Mid-Continent did not know whether there would be coverage for the damages sought in the underlying action because Florida courts had not decided which trigger applies. Mid-Continent was required to resolve this uncertainty in favor of the insured and offer a defense to Cronk Duch.

Carithers v. Mid-Continent Cas. Co., 782 F.3d 1240, 1246 (11th Cir. 2015).

Further, the Eleventh Circuit held that injury-in-fact was the appropriate

trigger for this **[*6]** case. *Id. at 1247*. However, the court reversed Judge

Magnusson's damages calculation and remanded for a

new determination of

damages. *Id. at 1251*.

After the Eleventh Circuit rendered its opinion but before the mandate

issued, the Carithers filed a Civil Remedy Notice ("CRN") in accordance with

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Florida Statute § 624.155, alleging bad faith by Mid-Continent, and other violations of Florida law. (Doc. 50-8). Mid-Continent did not pay the amounts allegedly owed but responded to the CRN by claiming it had not acted in bad faith. Id.

After the mandate issued, Judge Magnusson entered an amended judgment for property damage of $26,684.77 plus interest, and attorneys' fees incurred by Cronk Duch in the Underlying Action of $13,342.46 plus interest. Coverage Action, Doc. 163. On September 14, 2015, Mid-Continent paid the amended final judgment in full. Id., Doc. 175. The district court then granted the Carithers' motion for attorney's fees in the Coverage Action, awarding a total of $323,047.35 in fees and costs, which Mid-Continent timely paid. Id., Docs. 173 & 175.

On August 3, 2016, the Carithers filed this action, alleging multiple violations of *Florida Statute § 624.155*, including a claim for bad faith and that Mid-Continent's actions in denying coverage for **[*7]** the Underlying Action were part of a general business practice-making it liable for punitive damages. (Doc. 1). Mid-Continent moved to dismiss the complaint, (Doc. 14), which the Court granted without prejudice, (Doc. 44). In its ruling, the Court limited discovery to the Cronk Duch claim only, and requested briefing on damages. Id. On September 25, 2017, the Carithers filed an Amended Complaint, (Doc. 50), and

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Mid-Continent again moved to dismiss, (Doc. 62). The Court denied this motion

but maintained its bifurcation of discovery. (Doc. 76).

II. MOTION FOR SUMMARY JUDGMENT

By virtue of the assignment from Cronk Duch to the Carithers, the

Carither stand in the shoes of Cronk Duch, Mid-Continent's insured. Insurers

in Florida are obligated to act in good faith toward their insureds in handling

claims. *Bos. Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980)*.

Statutory bad faith is "[n]ot attempting in good faith to settle claims when,

under all the circumstances, [the insurance company] could and should have

done so, had it acted fairly and honestly toward its insured and with due regard

for her or his interests." *§ 624.155(1)(b)*1, Fla. Stat. (2018). In determining

whether an insurer acted fairly and honestly toward its insured, the fact finder

considers:

(1) whether **[*8]** the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and (5) efforts made by the insurer to settle the liability claim in the face of the coverage dispute.

Laforet, 658 So. 2d at 63 (citing Robinson v. State Farm Fire & Cas. Co., 583

So. 2d 1063, 1068 (Fla. 5th DCA 1991)).

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Although Mid-Continent raises several potentially convincing arguments, a determination of bad faith is made by analyzing the totality of the circumstances, and the Florida Supreme Court has said time and again, "it is for the jury to decide whether the insurer failed to 'act in good faith with due regard for the interests of the insured.'" *Harvey v. GEICO Gen. Ins. Co., 259 So. 3d 1, 7 (Fla. 2018)* (quoting *Bos. Old Colony, 386 So. 2d at 785*); see also, e.g., *Berges v. Infinity Ins. Co., 896 So. 2d 665, 680 (Fla. 2004)*; *Campbell v. Gov'tEmps. Ins.*

Co., 306 So. 2d 525, 530 (Fla. 1974). Because Mid-Continent has failed to prove that it is "entitled to judgment as a matter of law," its Motion for Summary Judgment will be denied. Fed. R. Civ. P. 56.

III. MOTION TO STRIKE [*9] MEDIATION STATEMENT

Two days after the Court held a hearing on the pending motions, Mid-Continent filed a Notice of Filing Carithers' Mediation Statement in Support of [Mid-Continent's] Motion for Summary Judgment, (Doc. 127), which contained the Carithers' mediation statement in the Underlying Action, which states: "Prior to litigation, Plaintiffs sought to settle this matter for the amount of $90,000. They would no longer be willing to settle this action for that amount, and Defendants have made no settlement offer whatsoever." (Doc. 127-1 at 5). Mid-Continent filed the mediation statement to rebut Hugh Carithers's affidavit-the only evidence of damages-that he and his wife would have settled the Underlying Action for $25,000.

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The Court directed the Carithers to file a statement explaining the difference between Hugh Carithers's affidavit, (Doc. 112-3), and the mediation statement. (Doc. 130). The Carithers filed a response, (Doc. 131), and a separate motion to strike the mediation statement, (Doc. 132). In their response to the mediation statement, the Carithers argue that the mediation statement is privileged under Florida Statute 44.405 and Middle District of Florida Local Rule 9.07(b) and is "inadmissible as having **[*10]** little to no evidentiary value" because it represents posturing by the party. (Doc. 131 at 2-3). However, the Carithers' motion to strike the mediation statement only argues that the mediation statement should be struck because Mid-Continent's disclosure of it was untimely. (Doc. 132).

The parties' treatment of the mediation statement, and their arguments for and against striking it, are confounding. Although mentioned in the response to Mid-Continent's filing of the Mediation Statement, the Carithers' Motion to Strike fails to reference Florida Statute § 44.405, which potentially precludes Mid-Continent from disclosing the Mediation Statement. More perplexing is the Carithers' argument that they are prejudiced by Mid-Continent not providing them a document that their own counsel created and that they knew Mid-Continent possessed. (Doc. 96-2 at 2 (Mid-Continent

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asserting in its privilege log the mediation privilege for "Plaintiffs' Mediation Statement in liability action")); (Doc. 127-1). 4

Mid-Continent's actions are equally perplexing. It claims that it previously refused to disclose the mediation statement based on Florida's mediation privilege. (Doc. 127 at 1 n.1). However, that privilege, codified in Florida Statute § 44.405 **[*11]**, states that "[a] mediation participant shall not disclose a mediation communication to a person other than another mediationparticipant or a participant's counsel." § 44.405. Mid-Continent refused to be a "mediation participant," and, obviously, the Carithers were "mediation participant[s]." Thus, the Court does not understand Mid-Continent's legal basis for withholding production of the mediation statement.

Nonetheless, the mediation statement, although potentially available for cross examination of the Carithers at trial, 5 only further evidences the existence of factual disputes concerning the damages at issue. Thus, the Court does not need to rely on it in ruling on Mid-Continent's motion for summary judgment. However, because the Carithers' only asserted basis to strike the

4Attorney Robert Warren created the mediation statement and was the Carithers' counsel in the Underlying and Coverage Actions. Although not officially listed on the docket as representing the Carithers in this action, Mr. Warren was present at counsel table during the hearing on the pending motions. (Doc. 126).

5While normally a mediation statement is privileged, when the very issue is the amount the Carithers would have accepted to settle the Underlying Action, the mediation statement may be probative, **[*12]** non-privileged evidence.

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mediation statement is that it was not timely disclosed-even though they created the document, knew Mid-Continent had it, and it was responsive to Hugh Carithers's recently filed affidavit-the Court will deny their motion to strike. If the Carithers wish to renew their motion to strike before trial based on different reasoning, they may do so.

IV. MOTION TO EXCLUDE MCINTOSH

Mid-Continent seeks to exclude the Carithers' expert,

Douglas McIntosh, arguing that he is unqualified, and that his opinions are unreliable and unhelpful to the jury. (Doc. 106 at 2). By contrast, the Carithers assert that McIntosh is qualified, his opinions are based on his relevant experience and review of the case, and his testimony will be helpful to the jury. (Doc. 111 at 2- 4).

Federal Rule of Evidence 702 governs the admissibility of expert testimony and requires judges to act as the gatekeeper to ensure that expert testimony "is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm.,Inc, 509 U.S. 579, 589 (1993)*; see also *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999)* (holding that Daubert's gatekeeping obligation applies to all expert testimony). The party offering the expert testimony bears the burden of demonstrating admissibility by a preponderance of the evidence, and this burden is "substantial." **[*13]** Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty.,

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402 F.3d 1092, 1107 (11th Cir. 2005). To be admissible, the proponent of the

expert testimony must satisfy three requirements:

First, the expert must be qualified to testify competently regarding the matter he or she intends to address. Second, the methodology used must be reliable as determined by a Daubert inquiry. Third, the testimony must assist the trier of fact through the application of expertise to understand the evidence or determine a fact in issue.

Kilpatrick v. Breg, Inc., 613 F.3d 1329, 1335 (11th Cir. 2010). If the testimony

satisfies these three requirements, it must then still satisfy Rule 403. United

States v. Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004) (en banc).

A. McIntosh's Qualifications

Mid-Continent contends that McIntosh is unqualified "to render an

opinion on the good faith handling of a construction defect property damage

claim[]" because he:

(1) has never worked for or overseen the operations of an insurance company; (2) has, at best, limited experience handling construction defect property damage claims; (3) has no reported decisions on the trigger of coverage; and (4) has never authored a claims manual or developed procedures for handling responses to CRN's under the facts similar to the ones of this case. . . .

(Doc. 106 at 11). The Carithers assert that McIntosh's **[*14]** experience is sufficient

for him to testify as an expert.

The first prong requires that an expert be qualified to testify competently

regarding the matter he intends to address, and this can be demonstrated in

several ways. See *Fed. R. Evid. 702*. *Rule 702* allows a witness to qualify as an

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expert based upon his knowledge, skill, experience, training, or education. Id.; see *Frazier, 387 F.3d at 1260-61*.

McIntosh is qualified to render opinions regarding whether Mid-Continent's handling of Cronk Duch's claim complied with industry standards and customs, as well as general information about the insurance industry. See*Frazier, 387 F.3d at 1260-61*. McIntosh has practiced law in Florida for more than thirty-six years, and for the last twenty-five years has focused on providing legal advice to insurance companies related to claims handling. (Doc. 106-1 at 2). In so doing, he has "actively assisted claims handlers such as those involved in this case[] with meeting the good faith obligations of their employer as an insurer under Florida law." Id. Although he has never been employed by an insurance company, he adjusts claims for insurance companies weekly, typically in situations where a claimant has made threats or overtures about bringing a bad faith action. (Doc. 106-2 at **[*15]** 198-99). These claims have included construction defect property damage claims and claims where the appropriate trigger was a question. Id. McIntosh has advised insurers what trigger should apply under a specific policy. *Id. at 200*. Further, McIntosh has audited claims and given opinions to insurers on whether the proper trigger was applied. *Id. at 202*. Additionally, McIntosh is a Certified Instructor through the Florida Department of ***Insurance*** in courses dealing with ethics, ***bad faith***, and claims

handling. Id.; (Doc. 106-2 at 41-42).

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B. Reliability of McIntosh's Opinions

Next, the Carithers must demonstrate that McIntosh's opinions are reliable. *Frazier, 387 F.3d at 1261*. The reliability prong is distinct from an expert's qualifications; thus, an expert can be qualified but his opinions unreliable. Id. "[A] basic foundation for admissibility [is] that '[p]roposed [expert] testimony must be supported by appropriate validation-i.e., "good grounds," based on what is known.'" Id. (second and third alterations in original) (quoting *Daubert, 509 U.S. at 590*). "Exactly how reliability is evaluated may vary from case to case, but what remains constant is the requirement that the trial judge evaluate the reliability of the testimony before allowing its **[*16]** admission at trial." Id.

An expert who relies upon his experience as the foundation for his opinions must explain how his experience supports his opinions. See Hughes, 766 F.3d at 1329 (citing *Frazier, 387 F.3d at 1265*). The proponent of the expert testimony has the burden of explaining how the expert's experience "led to the conclusion he reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case." *Frazier, 387 F.3d at 1265*.

McIntosh has shown that he relied on his experience in formulating his opinions, e.g., Doc. 106-2 at 45, 95, 105, 113, 182, 192, and there is not "too great an analytical gap" between the opinions offered and his experience, see Joiner,

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522 U.S. at 146. It logically follows that someone who adjusts claims weekly, has advised insurance companies on proper claims handling for more than twenty-five years, and audits claims files and provides opinions to insurers about whether the proper trigger was applied will be able to rely on that experience to formulate an opinion about whether Mid-Continent properly handled Cronk Duch's claim.

That McIntosh cannot disclose specific legal advice he gave clients does not render his expert opinions unreliable. See Doc. 106 at 13 (arguing **[*17]** that McIntosh's opinions are unreliable because he asserted the attorney client privilege in response to certain questions regarding advice he has given clients). However, the Court will look carefully upon any assertion of the attorney client privilege. It appears that McIntosh can testify about his experience specific to the issues without disclosing protected confidential communications. 6 Further, any limitations McIntosh places on his testimony can be considered by the jury in determining its weight.

C. Helpfulness of McIntosh's Opinions

The final requirement that the Carithers must demonstrate is that the proffered expert testimony will assist the trier of fact. *Frazier, 387 F.3d at 1262*.

6For example, without invading the attorney client privilege, McIntosh can answer generally whether he has ever advised clients regarding the appropriate trigger of coverage differently than his opinions in this case and why.

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"By this requirement, expert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person. Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." **[*18]** *Id. at 1262- 63* (citations omitted). "[W]here the 'weight of legal authority on the coverage issue' and the reasonableness of the coverage decision are at issue, we would expect [expert] opinions considering, applying, and clarifying such legal authority to be relevant." *Garcia v. GEICO Gen. Ins. Co., 807 F.3d 1228, 1235 (11th Cir. 2015)* (citation omitted).

McIntosh's opinions about different trigger theories and how the weight of legal authority informs an insurer's decision whether to provide a defense are not within the common knowledge of the average juror. Id. McIntosh is permitted to testify as an expert, and Mid-Continent may object at trial to specific opinions that it believes are unfounded.

V. CONCLUSION

Accordingly, it is hereby

ORDERED:

1. Mid-Continent's Motion for Summary Judgment, (Doc. 107), is

DENIED.

2. Mid-Continent's Motion to Exclude Expert Testimony of Douglas

McIntosh (Doc. 106) is **DENIED**.

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3. The Carithers' Motion to Strike, Exclude, and/or Preclude Mid-Continent Casualty Company from Relying on the Mediation Statement (Doc.

132) is **DENIED without prejudice**.

4. Not later than **August 9, 2019**, the Carithers shall file a proposed discovery plan (including deadlines) for their pattern and practice claim and a separate memorandum, not to exceed ten pages, **[*19]** discussing whether the Court should bifurcate their pattern and practice claim from the current bad faith claim.

5. Not later than **September 3, 2019**, Mid-Continent shall file separate responses, not to exceed ten pages, to the Carithers' proposed pattern and practice discovery plan and their memorandum on whether the Court should bifurcate the case.

6. The Carithers' Motion to Compel, (Doc. 96), is **DEFERRED**. The Court will rule on the motion after receiving briefing on the Carithers' pattern and practice discovery plan and bifurcation.

DONE AND ORDERED in Jacksonville, Florida this 16th day of July,

2019.

TIMOTHY J. CORRIGAN

United States District Judge

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jb Copies:

Counsel of record

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

HUGH A. CARITHERS and KATHERINE S. CARITHERS, etc.,

Plaintiffs,

CASE NO. 3:16-cv-00988-TJC-MCR

vs.

MID-CONTINENT CASUALTY COMPANY,

Defendant.
_____/

DEFENDANT MID-CONTINENT CASUALTY COMPANY'S MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF DOUGLAS McINTOSH AND SUPPORTING MEMORANDUM OF LAW

Defendant, Mid-Continent Casualty Company ("MCC"), pursuant to Federal Rule of Evidence 702 and Middle District of Florida Local Rule 3.01, moves in limine to exclude the testimony of Douglas McIntosh, Esq., who has been retained by Plaintiffs, Hugh A. Carithers and Katherine S. Carithers ("Plaintiffs" or the "Carithers"), as their purported expert witness on construction defect claims handling practices under commercial general liability insurance policies. The grounds for the motion are contained in the following memorandum of law.

I. INTRODUCTION

The statutory bad faith claim the Carithers have brought against MCC is based on MCC's alleged bad-faith reliance on the manifestation trigger theory of coverage in denying a defense to its insured ("Cronk Duch") in an underlying construction defect lawsuit brought by the Carithers. To support their claim, the Carithers intend to offer the testimony of Douglas McIntosh as a construction defect claims handling expert. McIntosh opines that MCC breached its good faith obligations by failing to defend Cronk Duch and by failing to pay, in response to a civil remedy notice, a judgment that had just been remanded to the district court for a reduction in amount.

However, McIntosh's testimony must be excluded under Federal Rule of Civil Procedure 702. He is completely unqualified to testify on construction defect claims handling standards. He is simply an insurance lawyer whose "experience" in claims handling comes from the handful of cases that happen to be referred to him by insurance company clients, only a few of which involved construction defect claims. Yet McIntosh has no experience at all with the vast majority of cases that are never referred by insurance companies to outside counsel. Moreover, he has never worked as a claims adjuster, supervisor, manager, or in any capacity for an insurance company. He simply does not possess the expertise to opine on MCC's standards for handling construction defect claims.

Further, McIntosh's deposition testimony reveals that the bases for his opinions are unsupported by any authority or treatise, were withheld on grounds of attorney-client privilege, or are simply incorrect. Thus, the methodology underlying his opinions is inherently unreliable. Moreover, much of his testimony consists of nothing more than legal conclusions and opinions on legal issues, which are not relevant in that they do not assist the trier of fact in determining any facts at issue. Accordingly, and as discussed in more detail below, the Court should exclude McIntosh's testimony.

II. ARGUMENT

A. The *Daubert* Standard for Admission of Expert Testimony

The admission of expert evidence is governed by Federal Rule of Evidence 702,[1] as construed by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). In *Daubert*, the

[1] Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

Supreme Court required district courts to assume a "gatekeeping" role to ensure that all expert testimony is both reliable and relevant before being admitted into evidence. 509 U.S. at 597. Based on *Daubert*, the Eleventh Circuit has set forth guidelines that provide for the admissibility of expert testimony where:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Rink v. Cheminova, Inc., 400 F.3d 1286, 1291 (11th Cir. 2005) (citation omitted).[2] The proponent of the expert testimony has the burden of satisfying each of the three prongs of the inquiry by a preponderance of proof. *Daubert*, 509 U.S. at 593; *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

[2] In addition, district courts must "be mindful of other applicable rules," including Federal Rules of Evidence 703 and 403. *Daubert*, 509 U.S. at 595. Under Rule 703, expert opinions may be based on hearsay only if the "facts or data" relied upon are of a type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Id.* Rule 403 allows a court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

1. Qualifications of Expert

As a preliminary matter, an expert witness must be "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702; *see also Frazier*, 387 F.3d at 1260-61 (training, education, and experience in a field provide possible means to qualify for expert status). Nevertheless, "while an expert's qualifications may bear on the reliability of his proffered testimony, they are by no means a guarantor of reliability. . . . [O]ur caselaw plainly establishes that one may be considered an expert but still offer unreliable testimony." *Frazier*, 387 F.3d at 1261. Although determining whether an expert is qualified is necessarily a case-specific determination, the Eleventh Circuit has affirmed the exclusion of testimony that fell outside of the expert's competence. *See City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 565 (11th Cir. 1998) (statistics expert could not testify on issues regarding the existence of conspiracy and legal standards).

2. Reliability Under *Daubert*

In assessing the reliability of expert testimony, a non-exclusive, four-factor test is used to evaluate the admissibility of expert testimony:

> (1) Whether the expert's methodology can be (and has been) tested;
>
> (2) Whether the expert's technique has been subjected to peer review and publication;
>
> (3) Whether, in respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and
>
> (4) Whether the theory or technique enjoys general acceptance by the relevant community.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149-50 (1999); *see also United States v. Great Lakes Dredge & Dock Co.*, 259 F.3d 1300, 1305 (11th Cir. 2001).

The Supreme Court has deemed these factors "a mere starting point." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999). However, "*any* step that renders the analysis unreliable under the *Daubert* factors renders the testimony inadmissible." *Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (citation omitted).

3. Relevance or "Fit"

The third prong of the *Daubert* analysis is relevance or "fit." Expert testimony must be "helpful" and "assist the trier of fact to understand the evidence or determine a fact in issue." *Daubert*, 509 U.S. at 591. The trial court must ensure that the proffered testimony is "sufficiently tied" to or "fits" the facts of the case. *Id.* (citing *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985). Again, the district court has a duty under *Daubert* to exclude the plaintiff's evidence if the plaintiff fails to establish admissibility by a preponderance of the evidence. *See, e.g.*, *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998); *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1222 (D. Colo. 1998).

Viewed against these standards, Plaintiffs' expert on claims handling practices, Douglas McIntosh, should not be allowed to testify.

B. McIntosh Is Unqualified to Testify as to Claims Handling Practices, and His Opinions are Neither Reliable nor Relevant

McIntosh was retained by Plaintiffs to provide an opinion "as to the claims handling practices by [MCC] with the *Carithers* claim made against the MCC-insureds, Cronk Duch Miller & Associates, Inc., et al." (Expert Witness Report of Douglas M. McIntosh at 1, Aug. 13, 2018) ("McIntosh Report").[3] As discussed below, he is not qualified to express such an opinion. Even if he were, his opinion testimony is inherently unreliable because he was either unaware of any

[3] A copy of McIntosh's initial report is attached as Exhibit 1. McIntosh did not submit a rebuttal report.

authority to support his opinions, cloaked the bases for his opinions in the guise of attorney-client privilege, or stated bases for his opinions that were demonstrably incorrect. Moreover, many of his opinions have no relevance because they are nothing more than legal opinions or conclusions.

1. McIntosh's Opinions

In his report, McIntosh—after stating that MCC had denied coverage and a defense to Cronk Duch primarily based on its "determination that a 'manifestation trigger' theory would apply to its obligations under its policies issued to the Cronk Duch entities, rather than an 'injury-in-fact trigger' or other insurance industry trigger theory"—rendered the following opinions:

> 7. Typically in the industry, over my many decades of providing assistance and advice to insurers such as MCC, it is normal for a carrier to defend its insured(s) in a Third Amended Complaint like that involved below in *Carithers*, under a reservation of rights to pursue court determination of its rights and obligations for a claim that leaves one in doubt about its obligations. In this manner, the insured is protected, and not left to fend for itself if the carrier outright denies coverage and defense for a particular claim or lawsuit.
>
> . . .
>
> 12. In 2011, the state of the law for theories on triggers of coverage for construction-related defects and damages claims (sometimes referred to in the industry as "rip and tear" litigation) was unsettled in Florida (as well as other states around the country), in particular when fact-intensive discovery will be needed to establish one trigger theory over another.
>
> 13. In my experience handling claims of this nature for a number of national carriers similar to MCC, the standard and prudent course of action is to defend the insured under reservation or rights (with written non-waiver agreement if necessary) and pursue separate, declaratory relief litigation to firmly establish the position being reserved upon (here, a manifestation trigger with no coverage or defense obligation versus an injury-in-fact trigger of coverage and a correspondent duty to defend).

> 14. MCC failed to protect its insured(s) with a provisional defense and reservation of rights. Instead, MCC chose to leave its insured(s) to fend for themselves in the *Carithers* litigation, and refused to participate in that defense in any manner.
>
> 15. Once MCC litigated its manifestation-trigger theory to the USDC and the 11th Circuit Court of Appeals, and lost on that issue, MCC had a clear obligation to settle the claim by its insured(s) and their assignees, and failed to do so. This constituted a breach of MCC's good faith obligations under its policy of insurance.
>
> 16. Once MCC received a Florida Statute §624.155 Civil Remedy Notice (CRN) dated June 25, 2015, it was obligated to cure its prior inferior claims practices, and pay the sums it clearly owed on the Carithers" loss within sixty (60) days of the CRN. MCC failed to do this, again breaching its good faith obligations under its policy issued to its insured(s).

(McIntosh Report at 4-5, 6-7.)

2. McIntosh Is Not Qualified to Opine on Construction Defect Property Damage Claims Handling Practices.

McIntosh has been practicing law in Florida for thirty-six years. (McIntosh Report at 2.) In preparing his opinions, McIntosh did not rely on any treatises that he considered authoritative. (McIntosh Dep. 29:2-22, 30:2-4, Nov. 26, 2018.[4]) In fact, he does not consider any particular treatise as authoritative in either the area of insurance coverage or bad faith. (McIntosh Dep. 29:23-30:1.) As to the key trigger of coverage issue in the underlying case, McIntosh has no reported decisions, and could not even recall if he had ever filed any briefs on the subject. (McIntosh Dep. 37:14-25.) His only reported decision in a construction case involved a claim by an injured worker, as opposed to a property damage claim. (McIntosh Dep. 56:6-10, 175:22-176:5.)

Critically, McIntosh has never worked for an insurance company in any capacity, including as either a claims adjuster, a supervisor, or a manager. (McIntosh Dep. 40:17-41:9.) Moreover,

[4] A copy of the transcript of McIntosh's deposition is attached as Exhibit 2.

unlike MCC's expert, William Hager,[5] he has never worked in any capacity regulating the conduct of insurance companies, either in Florida or elsewhere. (McIntosh Dep. 41:10-13.) Nor has he ever worked for the state of Florida as an insurance adjuster, or held an insurance adjuster's license in any state. (McIntosh Dep. 41:10-13, 43:7-12.) McIntosh has never authored a claims manual, (McIntosh Dep. 44:1-5), nor has he provided procedures to any insurance company for handling claims when there is a majority view on a particular legal issue. (McIntosh Dep. 48:12-15). In addition, he has never developed procedures for insurance companies on how to respond to a civil remedy notice when the amount of the claim is contested or when the insurer has to pay a judgment under a third-party policy. (McIntosh Dep. 60:12-15, 62:25-63:3.)

McIntosh's experience is strictly limited to claims sent to him by a limited number of insurance companies. (McIntosh Dep. 63:10-12.) However, he conceded that there are hundreds if not thousands of claims involving the duty to defend, when to pay a judgment, property damage caused by construction defects, and other issues, which are handled by insurers and are never sent to lawyers who represent insurance companies. (McIntosh Dep. 63:13-64:17, 176:14-177:4.) In an attempt to bolster his credentials, McIntosh testified that he has audited claims files and has also adjusted claims for insurance companies. (McIntosh Dep. 181:5-182:20.) However, none of his experience in adjusting claims involved an insurer's duty to defend in a construction defect property damage suit. (McIntosh Dep. 196:12-25.) In fact, his auditing experience in the construction defect area consisted of perhaps five files. (McIntosh Dep. 201:3-202:2.) When asked about his experience in adjusting claims involving construction defect property damage claims, his "guesstimate" was about a dozen claims for 2 or 3 insurers, hardly an extensive sample of cases from which to glean the practices of the insurance industry. (McIntosh Dep. 199:3-10.)

[5] A copy of Hager's initial report is attached as Exhibit 3.

McIntosh is plainly not qualified to testify on the issue of MCC's construction defect property damage claims handling practices. He is simply a lawyer who specializes in insurance law. As the court in *Lopez v. Allstate Fire & Casualty Insurance Co.*, No. 14-20654, 2015 U.S. Dist. LEXIS 127498 (S.D. Fla. Sept. 23, 2015), recognized in excluding an insurance lawyer as an expert: "A lawyer with extensive experience in a particular area of law is not necessarily qualified to provide expert testimony on proper internal processes of the particular industry the lawyer represents." *Id.* at *14 (citing *Novak v. Progressive Halcyon Ins. Co.*, No. 04-0632, 2005 WL 5989782, at *4-5 (M.D. Pa. Sept. 13, 2005); *Butler v. First Acceptance Ins. Co., Inc.*, 652 F. Supp. 2d 1264, 1272 (N.D. Ga. 2009)).

In *Lopez*, the plaintiffs, represented by Ver Ploeg & Lumpkin, sought to exclude the testimony of D. James Kadyk, an attorney with thirty-six years of experience in casualty and insurance law. 2015 U.S. Dist. LEXIS 127498 at *1, 8-9. Kadyk attempted to offer opinions that Allstate properly handled the claim and was not in bad faith when it did not tender its policy limit in the first forty-five to sixty days after the accident. *Id* at *9-10. The plaintiffs sought to disqualify Kadyk "because he has never been an insurance adjustor, managed insurance adjustors, been employed by an insurance company, or even received training in proper claims adjusting. Rather, Mr. Kadyk has only worked as an attorney specializing in insurance law." *Id.* at *13. In contrast, Allstate asserted that "Mr. Kadyk's thirty-six years as an attorney specializing in insurance law is sufficient experience to qualify him as an expert on good faith insurance claims handling." *Id.* The court agreed with the plaintiffs and granted the motion to strike Kadyk as an expert, finding that "his particular expertise—in insurance law—does not match the type of expertise needed to render an expert opinion on the internal standards for handling an insurance claim." *Id.* at *14; *see also Butler v. First Acceptance Ins. Co., Inc.,* 652 F. Supp. 2d 1264, 1272 (N.D. Ga. 2009) (excluding

expert in bad faith failure to settle case where expert worked as attorney for over thirty years in personal injury and insurance litigation, but never worked in insurance industry).

In *Kearney v. Auto-Owners Insurance Co.*, No. 8:06-cv-595, 2009 U.S. Dist. LEXIS 108918 (M.D. Fla. Nov. 5, 2009), the insured in a bad faith action moved in limine to exclude the expert opinion testimony of Charles T. Wells, a former justice of the Florida Supreme Court. *Id.* at *11. Wells intended to testify that the insurer had processed and handled the insured's claim for payment reasonably and appropriately. *Id.* The insured argued that Wells was not qualified to render such an opinion. *Id.* at *12. Agreeing with the insured, the court found that Wells' background and experience as an attorney and state supreme court justice "does not qualify him as an expert regarding the insurance claims handling process." *Id.* at *13.

Additionally, in *Estate of Arroyo v. Infinity Indemnity Co.*, No. 15-20548, 2016 U.S. Dist. LEXIS 115669 (S.D. Fla. Aug. 29, 2016), Infinity challenged the credentials of attorney Lewis Jack because he had never adjusted casualty claims nor been licensed to do so in Florida. *Id.* at *2. Infinity further contended that much of Jack's opinions were based on proscribed determinations of credibility and factual disputes reserved for the jury. *Id.* The court concluded that even though Jack had worked for over forty years advising insurance companies, his opinions must be excluded. *Id.* at *6-7. The court found that Jack was not qualified to render an opinion on insurance claim handling because he had "no experience in personally handling claims, has not published any materials on the subject, and appears unfamiliar with guidelines from the Florida Department of Insurance." *Id.* at *7.

Similarly, here, McIntosh's experience as an insurance lawyer does not qualify him to opine on any issues regarding MCC's claims handling standards. He has merely provided legal advice and representation to a limited number of insurance companies who are his clients, and has

done so only in that small fraction of cases which happen to be referred to outside lawyers. He has never been employed by an insurance company in any capacity, and thus he has no expertise in the handling of those thousands of cases that involve construction defect property damage, the duty to defend, and when a judgment must be paid, and which are regularly handled by insurers without the involvement of outside lawyers. As amply illustrated by the authorities discussed above, a lawyer such as McIntosh, who (1) has never worked for or overseen the operations of an insurance company; (2) has, at best, limited experience handling construction defect property damage claims; (3) has no reported decisions on the trigger of coverage; and (4) has never authored a claims manual or developed procedures for handling responses to CRN's under the facts similar to the ones of this case, does not possess the requisite expertise to render an expert opinion on the good faith handling of construction defect property damage claims.

3. McIntosh's Methodology Is Patently Unreliable Because It Is Either Not Based on Any Authority, Cloaked in Attorney-Client Privilege, or Based on an Incorrect Premise.

McIntosh is asking the court to rely upon his experience as an attorney handling insurance matters as the sole basis for the opinions he proffered. However, McIntosh repeatedly conceded that he was not aware of any authority to support his opinions. For example, he testified that he was not aware of any decision in the state of Florida in which an insurer was found to be in bad faith for following the majority view of the law in determining not to defend an insured, or aware of any treatise suggesting the same. (McIntosh Dep. 49:15-50:12.) Nor did he review any treatises or articles to determine the custom and practice of the insurance industry in determining when to pay judgments rendered against an insured for a third party claim. (McIntosh Dep. 63:4-9.) He further testified he was unaware of any case that held, or treatise which suggested, that an insurer was in bad faith when it appealed from a judgment and obtained a substantial reduction of the amount claimed as covered under an insurer's policy. (McIntosh

Dep. 68:24-69:22.) Next, McIntosh testified that it is normal for an insurer to defend an insured under a reservation of rights and then file a coverage action. (McIntosh Dep. 94:3-11.) However, when pressed, McIntosh admitted that he was aware of no studies by the insurance industry which track the number of claims that are denied as opposed to those that are not, or the number of claims that are denied by insurer without filing coverage actions. (McIntosh Dep. 95:25-96:14.)

In rejecting an attorney's testimony is strikingly similar circumstances, Judge Cooke in *Lopez* found that Kadyk had failed to show how his experience as an attorney handling insurance matters provided a sufficient basis for the opinions he proffered. 2015 U.S. LEXIS 127498, at *16. The court noted that Kadyk was "simply asking the Court to take a leap of faith that his extensive work as an attorney has given him the ability to reliably apply that experience to the facts of this case." *Id.* at *17. The court refused to take that "leap" since Kadyk "failed to meet his burden of explaining how that experience can reliably lead to the conclusions he proffers." *Id.*

Because McIntosh was unable to cite any treatise or authority to support his opinions, those opinions are deemed completely unreliable under *Daubert*. *See, e.g.*, *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty.*, 402 F.3d 1092, 1113 (11th Cir. 2005). ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."); *Tindall v. H&S Homes, LLC*, No. 5:10-cv-044, 2012 U.S. Dist. LEXIS 110034, at *30 (M.D. Ga. Aug. 7, 2012) (expert apparently designed own version of business judgment rule "without consulting any acceptable treatise or authority on the matter," which "renders his opinion wholly unreliable").

Additionally, McIntosh on numerous occasions refused to answer questions on the basis of attorney-client privilege, preventing MCC from testing his opinions. For example, he refused

to answer when asked if he had ever advised a client between 2002 and 2012 that manifestation was the appropriate trigger of construction defect cases in Florida. (McIntosh Dep. 36:24-37:9.) Similarly, when asked about procedures he has prepared for his clients for handling construction defect claims to see if his opinions were consistent with the advice he has provided over the years, he declined to answer on the basis of attorney-client privilege. (McIntosh Dep. 44:6-17.) In addition, when pressed, McIntosh, asserting attorney-client privilege, refused to answer any questions regarding the very limited work he claimed to perform as an adjuster or auditor. (McIntosh Dep. 199:11-14, 200:2-19, 201:22-24, 202:3-11.) Finally, he also refused to answer when asked whether he had ever advised an insurer that it is bad faith under a third-party policy not to pay the undisputed portion of claim prior to the entry of a judgment or final judgment. (McIntosh Dep. 39:8-40:9.) McIntosh's refusal to provide answers regarding key elements of his opinions also renders his methodology unreliable. *See, e.g.*, *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1344 (11th Cir. 2003) ("[A]n expert's failure to explain the basis for an important inference mandates exclusion of his or her opinion.").

Finally, in many cases, McIntosh was simply wrong, calling into question his reliability. On the critical question of a an insurer's duty to defend, he testified that inferences drawn from the allegations of a complaint can create a duty to defend. (McIntosh Dep. 78:22-80:18.) A legion of cases in determining an insurer's duty to defend, including a decision by this Court, hold otherwise. *See Wackenhut Servs. v. Nat'l Union Fire Ins. Co.,* 15 F. Supp. 2d 1314, 1321 (S.D. Fla. 1998) ("[I]nferences that can be made from the allegations of the complaint 'are not sufficient' to trigger the duty to defend.") (quoting *Fun Spree Vacations, Inc. v. Orion Ins. Co.*, 659 So. 2d 419, 421 (Fla. 3d DCA 1995)); *Singer v. Colony Ins. Co.*, 147 F. Supp. 3d 1369, 1375

(S.D. Fla. 2015) (same); *Auto-Owners Ins. Co. v. Elite Homes, Inc.*, 160 F. Supp. 3d 1307, 1310 (M.D. Fla. 2016) (Corrigan, J.) ("Inferences, too, are not enough.").

Next, he testified that the determination of whether a carrier is in bad faith was a four-part test under the seminal case of *Laforet*, when in fact it is a five-part test. (McIntosh Dep. 97:20-98:6.) An expert in Florida bad faith law would not only know this is a five-part test, but would also be able to recite all five factors. As the court observed in *Arroyo*, a proffered expert's unfamiliarity with the law is a basis for the court, acting as a gatekeeper, to prevent that expert from testifying. *See* 2016 U.S. Dist. LEXIS 115669, at *7.

He was also wrong about the facts. For example, he testified that MCC's Florida branch office supervisor Bob Rogers made the initial coverage determination, when he did not. (McIntosh Dep. 101:11-16.) This factual error colored McIntosh's testimony, causing him to wrongly conclude and improperly testify that MCC did not follow the procedures that it had in place to determine whether it owed Cronk Duch a defense based upon the complaints tendered to it. *See Arroyo*, 2016 U.S. Dist. LEXIS 115669, at *7 (preventing attorney Jack from testifying due to his proscribed determinations of credibility and factual disputes). Based upon his lack of knowledge of both the law and the facts, McIntosh's methodology is simply unreliable, and his testimony is therefore inadmissible under *Daubert*.

4. McIntosh's Testimony Has No Relevance or "Fit" Because His Opinions Concern Issues of Law.

Testimony is relevant if it "assists the trier of fact . . . to understand the evidence or to determine a ***fact*** in issue." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998) (emphasis added). While experts may testify as to an ultimate issue of fact, they may not testify as to legal conclusions. *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990). Thus, it is well-settled that expert testimony regarding issues of law is

inappropriate and should be excluded. *See Clarendon Am. Ins. Co. v. Bayside Rest., LLC*, No. 05-1662, 2006 WL 2729486, at *2 (M.D. Fla. Sept. 25, 2006) ("[T]his Court does not look to engage in a 'battle of the experts' on an issue that is ultimately to be decided as a matter of law."); *Am. Home Assur. Co. v. Devcon Int'l, Inc.*, No. 92-6764, 1993 WL 401872, at *4 (S.D. Fla. Sept. 28, 1993) (striking affidavit of insurance expert because expert was merely making legal conclusion); *Lopez*, 2015 U.S. LEXIS 127498. at *17 ("To the extent Mr. Kadyk is forming this opinion based on the requirements of Florida Statutes, if needed, the Court will instruct the jury on the relevant PIP law . . . .").

McIntosh opined that, based upon the allegations in the amended and third amended complaints that the defects to the Carithers' home were latent, MCC breached its duty to defend when it denied a defense to Cronk Duch. (McIntosh Dep. 86:24-88:5, 102-3.). Even McIntosh conceded that, unless there were "a slight question of fact," which he did not think there was, this was a question of law for the court to decide. (McIntosh Dep. 74:18-75:18.). Of course, McIntosh could not cite a single Florida case that supported his legal conclusion that the allegation of a latent defect alone triggers a duty to defend under the manifestation trigger. (McIntosh Dep. 103:16-104:1.).

McIntosh then opined that because this case involved a *Coblentz* agreement in which the insured settled with the claimants and assigned its rights to a third party, this was now akin to a first-party as opposed to a third-party claim. (McIntosh Dep. 185:2-12.). This, too, is a purely legal opinion. More important, he was simply wrong on this point, because this was a third-party claim brought by the Carithers as opposed to a first-party claim brought by Cronk Duch directly against MCC for damages to property it owned or leased. In addition, McIntosh testified regarding the relative weight of a federal court decision versus a state court decision, and gave

his opinions about the holding of certain cases and the law regarding an insurance company's duty to defend, (McIntosh Dep. 187:18-194:15, 204:23-207:12), all of which are, once again, pure legal issues.

In *Montgomery*, the district court allowed the plaintiff to offer expert testimony about the interpretation of the policy issued to the plaintiff and the scope of the insurer's duty to defend and provide tax counsel for the underlying tax matter. 898 F.2d at 1540. On appeal, the Eleventh Circuit observed that while an expert could offer his opinion on an ultimate issue of fact, he could not tell the jury what result to reach. *Id.* at 1541. Similarly, the court added, the expert could "not testify to the legal implications of conduct; the court must be the jury's only source of law." *Id.* (citations omitted). The court found that the expert's testimony that the insurer had a duty to hire tax counsel in the underlying case was a legal conclusion, and therefore should not have been admitted. *Id.*

Here, much of McIntosh's testimony consists of nothing more than conclusions of law and inappropriate opinions on legal issues. Conclusions of law and opinions on legal issues from an expert have no relevancy because they do not assist the trier of fact.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, MCC respectfully requests that the Court enter an order excluding the testimony of Plaintiffs' expert witness, Douglas McIntosh, under Rule 702.

Rule 3.01 Certification

Pursuant to Local Rule 3.01(g), undersigned counsel for MCC certifies that he conferred with R. Hugh Lumpkin, Esq., and Mark Boyle, Esq., counsel for the Carithers, in a good faith effort to resolve the issues raised in this motion but the parties were unable to reach an agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record. I am unaware of any non-CM/ECF participants.

s/James H. Wyman
James H. Wyman

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

HUGH A. CARITHERS AND KATHERINE S. CARITHERS, as the Assignee of CRONK DUCH MILLER & ASSOCIATES, INC., CRONK DUCH ARCHITECTURE, LLC, CRONK DUCH CRAFTSMAN, CRONK DUCH PARTNERS, LLC, CRONK DUCH HOLDINGS, INC., AND JOSEPH S. CRONK,

Plaintiffs,

vs.

MID-CONTINENT CASUALTY COMPANY,

Defendant.
_____/

CASE NO. 3:16-cv-00988-TJC-MCR

EXPERT WITNESS REPORT OF DOUGLAS M. McINTOSH

A. Introduction

I have been retained by counsel for Plaintiffs to review and evaluate the materials contained in the reproduced record provided to me in this matter. Specifically, I have been asked, based upon a thorough and objective evaluation of those materials (as noted with greater particularity in this Report), and based upon my personal and professional experience, to provide my expert opinion as to the claims handling practices by Mid-Continent Casualty Company ("MCC") with the *Carithers* claim made against the MCC- insureds, Cronk Duch Miller & Associates, Inc., et al.

Exhibit 1

This report is based upon my extensive experience with claims analysis standards and claims handling in Florida. These opinions are preliminary as discovery is ongoing in this matter.

By way of background and experience, my professional vitae is attached as Exhibit "A." During my over 36-years of practice of law in Florida, I have represented multiple insurers such as MCC, and have also represented insureds such as Cronk Duch, et al., and claimants such as the Carithers. Over the past 25-plus years, I have focused my practice on the counseling of insurance companies such as MCC, and have provided legal advice and counsel to a variety of national and multi-national insurers over these years, on issues related to claims handling, Florida law on prudent claims handling practices, and I have actively assisted claims handlers such as those involved in this case, with meeting the good faith obligations of their employer as an insurer under Florida law. I have also actively handled claims such as the type involved here in primary defense of same as well as serving as the legal representative of the claims arm of insurers such as MCC, assisting in discharge of the insurer's good faith obligations to its insured(s). I have been accepted and testified as an expert in the field involved in this case, many times in both State and Federal Courts throughout Florida. My testimonial history is attached as Exhibit "B."

In accord with Fed. R. Civ. P. Rule 26(a)(2)(B), the analysis and support that follow comprises my current evaluation, conclusion and opinions.

B. Summary of Facts and Opinions

Based on thorough review of all materials provided to me, I have arrived at the following opinions based upon those materials (and pertinent facts recited here):

1. First notice of the *Carithers* claim was provided to MCC on August 30, 2011. On September 9, 2011, MCC claim handler Sharlatean Boston, sought internal coverage counsel review from Gene Hert at Home Office. On September 12, 2011, MCC reserved its rights with its insured(s) Cronk and Cronk Duch Holdings, Inc., while it investigated the claim and its coverage obligations.

2. On September 14, 2011, after a "Claims Coverage Committee" meeting on the *Carithers* claim in Home Office, MCC's Hert wrote to Claims Handler Boston and directed her to deny the claim in its entirety. On September 22, 2011, Claims Handler Boston issued a denial letter to MCC's insureds for the *Carithers* claim, in its entirety.

3. The Carithers originally filed suit against MCC's insureds, in March, 2011. On December 22, 2011, after receipt of a Third Amended Complaint and renewed demand by legal counsel for Cronk Duch, et al., for indemnity and defense under several MCC policies, MCC held another Claims Committee meeting and again denied coverage and defense to its insureds and omnibus insureds for the *Carithers* suit.

4. MCC based its December 22, 2011 denial of coverage and defense on a variety of conditions and exclusions found in its CGL policy issued to Cronk Duch Holdings, Inc. MCC reserved the right to institute an action "to have the rights of the parties determined."

5. Chief among its reasons for declining to defend or indemnify its insureds, was MCC's determination that a "manifestation trigger" theory would apply to its obligations under its policies issued to the Cronk Duch entities, rather than an "injury-in-fact trigger" or other insurance industry trigger theory. The law was unsettled in this area of insurance coverage litigation in 2011. *See Carithers v. Mid-Continent Cas. Co.*, 782 F3d 1240, 1246 (11 Cir. 2015).

6. It has long been the standard, practice and custom in the insurance industry in Florida (and in most other jurisdictions) that an insurer such as MCC must resolve doubts about scope of coverage and the far broader duty to defend, in favor of the insured (sometimes pending a court determination to the contrary).

7. Typically in the industry, over my many decades of providing assistance and advice to insurers such as MCC, it is normal for a carrier to defend its insured(s) in a Third Amended Complaint like that involved below in *Carithers*, under a reservation of rights to pursue court determination of its rights and obligations for a claim that leaves one in doubt about its obligations. In this manner, the insured is

protected, and not left to fend for itself if the carrier outright denies coverage and defense for a particular claim or lawsuit.

8. Here, MCC denied both coverage and defense obligations to its insured(s), and effectively abandoned its insureds with respect to the defense and potential resolution of the *Carithers* suit.

9. Leaving an insured to its own devices as MCC did in the *Carithers* case, allows an insured to take reasonable steps to protect itself, and avoid the cost of contentious litigation that would otherwise be the obligation of the insurer, under the insurance contract and insurer-insured relationship. Defending a claim under reservation (under the long-recognized broader duty to defend under Florida law) is the most prudent and oft-chosen course of action by insurers such as MCC. MCC did not pursue its "reservation" to seek to have the rights of the parties determined.

10. Leaving an insured to defend on its own, with no prospect of resolution by a participating insurer, avails an insured the right to enter in to "vouching settlement" or agreement, whereby the insured accedes to liability and damages in a judgment in exchange for a promise by the injured party to pursue only the insurer for recovery of that judgment, protecting the insured in a number of ways.

11. Insurers such as MCC well know the recourse that is afforded under Florida insurance law, custom and practice, when the insurer refuses to defend and

reserve its rights on coverage issues, and instead abandons its insured(s) with respect to the claim being made against them.

12. In 2011, the state of the law for theories on triggers of coverage for construction-related defects and damages claims (sometimes referred to in the industry as "rip and tear" litigation) was unsettled in Florida (as well as other states around the country), in particular when fact-intensive discovery will be needed to establish one trigger theory over another.

13. In my experience handling claims of this nature for a number of national carriers similar to MCC, the standard and prudent course of action is to defend the insured under reservation or rights (with written non-waiver agreement if necessary) and pursue separate, declaratory relief litigation to firmly establish the position being reserved upon (here, a manifestation trigger with no coverage or defense obligation versus an injury-in-fact trigger of coverage and a correspondent duty to defend).

14. MCC failed to protect its insured(s) with a provisional defense and reservation of rights. Instead, MCC chose to leave its insured(s) to fend for themselves in the *Carithers* litigation, and refused to participate in that defense in any manner.

15. Once MCC litigated its manifestation-trigger theory to the USDC and the 11th Circuit Court of Appeals, and lost on that issue, MCC had a clear obligation

to settle the claim by its insured(s) and their assignees, and failed to do so. This constituted a breach of MCC's good faith obligations under its policy of insurance.

16. Once MCC received a Florida Statute §624.155 Civil Remedy Notice (CRN) dated June 25, 2015, it was obligated to cure its prior inferior claims practices, and pay the sums it clearly owed on the Carithers' loss within sixty (60) days of the CRN. MCC failed to do this, again breaching its good faith obligations under its policy issued to its insured(s).

17. Prior to the institution of the CRN, MCC's claims handlers had oversight on the file by parent company Great American Insurance Company (GAIC), by Raymond Corley, there. In October, 2014, Mr. Corley disagreed with claim handler and MCC Assistant Vice President Gary Renneckar, when he wrote (while the *Carithers* suit was on appeal from an adverse judgment against MCC), that the "case has more value than your last offer," and he commented on the risk of "another Federal Court (going) against manifestation." It is not clear if AVP Renneckar did anything in light of this advice from Mr. Corley at GAIC.

18. MCC failed to cure the claims handling violations pointed out in the CRN, within sixty (60) days, by even agreeing to pay sums clearly owed to its insureds, for covered damages and defense costs incurred.

19. It appears from this record, and it is my current opinion that MCC has consciously decided upon a course of business conduct to deny claims such as the

Carithers claim, without protecting its insureds with a defense under reservation of rights, in favor of asserting a pure manifestation theory for trigger coverage under its CGL policy forms, in an effort to push claims in to subsequent years other than the occurrence-years under MCC polices, all in an effort to avoid paying for defense of "rip and tear" litigation, at substantial exposure to MCC insureds such as the Cronk Duch entities.

20. I reserve the right to enlarge or add to these statements and opinions as discovery continues, and as materials may be provided to me for review.

C. Documents Reviewed

I reviewed the following documents ("Record") in connection with the preparation of this report:

- DE 37 Confidentiality Agreement and Order;
- DE 50 Amended Complaint with exhibits;
- Documents produced by Mid-Continent Casualty Company (MCC 000001-MCC 001101 and MCC 001085-B – MCC 3498-B);
- *Carithers v. Mid-Continent Cas. Co.,* 782 F3d 1240 (11 Cir. 2015); and
- Summary Judgment in *Carithers v. Mid-Continent Cas. Co.,* 3:12-cv-00890-MHH-PDB.

D. Facts Considered

I have considered all documents mentioned. I will be happy to review other facts or documents as discovery continues in this case. I presently have no exhibits

that might be used to summarize or support my opinions, aside from my file materials and document summaries prepared by my staff.

E. Qualifications

My vitae with the majority of my qualifications is attached as Exhibit "A." In addition, I have counseled insurance companies similar to MCC on the exact issues presented by this claim, on numerous occasions over my 36-year-plus career, and most significantly and directly, within the past 25-plus years as my practice has predominantly embraced insurance coverage, prudent claims practices, and bad faith litigation in Florida. I have also assisted claims handlers such as the MCC claims professionals involved in this claim, with claim handling and compliance with Florida statutory Civil Remedy Notices and the standards of good faith imposed under Florida law, on numerous occasions, and do so daily in my law practice. I have also been retained directly by insurers such as MCC, to act with and sometimes, in place of, claims handlers such as those assigned to this claim, to discharge the duties owed by insurers under their policy issued to their insureds.

F. Other Cases

In the past four years, I have testified as an expert witness in the following cases:

1. See Exhibit "B," attached.

G. Compensation

My law firm charges $425.00 per hour for my time and $175.00 per hour for my paralegal assistant's time.

I attest that the forgoing is my opinion based upon a reasonable degree of certainty in respect of the facts, circumstances, my legal qualifications, and generally accepted custom and practice of the insurance industry as would be relevant in this litigation. I respectfully reserve the right to amend, supplement or change my opinion and this report as warranted by the review of any additional materials provided and developments as they materialize.

Dated this 13th day of August, 2018

McINTOSH, SAWRAN & CARTAYA, P.A.
1775 East Sunrise Boulevard
P. O. Box 7990
Ft. Lauderdale, FL 33338-7990
Telephone: (954) 765-1001
Facsimile: (954) 765-1005

By: 

DOUGLAS M. McINTOSH
Florida Bar No.: 325597
dmcintosh@mscesq.com

DOUGLAS M. McINTOSH
INDIVIDUAL VITAE

Born Miami, Florida, August 23, 1955

ADMITTED TO PRACTICE:

Florida Bar, 1981
U.S. District Court, Southern District of Florida, 1981
Middle District of Florida, 1992
Northern District of Florida, 2013
U.S. Court of Appeal, Fifth and Eleventh Circuits, 1981
U.S. Supreme Court, 1986
Certified Guardian Ad Litem, Florida Supreme Court
Certified Arbitrator, 17th Judicial Circuit

EDUCATION:

Boston College (A.B., 1977)
Nova University (J.D., 1981)

PUBLICATIONS/LECTURES:

"Settlement Agreements & Concluding Cases", The Defense Speaks, Chap. 50 (2006, Fla. Defense Lawyers Association, Co-Author with Robert C. Weill)
Defense Techniques, Ch. 55A., "Psychiatric Malpractice" (Matthew Bender & Co. Inc.) (1995), (Co-Author with James C. Sawran and Carmen Y. Cartaya)
"Open to Win: Persuade at the Outset", 14 Trial Advocate Quarterly No. 4 (October 1995).
Author and featured speaker "Insurance Coverage Law In Florida", West Palm Beach, Florida, February 28, 1997.
FDLA Annual Meeting, "Bad Faith Litigation in Florida," author and featured speaker, West Palm Beach, Florida, September 28, 1994
1995 FMMCCI Annual Seminar: "Bad Faith in Florida from the Defense Perspective," featured speaker, Orlando, Florida, July 25, 1997.
"Insurance Coverage Law in Florida," National Business Institute, Featured Speaker, Co-Author, 1997.
Featured columns, "On the Record," For the Defense (DRI), 2003, 2006
Frequent lecturer and expert witness, medical negligence, professional negligence, bad faith and insurance coverage issues.
Expert witness in both State and Federal Courts, insurance coverage, bad faith, and other litigation issues.
Co-Chair, DRI Insurance Roundtable, Dallas, Texas (2008)
Chair and Presenter, DRI Insurance Roundtable, Dallas, Texas (2009)
Program Chair, Best Practices For Law Firm Profitability, (DRI, 2009, New York)
Speaker, Best Practices For Law Firm Profitability, (DRI, 2010, New York)
Panel Member, 2010 DRI Insurance Roundtable, (Chicago, 2010)
Speaker, ADTA Annual Meeting, "Jury Selection and the Art of Conversation" (April, 2015)

EXHIBIT
A

Speaker/Author, ACCEC Annual Meeting, May, 2016 (Chicago), "Insurer Guidelines and Third Party Bill Reviews: Ethical and Practical Ramifications" (Co-author).
Speaker, ACCEC Annual Meeting, May, 2017 (Chicago), "You Screwed Up: You Trusted Us! Conflicts Among Insurers, Independent Counsel and Insureds."
Co-Author, "Forcing Carriers to Insure," In-House Defense Quarterly, Fall 2017 (DRI)
Panelist, ACCEC Annual Meeting, May 2018 (Chicago), "Use of Experts in Coverage and Bad Faith Litigation."
Certified Instructor (#1338201), Florida DOI, Adjustors Ethics Course

PROFESSIONAL ASSOCIATIONS:

The Florida Bar
Civil Rules Procedure Committee (1989-1993) (1996-1999)
Federal Bar, Trial Bar (So. District, Middle District, Fla)
Broward County Bar Association
Chair, Professionalism Committee, 1999 - 2003
Co-Chair, Professionalism Committee, 2004
Chair, Peer Review Council, 2004 - 2005
Dade County Bar Association
Board of Governors, Shepard Broad Law Center, Nova Southeastern University (1996-Present) (Chair, Development Committee, 2011 – 2016) (vice-chair, BOG 2017 – present)
Fellow, American College of Coverage and Extracontractual Counsel (ACCEC) (Co-Chair Professionalism and Ethics Committee, 2013 – present)
Florida Defense Lawyers Association
Director (1987-1992)
Secretary-Treasurer (1992-1993)
President-Elect (1993-1994)
President (1994-1995)
Past President (1995-1996)
Chairman- Legislative Action Committee (1995-1998)
DRI, The Voice of the Defense Bar
State Representative (1997-2003)
National Director/Board of Directors (2003-2006)
Co-Chair, SLDO Relationship Committee (2005 – 2007)
Member, Membership Committee (2005 - 2006)
Co-Chair, DRI Insurance Roundtable (2007 – 2008)
Chair, DRI Insurance Roundtable (2009)
Insurance Law Committee (2005 – present) (Chair, Insurer Relations Subcommittee, 2008 – 2014)
Law Practice Management Committee (2007 – present; Steering Committee, 2009)
Chair, DRI Research and Development Committee, 2010, 2011
Steering Committee Member, DRI, Law Firm Practice Management Committee, (2009 - 2011)
Appointee, DRI Task Force on Alternative Fees, E-Billing, and Audits (DRI, 2010– 2011)
Chair, Product Development and Competition Committee, 2011, 2012
International Association of Defense Counsel (IADC) (Member: Medical Malpractice, Admiralty, Maritime and Energy Law, Insurance and ReInsurance Standing Committees) (1987 – present)

Elected Member, Association of Defense Trial Attorneys (ADTA), 2006 - present
Saint Thomas More Society, South Florida Chapter
Florida Chamber of Commerce Legal Advisory Committee (1999-2004)

AWARDS/ACHIEVEMENTS/ACTIVITIES:

Who's Who in American Law (5th Ed. 1987-88)
Continental Who's Who, Professionals and Executives (2007)
Florida Supreme Court Guardian Ad Litem Pro Bono Award, 17th Judicial Circuit (October, 1992)
J.C. Penney Golden Rule Service Award (May, 1992)
Nova Southeastern University Law Alumni Achievement Award (1994)
Finalist for Nova Southeastern University Student Life Achievement Alumnus of the Year (2004)
DRI, Rudolph Janata 1994 Outstanding Achievement Award (Best State Defense Organization, while President of the Florida Defense Lawyers Association) (1995)
The Florida Supreme Court, Judicial Management Council
Long Range/Strategic Planning Committee (1996)
Hope Outreach Center, Inc.
President of the Board of Directors (1995-1998; 2003-2005)
Member of the Board of Directors (1995-2009)
Advisory Council (2010 – present)
Leading Florida Attorneys: Personal Injury Defense Law (1997)
Recipient, 1997 Presidents Award for role in creation of Florida Liability Claims Institute, Florida Defense Lawyers Association
Recipient of 2000 "Joseph P. Metzger Outstanding Achievement Award," Florida Defense Lawyers Association
Recipient, DRI, DRI State Leadership Award-Florida, 2001
Recipient, DRI, Most Outstanding State Representative Award, 2002
Recipient, DRI Service Award, 2006
Recipient, Outstanding Service Award, Broward County Bar Association, 2002-2003
Recipient, "Lynn Futch Professionalism in Practice Award", Broward County Bar Association, 2004
Recipient, Nova Southeastern University, Shepard Broad Law Center, Alumnus of the Year, 2004
Recipient, St. Thomas More Society, Archbishop Edward A. McCarthy Award, 2006
South Florida's Top Lawyers, 2010-Present (Miami Herald)
2006-Present Florida Super Lawyers [Personal Injury Defense: General; Insurance Coverage; Personal Injury Defense: Medical Malpractice] (Thomson Reuters)
2012-Present Florida Super Lawyers Business Edition [Litigation] (Thomson Reuters)
2010 South Florida Movers and Shakers Award Nominee, South Florida Business Leaders Magazine
2011-Present Florida Trend Preeminent Lawyer, Insurance Law
2012-Present Best Lawyers in America, Personal Injury Litigation - Defendants
2014, 2015 Corporate International Global Award, "Insurance Coverage Attorney of the Year in Florida" (Corporate International Magazine)

AV rated by Martindale Hubbell

Updated June, 2018

Cases in which Douglas M. McIntosh, Esq., has been retained as an expert witness from 2013 to the present.

RETAINED JANUARY 2013

- EXPERT REGARDING BAD FAITH: ***GEICO* (*Plaintiff/Counter-Defendant) v. Janet Prushansky (Defendant/Counter-Plaintiff),*** Case No. 9:12-cv-80556-KAM, United States District Court, Middle District of Florida. Retained by Adam Duke of Young, Bill, Boles, Palmer & Duke, P.A. (for GEICO).

  i. Deposition testimony for GEICO on May 1, 2013;
  ii. Trial testimony for GEICO on March 4, 2015; and
  iii. Trial testimony for GEICO on May 28, 2015.

RETAINED DECEMBER 2014:

- EXPERT REGARDING BAD FAITH: ***Earle Rader, Jr. v. Safeco Insurance Company of Illinois***, Case No. 2012 CA 354 "K", First Judicial Circuit, Escambia County, Florida. Retained by Brentt Palmer of Young, Bill, Roumbos & Boles, P.A. (for Safeco).

  i. Deposition testimony for Defendant on February 27, 2015; and
  ii. Trial testimony for Defendant on May 1, 2015.

- EXPERT REGARDING BAD FAITH: ***Linda Ford v. GEICO***, Case No. 1:14-cv-00180-MW-GRJ, United States District Court, Northern District of Florida, Gainesville Division. Retained by Megan Alexander and Jordan Thompson of Young, Bill, Roumbos & Boles, P.A. (for GEICO).

  Deposition testimony for Defendant on March 24, 2015.

RETAINED IN MAY 2015:

- EXPERT REGARDING BAD FAITH: ***Christian John Leonhardt v. GEICO Casualty Company, et al.***, Case No. 2011-CA-006318-NC, Twelfth Judicial Circuit, Sarasota County, Florida. Retained by Jordan Thompson of Young, Bill, Roumbos & Boles, P.A. (for GEICO).

  i. Deposition testimony for Defendant on January 20, 2016.
  ii. Trial testimony for Defendant on September 29, 2016.

EXHIBIT
B

RETAINED IN SEPTEMBER 2015:

- EXPERT REGARDING BAD FAITH: ***Tanya Brown v. GEICO Indemnity Company, et al.***, Case No. 13-CA-006390, Thirteenth Judicial Circuit, Hillsborough County, Florida. Retained by M. Justin Lusko of Young, Bill, Roumbos & Boles, P.A. (for GEICO).

  Deposition testimony for Defendant on March 21, 2018.

RETAINED IN NOVEMBER 2015:

- EXPERT REGARDING BAD FAITH: ***Manuel Gonzalez, et al. v. GEICO General Insurance Company***, Case No. 8:15-CV-0240-JSM-TBM, United States District Court, Middle District of Florida, Tampa Division. Retained by Amanda Kidd of Young, Bill, Roumbos & Boles, P.A. (for GEICO).

  i. Deposition testimony for Defendant on January 27, 2016 and April 29, 2016.
  ii. Trial testimony for Defendant on March 2, 2017.

RETAINED IN MAY 2016

- EXPERT REGARDING INSURER AND AGENT CLAIM HANDLING PRACTICES: ***Nautilus Insurance Company v. Gabor Insurance Services, Inc.***, Case No. 1:16-CV-20024-RNS, United States District Court, Southern District of Florida. Retained by Cindy Ebenfeld of Hicks, Porter, Ebenfeld & Stein, P.A. (for Nautilus Insurance Company).

  No testimony provided.

RETAINED IN JUNE 2016

- EXPERT REGARDING LEGAL NEGLIGENCE: ***Loran Leroy Smith v. Hartford Insurance Company, Wilson, Elser, Moskowitz, Edelman& Dicker, LLP, and Michael D. Logan, Esquire***, Case No. 2015-CA-003461, 15th Judicial Circuit, Palm Beach County, Florida. Retained by Joel D. Adler of Marlow, Adler, Abrams, Newman & Lewis (for Wilson, Eiser, Moskowitz, Edelman & Dicker, LLP and Mr. Logan).

  No testimony provided.

RETAINED IN AUGUST 2016

- EXPERT REGARDING BAD FAITH: ***Maritza Bermudez v. GEICO General Insurance Company***, Case No. 10-35793 CA 24, 11th Judicial Circuit, Miami-Dade County, Florida. Retained by James K. Clark of Clark, Robb, Mason, Coulombe, Buschman & Charbonnet (for GEICO).

  No testimony provided as of this date.

RETAINED IN OCTOBER 2016

- EXPERT REGARDING BAD FAITH: ***Richard Soricelli v. GEICO Indemnity Company***, Case No. 8:16-cv-01535-JSM-TBM, U.S. District Court, Middle District of Florida, Tampa Division. Retained by Megan Alexander of Young, Bill, Roumbos & Boles, P.A. (for GEICO).

  i. Deposition testimony for Defendant on January 31, 2017.
  ii. Trial testimony for Defendant on December 6, 2017.

- EXPERT REGARDING BAD FAITH: ***Ana Daniels v. GEICO General Insurance Company***, Case No. 8:16-cv-00031-MSS-TBM, U.S. District Court, Middle District of Florida, Tampa Division. Retained by Adam Duke and Cody S. Pflueger of Young, Bill, Roumbos & Boles, P.A. (for GEICO).

  Deposition tesimony for Defendant on February 8, 2017.

RETAINED IN DECEMBER 2016

- EXPERT REGARDING BAD FAITH: ***Patricia Strong v. GEICO General Insurance Company***, Case No. 8:16-cv-01757-CEH-JSS, U.S. District Court, Middle District of Florida, Tampa Division. Retained by Megan Alexander of Young, Bill, Roumbos & Boles, P.A. (for GEICO).

  Trial testimony for Defendant on October 25, 2017.

RETAINED IN JANUARY 2017

- EXPERT REGARDING BAD FAITH: ***Hallmark Insurance Company v. Maxum Casualty Insurance Company***, Case No. 2:16-cv-682-UA-CM, U.S. District Court, Middle District of Florida, Orlando Division. Retained by Richard M. Benrubi of Law Office of Richard M. Benrubi, P.A. (for Hallmark Insurance Company).

i. Deposition testimony for Plaintiff on November 6, 2017.
ii. Trial testimony for Plaintiff on May 30, 2018.

RETAINED IN FEBRUARY 2017

- EXPERT REGARDING BAD FAITH: ***Tanner Wiggins, as Father and Legal Guardian of A.W. v. Government Employees Insurance Company***, Case No. 3:16-cv-1142-J-32MCR, U.S. District Court, Middle District of Florida, Jacksonville Division. Retained by Megan Alexander of Young, Bill, Roumbos & Boles, P.A. (for GEICO).

  Deposition testimony for Defendant on July 6, 2017.

RETAINED IN MAY 2017

- EXPERT REGARDING BAD FAITH: ***Plaintiff/Counter-Defendant GEICO Indemnity Company v. Defendant/Counter-Plaintiff Latonga Hamilton, individually, as Personal Representative of the Estate of Ron Campbell, as mother of Briana Campbell, Daga Campbell and Jarvaras Campbell, and as assignee of Robert Sinn***, Case No. 1:16-cv-21802-JLK, U.S. District Court, Southern District of Florida, Miami Division. Retained by Adam Duke of Young, Bill, Roumbos & Boles, P.A. (for GEICO).

  No testimony provided at this time.

- EXPERT REGARDING ATTORNEY FEES: ***Abbey Kaplan, Steve Silverman and Kluger, Kaplan, Silverman, Katzen & Levine, P.L. V. Nautilus Insurance Company***, Case No. 01-16-0001-5522, American Arbitration Association. Retained by R. Hugh Lumpkin of VerPloeg & Lumpkin, P.A. (for Claimants).

  i. Deposition testimony for Claimants on June 20, 2017.
  ii. Testimony for Claimants at Arbitration on June 28, 2017.

- EXPERT REGARDING REASONABLENESS OF SETTLEMENT: ***Progressive American Insurance Company a/s/f David Severns v. Fletcher Larkin***, Case No. CACE 11-009695 (03), 17th Judicial Circuit, Broward County, Florida. Retained by George L. Cimballa of Law Offices of George L. Cimballa, III (for Fletcher Larkin).

  No testimony provided.

RETAINED IN NOVEMBER 2017

- EXPERT REGARDING ATTORNEY FEES: ***Paul Krofchik v. Road to Sedona, Inc., d/b/a Thirteen, City of Wilton Manors and Conifer Insurance Company***, Case No. 06-2017-CA-001206-AXXXX-CE, 17th Judicial Circuit in and for Broward County, Florida. Retained by Joel R. Wolpe of Qunitairos, Prieto, Wood & Boyer, P.A. (for Conifer Insurance Company).

  No testimony provided.

RETAINED IN JANUARY 2018

- EXPERT REGARDING ATTORNEY FEES: ***Dwella Nelson and Robert Nelson v. Academy of Dance, Music & Theatre, Inc., and Palm Beach State College***, Case No. 50-2016-CA-001650-XXXX-MB, 15th Judicial Circuit, in and for Palm Beach County, Florida. Retained by Edward C. Prieto of Quintairos, Prieto, Wood & Boyer, P.A. (for Palm Beach State College).

  Testified at hearing on February 21, 2018.

RETAINED IN MARCH 2018

- EXPERT REGARDING BAD FAITH: ***Heather R. Eres, individually, as Personal Representative of the Estate of Kevin D. Bryant, deceased, and as assignee of Eli Villareal a/k/a Eli Villareal Alvarez v. Progressive Insurance Company***, Case No. 8:17-cv-02354-EAK-MAP, U.S. District Court, Middle District of Florida, Tampa Division. Retained by Megan Alexander of Young, Bill, Roumbos & Boles, P.A. (for Progressive).

  No testimony provided at this time.

RETAINED IN MAY 2018

- EXPERT REGARDING BAD FAITH: ***Bethel Missionary Baptist Church of Haywood County v. Southern Mutual Church Insurance Company,*** Civil Action No. 1:17-cv-00339, U.S. District Court, Western District of North Carolina, Asheville Division. Retained by John I. Malone, Jr. of Goldberg Segalla, LLP (for Southern Mutual).

No testimony provided at this time.

RETAINED IN JUNE 2018

- EXPERT REGARDING ATTORNEY FEES: ***Scottsdale Insurance Company, as subrogee of National Concrete Preservation, Inc.,*** Case No. 1:18-cv-21207-CMA, U.S. District Court, Southern District of Florida, Miami Division. Retained by J. Blake Hunter of Butler Weihmuller Katz Craig, LLP (for Scottsdale Insurance Company).

  No testimony provided at this time.

- EXPERT REGARDING ATTORNEY FEES: ***Mama Jo's, Inc. d/b/a Berries v. Sparta Insurance Company,*** Case No. 1:17-cv-23362 KMM/McAliley, U.S. District Court, Southern District of Florida, Miami Division. Retained by Jorge A. Maza and Holly Harvey of Clyde & Co US, LLP (for Sparta Insurance Company).

  No testimony provided at this time.

RETAINED IN JULY 2018

- EXPERT REGARDING INSURANCE LAW AND DUTIES AND OBLIGATIONS UNDER AN INSURANCE CONTRACT: ***City of Florida City v. Public Risk Management of Florida, et al.*** Case No. 2016-031245 (CA) (01), 11th Judicial Circuit, in and for Miami-Dade County, Florida. Retained by Rory Jurman and Jill B. Mendelsohn of Fowler White Burnett, P.A. (for OneBeacon Insurance Company).

  No testimony provided at this time.

- EXPERT REGARDING CLAIMS HANDLING PRACTICES: ***Hugh A. Carithers, et al. v. Mid-Continent Casualty Company,*** Case No. 3:16-cv-00988-TJC-MCR, U.S. District Court, Middle District of Florida, Jacksonville Division. Retained by R. Hugh Lumpkin of Ver Ploeg & Lumpkin, P.A. (for Plaintiffs).

  No testimony provided at this time.

Updated 8/08/18

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION
CASE NO: 13:16-cv-00988-TJC-MCR

HUGH A. CARITHERS and KATHERINE S. CARITHERS, as the Assignees of CRONK DUCH MILLER & ASSOCIATES, INC., CRONK DUCH ARCHITECTURE, LLC, CRONK DUCH CRAFTSMAN, CRONK DUCH PARTNERS, LLC, CRONK DUCH HOLDINGS, INC., and JOSEPH S. CRONK,
Plaintiffs,

vs.

MID-CONTINENT CASUALTY COMPANY,
Defendant.
_____/

DEPOSITION OF DOUGLAS M. MCINTOSH

DATE TAKEN: November 26, 2018

TIME: 10:00 a.m. to 4:15 p.m.

LOCATION: 1776 East Sunrise Boulevard
Fort Lauderdale, Florida 33338

TAKEN BY: Defendant

REPORTER: Chanelle Stracuzza,
Notary Public

MAGNA LEGAL SERVICES
110 Southeast 6th Street, Floor 33301
Fort Lauderdale, Florida 33301
OFFICE (866) 624-6221
FAX (866) 579-0819

Exhibit 2

A P P E A R A N C E S

For the Plaintiffs:

Mark A. Boyle, Esquire
BOYLE & LEONARD, P.A.
2050 McGregor Boulevard
Fort Myers, Florida 33901
(239) 337-1303
Mboyle@insurance-counsel.com

For the Defendant:

Ronald L. Kammer, Esquire
HINSHAW & CULBERTSON
2525 Ponce de Leon Boulevard, Floor 4
Coral Gables, Florida 33134
(305) 358-7747
Rkammer@hinshawlaw.com

I N D E X

E X H I B I T S

THEREUPON,

DOUGLAS M. MCINTOSH,

a witness, having been first duly sworn, upon his oath, testified as follows:

DIRECT EXAMINATION

BY MR. KAMMER:

Q. Can you please state your full name?

A. Douglas M. McIntosh.

Q. Since I know you've done this before, I'm going to give an abbreviated version of my instructions that I give at the beginning of a deposition. A couple of things, number one, if for any reason you don't understand one of my questions, will you tell me that you do not understand and I will rephrase the question?

A. Yes.

Q. If you answer a question, I'm going to assume you understood it, correct?

A. Yes, sir.

Q. If at any time you need a break, please tell me you need a break and we'll take one. If we're in the middle of a question, I may or may not ask you to finish answering that question; is that also understood?

A. Yes, that's fine.

Q. What is your professional address?

A. 1776 East Sunrise Boulevard, Fort Lauderdale,

Florida 33304.

Q. I'm going to show you what I'm going to mark as Exhibit 1 and I'll ask if you've seen it?

(Defendant's Exhibit Number 1, Notice, was marked for identification.)

BY MR. KAMMER:

Q. Have you seen Exhibit 1?

A. Yes.

Q. Can you please go to Schedule A?

A. All right.

Q. Have you brought with you today any and all documents whatsoever that you've reviewed and relied upon in formulating your opinions in this case?

A. Yes.

Q. Do you have a list of those documents?

A. A partial list I have. Yes, sir.

Q. Do you have that partial list in front of you?

A. Yes.

Q. May I see it please?

A. (Handing).

MR. KAMMER: Can we mark this as Exhibit 2?

(Defendant's Exhibit Number 2, Partial List of Documents, was marked for identification.)

BY MR. KAMMER:

Q. Have you reviewed everything that is on this

list?

A. Yes, sir.

Q. Including the entire claim file that was produced by Mid-Continent Casualty Company in this case?

A. I have looked at portions of the claim file, yes, sir.

Q. Do you know sitting here today which portions of the claim file you looked at and which portions you did not?

A. No.

Q. Did you look at the, what we refer to in this case, the construction defect court file which was the suit filed by Mr. and Mrs. Carithers against Cronk Duch, et. al?

A. I looked at several pleadings from that court file.

Q. Do you recall which pleadings you looked at?

A. I looked at the original complaint filed by Mr. Carithers, I looked at the amended complaint filed by Mr. Warren and I looked at a second or third amended complaint in that action.

Q. Did you examine, what we call, the coverage file which was the suit filed by Carithers against Mid-Continent?

A. I reviewed pleadings from the coverage file,

yes, sir.

Q. Do you recall which pleadings you've reviewed?

A. Sitting here right now, no but it was the seminal complaint, the answer to affirmative defenses, summary judgement motions and oppositions to summary judgement among other things.

Q. Did you review any of the orders entered in that case?

A. Yes, sir.

Q. On the list it says, "collective list and timeline"; did I read that correctly?

A. Yes.

Q. What is the "collective list and timeline"?

A. This is an index of documents, as you could tell by the top page, provided by the Ver Ploeg & Lumpkin Firm and that is more than likely a descriptor that they used. Although, I have a list and timeline in my files, a hard copy, but what you're holding, Ron, is an index of what's on these discs which I put everything on disc for you.

Q. So what's on the disc is everything that's hardcopy?

A. No, what's on the disc is everything provided. What's hardcopy is selected materials from what's on the disc.

Q. Got it. Okay.
A. That's the subset.
Q. Understood. So whatever's hardcopy would be on the disc, correct?
A. Yes, sir.
Q. Okay. Do you recall on or about what time you received the discs from the Ver Ploeg & Lumpkin Firm?
A. These discs, my IT department burned last week in response to the duces tecum. These three discs you see here, one each for you-all. Included on them is also depositions that you asked for in your schedule. The disc from the Ver Ploeg & Lumpkin Firm is in here somewhere along with the transmittal and I don't know the date.
Q. Is the collective list and timeline burned on the disc?
A. If it's here, yes, sir.
Q. Okay. Now you said this was a partial list of documents you reviewed. What other documents have you reviewed in order to render your opinions here today -- that's not contained on Exhibit 2? Sorry.
A. In my two red-wells there are some documents that wouldn't be on this list. As an example, there are selected cases. There's a law folder with a lot of cases. Those are not on this list.

There are deposition summaries in front of each deposition folder that I reviewed. Those are not on these lists. Those are prepared by my paralegal who works on these files with me over the years. Those are summaries I reviewed to begin with before going to the depositions themselves.

Q. So you reviewed both the summaries and the depositions?

A. Summaries and then select portions of the depositions. I might skip name, address and things like that.

Q. Other than the deposition summaries and the law folder, is there anything else that's not contained on Exhibit 2?

A. There's an executed confidentiality agreement that I was required to execute --

Q. That's actually on Exhibit 2.

A. Is it?

Q. Yeah.

A. I'm not sure but they must be in here because they came out of the file. I've printed the '05-'06 policy and the '08-'09 Mid-Continent policies.

Q. Okay. Anything else?

A. My expert report, it's not on this list, and then other work product of mine consisting mainly as I

said of the depositions summaries. I also have a chronology that we utilize in these cases. "We" meaning me and my paralegal. So in this folder, which is marked Bates numbers documents -- actually, it should go into my investigation folder. I have an investigation folder that I keep that in... is a chronology that my office prepares that I use in these cases.

Q. Do you have a billing file?

A. No, we don't hardcopy bill. It's electronic.

Q. The second thing on Schedule A is, "Any and all reports, records, memoranda, correspondence, notes, video tapes, photographs, plans, specifications, blueprints, shop drawings, sketches, as-builts, anything whatsoever, which in any way relate to your opinions and/or testimony in this case."

Do you have any documents responsive to Number Two other than your report?

A. Nothing else other than the documents in these red-wells and on the disc.

(Defendant's Exhibit Number 3, Report, was marked for identification.)

BY MR. KAMMER:

Q. Doug, I'm going to show you what I've marked as Exhibit 3. Is this the one and only report you prepared in this case?

A. It appears to be, yes.

Q. And is that report something that you, yourself prepared?

A. Yes, sir.

Q. And do you recall approximately when you prepared that report?

A. It was in the month of August of this year.

Q. Do you have -- going to Number Four. "Any and all handwritten notes, memorandum or writings pertaining to your review of the matter and all written reports which you have prepared, or which were supplied to you, which in any way relate to your review of the case."

First of all, did you make any handwritten notes?

A. You'll see notes in my chronology, you'll see notes in some of the deposition summaries, you'll see notes in perhaps some of the depositions but usually, I mark up the summaries with both highlighter and handwritten notes.

Q. And those are contained in the documents you produced today?

A. Yes, sir.

Q. Do you have a retention agreement -- going to Number Five -- in which you were retained as an expert in this case?

A. I'm looking. I'm sorry. I'm sure there must be one. I normally send out a letter on my retention. Yes, I do.

Q. Can you please tell me when you were retained?

A. I was contacted, it looks like July the 30th -- hang on -- strike that.

I was preliminarily contacted on July 24th and then July 27th, I did a formal case report conflict check on July 30th and I acknowledged my retention on August 3rd.

Q. Who contacted you?

A. Hugh Lumpkin and Matt Weaver.

Q. Have you ever been retained by Mr. Lumpkin and Weaver before this engagement?

A. Yes.

Q. How many other cases?

A. "Retained", you mean as an expert?

Q. Yes.

A. One or two.

Q. Were those also bad faith cases?

A. One was an attorneys' fees case in an arbitration and the other might have just been a consultation on coverage, I'm not sure if it got to bad faith.

Q. Did they agree to pay you a fee?

A. I believe so. Yes, sir.
Q. Are you being paid by the hour?
A. Yes, sir.
Q. What is the hourly rate, please?
A. My hourly rate here, the firm charges for my time, is $425 per hour and for my paraprofessional time by Delle Lenzen is $175 an hour.
Q. And prior to your deposition today, do you have an approximate number of hours that you've spent preparing for your testimony?
A. Yes.
Q. And how much have you spent approximately?
A. I had my accounting department run a billed fees and costs and a WIP report here for you that I have here, if you want.
MR. KAMMER: Why don't we mark that as Exhibit 4.
(Defendant's Exhibit Number 4, Billing, was marked for identification.)
THE WITNESS: And just so we're clear, this doesn't break down the hours between me and my paralegal, that's a global.
BY MR. KAMMER:
Q. Right. Without guessing, do you know how many hours you've spent and how many hours your paralegal

Ms. Lenzen has spent?

A. No, I don't. I have to look at the bills.

(A discussion was held off the record.)

BY MR. KAMMER:

Q. You do have copies of the bills, correct?

A. Yes, my accounting department has those.

Q. Does your file also contain any and all correspondence between you and counsel for Mr. And Mrs. Carithers?

A. Yes.

Q. Is that in a separate file?

A. It's in the correspondence clip here. I don't believe it would be anywhere else.

Q. May I take a look at the correspondence clip?

A. Other than items that we removed that had to do with my expert report and consultations with counsel (handing).

Q. Are you talking about preliminary expert reports?

A. Yes, sir.

Q. Thanks. Have you had any discussions at all with Mr. or Mrs. Carithers?

A. No.

Q. Have you had any written communications with either Mr. or Mrs. Carithers?

A. No, sir.

Q. Attached to your expert report is a list of articles you've written in cases in which you testified; am I correct?

A. Yes, my curriculum vitae is attached as Exhibit A and my testimonial history for the past five years is Exhibit B.

Q. Is the curriculum vitae that's attacked as Exhibit A current?

A. Yes.

Q. The publications that you have authored, do you have copies of any of those publications in your file today?

A. No.

Q. Do you have access to any of those publications?

A. Depends. I'm not sure. I'd have to look at which ones you're talking about and then I could tell you.

Q. "Settlement Agreements & Concluding Cases", do you have access to that?

A. Where are you looking on my CV?

Q. Page 1 of 3.

A. I'm not sure if I have that. I was recently looking for it for a young lawyer but I couldn't find it.

Q. "Defense techniques", do you have a copy of that?
A. No, I don't have it. It's in the book.
Q. "Open to Win", do you have a copy of that?
A. I'm not sure.
Q. On the "FDLA Annual Meeting, 'Bad Faith Litigation in Florida'", it says, "Author and featured speaker". Did you prepare a paper for that meeting?
A. I did.
Q. Do you have a copy of that paper?
A. Not to my knowledge, no, sir.
Q. Did that paper deal with bad faith in conjunction with the duty to defend in Florida?
A. I'm sure it encompassed both duty to defend and other issues.
Q. "Other issues" being duty to settle?
A. Duty to indemnify, duty to settle, duty to communicate. A number of items.
Q. Do you have a copy of the paper "Insurance Coverage Law in Florida" where it again says, "Co-Author" -- "Speaker and Co-Author". Do you have a copy of that paper?
A. From '97, no, sir.
Q. That would be from -- I'm sorry, I misread. Let me start over.

1995, there was an FMMCCI Annual Seminar; did I read that correctly? I skipped over one by accident, Doug. FMMCCI; do you see it?

A. Yes, I see it.

Q. What is the FMMCCI?

A. I believe it was the Florida Medical Malpractice Claims Counsel Institute.

Q. And you gave a presentation, Bad Faith in Florida, from a defense perspective?

A. Yes, sir.

Q. Did I read that correctly?

A. Yes.

Q. Did you prepare a paper for that?

A. I'm sure I did, yes.

Q. Was that paper focussed on bad faith and medical malpractice claims?

A. It would have predominately dealt with medmal, yes, sir.

Q. Do you have a copy of that paper?

A. No, sir.

Q. The next is Insurance Coverage Law in Florida from the NBI; did I read that correctly?

A. Yes, sir.

Q. Did you prepare a paper for that in 1997?

A. Yes, sir.

Q. Do you have a copy of that paper?
A. I don't think so. No, sir.
Q. Have you looked for it?
A. You mean, like for today's depo?
Q. Yes.
A. No.
Q. The title of that paper is "Insurance Coverage Law in Florida". Did that paper cover or not cover bad faith?
A. I'm sure it encompassed bad faith at some point.
Q. The next says, "Featured Columns, 'On the Record,' For the Defense, 2003, 2006." Did I read that correctly?
A. Yes, sir.
Q. Did any of those columns in the magazine for the defense deal with bad faith?
A. No, sir. I don't believe so.
Q. If we go to Page -- Exhibit B. Is this a current list of all of the cases in which you've been retained as an expert witness from 2013 to the present?
A. Yes, sir.
Q. Going case-by-case on the first page, on the three GEICO matters -- excuse me, the first GEICO matter and then the Safeco and then the GEICO matter. Were those

all failure to settle cases?

A. I'm not sure what you mean by "failure to settle cases". They were bad faith cases that involved the claims handling practices of the defendant insurer.

Q. Let's take it case-by-case. In the first case which is Prushansky, is that a case where GEICO -- it was claimed that GEICO did not settle a case when it had the opportunity to do so?

A. I don't remember specifically. That could have been one of the issues.

Q. Do you remember any of the issues in that case?

A. Sitting here today, no, sir.

Q. The Rader case versus Safeco, was that a case involving the alleged failure of Safeco to settle a case resulting in an excess verdict?

A. That may have been one of the issues. Yes, sir.

Q. Do you remember any of the other issues?

A. No, sir.

Q. In --

A. Well, strike that. Yes, I do remember that each of these cases, and Rader in particular, had to do with the claims handling practices of the GEICO, in this instance the Safeco Insurance Company of Illinois, claims professionals.

Q. But in the Rader case, was that case involving the failure to settle resulting in an excess verdict?

A. I don't remember.

Q. The Ford versus GEICO case, did that case involve the failure to settle resulting in an excess verdict?

A. I don't remember.

Q. Is there anything that would refresh your recollection?

A. I would have to go look at the file and just check, or my deposition from the case.

Q. The Leonhardt versus GEICO case, did that case involve the failure to settle resulting in an excess verdict?

A. I'm not sure.

Q. Is there anything that would refresh your memory?

A. Again, I would have to look at the file or my deposition.

Q. Tanya Brown, did that case involve the failure to settle resulting in an excess verdict?

A. No.

Q. What did that case involve?

A. I believe that was a failure to timely settle the case and abandonment of the insured but I'm not

positive. I would have to check, Mr. Kammer, the deposition.

Q. Gonzalez versus GEICO, did that case involve the failure to settle resulting in an excess verdict?

A. I don't remember.

Q. Nautilus versus Gabor Insurance, it looks like that was agent claim handling practices?

A. Yes, that was an E&O issue.

Q. The next case is Smith versus Hartford; what was that case about? It looked like legal malpractice; am I right, from the description?

A. Yes, it was a combination of legal malpractice and agent error and omission.

Q. Going to the next page, Bermudez versus GEICO General; does that case involve failure to settle resulting in an excess verdict?

A. That one I'm unsure about because I think the defense lawyer and the Judge were unsure about it but... we don't really know what Ms. Bermudez is suing for but it had to do with failure to timely pay, I believe, first-party benefits under the policy.

Q. Okay. Would you agree with me that there's a difference between a first-party and a third-party policy regarding the duty to pay?

A. The duty to pay?

Q. The duty to pay.
A. There can be differences.
Q. With regards to Soricelli, did that case involve the failure to settle resulting in an excess verdict?
A. I believe it did. Yes, sir.
Q. Daniels versus GEICO, did that case involve the failure to settle resulting in an excess verdict?
A. I believe it did, yes.
Q. Strong versus GEICO General, did that case involve the failure to settle resulting in an excess verdict?
A. I believe so. Yes, sir.
Q. Hallmark Insurance Company versus Maxum Casualty, is that a dispute between two insurance companies, one being an excess carrier and one being a primary carrier --
A. Yes, sir.
Q. -- and the failure to settle?
A. Yes, and unnecessarily exposed the excess carrier to an excess verdict.
Q. The next case, Tanner versus Government Employees, which is GEICO, is that another case involving the failure to settle resulting in an excess verdict?
A. I don't remember but I believe so. Yes, sir.
Q. The next case is GEICO versus Hamilton; is that

case again involving the failure to settle resulting in an excess verdict?

A. I'm not sure but I believe so.

Q. The next case looks like attorney fees. And then the Progressive versus Severns and Fletcher, does that case involve whether a settlement was reasonable in the context of a Coblentz agreement?

A. I don't know. That case didn't go very far.

Q. Going to the next page, skipping over the attorneys fees. Eres versus Progressive, did that case involve the failure to settle resulting in an excess verdict?

A. Yes, sir. I believe so.

Q. The next one, Bethel versus Southern Mutual Church Insurance Company, did that case involve the failure to settle resulting in an excess verdict?

A. I don't believe so, no.

Q. Can you tell me briefly what that case involved?

A. It's damage to first-party claim, damage to a Church Steeple and has to do with occurrences and causation and fact issues and whether the damages were occasioned under one policy period or another.

Q. What is the bad faith issue in that case?

A. I'm not sure there is one. I believe that right now it's in the coverage phase in the Western

District of North Carolina and the judge has not allowed a bad faith claim to proceed at this point.

Q. Okay. Then going to the last page, City of Florida versus Public Risk; what is that case about?

A. That had to do with coverage issues for city officers who had been accused of fraud done in Florida City and whether and to what extent there was coverage afforded for the acts of the City Commissioners and Mayor and people like that.

Q. And you were retained by Mr. Jurman of Fowler, White?

A. Yes, sir.

Q. And he represents OneBeacon?

A. Yes.

Q. Did OneBeacon provide a defense to its insureds in the case?

A. I'm not sure right now. And let me just correct that, I'm just looking at the file right now again, I may be only on the issue of fees in that case. I just have to check.

Q. Okay. Other than --

A. Oh, no. I'm sorry. It is duties and obligations under the insurance contract.

Q. Going back to my last question because I'm not sure I got a clear answer, did OneBeacon provide a defense

to its insured in that case?

A. I'm not sure.

Q. Do you retain copies of your deposition transcripts that you provided in other cases?

A. Many of them. Yes, sir.

Q. Did you bring them with you today?

A. Yes, sir.

Q. And do you have them here today?

A. Yes, sir.

Q. Are they burned on a disc?

A. Yes.

Q. Perfect.

A. And then there's an index of them that I have for you here (handing).

Q. Great.

(Defendant's Exhibit Number 5, Depositions List Given by Mr. McIntosh, was marked for identification.)

BY MR. KAMMER:

Q. That takes care of Number Seven so let's go to Number Eight.

Did you review any discovery responses in this case?

A. I believe I reviewed some discovery. Yes, sir.

Q. Okay. And the billing records which is Number Nine, the only thing that you have with you today is the printout, correct?

A. Yeah. Normally, what I provide in the deposition phase is my AR and the WIP, that would be Work in Progress. The only thing that would be missing from that is my work from over the weekend just prior to today.

Q. On Exhibit 5, does that include depositions and trial testimony or just depositions?

A. I believe it's predominantly depositions. I don't believe there's any trial testimony there.

Q. Do you have copies of any of your trial -- strike that.

Have you given any trial testimony in any case as a bad faith expert in the last five years?

A. Yes.

Q. But you do not have any of those with you today?

A. I don't believe I have any of those trial transcripts. I saved the Prushansky case, which was tried twice, and I think I probably have the first trial testimony since it went up on appeal and got reversed.

(A discussion was held off the record.)

BY MR. KAMMER:

Q. So the disc -- Exhibit 5, would include

everything but the Prushansky trial testimony which you believe that you have?

A. I'm not sure if I have the Prushansky trial or not. I know that I would have had it at some point because of the way the case proceeded but that's some time ago. I may not have that any longer.

Q. Okay. I believe that you said that you did some research and you have a research folder?

A. Yes, sir.

Q. Can you please pull that out?

A. (Handing).

Q. Is that research you did or did someone else do that for you?

A. It's research that I asked the cases to be pulled and then someone actually went and got them.

Q. How did the person pulling the cases know which cases to obtain for you?

A. I wrote them down on a piece of paper.

Q. And how did you determine which cases to look at?

A. I looked at the deposition that Matt Weaver took of, I believe, Mr. Pancoast {phonetic} and Mr. Hert {phonetic} where cases were brought up. I also knew the cases off the top of my head that I thought I would want so I wrote those down on a piece of paper and asked my

secretary to pull them.

Q. Did you consult any treatises in formulating your opinions today?

A. There was a -- you'll see a treatise in here that's not very complete. It's --

Q. Is that part of the research folder?

A. Yes, sir.

Q. Can I have the research folder back? I must have missed it. I apologize.

A. It's just out of the construction law manual.

Q. Okay.

A. But do you want it?

Q. Yeah, could I have the folder back?

A. Yeah (handing).

MR. KAMMER: Let's mark this folder as the next exhibit.

(Defendant's Composite Exhibit Number 6, Research Folder, was marked for identification.)

BY MR. KAMMER:

Q. So the one treatise was Liability Insurance Triggers of Coverage from Mr. Leiby?

A. Larry Leiby, yeah.

Q. Are there any particular treatises that you consider to be authoritative either in the area of insurance coverage or bad faith?

A. No.
Q. Do you consider Mr. Leiby's article to be authoritative?
A. No, it was instructive and not very much so.
Q. In rendering your opinions today, did you consult any treatises?
A. By "treatises", you mean?
Q. Reference materials, books, articles.
A. Just what's in my research folder.
Q. And if it's not in the research folder, which we marked as Exhibit 6, that means that's a case that you have not looked at, correct?
A. In particular for this deposition, that would be correct. I may have looked at it, not knowing what case you're talking about, there's a good chance I've seen many of the cases that might not be in my folder.
Q. The law firm that you're associated with and you're the named partner, they represent a fair number of insurance companies, correct?
A. Yes, sir.
Q. And part of your practice is the representation of insurance companies and coverage litigation?
A. That's part of my practice, yes.
Q. And as part of your practice, have you ever litigated the issue of trigger of coverage?

A. I'm sure that I have litigated it in a suit. I don't know if it's ever been adjudicated in a court.

Q. And between 2002 and 2012, has anyone in your firm ever advocated the manifestation trigger on behalf of any client?

A. Sitting here right now, I don't recall, no, but it's possible.

Q. In any of those cases, did you have a client that denied the duty to defend based upon the manifestation trigger?

A. I don't believe so. No, sir. Of course, I could only speak for the clients that I've represented in that context. Your other question was anybody in the firm.

Q. Right. How about anyone in the firm?

A. Not that I'm aware of.

Q. Does McIntosh Sawran maintain a list of clients that it represents currently?

A. We have a client list within our system. Yes, sir.

Q. And those would include the various insurance companies that you've represented -- the firm has represented?

A. The current list would include current clients of the firm.

Q. Has McIntosh Sawran ever represented Auto-Owners?

A. I don't believe so.

Q. Has McIntosh Sawran ever represented Amerisure?

A. I don't believe so. No, sir.

Q. Has McIntosh Sawran ever represented the Insurance Company of America?

A. Who's the parent of that company?

Q. Zurich.

A. It's possible, yes.

Q. Has McIntosh Sawran ever represented Mid-Continent Casualty Company?

A. Not to my knowledge. No, sir.

Q. Has McIntosh Sawran ever been adverse to Mid-Continent Casualty Company?

A. Yes.

Q. How many times?

A. Under six.

Q. Were any of those cases bad faith cases?

A. Yes.

Q. How many?

A. One that I could recall.

Q. Do you recall the name of the case?

A. It was West Chester Fire Insurance Company versus Mid-Continent.

Q. What was the outcome of that case?
A. I won it at trial level in front of Judge Marino and it was reversed on appeal in the 11th.
Q. Do you recall on what issue it was reversed?
A. That's an interesting question. The 11th wrote a very vague and kind of nebulous opinion about that but they found that there was no causation ultimately. While there was bad faith, there was no causation and so they took away the judgement that was entered against the Mid-Continent.
Q. The other approximately five cases against Mid-Continent, do you recall what those were about?
A. I was trying -- you know, the question was broad. I'm sure we've had disputes with Mid-Continent, whether in excess and primary situations or co-insurance situations and so that's where I was guesstimating five but other than that, I don't recall specifically any.
Q. Do you recall the outcomes of any of those cases?
A. I don't believe they were litigated in formal settings. They were resolved after, you know, being ironed out between the two carriers.
Q. Has McIntosh Sawran ever represented United National Insurance Company?
A. Not to my knowledge.

Q. Has McIntosh Sawran ever represented Great American Insurance Company?

A. I'm not sure that we've represented Great American Insurance, some of it's subsidiaries, yes or former subsidiaries.

Q. Would that representation have included Great American or any of its subsidiaries in coverage litigation?

A. I believe I did some coverage work in years -- many years ago for some of their former subsidiaries.

Q. Define "many years ago".

A. Over 20.

Q. How about Scottsdale Insurance Company?

A. I have not represented Scottsdale. No, sir.

Q. How about any companies under the Nationwide umbrella so-to-speak?

A. Not to my knowledge. That doesn't ring a bell, no.

Q. By the way, my last question, has McIntosh Sawran ever represented any companies under the Nationwide umbrella?

A. I would have to check but I don't know.

Q. Has McIntosh Sawran ever represented Tower Hill?

A. I don't know.

Q. Has McIntosh Sawran ever represented Essex?

A. Yes.
Q. In the Zoda {phonetic} case?
A. That was one of them.
Q. In any of your representation of Zurich, have you litigated the issue of trigger of coverage?
A. When you say "litigated the issue", are you talking about conclusion by a court?
Q. No.
A. You're talking about is there a suit or has there been a formal lawsuit where that was an issue?
Q. Correct.
A. The answer is yes.
Q. Between 2002 and 2012, for what clients did McIntosh Sawran litigate the issue of trigger of coverage?
A. 2002 to '12 you said?
Q. Yeah.
A. 2002 might have involved Markel {phonetic} and either Essex or Evanston Insurance Company, two member companies of the Markel Group. Zurich, which would include Zurich American Insurance Company, Steadfast Insurance Company, maybe some of the Maryland Casualty Companies. And I can't remember any other carriers right now.
Q. Of the four that you mentioned, including their subsidiaries, Markel, Essex, Evanston and Zurich, did your

firm file any briefs -- by "your firm", I mean McIntosh Sawran -- file any briefs on the issue of trigger of coverage?

A. I'm not sure.

Q. In any case, did McIntosh Sawran between 2002 and 2012, file a brief advocating the manifestation trigger?

A. I'm not sure.

Q. Is there anything that would refresh your recollection?

A. I would have to go to the cases and look and see if the client asserted that position.

Q. Have you ever advised any client between 2002 and 2012 that manifestation was not the appropriate law in Florida for the trigger of coverage in CD cases?

MR. BOYLE: Objection to form.

THE WITNESS: I want to be careful with that answer because I'm not going to divulge attorney/client privilege information but the answer to that is yes.

(The requested portion of the record was read by the court reporter.)

BY MR. KAMMER:

Q. Have you ever advised any clients between 2002 and 2012 that manifestation was the appropriate trigger of

coverage?

MR. BOYLE: I used a form objection but he's already raised the issue about his attorney/client relationships.

MR. KAMMER: I understand that he may not be able to answer.

THE WITNESS: Yeah, I mean, I don't want to divulge attorney/client privileged information so I don't want to open a door to that. If you want to ask me generally, have I ever advised a client about the manifestation theory and whether it applied to a particular claim, the answer is yes.

BY MR. KAMMER:

Q. Do you have any reported decisions in the State of Florida regarding trigger of coverage?

A. Do I have any under my name, you mean?

Q. Yes.

A. Not to my knowledge.

Q. How about the firm's name?

A. Not to my knowledge.

Q. Do you remember the names of any cases that McIntosh Sawran filed briefs on behalf of its clients regarding the trigger of coverage for construction defect cases between 2002 and 2012?

A. I do not remember.

Q. Would you agree with me that insurance carriers decline to defend cases without filing declaratory judgement actions in certain cases?

A. Yes.

Q. Have you ever provided an opinion as an expert witness that an insurance company is in bad faith when it denied a defense without filing a declaratory judgement action?

A. Solely because of that fact?

Q. Yes.

A. No.

Q. Do you believe -- are you familiar with what we refer to as "civil remedy notices of insurer violations", hereto after called "CRNs" in today's deposition?

A. Yes, sir.

Q. Have you advised clients regarding how to respond to CRNs?

A. Yes, sir.

Q. Have you ever had a case, a third-party case, where a civil remedy notice was served before the entry of an amended final judgement?

A. Yes.

Q. In what cases?

A. I don't remember the names of them but I've had it happen.

Q. Did any of those cases proceed to a bad faith case?

A. I don't recall.

Q. Is there anything that would refresh your memory?

A. I would have to go back and hunt through a wide variety of cases to see if I could even find them.

Q. Without divulging any attorney/client information in any of those cases... proceed to where there was a claim of bad faith in the third-party context for an insurer not paying the undisputed amount of a claim before a judgement or an amended final judgement was entered?

A. That's a long question. I'm going to have to --

Q. Do you want it read back?

A. Yes, please.

Q. Sorry for the long question.

A. That's fine.

(The requested portion of the record was read by the court reporter.)

MR. BOYLE: Objection to form. But you could answer, of course.

THE WITNESS: I cannot specifically remember a specific instance but I'm quite sure there have

been cases that meet and fit that description.

Yes, sir.

BY MR. KAMMER:

Q. Do you remember the names of any of those cases?

A. I do not.

Q. Are you able to tell me what advice you provided into those cases without violating the attorney/client privilege?

A. No, I would not be able to.

Q. Did any of those cases proceed to litigation where pleadings or briefs were filed?

A. Sitting here today, I don't recall that being the case. No, sir.

Q. I've taken a look at your resumé. I just want to ask you a couple of questions about your resumé, if I can.

Have you ever directly worked for an insurance company where your paycheck came from the insurance company?

A. No.

Q. Have you ever worked as an adjuster for an insurance company?

A. In-house at the company?

Q. Yes.

A. No.

Q. Have you ever worked as a claims supervisor in-house for an insurance company?

A. No, sir.

Q. Have you ever worked as a claims manager in-house for an insurance company?

A. No.

Q. Have you ever served on the board of directors for any insurance company?

A. No.

Q. Have you ever worked for the State of Florida in a capacity in which you were regulating an insurance company?

A. No.

Q. Do you presently hold any certifications in claim handling?

A. Let me answer that and then I have to go back to a prior question. Certification in claims handling, I'm certified by the State of Florida as an instructor for their continuing education for insurance adjusters.

Q. And that's a certification given to lawyers, correct, to provide continuing legal education?

A. Lawyers --

Q. Excuse me, I misspoke. Let me strike that.

That's a certification that you get from the State of Florida in order to provide certain continuing

education courses?

A. For licensed adjusters in the state. Yes, sir.

Q. How long have you held that certification?

A. I'm not sure. Several years.

Q. And that certification is on a course-by-course basis?

A. You have each course approved under your certification number. Yes, sir.

Q. And how many courses have you had approved?

A. I don't know the exact number.

Q. Have any of those courses that have been approved deal with bad faith?

A. Yes.

Q. Claims handling?

A. Yes, sir.

Q. Do you currently hold a license, an adjusters license of any kind?

MR. BOYLE: Objection to form.

BY MR. KAMMER:

Q. Insurance adjusters license of any kind?

MR. BOYLE: Objection to form.

MR. KAMMER: What's wrong with the form of that question?

MR. BOYLE: It assumes that you have to have

one to adjust claims and Florida lawyers don't.

MR. KAMMER: That wasn't my question. I was asking a factual question. Thank you for explaining.

BY MR. KAMMER:

Q. Can you answer my question?

A. Yeah. I don't have a license -- adjusters license with the state.

Q. Have you ever?

A. No, sir.

Q. In any state whatsoever?

A. No, sir.

Q. You said before that you wanted to go back and correct a question and we've gotten a little bit ahead of ourselves; do you remember what it was?

A. Yeah. I hadn't been asked that question. You asked if I've ever served on the board of an insurance company and back in the late 80's, early 90's, I may have served on the board of a small insurer, Florida Lawyers Insurance Guaranty but I'm not sure if it was a board appointment or some ad hoc position.

Q. And that's a carrier that specialized in providing legal malpractice policies to lawyers in the State of Florida at that time?

A. Yes, sir.

Q. Have you ever written a claims manual for a commercial liability carrier?

A. A whole manual?

Q. Yes.

A. No, sir.

Q. Have you ever established procedures for handling construction defect claims for any insurer?

A. I'm sure I have advised insurers that insure in that arena on procedures for their claims people to follow. Yes, sir.

Q. Have those procedures ever been reduced to writing?

A. I'm not sure.

Q. Can you divulge what those procedures are without violating the attorney/client privilege?

A. No because I would have written them to the client for their use.

Q. Do you recall which carriers that you wrote those for?

A. I believe it was some of the Markel Companies and I may have written some for some of the Zurich Companies.

Q. Do you recall when you wrote those?

A. In the timeframe you're talking about, 2002 to 2012.

Q. When was the last time you wrote any procedures for claim handling of construction defect claims?

A. That's going back, well over seven years ago.

Q. Seven or more years ago?

A. Yes, sir.

Q. Did the claim procedures involve how you determined the duty to defend?

A. I don't have specific recall {sic} but I would envision that I would have talked about that as a seminal point in the discussions.

Q. In reaching your opinions today, did you make any assumptions regarding how an insurer in Florida determines the duty to defend?

A. Did I make assumptions?

Q. Yes.

A. I only used my skill, knowledge and experience in how that works in Florida for the past 37 years that I've been doing it.

Q. And your understanding of the duty to defend in Florida is?

A. Is what?

Q. How is it determined?

A. It's determined by an analysis of the four corners of the coverage document, the policy, together with the four corners of the complaining document,

normally a complaint.

Q. When you establish procedures for handling -- strike that.

In any time that you establish procedures for handling claims for any insurer, did it address how an insurer determines what the applicable law is?

A. I don't have a specific recall of the procedures that I would have written. However, the first question is contained within a coverage analysis in that setting and you always look at choice of law issues.

Q. Okay. Once you determine that the choice of law is Florida or any other state, how do you determine what the applicable law is in that state?

A. If it's --

Q. Let me rephrase. Have you ever advised an insurance company how it should determine what the applicable law is on a given issue in a state?

A. Sure.

Q. And without divulging anything that's attorney/client privilege, how does an insurance company determine what the applicable law is?

A. It depends on the particular state. Florida is lex loci contractus.

Q. So if Florida is lex loci contractus, how would

you determine, by way of example, what the law is on what is or is not property damage?

A. If it's construction of the policy and the language in the policy then the governing law of the state where the policy was issued for delivery or delivered would govern that issue.

Q. And how do you make that determination?

A. Well, you start by looking at the policy itself, is there a definition of property damage, if the policy is silent as to the definition then you would look at case law in the jurisdiction where the construction of the policy is going to be entertained and then you would see if that term has been identified in the case law.

Q. And in any of your prior work, have you advised insurers -- I'm not talking about choice of law here. Have you advised insurers how they should make a determination of what the applicable law is on any given issue?

A. Over the course of my career?

Q. Yes.

A. Sure.

Q. And has there been times where the law is -- where there are decisions that go both ways on a certain issue?

A. Yes.

Q. And where the Supreme Court of a given state has not weighed in on that issue?

A. Yes.

Q. Has there been a time where there have been 11 decisions that support one view and one or two that go the other way?

A. I can't recall specifically if those numbers are there but I have seen instances where there is a majority of decisions or a majority view, you might call it.

Q. And when there is a majority view, have you ever provided procedures to an insurance company for handling claims when there's a majority view on an issue?

A. I don't believe so. No, sir.

Q. Is an insurance company allowed to follow the majority view on an issue?

A. I don't know if I could answer that question without more facts and circumstances. That's vague to me.

Q. Can an insurance company follow the majority view on an issue without being in bad faith in declining to defend a case?

A. I think the answer to that question is yes and no.

Q. Okay. Why is it "yes" and why is it "no"?

A. It depends on the facts and circumstances of the claim that's being presented and whether the proposed declination, presumedly based on either a lack of coverage grant or an exclusion within the coverage grant, directly applies to the facts in line with the majority as opposed to a set of facts and circumstances where the majority view can be entertained or espoused by the carrier but the minority view creates, at least on the initial analysis for a duty to defend, a question that should be decided and aired upon in favor of coverage to the insured for the duty to defend saving under either reservation or other vehicle the obligation to indemnify.

Q. Are you aware of any decisions in the State of Florida where an insurer was held in bad faith for following the majority view on the law in declining a duty to defend?

MR. BOYLE: Objection to form.

THE WITNESS: I'm not aware of a case that stands for the proposition you just named. No, sir.

BY MR. KAMMER:

Q. Are you aware of any treatise that you would consider authoritative which has held that an insurer who

follows the majority view on an issue is in bad faith?

A. I don't know that treatises hold anything. They espouse certain positions and I don't recall seeing anything in a treatise that would espouse the proposition that you have stated.

Q. Let me rephrase my question. You're correct. I shouldn't have used the word "held".

Are you aware of any treatise in which the author of the treatise maintained that an insurer who follows the majority view on an issue and declines the duty to defend is in bad faith?

A. I'm not aware of any treatises. No, sir.

Q. In your practice, are you generally familiar with the Florida standard for an insurer being in bad faith if it denies the duty to defend?

A. Are you talking about the Florida standard jury instruction for bad faith?

Q. Well, is there a Florida standard jury instruction jury instruction that addresses the duty to defend?

A. No.

Q. Are you aware of any decision in the State of Florida in which an insurer had successfully litigated an issue and was told by the Court that it's position was correct and then later found to be in bad faith because it

followed prior decisions in which a court found in it's favor on that issue?

MR. BOYLE: Objection to form.

BY MR. KAMMER:

Q. Let me rephrase the question.

Are you aware of any Florida case in which an insurer was found in bad faith having won an issue where it applied the same law where the law had not changed?

A. I don't understand the question.

Q. You're familiar with the Pozzi Windows case?

A. Yes.

Q. And are you aware that there was a bad faith component to that case?

A. I believe there was.

Q. Do you recall the outcome of the bad faith case in Pozzi Windows?

A. I'd have to look at it. It's in the folder.

Q. Which folder?

A. Exhibit 6.

Q. Pozzi Windows is here?

A. I think so.

MR. BOYLE: Which iteration? There are several.

MR. KAMMER: Good question. I don't think anything of them were. I'm going to look.

THE WITNESS: Not finding it?
MR. KAMMER: No, it's not here.
THE WITNESS: I thought I had written both J. Southern {phonetic} and Pozzi Window on my list.
BY MR. KAMMER:
Q. Okay. Let me see if I could rephrase the question.
One of the cases that's in your folder is a case called Siena -- Mid-Continent versus Siena?
A. Yes.
Q. So that's a case that you reviewed in connection with this opinion?
A. May I see it?
Q. Yes (handing).
A. Yes. I reviewed this case, yes.
Q. Can you please tell me what the date of that decision is?
A. It was July 8, 2011.
Q. And based upon your review of the materials in this case, do you have a recollection of when Mid-Continent issued its first declination letter?
A. In that case?
Q. No, in this case.
A. Oh, in this case. I would have to look at the timeline.

Q. Okay. If I told you it was in September of 2011, would that refresh your recollection?

A. Yes, that's what it was.

Q. Okay. If you would go to the Siena case for me, please.

A. Okay.

Q. Take a look at Roman Numeral Four of the Judge's decision.

A. Yes.

Q. Do you see where it begins with the sentence, "In Auto-Owners versus Travelers Casualty Insurance Company"; did I read that correctly?

A. Yes.

Q. If you keep going down, it goes through the four different trigger theories?

A. Yes, sir.

Q. And then it says, "This exposition of Florida law has since been uniformly followed"; do you see that?

A. I see that statement. Yes, sir.

Q. So going back to my last question, are you aware of any Florida case in which an insurance company applies law that has been uniformly followed in which it has been held in bad faith for doing so?

A. I think your prior question, Mr. Kammer, was bad faith under the duty to defend. This one has left

that out. I'm not aware of a case where a court has been found to be in bad faith simply by virtue of the fact that it followed a majority position.

MR. KAMMER: Can you read his question back? I think you misspoke.

(Requested testimony was read.)

THE WITNESS: What I meant to say was, where a court has found an insurer to be in bad faith.

BY MR. KAMMER:

Q. And to drill it down, are you aware of any case where a court has found an insurer to be in bad faith when it declines to defend where it is {sic} applied law that has been uniformly followed?

A. I believe that maybe the case in my -- in a case that I have pending in the 11th Circuit right now.

Q. What case is that?

A. It's called Zurich American Insurance Company versus Southern Owners Insurance Company.

Q. Other than that case, are you aware of any other cases?

A. I'd have to look through the cases to see. There is, of course, a distinction in the law between the duty to defend and bad faith for that breach as opposed to the duty to indemnify.

Q. Right. I'm just talking about the duty to

defend.

I presume you represent Zurich American in the case?

A. I did, yeah -- or I do.

Q. And that case is still pending?

A. Yes, sir.

Q. The trial court was where?

A. Jacksonville Middle District.

Q. Who was the trial judge?

A. The female in the court there.

MR. BOYLE: Cuttington {phonetic}?

THE WITNESS: No.

MR. KAMMER: Don't feel bad, I can't remember either.

THE WITNESS: I picture her face in my mind, I'm sorry.

BY MR. KAMMER:

Q. What position did Zurich American advocate in that case?

A. We advocated that the other carrier under its policy was required to provide additional insured coverage to the insured under the Zurich policy and that they failed to defend when demanded to do so on three occasions and then failed to indemnify once Zurich was forced to settle the case.

Q. Do you recall what kind of additional insured endorsement was in the Southern Owners policy?

A. They were the standard CG ISO form endorsements. I don't recall which numbers.

Q. Okay. Was it an ongoing or completed or both?

A. This was a completed ops issue. Although, there was evidence that they still were doing work at the premises when the gentleman fell.

Q. So this was a bodily injury case?

A. Yes.

Q. What was the outcome of that case at the trial court level?

A. The case was settled confidentially at mediation.

Q. Was there an order entered on -- strike that.

Were dispositive motions filed in that case?

A. In the underlying case?

Q. Yes.

A. I'm sure there were dispositive motions. I don't know if there were rulings or not.

Q. Do you recall what position you took on behalf of Zurich American?

A. Yes.

MR. BOYLE: Judge Marcia Morales Howard.

THE WITNESS: There it is.

MR. BOYLE: Which I should have remembered because she did some time in Fort Myers.

BY MR. KAMMER:

Q. Was bad faith an issue in that case? And "that case", I'm talking about Zurich American versus Southern Owners?

A. No. Bad faith is not an issue in that case, not yet.

MR. BOYLE: Can we take a break?

MR. KAMMER: One final question.

BY MR. KAMMER:

Q. If the case was settled confidentially, how could bad faith still be an issue in that case? I'm just curious and then we can take a break.

A. Because of Southern Owners' activity since.

MR. KAMMER: Okay. We'll further explore that when we get back.

(A break was taken.)

BY MR. KAMMER:

Q. Going back to my last question, the bad faith case would be based upon Southern Owners' conduct post-settlement then, if there's going to be one filed?

A. Yes, and civil remedy violations that were not cured.

Q. What civil remedy violations were not cured in

that case by Southern Owners?

A. Failure to defend their insured, failure to indemnify their insured.

Q. By "their insured", you mean their purported additional insured?

A. Yes.

Q. And those claims were not part of this confidential settlement I presume?

A. No.

Q. Would you agree with me that the law regarding when an insurer has to defend an additional insured under an ongoing operations hazard -- strike that.

Is the law in Florida currently settled or unsettled on whether an insurer has to defend an additional insured under an ongoing operations only AI endorsement?

MR. BOYLE: Objection to form.

THE WITNESS: I don't know the answer to that offhand.

BY MR. KAMMER:

Q. Are you presently litigating matters, Doug, involving ongoing operation hazard or completed operation hazards only AI endorsements?

A. I'm sure I have cases in the office that have those as their subject matter. Yes, sir.

Q. And do you have cases in the office where any of your clients have disclaimed coverage to a purported additional AI because they either have an ongoing or completed operations only endorsement?

MR. BOYLE: Objection to form.

THE WITNESS: I'm trying to think. I don't believe so but it's possible.

BY MR. KAMMER:

Q. Is there anything that would refresh your recollection as to that issue?

A. I would have to go and look at cases particularly on those issues and sub-issues that you've identified. I can't think of any offhand.

Q. Are you currently aware of any case in which an insurer -- strike that.

Are you currently aware of any reported decision in which an insurer was held in bad faith in Florida for failing to insure an additional insured under either a completed operations or ongoing operations only endorsement?

A. I don't know.

Q. Have you ever advised an insurance company regarding procedures for responding to civil remedy notices?

A. Yes.

Q. Without divulging matters involving the attorney/client privilege, can you tell me what those procedures consisted of?

A. The procedures are outlined by 624.155, the statute, and I've advised the carrier on both substance and timeliness of complying with what's required under that statute.

Q. Has any of that advice involved curing civil remedy notice -- a purported alleged civil remedy notice violations when the amount in controversy is contested?

A. Yes.

Q. Have you developed any procedures for handling claims for insurers on how to respond to civil remedy notices when the amount of the claim is contested?

A. I don't believe so. No, sir.

Q. As you sit here today, are you aware of any practices and procedures in the insurance industry generally on how insurers respond to civil remedy notices where the amount is in controversy?

A. I'm going to need that read back, please.

(The requested portion of the record was read by the court reporter.)

THE WITNESS: Aware of procedures promulgated in either a case or a company document?

BY MR. KAMMER:

Q. What insurance companies do. Not in cases. What insurance companies do.

A. You mean custom and practice in what they do?

Q. Yes.

A. I'm aware of what certain companies do and have counselled companies on what to do.

Q. What is your understanding of what insurance companies do in responding to civil remedy notices where the amount claimed is in controversy in the third-party context?

A. If the insurer violation is one that either concerns or is recognized by the insurer to need cure, that is something did happen that should be fixed within the 60 days, then the carrier should and does take action to cure that violation. If you cannot cure it completely because the amount in controversy is either inchoate or unknown, then normally there is an offer that is made to try to resolve that aspect to cure the violation or continuing discussions along those lines. But at least, an effort by the company to attempt to cure the violation with payment of some sum of money if that's what's being sought.

Q. And where does that -- again, you've just told me what that is. Have you read any document or paper from any -- strike that.

The standard -- your answer that you just gave, have you seen that answer in any insurance company literature?

MR. BOYLE: Objection to form.

BY MR. KAMMER:

Q. And by "insurance company literature", I mean insurance company claim handling guidelines, articles written by the insurance industry.

A. I can't sit here and specifically cite you to either an industry manual that I've seen or a guideline of that type. I could tell you that in many of the depositions that I have read over my career of the people that are responsible for making those decisions in-house at insurance companies, I believe that to be the prudent course for an insurance carrier to follow when dealing with a civil remedy notice in the State of Florida.

Q. And how does an insurance -- strike that.

In any of the advice that you've given to the insurers for the handling of claims, include {sic} when to pay judgements under a third-party policy?

A. Have I ever advised an insurance company when it has to pay a judgement?

Q. Well, that was not my question. My question is, have you ever established procedures for claim handling

for an insurer as to when it is obligated to pay a judgement under a third-party policy?

A. No.

Q. Have you reviewed any treatises or insurance company articles as to what the custom and practice of the insurance industry is when to pay for a judgement under a third-party for a third-party claim?

A. Not sitting here now, no, sir. Not that I could recall.

Q. So your experience has been on claims that are sent to you to evaluate by insurance companies, correct?

A. That's part of my experience. Yes, sir.

Q. And would you agree with me that hundreds, if not thousands of claims are routinely handled by the insurance industry that never get referred to lawyers like Mark, you and I?

A. Oh, I'm sure that's the case. Yes, sir.

Q. And the claims that you and I never see involve duty to defend, correct?

A. They could.

Q. Okay. When to pay a judgement?

A. I don't know if there would be an issue about when to pay a judgement. It's pretty standard in the industry when you pay a judgement.

Q. And what's your understanding of when a

judgement is paid?

A. It depends on the jurisdiction you're in but usually, it's within a number of days after the rendition of the judgement that the payment has to be made or bonded if you're going to appeal.

Q. But you would agree with me that there are many cases that we, as lawyers -- excuse me. Many claims that we never see as lawyers that are routinely handled by the insurance industry?

A. Not every claim made against an insurance company by their policyholder sees the eyes of a lawyer.

Q. Some of those claims are settled before they see an eye of a lawyer, correct?

A. Sure.

Q. Some of those claims are denied before they even see the eyes of a lawyer?

A. Sure.

Q. And when those claims are denied, if they're not contested by the policyholder, a lawyer probably never sees it?

A. I don't know how to answer that. There are many things that could happen in the scenario you just gave where a lawyer could ultimately end up seeing that.

Q. Okay. Would you agree with me that there are generally four trigger theories?

A. Yes, sir.
Q. Would you agree with me that those trigger theories may be applied differently depending upon whether it's a bodily injury claim or a property damage claim?
A. I would agree there can be a different application of the trigger as between those two types of injuries, yes, or damages.
Q. And would you agree with me that in the property damage context the triggers may apply differently as opposed to whether it's a long-tail or continuing injury or alleged continuing injury or not?
A. Yes.
Q. Can you go, I think, to your report, which is Exhibit 3 --
MR. KAMMER: Before we do that, I want to mark as Composite 7 -- I want to see what's in here. Can I take a look?
THE WITNESS: Yes.
BY MR. KAMMER:
Q. Before we go to your report, did you review each of these depositions or the summaries that are contained in your file?
A. The summaries, yes, on each of them.
(Defendant's Composite Exhibit Number 7, Selected Bates Documents, were marked for

identification.)

(Defendant's Composite Exhibit Number 8, Investigation Folder, was marked for identification.)

(Defendant's Composite Exhibit Number 9, Two Red-Wells, were marked for identification and kept by the Witness.)

BY MR. KAMMER:

Q. Can you identify Exhibit 7 for me?

A. Exhibit 7 is a selection of Bates numbered documents taken out of the combination of the claims file as far as the other materials that were sent. It looks to be mostly the claims file but some pleadings are in there, too -- selected Bates documents.

Q. And while we're on Exhibit 7, who selected those for you?

A. I did.

Q. Can I see that?

A. Yes, sir (handing).

Q. Exhibit 7 has some highlights; were those highlights made by you?

A. Yes, sir.

Q. Is there a particular reason why these documents are in or a part of Exhibit 7?

A. I believe that was when I was in the process of preparing my expert report. Those were documents I

selected to assist me in my preparation of the report.

Q. So if it's in Exhibit 7 those are documents that you relied upon, correct, in preparing the report or --

(Multiple speakers.)

THE WITNESS: Yes, I used them for review in preparation of my report. Yes, sir. And there's another set of Bates documents in my investigation folder, that's 8.

BY MR. KAMMER:

Q. We're going to get to that.

One of the documents contained in Exhibit 7 is a copy of Judge Magnuson's {phonetic} December 6, 2013 order, correct?

A. Yes.

Q. I don't see where any part of that order is highlighted; am I also correct?

A. In this particular iteration of the document, that's correct.

Q. Did you review the memorandum and order dated December 6, 2013?

A. I have several times. Yes, sir.

Q. Did you review the part of the order at the bottom of Page 3 and the top of Page 4 that says, "If the manifestation trigger applies, Mid-Continent is not bound to defend or indemnify Cronk Duch because there is no

dispute that the damage was not manifest until two years after the Mid-Continent policy expired"?

A. I recall reading that line. Yes, sir.

Q. Do you recall reading in that decision that Judge Magnuson also observed that the law in Florida regarding trigger of coverage had recently changed?

A. What page are you referring to, 4?

Q. I think so. I'm trying to find the language. I know I saw it once before in this case.

Actually, are you aware -- the quote is, "The Middle District of Florida recently held an in-detailed analysis." I'm on Page 4.

A. Yes, Page 4. I see it. Yes, sir.

Q. Did you review that as well?

A. Yes.

Q. And the case that the Court was considering was Axis Surplus Lines versus Contravest which was found -- which is a 2012 decision?

A. Yes, sir.

Q. Are you also aware that even after Axis Surplus versus Contravest, some courts continued to apply a manifestation trigger in Florida?

A. I believe that's true.

Q. With regard to the duty to indemnify, are you aware of any Florida court where an insurance company took

an appeal and obtained a substantial reduction of the amount initially claimed as being covered under the policy and was later found to be in bad faith?

A. Sitting here right now, I can't say if there is or is not.

Q. Are you aware of any literature, treatises or other alerted texts in which an insurance company took an appeal, obtained a substantial reduction in the amount owed and was found to be in bad faith?

A. For their failure to indemnify, their failure to defend or either?

Q. I thought my question was clear but since you have a question about it, let me strike that question and start over.

Are you -- with regards to the duty to indemnify, are you aware of any treatise or other writing in which an insurance company was found to be in bad faith where it appealed a judgement and obtained a substantial reduction in the amount that was originally thought to be covered under it's policy?

A. I can't think of a case right now. I can't say if there is or if there isn't one.

Q. You would agree with me that an insurance company has a right to take an appeal on an issue, correct?

MR. BOYLE: Objection to form.

THE WITNESS: If there is a legitimate appealable issue the insurance company has the right to do that, yes.

BY MR. KAMMER:

Q. And in this case with the 11th Circuit reducing the amount of covered damages by 70 percent or more, would that be evidence that there was a legitimate issue to appeal the issue of what was and what was not property damage in this case?

A. The decision by the 11th which ultimately remanded for entry of a lower judgement than that of which the lower court awarded demonstrated that there was a justiciable issue for a higher court to determine as to covered and uncovered damages.

Q. And therefore, Mid-Continent in this case would not be in bad faith for pursuing that issue to the 11th Circuit?

A. I don't think you're in bad faith for pursuing your appellate rights and remedies, it's what preceded that in terms of the claims handling. That would be still potentially at issue. Whether the damages get lowered or increased by an appellate court doesn't necessarily cure the bad faith that preceded that.

Q. What bad faith with regard to indemnity are we

talking about in this case?

A. I wasn't talking about a regard to indemnity. And I'm sorry, I know your question prefaced it with regard to the duty to indemnify so I apologize. I was talking about -- and then your question was in bad faith and I'm thinking bad faith in general so...

Q. I'm just talking about the duty to indemnify.

A. Okay. No, I'm not aware of...

Q. Okay. Would you agree with me that an insurance company could take an appeal on a legal issue to the 11th Circuit where that issue has not been determined by the highest court of that state without being in bad faith?

A. The question is too vague for me to answer.

Q. Would you agree with me that an insurance company can appeal an issue where the Supreme Court of that state has not issued a definitive ruling on what the law is without being in bad faith?

A. Again, I think it's an incomplete hypothetical. An insurance company has the right to appeal a decision that is an unsettled area of law by the Court in the highest position in the state, here, the Supreme Court of Florida, not having spoken on the issue, and would not necessarily be in bad faith because it has chosen to seek that redress. But it certainly could have been in bad faith by the way that it handled

the claim and put the insured in the position that it did to have to undergo that activity.

Q. Was -- in this case, is the your opinion that -- very limited question. Was Mid-Continent in bad faith by litigating the issue of manifestation before the 11th Circuit?

A. I don't believe Mid-Continent was in bad faith by virtue of litigating the manifestation issue. However, what my opinion is, is that Mid-Continent failed at the inception of this claim to recognize that coverage existed under a prior iteration of it's policy and had a duty to defend it's insured that it ignored and failed to execute which I believe was bad faith.

Q. And what is the basis of that opinion?

A. The basis of that opinion is when the original complaint came in, the first claims handler that touched the claim was a gentleman named R. Rodgers {phonetic}. And Mr. Rodgers in his claim note, that eventually made it's way to Ms. Boston who became the claim handler on the file, ignored the policy where coverage was in play in this case, the '05-'06 iteration of the policy issued to the Cronk Duch -- I'm not sure if that's how you pronounce that.

Q. Duch.

A. The Cronk Duch folks. And instead,

immediately settled on a manifestation approach and placed the date of occurrence in an '08-'09 policy. And that caused the insured to be exposed to a claim by the Carithers that they could neither defend without going into their own pocket to do so or that they could settle the covered claims without going into their own pocket to do so.

Q. Regardless of which Mid-Continent policy -- and there were four of them, correct?

A. Four. Yes, sir.

Q. You've reviewed the amended complaint and the third amended complaint?

A. I have.

Q. And the amended complaint and third amended complaint alleges that the damages were first -- that the defects -- the aforementioned defects were first discovered in 2010 and could not have been discovered prior to that date; do you recall, in general, those allegations?

A. They were generally allegations about the discovery by the plaintiff of the damages that were occasioned because of the defects in the home. What was missed by Mr. Rodgers and Ms. Boston and everybody after her, Mr. Neff {phonetic}, Mr. Pancoast, you name it, was the allegation in the original complaint and carried

forward in the other complaints that the house was constructed in 2003, delivered in 2005 with latent defects in the home. Which means by definition that the faulty workmanship and/or the construction that caused the damages to manifest themselves in 2010 were there in the 2005 to '06 policy period and had occurred in that time period or potentially would have been occurred.

Q. Would you agree with me that a carrier should look at the entire complaint to determine whether or not it has a duty to defend?

A. I agree that the four corners and eight corners rule applies for a carrier to be judged by whether it owes a duty to defend and later a duty to indemnify. However, in this case I go with what your own representatives testified to and many of my own clients subscribe to, a carrier is obligated to find coverage if they could find coverage.

Q. Would you agree with me that whether there was or was not a duty to defend is -- would it be an issue of law for the Court?

A. Yeah, the duty to defend normally is an issue of law unless there's a question of fact somehow about maybe notice or -- I mean, it could be a slight question of fact. But the Court will decide as a matter of law whether a duty to defend is owed, as it did here I

think.

Q. Was there an issue of fact in this case?

A. I don't believe one was raised.

MR. BOYLE: Objection to form.

MR. KAMMER: What was wrong with the form of that question?

MR. BOYLE: You meant as to the duty to defend.

MR. KAMMER: Yeah.

(Multiple speakers.)

BY MR. KAMMER:

Q. Let me rephrase so the record is clear.

Was there an issue of fact regarding the duty to defend in this case?

A. I don't remember if Mid-Continent and Mr. Catizone's office tried to raise a question in fact in opposition to the motion so I can't say. I don't think there was. I think the duty to defend was clear and was owed.

Q. And it was owed under an injury in fact trigger, and manifestation trigger or both?

A. I think that you can fairly say that whether you applied the injury in fact trigger or the manifestation trigger, both of which enjoyed some support in Florida case law at this time, you could have

found a duty to defend at least being owed and offered and in my opinion, it should have been done under reservation of rights for the manifestation or the injury in fact to flesh out with factual discovery later.

Q. And what is the allegation that you're relying upon in the complaint that would trigger a duty to defend under a manifestation trigger?

A. The allegation that there were latent defects in the home when it was delivered in 2005 to the buyer.

Q. Is it your opinion that every time a complaint alleged a latent defect that there's a duty to defend under a manifestation trigger?

A. I can't state that that's an opinion every single time. No, sir. You have to look more at what's being alleged. What were the defects that were being alleged and how did they ultimately come to be known.

Q. What about this complaint triggered a duty to defend under a manifestation trigger based upon the allegation of latent defects?

MR. BOYLE: Objection. Asked and answered.

MR. KAMMER: I don't think that was.

MR. BOYLE: You could answer. I'm not saying no.

THE WITNESS: I think I tried to answer it,

perhaps I didn't do it so well. What was failed to be considered, which you would see in every single prudent carriers claims handling practice that I have come to know over my 37 plus years of doing this and in particular, counselling companies for over 25 years, is a detailed coverage analysis under not just one of the policies, cherry picking a policy and saying we're going to throw it under this policy, which in my opinion is what happened, but starting with the '05-'06 policy and then looking at the four corners of the complaint.

If they had started with the '05-'06 policy which did not have a CG 22 94 exclusion in it and they had looked at the four corners of Mr. Carithers' complaint, I believe that the prudent, responsible claim handler and insurance carrier would have said this damage could have manifested itself between the time that the footers went in in 2003 and the house got delivered in 2005, therefore we better defend under reservation of rights and that could either be under an injury in fact or a manifestation theory.

BY MR. KAMMER:

Q. In 2011, were you generally familiar with the case law in Florida that had adopted the manifestation

trigger?

A. Yes.

Q. And would you agree with me, Mr. McIntosh, that the manifestation trigger was either based upon the date the damages that were discovered, correct?

A. That's one of the tests, yes.

Q. Or under the Best Truss case, whether they could have been discovered by an inspection by an expert or someone in the field? I'm paraphrasing --

(Multiple speakers.)

THE WITNESS: -- I think it's a reasonable inspection.

BY MR. KAMMER:

Q. Reasonable inspection?

A. Yes.

Q. So the manifestation trigger then would be either date of discovery, correct?

A. Yes, sir.

Q. Or discovered upon reasonable inspection, correct?

A. Yes, sir.

Q. Would you also agree with me that when you're determining the duty to defend in Florida, the inferences, even reasonable inferences, cannot trigger the duty to defend?

A. I'm not sure I understand your question. Inferences from extrinsic evidence or --

Q. Inferences from the complaint.

A. No, I wouldn't agree with that statement, Mr. Kammer. I think that under the law in Florida, when you're looking at and analyzing the company's duty to defend, which is paramount in the insurance contract, that reasonable inferences, if they suggest that there could be coverage under the policy that the company has issued -- taken in favor of defending the insured, rather than leaving them bare and without a defense.

Q. So as you sit here today, you're not aware of a single Florida case that says inferences drawn from the allegations of a complaint cannot be used to create a duty to defend?

A. No, I think you're reading that inferences from a complaint cannot be used to create coverage under a policy. I think there's a difference. I think that your duty to defend as, you know, in every single case, is broader than the duty to indemnify and coverage under a policy. But if there is a case that says you're not supposed to look at inferences and strictly look at the language used in the complaint, I would agree with that.

As an example, there are cases that say you don't look at the headings to the counts, there are

cases that say, you know, even though an insured wants to try to plead into coverage and plead that an assault and battery was really an occasion because of negligent supervision or hiring, it's still an assault and battery and the exclusion applies and you don't, you know, stretch outside of the four corners of the complaint.

But I can't completely agree with your statement that in this instance in particular, a reasonable inference, I bought a home -- I'm the plaintiff, I bought a home in 2005, it was constructed in 2003, Mr. Insurer, I bought a policy from you from '05 to '06 that covers the date that I took this home, it had latent defects in it, I want to be covered from the homeowner's suit against me because I built them this home. That, in your analysis of your duty to defend and coverage under your '05-'06 policy, should trigger the duty to defend in the carrier in my opinion, albeit perhaps under a reservation of rights.

Q. Is there any allegation in either the amended complaint or the third amended complaint which alleges that the damages began at the Carithers' home shortly after it was completed?

A. I don't recall specific allegations to that effect. No, sir.

Q. So to the extent cases finding that carriers did

not have a duty to defend under a manifestation trigger where there had been latent defects, those cases then under your opinion were wrongly decided?

A. I don't know if I could say that offhand. You have to show me the case and I'd have to tell you whether -- are there manifestation cases that were wrongly decided, yes.

Q. But still followed by the insurance industry while they were the law of the state?

A. Some carriers followed them, some carriers were cognizant of them but then still paid attention to their insureds needs and the coverages that they provided under their CGL form.

Q. Would you agree with me that a carrier is to follow the law that exists in a given state at the time it makes it's decision whether to defend a case?

A. I think that the answer I would give to that is a carrier is guided by the law that's existent in the state where it's issued its policy on the duty to defend when it has a complaint that it needs to decide whether there's coverage that triggers its obligations to defend its insured.

Q. Would you agree with me that a carrier should follow the law as it understands it at the time it makes its decision?

A. I think that's kind of an negative pregnant question, frankly. A carrier is going to follow the law as it understands it with the caveat that it does so at its own peril if it's deciding to do something unequivocally without any accommodation to the insured. That is, we're declining coverage, we're not going to defend you, you're on your own.

Q. In your practice -- this is the last area and then we'll take a comfort break.

In your practice, have you ever advised a carrier to disclaim coverage without issuing a reservation of rights?

A. Sure.

Q. And I take it when you provided that advice to disclaim coverage without issuing a reservation of rights, you did not believe the carrier in following your advice would be in bad faith, correct?

A. No, if in the instances where I have advised a carrier to disclaim coverage because I felt that there was an exclusion in the policy that completely prohibited coverage or the occurrence was not within the policy period that the carrier issued its policy for, I did not believe that the carrier was in bad faith if they followed my advice.

Q. And in that same instance, the carrier would not

be in bad faith by disclaiming and not providing a defense under a reservation of rights; am I correct?

A. I don't believe the carrier would be in bad faith for taking that position. Are they running the risk of being found at a later time to be wrong and therefore breaching their policy obligations to their insured, that's a risk.

Q. Right. And there's a difference between breaching a policy obligation and bad faith, correct?

A. There is.

Q. What is that difference?

A. You could have a breach of contract or a breach of policy claim without attending to bad faith.

Q. And one time you could have a breach of contract but not be in bad faith is if a carrier relies on the law as it perceives it when it makes the decision and later on, as in Pozzi Windows, the law changed?

A. No, I think you're stretching. I think in our defense business, we would all like to believe that's the case. But in Florida, you know, the Laforet decision and those decisions have taken away the fairly debatable standard and I think what you're referring to is a fairly debatable issue.

Q. Absolutely not. Pozzi Windows, the bad faith part, was decided after Laforet; wasn't that correct?

A. I'd have to look at the decisions. There's several Pozzi Windows.

Q. But the Pozzi Windows bad faith case, didn't the Court rule in that case that there was no bad faith as a matter of law because J.S.U.B. and Pozzi Windows changed the framework of Florida law on those issues?

MR. BOYLE: Objection to form.

THE WITNESS: I'd have to look at the case but I mean, there's no question that that evolution occurred.

BY MR. KAMMER:

Q. And in Florida -- would you agree with me that before 2002, Florida may have been an injury in fact state for property damage claims?

A. Before 2002?

Q. Yes.

A. Yeah, I think Trizec was decided in the 80's.

Q. And between 2002 and 2012, do you have any reason to disagree with Judge Hodges about what the state of the law was from the Sierra case?

A. I think that --

Q. Do you disagree with his statement? That was with my question.

A. I think his statement had to do with the evolution of law in the federal court system applying

Florida law.

Q. Okay. And then would you agree with me that after Axis came down in 2012 that the law shifted back, so to speak, to injury in fact?

A. I think it did. Yes, sir.

(A break was taken.)

BY MR. KAMMER:

Q. Mr. McIntosh, you realize you're still under oath?

A. Yes.

Q. Okay. We were talking about the complaint that was filed in the construction defect matter and specifically, the amended complaint and third amended complaint. Other than the allegation in those two complaints that the defect was latent, are there any other allegations that you believe were significant as to why Mid-Continent had a duty to defend under manifestation trigger?

A. No, the only basis and belief I have is from the case law that required them to look at the four corners of the that '05-'06 policy, which I did not find they did.

Q. The '05-'06 policy contained the same insuring agreement as the '06-'07, '07-'08 policies, correct?

A. The same --

Q. Insuring agreement.
A. Insuring agreement, yes, sir.
Q. And you've reviewed the testimony of the Mid-Continent witnesses in this case?
A. All except Mr. Neff.
Q. And they testified the reason for the disclaimer was based upon trigger of coverage, correct?
A. They testified that the reason for the disclaimer was they were going to apply the manifestation theory for trigger of coverage to the complaint and apply it with analysis of the '08-'09 -- I think it was actually cancelled for nonpayment of premium in '08 -- policy period.
Q. And they applied that policy because that was the closest policy in time to when the allegation of the complaint of when the damages were discovered; do you recall reading that testimony?
A. I recall reading the testimony that they said that they understood because he had alleged -- and I believe his allegations were for statute of limitations purposes -- that he couldn't have discovered the latent defect until 2010. That they -- they decided it would be outside of their last issued policy year.
Q. And if manifestation was the trigger and the date of discovery as alleged was 2010, coupled with the

allegation that upon reasonable inspection the defects could not be discovered then regardless of whether they analyzed the 2005 to '06, '06 to '07, '07 to '08 or '08 until that policy was cancelled, it would always be outside those policy periods?

A. I disagree.

Q. And why do you disagree with that?

A. Because the test is not what the plaintiff says when they discovered the damages, the test is whether under a reasonably prudent engineering inspection -- like Altonaga wrote the decision that brought that to the forefront, Judge Altonaga -- whether a reasonable inspection would have disclosed the damages because of the allegations in the complaint. You have to read the allegations, in a light most favorable to the insured to try to confer coverage for the insured who's bought the policy, that the allegations that the home was built between '03 and '05, delivered to the Carithers in '05, would have potentially warranted a defense being offered despite the fact that he said that he didn't discover it until a later date. That is manifestation could have in fact been found to have occurred or taken place in the '05-'06 policy period.

Q. Based upon the allegations of a latent defect?

A. Yes, sir.

Q. So it's your opinion that based upon the allegations of a latent defect, the damages could have manifested in any of the four Mid-Continent policies; do I have that right?

A. Yes.

Q. If you'd go to your experts report, please.

A. Okay.

Q. Go to Page 4, Paragraph 5.

A. All right.

Q. The last sentence of Paragraph 5 says, "The law was unsettled in this area of insurance coverage in 2011" and you cite to Carithers versus Mid-Continent Casualty Company, the 11th Circuit's decision in 2015, correct?

A. Yes, sir.

Q. Other than the statement in the Carithers' case, do you have any other basis for your opinion that the law was unsettled in this area of insurance coverage litigation in 2011?

A. Well, just the fact of what we were all going through in the industry at that time. I have always subscribed to the Trizec theory in most of my analyses even through 2002, '03, '05 and '06. And while the federal courts, as they are often of a want to do, perhaps enlarged those theories and embraced different theories, there was a question, it was unsettled in my

opinion in 2011, as the Carithers Court tried to observe.

Q. When is the law unsettled?

A. When you could have one trial court judge make a decision and then the same level trial court judge make another decision because there's no binding precedent above those two courts.

Q. If 11 cases say that manifestation between 2002 and 2012 was the law and one case goes the other way, is the law in that area unsettled if all of those are trial court decisions?

A. If they're all trial court decisions, I would say that there is an unsettled area of law because no appellate court has found in favor of the 11. You might call that a majority view, but it still could be unsettled.

Q. If the law is a majority view, would the majority view be the same as the weight of legal authority on that issue?

A. It really depends on the author of the opinion. Let's just say the one. Who is the judge, how cogent is the opinion and does it raise issues that, in the coverage area when you're trying to counsel an insurance company on coverage issues, that the insurance company should at least be cognizant of taking into

consideration before deciding I'm going to go with ten courts here, they should look at what the other opinion might have said.

Q. In September of 2011, what was the weight of legal authority as to the trigger of coverage in property damage cases -- property damage litigation in Florida?

A. In September of 2011?

Q. Yes.

A. That's before --

Q. Axis.

A. -- Judge Antoon's decision.

Q. That's 2012.

A. I think that the greater weight of published decisions at that time, the trend was in favor of a manifestation theory.

Q. In preparing for your opinions today, did you read the brief that Mid-Continent submitted to the 11th Circuit in the Carithers case?

A. No.

Q. As you sit here today, do you know whether Mid-Continent Casualty Company asked the Court to make new law in its brief to the 11th Circuit?

A. In the Carithers case?

Q. In the Carithers case.

A. I think both sides were asking the Court to

decide the issue once and for all as being brought up to the 11th.

Q. And would you agree with me that the 11th Circuit opinion in Carithers limited the holding of that case to its facts?

A. I agree.

Q. Would you agree with me that the 11th Circuit in Carithers left open the possibility of still applying the manifestation trigger under Florida law where -- in certain circumstances?

A. I have to look at the decision but I don't believe Carithers decided once and for all the law in Florida is trigger injury in fact.

Q. And so since Carithers -- let me rephrase.

Since the 11th Circuit's decision in Carithers, are you aware of any court that has held, either at the state court level or the federal court level applying Florida law, that the manifestation trigger can never be applied in a construction defect case?

A. Can I look at my stack of --

Q. Absolutely.

A. I don't think there's anything there. I need the question read back.

(The requested portion of the record was read by the court reporter.)

THE WITNESS: I'm not aware of a decision that says the manifestation trigger can never be applied in a construction defect case. I'm not aware of that being teed up. I am aware of the decision by Judge Dalton in the Travilion {phonetic} Construction versus Mid-Continent case which reiterated the injury in fact rules the most appropriate trigger theory for occurrence policies.

BY MR. KAMMER:

Q. Do you know what trigger the court applied in Travilion?

A. I believe that it went with the injury in fact trigger is more contextually consistent in that case but it found in favor of Mid-Continent. I don't -- were you on that case?

Q. (Nods head.)

A. Yeah. Okay. It didn't name a lawyer.

(Multiple speakers.)

THE WITNESS: So summary judgement was granted in favor of Mid-Continent.

BY MR. KAMMER:

Q. On the failure to allocate on the reasonableness of a consent judgement, correct?

A. Yeah, I think it had to do with the defects in the form of the judgement.

Q. And for the record, the Travilion case was decided when?

A. I think 2014. Yeah, January 2014. So was that the timeframe; was that the right timeframe?

Q. That's outside of 2012 but that's okay.

A. Okay. I thought you said any time after --

Q. Any time afterwards, yeah. But again, even in the Travilion case, I'd have to reread that case myself, there was not a definite statement by any court that manifestation could never be used in a construction defect case; fair statement?

A. No, all it did was it cited to Axis and said that cases applying the injury in fact trigger and the manifestation trigger under Florida law and concluding that the injury in fact trigger is more textually consistent with CGL policy language and has greater precedential support. So that's where -- when you asked me, I had remembered that language from that case where it's not a rejection of manifestation but it clearly adopts injury in fact.

Q. In 2014?

A. Yes, sir.

Q. Post Axis in 2012, correct?

A. Yes.

Q. Can you go to your report, Paragraph 7? I want

to ask you some questions about Paragraph 7.

A. Okay.

Q. You say, "It's normal for a carrier to defend it's insureds in a third-party complaint like that involved below in Carithers under a reservation of rights and pursue Court determination of its rights and obligations for a claim that leaves one in doubt about its obligations"; did I read this correctly -- part of this sentence correctly?

A. Yeah, except you said "third-party complaint", it says third amended --

Q. Third amended complaint. I'm sorry.

What is the basis for your opinion that is normal for a carrier to defend under a reservation of rights?

A. Well, I think we could start with the trilogy of cases, Pozzi Windows, that I just handed to you. Pozzi Windows says that. There are any number of one cases in this binder, 6, that cite to the prudent course of action for an insurance carrier is on the broader duty to defend to always try to err on the side of providing the defense under an explicit reservation that it fairly advises the insured why there might not be coverage under their policy and that it's going to reserve its rights to pursue a declaration and a

determination of no coverage. Sometimes that includes an agreement to recoup its defense fees.

There's case law, of course, that says you have to have the insured agree to that in writing. Many carriers use to just reserve and say I'll get it back. But the -- when I say it's normal for a carrier to defend its insured, that's where I have found to err on the side of the better -- the better side of valer {sic} or prudence with a carrier faced with a question about whether its obligation is triggered or not to defend under a reservation of rights. And then when the facts get developed, perhaps file a dec action.

Q. And that's based upon your experience of what's normal, correct?

A. My experience and the case law. Like I said, in Pozzi Windows the Supreme Court said exactly that.

Q. And so are you aware of any reports promulgated by the insurance industry as to how many claims are reported to the insurance industry -- third-party claims reported to the insurance industry on a yearly basis?

A. No. To what repository of information?

Q. To any repository -- to any studies like that or tests?

A. I'm not aware.

Q. Are you aware of any tests or studies by the

insurance industry as to the percentage of cases reported to the insurance industry under a CGL policy, the number of those claims that are denied as opposed to defended?

A. I don't know of any statistics like that.

Q. Are you aware of any statistics as to the cases in which a carrier denies where it also files a declaratory judgement action?

A. I don't know of statistics. I could tell you that there are a number of cases reported where that has been the case.

Q. Are you aware of any statistics as to how many claims the insurance industry instead of outright denying, defends under a reservation of rights?

A. Numbers and statistics, no. But I would look to your Siena case as a good example of what is outlined in the industry standards by the courts for what a carrier -- a prudent carrier should and does do.

Q. But we also agree that it's outlined in the courts that the mere fact that an insurer under certain circumstances does not provide a defense but simply denies a duty to defend, that in and of itself may not be bad faith, correct?

A. The denial of the duty to defend in and of itself may not be bad faith. The repercussions and what happens after that and the carrier's failure to protect

its insured can and often is bad faith.

Q. But to answer my question, the carrier can decline a duty to defend, later been found that that decision is wrong and still not be in bad faith?

A. I don't know what case you're talking about where that's happened.

Q. You're not aware of any case in Florida that says that?

A. I'm asking you. If there's one, tell me what it is. And I mean --

(Multiple speakers.)

BY MR. KAMMER:

Q. Well, I'm taking your deposition. I can answer that question but I'm not going to today.

A. Okay. Well, let me answer the question this way, it depends on the facts. I don't think you could say that a carrier that denies a duty to defend cannot and is never found in bad faith just because it denied the duty to defend. I don't agree with that.

Q. Okay. So if a carrier denies a duty to defend, is it automatic -- and it's found -- that decision is found wrong, is it automatically in bad faith?

A. No, there has to be -- the criteria would have to be met for bad faith.

Q. And what is your understanding of what those

criteria are?

A. I would have to go to the case law and give them to you. You could go to Pozzi Window and read it. I just read it a few minutes ago.

Q. Would that also be on the Laforet?

A. Yes, it's the Laforet four factors I think.

Q. Do all of those factors apply to the duty to defend?

A. No.

Q. You have Laforet --

(Multiple speakers.)

THE WITNESS: Let me just grab Pozzi because it's right there.

BY MR. KAMMER:

Q. I was going to give you Laforet.

A. Pozzi cites to Laforet.

Q. Okay. Here's Laforet. It's on -- right after Number 63 (handing).

A. Thank you. Five factors from Laforet. Okay. The first one is, "Whether the insurer was able to obtain a reservation of right to deny if a defense was provided." That has to do with a duty to defend.

Q. If a defense is provided, correct?

A. Right.

Q. Okay. What's the next factor?

A. "Efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit potential prejudice to the insureds." That is, did the carrier timely file a dec action or seek redress from the court that may have jurisdiction over the issues.

Q. Okay?

A. Third, "The substance of the coverage dispute or the weight of legal authority on the issue."

Q. We've talked about that. Next?

A. Four, "The insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage." That has to do with duty to defend.

Q. Right. And we talked about that. That's comparing the allegations of the complaint to the policies, plural in this case.

A. Well, no, it goes beyond that. When you talk about diligence and thoroughness, it's not just some claims examiner, in this case Rodgers or Boston, saying well, I've taken the complaint and I think the '08 policy applies. It's was the company diligent and thorough in looking at all of the allegations and looking at each policy on its own.

Policies are different occurrent years. They

have different coverages that are provided. And so, it's not just a matter of, as you've described -- I mean, I think you have to have diligence and thoroughness in the investigating of the facts and I did not see that in the Mid-Continent file.

Q. Other than reviewing the allegations of the complaint, what other factual investigation was required here?

A. Well, I think they could have called their insured and asked Mr. Carithers.

Q. You mean, Mr. Cronk or Mr. Duch?

A. They could have all --

Q. -- plaintiff --

(Multiple speakers.)

THE WITNESS: Well, he was at that point -- he really wasn't in the shoes yet.

MR. KAMMER: Yeah.

THE WITNESS: They could have called, obviously the contractor, the builder that the insured, found out things like when was the house CO'd, when was it finally built, investigation of that information. Because the allegation of latent defects implies that the defects were there when the Carithers took possession and purchased the home.

BY MR. KAMMER:

Q. So it's your testimony that part of their investigation should have been calling the insured and perhaps calling the claimant?

A. That happens in cases like that, sure. A prudent claims handler will call their insured and ask questions. If the allegations in the complaint are vague or ambiguous or jumbled then yes, I would expect the claims handler to call and try to get some of those facts straightened up.

Q. Do you have an understanding of whether the claim handler in this case attempted to obtain that information or not?

A. I would have to look at the chronology but I don't believe -- I know Mr. Rodgers didn't, who made the initial determination. I don't know if Ms. Boston did.

Q. What other investigation should have been done that wasn't done?

A. Well, ultimately what was learned in the case about the different damages to the balcony, to the garage, from the balcony to the tile to the mud-set, all of that information is something that could be ascertained early on.

Q. And that information, that comes from Judge Carithers trial testimony or from his deposition testimony

in this case?

A. I think it also comes out of Carithers' reported decision in the 11th.

Q. And the 11th Circuit decision was referring to Judge Carithers testimony at the trial of the coverage case?

A. His and I think there were two experts.

Q. One expert.

A. One. Okay.

Q. And do you even know whether the expert that testified at trial had been retained by Mr. and Mrs. Carithers in 2011?

A. I don't, no.

Q. And as you sit here today, if you don't know whether Mr. Carithers' would have been truthful about when he first observed the damages, if he had been asked those questions in 2011, do you?

A. No, I have no way of knowing what his answers would be.

Q. Okay. Because certainly, we would both agree that there's nothing alleged in either the amended complaint or the third amended complaint setting forth that Mr. Carithers observed the damages in 2005, correct?

A. I think it came in testimony later.

Q. So the answer to my question is correct?

A. Yes, sir. Nothing in the complaint.

Q. And there is nothing in the complaint that the damages were first observed in 2005 and were continuing in nature, correct?

A. No, there is -- again, I believe the complaint alleges enough in the words, "I took possession of the home with latent defects in '05" to have had a reasonable prudent -- and claims handler, their first charge is to check coverage.

Q. Right. We agree with that.

A. I did not see what I normally see in claims files of this type. And I testify often, as you know, for carriers in the bad faith arena. I did not see the standard insurance 101, if you will, of coverage check in this case.

Q. Can you name for me one case where a court found a duty to defend based solely upon the allegation of a latent defect applying a manifestation trigger where the complaint alleged, as it was alleged here, that the damages were first discovered in 2010 and could not have been discovered prior to that date upon reasonable inspection?

A. The only case I can cite you to is Carithers, where they ultimately found that.

Q. And the Carithers' case that we're talking about

is the 11th Circuit's decision, correct?

A. Yes, sir.

Q. Does an insurance company have to provide a defense under a reservation of rights and file a complaint for declaratory relief in order to be in good faith?

A. No.

Q. In what circumstances can an insurance company deny a defense without issuing a reservation of rights?

A. An insurance company can choose to deny a claim outright without issuing a reservation when it feels its denial is based upon the four corners of the complaint and the four corners of its policy and that there is no coverage possible that can be conferred to its named insured under the policy of insurance.

Q. And how does an insurance company -- strike that.

Would you agree with me that part of that equation is for the insurance company to make an assessment based upon the current state of the law at the time it makes that decision?

A. That's one of the factors that it has to be guided by, sometimes with or without counsel. And it's the totality of the circumstances, as you know. The test for the carrier to pass. So it's a variety of factors but one of them is trying to ascertain what the

state of the law is if it's a unique coverage issue.

Q. And based upon your experience, how does an insurance company ascertain what the state of the law is -- let me rephrase.

How does a reasonably prudent insurer ascertain what the law it?

A. They could do it at least in a couple of ways. One is they have in-house claims counsel and coverage counsel in-house that they resort to on a pretty regular basis for their claim handlers to be able to be guided by saying to them what is the law in this jurisdiction on this issue and they could get an answer that way. The second is to send it to outside counsel and ask outside counsel to do an analysis and prepare an opinion.

Q. Is it also reasonable for an insurance company to rely upon decisions it obtained regarding that issue in prior cases?

A. It's reasonable for the carrier to rely upon precedent where it has prevailed in deciding if that precedent is on an all fours application to the case being presented by their insured, yes.

Q. And how often, in your experience, is a case on all fours?

A. It's very rare.

Q. So under that standard a carrier would have to defend almost every case, right?

A. A carrier, when faced with the proposition that their decision on duty to defend could in fact be an error, in my opinion and based upon the case law that I've studied all the years I have, it's more prudent to err on the side of providing coverage to the insured under a reservation than it is to deny outright. But you could do that, you just have to be right and if you're not right then you're in trouble down the road.

Q. You'd be sued for breach of contract?

A. You'd be sued for breach of contract as well as extra contractual damages in certain circumstances.

Q. Is it also reasonable for an insurance company to rely upon services that helps it understand the law, like Law 360 is the first one that comes to my mind?

A. Yes, many claims examiners have access to that information.

Q. Is it also reasonable for an insurance company to rely upon what it learns at seminars that it attends held by third-parties, like Perrin or alike?

A. Yes, I think it's reasonably prudent for carriers to engage in those types of seminars both for its upper level people as well as its claim handlers on the lower level.

Q. And is it also reasonable for an insurance company to rely upon the advice that it may get from time to time by attorneys they hire to inform them about what the state of the law is?

A. It can be reasonable. It can also, depending on the totality of the circumstance, not be enough if that's all they're relying on.

Q. Based upon your review of the depositions in this case, you have an understanding of how Mid-Continent Casualty Company was informed of the law?

A. I did not see -- I have not read Neff's yet so I don't know if he was the one that was -- I suspect he was in charge of that but I maybe wrong. I need to read his depo.

Q. As you sit here today, do you recall Mr. Pancoast testifying about that issue or Mr. Hert testifying about that issue or Ms. Boston testifying about that issue?

A. I read all three of their summaries and I can look at the summaries and see what they said. I did not see -- strike that. I saw in each of their testimonies that the matter went to a coverage committee rather quickly both times that they had -- I think they had it assessed twice. They had it assessed with an amended complaint and then they had it assessed when a third

amended complaint came out.

Other than that, I've seen no minutes from the committee, I've seen nothing as to what the committee investigated or looked into other than the fact that what I saw in the file was they are going to use manifestation theory for trigger of coverage in CD cases and that's what they're doing. And one other thing was I saw after the fact, oversight by the Great American Company, I believe the gentleman's name was Corley, that questioned whether this course of action was prudent because they were continually asserting manifestation. And I think he raised a flag of, you know, you're running the risk of another bad manifestation case coming down in Florida and we might be better off looking at these things on a more detailed basis. At least, that's the way I read his memo.

Q. Do you remember the date of the Corley memo?

A. Was it 2014?

Q. So the Corley memo was way after the decision was made whether to provide a defense or not, correct?

A. Yeah.

Q. Going back to the provision of the defense. You just summarized the process that was used by Mid-Continent, correct?

A. Yes.

Q. The clients that you represent, can you disclose for me without waiving the attorney/client privilege how your clients determine whether there's a duty to defend? That's a yes or no answer.

MR. BOYLE: Objection to form. And I will instruct the witness, he can answer yes or no but you always have the right to explain your answer.

MR. KAMMER: I understand. I'm going to give him that right but how I phrase my next question is going to depend on what I hear.

MR. BOYLE: With all of those objections, do you need the question read again?

THE WITNESS: No, I think I can generally describe the bulk of what my clients do without revealing client confidences and secrets in a general fashion but to do specifics, I'd be invading their privilege.

BY MR. KAMMER:

Q. Okay. Let me ask you some specific questions, if I can.

Would it be fair to say that in determining the duty to defend, your clients look at the most recent iteration of the complaint?

A. Yes.

Q. Would it be fair to say that your clients also

look at the applicable policy or policies?

A. Yes, they're required to do so.

Q. Would it be fair to say that your clients also try to make a determination as to what the law is on a particular issue if that determination is required?

A. If there's a question of law or interpretation of the policy, they would. But if there is no question, that is I don't think there was any question in this case there was coverage under the '05-'06 policy for the Carithers complaint of damages.

Q. That wasn't my -- again, generally -- going back to my question.

Would part of the process being trying to determine what the applicable law is on an issue if required?

A. They wouldn't get there in this case.

Q. I'm not talking about this case.

A. Okay.

Q. I'm talking about generally.

A. Okay. So generally, the answer is if they don't have to get there to interpreting law, if they can look at the four corners of the complaint and the four corners of their policy and there is an occurrence that's covered under their policy, they don't need to go looking at law and theories of law. They need to

defend.

Q. That's why I said "if necessary".

So going back to my question, is part of the process looking and determining what the applicable law is, if necessary?

A. If it's deemed necessary that there has to be an analysis of the applicable law, yes that's part of the process.

Q. And is part of the process having the -- strike that.

As part of the process, who generally makes the initial decision as to whether a defense should or should not be provided?

A. Say that again.

Q. As part of the process at an insurance company, at what level is that decision made; whether to defend or not?

A. Oftentimes, it's made at the claim handler level.

Q. And would it be fair to say that in this case, Ms. Boston was the claim handler?

A. I don't know what Mr. Rodgers' role was except perhaps as an intake supervisor. I think he might have been her supervisor from what I could gather. He made the first determination.

Q. Mr. Rodgers has not been deposed in this case to your knowledge?

A. He has not.

Q. What's the basis of your opinion that he made the first determination?

A. His claim note.

Q. Other than the claim note, is there any other fact that you're relying upon that he made the first determination?

A. I saw nothing preceding that and he identified four policies, he identified delivery in '05 with various defects, latent and not discoverable, and then he set up -- he told the claim handler to put subsequent carriers on notice, that would be carriers after the MCC four policy period and instructed a reservation of rights, ROR, on the standard exclusions in the policy.

Q. Okay. Anything else from the initial claim note?

A. I'd have to go to the actual note itself. This is a summary in my chronology but that's what I recall.

Q. Generally, based from your clients, is the decision not to defend made, after it's made by the claim handler, reviewed?

A. Yes.

Q. And based upon your experience, generally speaking, who reviews the decision by the claim handler?

A. It can be a number of sources or people in the industry.

Q. In the company, you mean?

A. In the company.

Q. And that decision could be reviewed by the claims supervisor in the branch office?

A. Correct.

Q. And in some instances, that's where the review stops based upon your experience, correct?

A. I'm trying to think if -- I've represented many carriers over the 37 years.

Q. As have I.

A. I'm sure there are cases where it has stopped at the claims supervisor level. Yes, sir.

Q. And sometimes it's reviewed not only by the claims supervisor but by the manager in that office, correct?

A. Yes, sir.

Q. And then after it's reviewed by the claims supervisor and manager, it stops there, correct?

A. It can.

Q. And then on other occasions, it's reviewed by someone in a home office capacity?

A. Yes.

Q. As you sit here today, do any of your clients have a system in place in determining the duty to defend where no one person can make that decision but yet, it has to be reviewed by a claim handler, a manager, a supervisor, someone in the home office and by a committee?

A. I believe that most carriers that I have worked with over the years, in particular the last 20, require more than just one person making the decision.

Q. And if a carrier has a procedure in place that has more than one person reviewing that decision, is that a proper procedure as you understand it in the insurance industry?

A. It's a sound procedure for the insurance industry. Yes, sir.

Q. And even under that sound procedure, sometimes an insurance company can get it wrong?

A. Sure.

MR. KAMMER: I need to take a break.

(A break was taken.)

BY MR. KAMMER:

Q. Page 6 of your report, Doug.

A. Got it.

Q. The last part of Number 12 says, "In particular when fact-intensive discovery will be needed to establish

on trigger theory over another"; did I read that part of the sentence correctly?

A. Yes.

Q. What is the basis of your statement that a fact-intensive discovery -- strike that.

Is your reference to a fact-intensive discovery will be needed to establish one trigger theory over another pertaining to the duty to defend, the duty to indemnify or both?

A. I believe it's both.

Q. Okay. When is a fact-intensive discovery required to determine the duty to defend to establish a manifestation trigger over another trigger?

A. I think you could look at this case and something I just read in Mr. Neff's {sic} deposition in fact, in your cross-examination of him, it wasn't until later in the discovery that they realized that the defects being complained of existed in the home in 2005 when it was sold to the Carithers.

Q. Is it your opinion in this case that in order to determine whether a duty to defend is owed that discovery needs to be taken to determine when the damages were first discovered or discoverable?

A. You're treading on the law that says extrinsic facts are not to be referred to when determining the

duty to defend so that there's new opinions out that suggest it's okay to go outside the four corners. It's a recent case in Florida. I can't remember the name of it because I'm not good with names but it's recent. But it's not my opinion that fact-intensive discovery was needed for this company to determine whether it should and did have a duty to defend its insured by virtue of the allegations of the complaint.

Q. What is your understanding of law when an insurer can properly go outside the four corners of the complaint to determine a duty to defend?

A. When there's an ambiguity that could only be resolved by reference to extrinsic facts.

Q. Anything else?

A. I'd have to pull the decision.

Q. Do you remember the name of the case?

A. No, but I could ask one of my associates on a break.

Q. Do you remember how many years or months ago that case --

A. It's months.

Q. Is it your opinion in this case that Mid-Continent had to contact its insured to determine if they knew when the Carithers first discovered the damages?

A. No.

Q. Is it your opinion in this case that Mid-Continent had to contact Mr. or Mrs. Carithers to determine when they first saw the damages in order to determine whether it had the duty to defend?

A. My opinion is what?

Q. Is it your opinion that Mid-Continent had to contact Mr. or Mrs. Carithers before it disclaimed coverage on a manifestation trigger to obtain their testimony as to when they first discovered?

A. No, I don't have that opinion. I think if they had done that, they wouldn't have denied.

Q. But were they required to do that?

A. They were not required to go outside the four corners of their complaint and their policy but they should have applied either of the four theories of trigger to see if there was coverage under any one of the four theories. If there's coverage under any one of the four theories then in my opinion, they should have defended the case.

Q. As you sit here today and as of August and December of 2011, is there a single Florida case that applied the exposure theory to a property damage case?

A. I'm not suggesting that there was cases doing the other two theories. What I'm saying is, a carrier needs to look at any theory that exists for potential

coverage when it's deciding it's duty to defend on the four corners analysis.

Q. And if the carrier looks at all -- whether we call it two, three and four, okay. Does it have to look at all four in making its determination in its duty to defend or is it allowed to look at what it believes is the prevailing law at the time?

A. It's a totality of the circumstances test. And the way that I understand the law and the industry custom and practice is you don't rest on one theory to the exclusion of others that also might provide coverage, if there is a theory that provides coverage, you cover, defend and then pursue remedies if you think you're entitled to remedies.

Q. But you would agree with me that the Laforet case talks about the weight of legal authority, correct?

A. That's the third or fourth of the five standards. Yes, sir.

Q. So going back to Number 12, what -- I just want to make sure I understand your report.

Is it your opinion that no fact-intensive discovery was needed to be undertaken in this case by Mid-Continent in order to determine whether it had or did not have a duty to defend in this case?

A. When you say "fact-intensive discovery", are

you talking about actual discovery in the litigation process?

Q. I'm reading your report.

A. Okay. Then take me there.

Q. I asked you the question -- let's go back.

I said I looked at your -- I said, "In particular when fact-intensive discovery will be needed to establish one trigger theory over another."

A. Right.

Q. Then I asked you, does that pertain to the duty to defend or the duty to indemnify and you said both, right?

A. I said it can be both. Yes, sir.

Q. My question now, in this case, did Mid-Continent have to undertake any fact-intensive discovery to establish one trigger theory over another to determine its duty to defend?

A. I don't believe it did. No, sir.

Q. You don't believe it did do that or was it required?

A. I don't believe it was required to do that in this instance. I believe it was evident on the four corners of the Carithers' complaint that a theory of trigger to it, injury in fact, applied or could be applied to the complaint and they should have defended

the case under Trizec and it's progeny.

Q. Number 13. In the last five years, how many nonwaiver agreements have you entered into?

A. I don't know.

Q. More or less than five?

A. In the last five years?

Q. Yes.

A. More than five.

Q. Were the nonwaiver agreements in third-party cases?

A. Yes, and in first-party, both.

Q. Which carriers have you represented that entered into a written nonwaiver agreement, if you can tell me that without disclosing attorney/client privilege?

A. I can't do that without disclosing attorney/client privilege.

Q. Did any of the written nonwaiver agreements involve insurance coverage for a construction defect claim?

A. Sitting here, I can't remember all of the nonwaiver agreements that I have counselled and assisted carriers in entering in the past five years so I really can't answer your question.

Q. Do you have any reported decisions involving insurance coverage in the construction defect arena; you,

personally?

A. I can't remember if Simon Roofing versus American Guarantee was -- it wasn't a construction defect per se, but that was a while back. Other than that, I don't know.

Q. Do you have any reported decisions involving bad faith other than the Mid-Continent case that we talked about previously? I forgot to ask you that follow-up question.

A. I don't believe so. No, sir. Except in cases where I was the expert, which there are many.

Q. Are you aware of any authority where an insurer denied a defense, did not file a complaint for declaratory relief to firmly establish the position being reserved upon and was later found to be in bad faith solely because it did not offer a defense under a reservation of rights?

A. I can't say sitting here if I'm aware of a case of that nature or not.

Q. One of your other opinions is the timing of the payments that were made in this case by Mid-Continent. I want to go to that area if I can, just by way of background. We're now on Number 15.

MR. KAMMER: I want to mark the next two exhibits. Mark, for the record, Exhibit 10 is a typical first-party CGL policy -- ISO policy. And

11 is the --

MR. BOYLE: Are those the materials you've given me through --

MR. KAMMER: Yes.

MR. BOYLE: One's a commercial property.

MR. KAMMER: That's correct.

MR. BOYLE: It's a CP.

MR. KAMMER: And the other is a CG 00 01 12 04. I will represent that the CGL portion is from one of the Mid-Continent policies issued to one or more of the Cronk Duch entities.

MR. BOYLE: Do you know what year or it doesn't matter?

MR. KAMMER: It doesn't matter because they use the same form I believe in all of them.

MR. BOYLE: So you think they're all in force?

MR. KAMMER: For the purpose of this question, it really doesn't make a difference because --

MR. BOYLE: Okay.

THE WITNESS: Okay. So is 11 is the CG 00 01 form that's found in the Mid-Continent policies and 10 is a commercial property insurance ISO form.

(Defendant's Exhibit Number 10, Commercial Property Insurance ISO Form, was marked for identification.)

(Defendant's Exhibit Number 11, CG 00 01 12 04, was marked for identification.)

BY MR. KAMMER:

Q. Right. Are you familiar with the form I've showed you as Exhibit 10?

A. I'm sure I've seen it over my years of practice. I'm not fluent with it.

Q. Does part of your coverage practice involve first-party insurance coverage disputes?

A. Some of it does. I have a different division that's run by others to handle that but predominately.

Q. What percentage of your practice at the current time involves first-party insurance coverage?

A. Me, Douglas McIntosh?

Q. Yes.

A. It's probably less than five percent.

Q. Are you familiar with the payment provisions in a commercial property policy of when an insurer is obligated to make a payment under that policy?

A. I would have to look at the policy form. I know there's language that specifies...

Q. Can I help you?

A. (Handing).

Q. Helping you out, Page 11 of 16. It talks about options that a carrier has to make payment?

A. Yes.
Q. Would you agree with me those options to make payment are not present in a CG 00 01 form?
A. Yes.
Q. Would you agree with me that the law as to when a first-party insurer has to pay is different than when a third-party insurer has to pay?
A. Yes.
Q. If you take a look at Exhibit 11, the insuring agreement, "We will pay those sums that the insured becomes legally obligated to pay as damages"; did I read that correctly?
A. Yes, sir.
Q. What is your understanding of what "legally obligated to pay" means?
A. It means what it says. That is, when the insured is legally obligated. That can be by binding settlement agreement, it can be by arbitration award, it can be by judgement.
Q. Those are the three ways they could be legally obligated to pay?
A. Yeah.
Q. And I agree with you, by the way.
A. I mean, maybe in some instances there's pre-suit processes like in 558 where appraisals are --

(Multiple speakers.)
BY MR. KAMMER:
Q. Well, an appraisal is not a --
A. Not in 558.
Q. 558. Okay. But the 558 process would lead to a settlement though?
A. Normally, yeah.
Q. Thanks. I haven't thought of it that way but I agree with you.
So in Number 15 you say, "Once MCC litigated its manifestation trigger theory to the United States District Court and the 11th Circuit of Appeals and lost on that issue, MCC had a clear obligation to settle the claim by its insureds and their assignees and failed to do so. This constituted a breach of MCC's good faith obligations under its policy of insurance"; did I read that correctly?
A. That's what's written. Yes, sir.
Q. And that's still your opinion today?
A. I think I might change it to that they had a clear obligation to attempt to settle a claim.
Q. Okay. So they litigated the manifestation theory to the USDC; that would be the United States District Court?
A. Yes.
Q. And that would have been Judge Magnuson in this

case, correct?

A. Yes.

Q. And is it your opinion that Mid-Continent had an obligation to try to settle the case after Judge Magnuson issued his opinion?

MR. BOYLE: Objection to form.

MR. KAMMER: What's wrong with the form?

MR. BOYLE: You used the word "obligation".

MR. KAMMER: I used the term "obligation" because that's in his report.

THE WITNESS: Right.

MR. KAMMER: Okay. Just so you understand.

BY MR. KAMMER:

Q. You may answer the question.

A. I think they have an obligation to attempt to settle the case even while pursuing their appellate rights.

Q. In this case, after Judge Magnuson issued his opinion and before the amended final judgement was entered, did Mid-Continent make any settlement offers?

A. I have to look at the timing. I know there were settlement offers made and I'm just not sure at what point relative to Judge Magnuson's decision that happened.

Q. You have a timeline that you could refresh your

memory?

A. Yeah, what was the date of Magnuson's decision?

Q. His initial decision from the trial court was in 2014. I don't remember the exact date.

MR. BOYLE: Are you talking about the trial or the duty to defend determination? They're both that year.

MR. KAMMER: I was talking about the trial.

THE WITNESS: So the Court found that Maryland Casualty had a duty to defend on December 5, 2013.

BY MR. KAMMER:

Q. You meant Mid-Continent?

A. What did I say?

Q. You said "Maryland Casualty".

A. It's because it's MCC. They use the same --

Q. I knew exactly why you did that.

A. They use the same abbreviation for Maryland Casualty, sorry.

Q. But you're doing it less and less though?

A. Yeah. They found that Mid-Continent had a duty to defend in 2013. The final order from Judge Magnuson is 2/10 of '14.

Q. Are you aware that Mid-Continent during -- from the time of Judge -- a little bit of a different question.

From the time of Judge Magnuson's summary judgement order on manifestation and the amended final judgement that multiple settlement offers were made by Mid-Continent?

MR. BOYLE: I'll let him answer the question and then I want to raise the issue that I wanted to raise.

THE WITNESS: Okay. I saw indications in the depositions as well as in the timeline that the plaintiff made demands during that timeframe, $250,000 I believe, and there was reference to a counter offer of $150,000. But I was unclear because it was conveyed via the mediator -- George Bresher {phonetic} I think was the mediator. And I did not see, because it would have been in the context of a mediation, the actual offer but I assume that to be correct.

And then there was a -- the 11th always has their court ordered mediations with that nice lady, Beth her name is, and there was a reduced offer made then.

MR. KAMMER: Okay. What was the point, Mark?

MR. BOYLE: He already spoke about the mediation. I was going to say, I assume for the purpose of this question you're waiving his right

to talk about what happened in mediation.

MR. KAMMER: That's an interesting question, Mark. The case law on that issue -- the short answer to your question is yes, if necessary.

MR. BOYLE: I think there's one recent case that says because the parties are the same, the privilege doesn't apply in the EC case --

(Multiple speakers.)

MR. BOYLE: There's a Southern District of Florida, I want to say.

MR. KAMMER: I think there's two cases now that say that and subject to that --

MR. BOYLE: I only know the one.

MR. KAMMER: Okay. I'll send you the other one. I don't remember as I sit here today, Mark, whether it's a Southern District case. I think one of them --

MR. BOYLE: I don't remember which district but they're federal trial courts --

MR. KAMMER: I agree with you that there's two federal court decisions about whether the mediation privilege applies. We have not briefed that issue here but I think for the sake of --

MR. BOYLE: Just to let you know, we're going to take -- if it helps you in terms of framing your

questions to him, we're going to take the position that's all relative and admissible so you may inquire with that in mind.

MR. KAMMER: Okay. And I don't think we're going to --

(Multiple speakers.)

MR. KAMMER: I don't think that's going to be an issue because I want those to be in and I don't think -- the 150, I'm not even sure it was in the context of the mediation or not. It might have started in the mediation process but I'm not sure if it was.

MR. BOYLE: You and I discussed this on the record once over but my impression is actually it was at least a pre- or post-mediation follow-up or something like that but it is what it is.

MR. KAMMER: It is what it is. I think our record is unclear on that.

BY MR. KAMMER:

Q. So going back. So you would agree with me that you are aware of at least of two settlement offers that were made by MCC during the relevant time period although they were unsuccessful; agreed so far?

A. I was aware of the one settlement offer and then the appellate offer of a reduced judgement from 150

to 75.

Q. So that would be two?

A. Yes, sir.

Q. Okay. Other than making those offers, you said, "MCC had a clear obligation to settle the claim by its insureds and their assignees and failed to do so"; did I read that correctly?

A. Well, what I said before was I would modify that to be a clear obligation to attempt to settle the claim.

Q. So you want to amend your report to say "attempt to settle the claim"?

A. Yes, they had an obligation to attempt to settle.

Q. And its way that the carrier attempts to settle the claim is to make a settlement offer, correct?

A. Yes.

Q. And when -- and other than those -- making a settlement offer, how else does an insurance company attempt to make that -- to attempt settlement?

A. It has to been a reasonable settlement offer and it has to be tied to the actual exposure. And I utilized in my opinion, the notes by Mr. Corley and Mr. Renneckar in the file found at MCC 2406 B and MCC 2407 B, where both of those gentleman, Mr. Corley and

then from Renneckar back to Corley, expressed that Mr. Corley was questioning the settlement strategy, he didn't understand how the MCC arrived at the $150,000 offer and wasn't going to simply reoffer that money. And the response back was essentially, the plaintiffs will have to win at trial and any judgement will have to be affirmed by an appellate court until they paid more. They were going to stick with what they thought was a fair evaluation and not increase the 150.

Q. Do you have an opinion as you sit here today what a reasonable settlement offer would have been at the time Mid-Continent offered $150,000?

A. I think it would have had to have contemplated the awarded fees that were sure to follow.

Q. Do you have an opinion as to what the amount of that reasonable settlement offer would be?

A. Yeah, it would have to have been in excess of $200,000, maybe closer to 3.

Q. Even though the demand was 250 at the time?

A. Yes, sir.

Q. When the $250,000 settlement offer was made, would you agree with me that if the Court adopted a manifestation trigger or if Mr. Warren lost all of the issues on what constituted property damage, Mr. Warren would have recovered no fees?

A. Yes.
Q. Would you agree with me that --
A. Well, wait, you're saying he would have lost the duty to defend as well?
Q. Correct.
A. Okay. Yes.
Q. Would you agree with me that -- you've testified as an attorneys fee expert?
A. I have.
Q. Would you consider yourself generally familiar with the law involving attorneys fees?
A. Yes, sir.
Q. And attorneys fees awarded in the fee shifting context?
A. Yes.
Q. Would you agree with me that under 11th Circuit case law that the Court when in determining attorneys fees has the discretion not to award fees on an issue that a lawyer litigates but loses?
A. I think that's a fair recitation of the federal law. I think it differs a little bit with state law.
Q. But the federal -- the coverage case was pending in Federal Court?
A. It was, yes.

Q. When Mr. Warren made his demand of $250,000, do you know what fees he incurred as of that date?

A. Only in retrospect from the amount of fees that were awarded by the trial court at a later date. I don't know what they were at that moment in time.

Q. Do you know -- would you agree with me that when Mr. Warren was demanding $250,000 that his client -- he was also seeking 100 percent or it was still possible for Mr. Carithers to obtain 100 percent of the damage award or about $100,000?

A. I don't understand your question. The 250 encompassed the 100 in damages?

Q. Yeah, that's another way of saying it.

A. Yes.

Q. And would you agree with me that at the end of the process, Judge Carithers did not obtain approximately $100,000 but substantially less?

A. He did, yes.

Q. Have you seen any evidence that at the time the $250,000 demand was made that the case could have been settled for anything less than that?

A. I believe I read in Mr. Carithers' testimony that if a certain amount of money would have been offered early on, he would have --

Q. Early on. I'm talking about when the $250,000

demand was made that Mr. Carithers and Mrs. Carithers would have accepted a penny less than 250; have you seen anything in this record?

A. I think that -- I was confused by the testimony about that. I'm not sure the $150,000 offer was completely conveyed to Judge Carithers based upon the testimony that I read but I'm unclear about that.

Q. You read Mr. Warren's testimony?

A. I did read Mr. Warren's, yes.

Q. Was there any doubt in Mr. Warren's testimony that $150,000 offer was made?

A. I think he stated that he conveyed that but without proof of that fact in his file.

Q. But you would agree with me that Mr. Warren believed that Mid-Continent made $150,000 settlement offer to settle this case regardless of whether Mr. Warren communicated that or not, correct?

A. Yes, I think Mr. Warren was clear about that that he recalled that offer being made.

Q. Number 12. You say, "In 2011, the state of the law for theories on triggers of coverage for construction-related defects and damages claims (sometimes referred to in the industry as 'rip and tear' litigation) was unsettled in Florida as well as in other states around the country," and we've talked about the other part.

There seems to be a mistake here.

Are you claiming in 2011 that the damage for rip and tear litigation was unsettled? Because I've never heard of trigger sometimes being referred to as "rip and tear litigation". That's the quandary I have in your report.

A. I'm not referring to "triggers" as rip and tear litigation. I'm referring there to construction-related defects and damages claims as rip and tear litigation.

Q. Okay. Again, you say that -- we've talked about trigger of coverage being unsettled. We're not going to go over that again.

But I want to make sure, do you have an opinion as to whether rip and tear law was unsettled in Florida in 2011?

A. When did J.S.U.B. come out?

Q. J.S.U.B. is not a rip and tear case.

A. I know. I'm just looking for a date.

MR. BOYLE: December 20, 2007 at the Florida Supreme Court. March of 2005 at the District Court level.

THE WITNESS: Okay. I would have to look in my cases. It seems to me that there were still differences of opinion on -- and the reason I asked

about J.S.U.B. was because that attempted to give some clarification to the construction defect claims that were out there.

BY MR. KAMMER:

Q. Prior --

A. Go ahead.

Q. I'm sorry, I thought you were done. I apologize.

A. I lost my train of thought.

Q. Before the 11th Circuit's opinion of Carithers, are you aware of any case that found that there was coverage for defective work that had to be removed and/or replaced in order to repair damage caused by defective work in Florida?

A. I'm not aware of any sitting here today. There could be, I don't know.

Q. Are you aware of any case in Florida where an insurance company was found to be in bad faith for failing to pay an element of damages where the Court clarified the law on a particular issue?

A. The question is vague to me.

Q. Let me rephrase.

Are you aware of any Florida case finding an insurer was in bad faith where the Court clarified an area of law on a particular issue?

A. I'm having so much trouble with your question. I think in every case when a court finds bad faith when below it was contested that there was no bad faith, the Court clarifies the issue and says it was bad faith or it wasn't bad faith.

Q. Let me -- I understand the problem with my question so let me try again.

In this particular case, if the Court found -- strike that.

In Carithers, if the Court clarified what was rip and tear damages under Florida law, can an insurance company be held in bad faith where the Court clarified what is and what is not rip and tear; in other words, a questionable area of the law?

A. I think if it's a fair question, that's -- we're talking about indemnification duties here?

Q. Correct.

A. I don't think it could be found in bad faith for its failure to indemnify under that circumstance. The question about whether it should have defended is a different question.

Q. So in this particular case, are you generally familiar with the facts of what preceded in the coverage litigation between the time of the 11th Circuit's opinion and when the Court issued its amended final judgement?

MR. BOYLE: Objection to form.
MR. KAMMER: What's wrong with the form?
MR. BOYLE: I don't even understand what you're asking.
MR. KAMMER: Strike that. I'll be more specific.
BY MR. KAMMER:
Q. You would agree with me that the 11th Circuit remanded the case back to the trial court to make a determination or what was and was not coverage damages?
A. Yes.
Q. Would you agree with me that Judge Magnuson invited letter briefs from counsel on that issue?
A. I don't recall that but I think the issue was briefed for the court.
Q. In rendering any of your opinions here today, did you look at any of the letter briefs?
A. I don't have a recall of having done so no.
MR. KAMMER: Let me see if I can refresh your recollection. I'm going to mark as the next Composite Exhibit 12.
(Defendant's Composite Exhibit Number 12, Letters, were marked for identification.)
BY MR. KAMMER:
Q. This is Composite Exhibit 12. Can you take a

look at that for me, Doug, and see if you've reviewed any of those letters?

A. I don't recall the amended judgement in a civil case attached to this packet. I do recall the letters back and forth between the Litchfield Cavo Firm and Mr. Warren.

Q. Would you agree with me that the letters that I've attached as Composite Exhibit 12 are letters written by either Litchfield Cavo or Mr. Warren to Judge Magnuson; correct so far?

A. Yes.

Q. Would you further agree with me that those letters expose at least three different damage amounts that the Judge should award; two by Mr. Warren and one by Litchfield Cavo?

A. Yes, they had different numbers in them.

Q. And would you further agree that the Judge did not award any of those numbers but chose different numbers in his amended final judgement?

A. I don't have it in front of me but I seem to recall that he came close to the one number in Mr. Warren's letter but there was a difference. I attributed it to an interest calculation.

Q. And if you read those letters, there was also a dispute among the parties on how to calculate interest,

correct?

A. Right, there was an interest issue.

Q. Are you aware in this case that Mr. Warren on June 30, 2015 served a civil remedy notice?

A. I am.

(Defendant's Exhibit Number 13, Civil Remedy Notice, was marked for identification.)

BY MR. KAMMER:

Q. Before I get to that, Doug, I may have asked you this question before but we talked about the law regarding completed operations hazard and ongoing operations hazard; do you remember that?

A. A little bit, yeah.

Q. And I think I asked you this question, if I did, I apologize.

Do you consider the law in that area to be settled or unsettled in Florida?

MR. BOYLE: You did ask him, but you could answer anyway.

THE WITNESS: I'm not sure much has settled in Florida to be honest with you.

BY MR. KAMMER:

Q. Are you currently involved in any litigation other than that one case that had that confidential settlement involving additional insured status in Florida

involving the completed operations or ongoing operations AI?

A. I don't know.

Q. Have you ever -- again, you may not be able to answer this question.

Have you ever advised a carrier to disclaim coverage on the basis that its additional insured was not an insured because it was either a completed or ongoing operations hazard?

A. I would say the answer to that question -- it's hard for me to recall every case that I've had dealing with that issue, Ron, but knowing me and the way I approach these cases, I rather doubt that I told a carrier to disclaim.

MR. BOYLE: For the record so the Judge understands, the deponent and the person asking the questions know each other and are friendly through cases other than this case. There has been a lot of first names exchanged.

THE WITNESS: Sorry.

MR. KAMMER: Yeah. By the way, I don't think we need to apologize for that.

MR. BOYLE: I don't either. I don't want the Judge to think either one of you is being blithe or disrespectful.

MR. KAMMER: I appreciate that and I think that comment is well taken. Obviously, everyone in this room knows each other very well and I think we could all be a little bit informal. Obviously, in the courtroom we won't be able to.

MR. BOYLE: This was not a critique of the informality. It was really just for the Judge and/or his clerks who get to review this.

MR. KAMMER: Mark, well said and I appreciate the comment.

BY MR. KAMMER:

Q. Are you aware of any clients that you currently represent that deny a duty to defend to an additional insured based upon whether it's either a completed operations hazard or an ongoing operations hazard?

A. I mean, I'd have to answer that question yes, I think that I've seen that happen.

Q. And where you've had a client that has denied based upon a completed operations hazard -- strike that.

In those cases where you've had a client that denied a duty to defend based upon a completed operations hazard or an ongoing operations hazard, is any of that an act of litigation?

A. I don't think so, possible.

Q. Are any in litigation that has concluded with an

entry of a judgement one way or the other on the duty to defend?

A. I can't recall sitting here if that's the case or not.

Q. Have any of those cases involved a subsequent bad faith action based upon the duty to defend?

A. I would say yes. That's probably where I got involved.

Q. And is that the case we talked about earlier?

A. No.

Q. What other case are we talking about?

A. These aren't reported decisions or in the public records so I can't disclose what they are. They're cases that have been resolved without need of litigation.

Q. And in those cases, were you defending the carrier that denied the duty to defend based --

A. Yes, sir. I'm sorry, I didn't let you finish.

Q. And I think you said those cases have resolved?

A. Yes, sir.

Q. Did they resolve pursuant to confidential settlements?

A. Yes, sir.

Q. Did any resolve without confidential settlement?

A. No.

Q. So in any of those cases -- you're probably not going to be able to answer this question -- involve a payment of an extra contractual expense?

A. I can't answer.

Q. In any of those cases, did you take any positions in writing that the carrier was not in bad faith for having denied the duty to defend?

A. I'm not sure sitting here if I did or did not.

Q. So going back to the civil remedy notice -- I got sidetracked.

That civil remedy notice was served while the issue of what the amount of -- strike that.

Would you agree with me that the civil remedy notice was served and accepted by the department while Judge Magnuson was still considering the amount of the amended final judgement?

A. I believe that timeline is correct.

Q. Would you agree with me that shortly after Judge Magnuson entered his amended final judgement that Mid-Continent paid the amount of that final judgement including all post-judgement interest?

A. Yes, I believe they paid within a few days of the amended judgement in the civil case.

Q. Number 16 of your opinion says, "Once MCC received the civil remedy notice, it was obligated to cure

its prior inferior claims practices, and pay the sums it clearly owed to the Carithers' loss within 60 days of the CRN. MCC failed to do so, again breaching its good faith obligations under its policy issued to its insureds"; did I read that correctly?

A. Yes.

Q. Is there a particular reason why in Number 16 you used the word "policy" singular?

A. Because it failed to recognize it's obligations under the '05-'06 policy period.

Q. Okay. Would you agree with me that Number 16 doesn't refer to the '05-'06 policy?

A. No, but that's the policy that was in play.

Q. Okay. When you said that it was obligated, "it" being MCC, "to cure its prior inferior claims practices"; do you see that?

A. Yes.

Q. What prior inferior claims practices are you referring to in Paragraph 16 of your report?

A. I'm referring to the claims practice violations that were cited in the CRN.

Q. Okay.

A. Let me finish.

Q. I'm sorry, I thought you were.

A. No. Failing to adopt and implement standards

for the proper investigation of claims, failing to acknowledge and act promptly upon communications with respect to claims, denying claims without conducting original investigations, failing to promptly notify the insured of any additional information necessary for processing of the claim. Those are all out of 626 and 624 of the Florida Statutes.

And then perhaps equally important, if not more importantly, Mr. Catizone's reply that he filed electronically failed to acknowledge in any way that its claims practices -- all he did was continue his denials that had already been determined. He just continued MCC's denial of coverage not being in bad faith. He continued reiterating the issues. He doesn't say anything about the judgement needs to be -- is not complete and we're ready to pay when we have to because we know we were wrong.

Q. Are you sure about that?

A. Yeah, he says -- the appellate court accepted one or more of MCC's coverage defenses is correct, resulting in a reduction. But he doesn't acknowledge that they found that he had -- that MCC had a duty to defend.

Q. You would agree with me that his response says, "To date, the District Court has not issued a ruling as to

the new determination of damages. Until the Court enters a judgement, MCC has no obligation to pay any amount to the Carithers"; did I read that correctly?

A. Yes, you read that correctly. He's wrong.

Q. Why is he wrong?

A. Because he has to make an attempt in good faith to settle when he could and should have done so -- when the carrier could and should have done so had it made an attempt to do so.

Q. The civil remedy notice lays out a number of things. The first was "Not attempting in good faith to settle claims when, under all of the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for her or his interest." That's number one.

A. Yes.

Q. We've talked about that issue and I think we've talked about that two settlement offers were made and that you did not feel that the $150,000 offer was reasonable under the circumstances.

Other than that testimony, are there any other basis for your opinions in this case that Mid-Continent did not attempt in good faith to settle claims, et cetera?

A. Yes, at the very inception of the claim, Mid-Continent failed to acknowledge that it had a policy

year that was triggered, could have been triggered by the complaint and that provided coverage to the Cronk Duch entities for the at least part of the claims of the Carithers. They failed to act fairly and honestly towards their insured by not going through that examination and not discussing that with their insured, instead relying upon putting all of their marbles in the manifestation pot under the latest policy year issued to their insured.

Q. Would you agree with me that Mid-Continent issued a reservation of rights letter to its insured in this case?

A. Well, that's an interesting question because -- you're talking about Ms. Boston's letter?

Q. Yes. Did they issue a reservation of rights letter?

A. I don't think it was a reservation of rights letter. It used the terminology "reservation of rights" but it denied the claim. So I don't consider her letter to be a reservation of rights. No, sir.

Q. Did she issue two denial letters?

A. She issued two denial letters but coupled it with a reservation of rights letter. And when you read her claim file, it's very confusing. And in addition with her deposition testimony, it's very confusing what

she meant to write and what she was instructed to right from her supervisor's perspective. They use the phrase "D.T.D letter", they use the phrase, "Set up with ROR".

When you're in the industry, as we all have been, and I've read thousands of claim notes like that. When you say draft the duty to defend letter, you're referring to -- you're going to tender a defense and especially when it's coupled with the letters "ROR", you're going to defend under reservation of rights. They did not do that.

Q. Is it your opinion that Ms. Boston initially wanted to defend this case and was instructed by her supervisor and others to not defend and issue a denial letter; is that your opinion?

A. I think -- that's not what her testimony says.

Q. I understand that.

A. But I think that the claim notes fairly read can be construed to be she was confused and she says she sent an ROR and then later, it goes to committee and they agree with her denying the claim. And she says in her 9/9/11 note, "In the meanwhile, we'll draft duty to defend."

Now I read her testimony where she said, what I meant by that was a denial letter. I believe that's what she testified to. No? You're looking confused.

Q. I'm not confused. Keep going.
A. Okay. I'm wrong?
Q. Her deposition testimony will stand for itself.
A. Okay. Well, when she writes in her claims note, "In the meanwhile, we're draft duty to defend". And then the next note from Mr. Rodgers goes straight to "complaint, the allege is manifested in 2010, the last policy was in '08" and then they changed the occurrent state from '07 to '08, they clearly were only focussed on the '08 policy and they failed to accommodate and the '05-'06 policy and the fact, as later accepted by an appellate court, that the damages occurred during that policy period.
Q. And the appellate court was relying upon contradicted testimony at trial, correct?
A. Contradict or uncontradicted, I know it relied upon testimony at trial, yes.
Q. Other than what you testified to, any other basis for not attempting in good faith to settle claims?
A. When they had the second chance to revisit this again and to look at coverage fresh, they once again failed to -- "they", meaning Ms. Boston, her supervisor and the claims committee comprised of very high up persons in the business from what I read in the depositions -- failed to look at the '05-'06 policy

period and the allegations that triggered coverage during that year.

Q. And again, we're talking about the allegation of the latent defect, correct?

A. Yes, sir.

Q. Anything else?

A. Their denial letter was a mixed bag, as I said before. She denied the claim and then she purported to reserve her rights. The two don't equate.

Q. So in your practice, you've never seen a denial letter that has denied for certain reasons and reserved rights on others; you've never seen that?

A. No, I've seen that. That's not the way her letter read though.

Q. That's not how you believe her letter read, correct?

A. The way I read her letter and the way it's written is she's denying the claim and then in the next sentence she says, we have to reserve our rights and goes into the issues concerning denial of the claim. We could pull her letter up and look at it, if you want.

Q. I think it's in here. Here's the December 22nd letter (handing).

Where does that letter mention reservation of rights on the same page where it says that it's denying?

A. At Page 8.

Q. Okay.

A. She goes through and cites before that, in the seven pages preceding that, many of the endorsements to the policy. One of which is 2294, which isn't in the '05-'06 policy for damage to your work by subcontractors on your behalf. On Page 8, she says, "The above analysis constitutes Mid-Continent's best effort to inform you of all of the factors of which we are currently aware that preclude our ultimate responsibility to defend or indemnify you for any allegations made by the claimant in this case. In some, Mid-Continent reserves its rights not to indemnify Cronk Duch, Holdings to the extent made does not allege an occurrence."

That makes no sense. You're either denying or you're reversing your rights not to indemnify. Those two sentences, in my opinion, don't go together in a denial letter. Then she goes onto say, "Further, Mid-Continent reserves the right to rely on other policy definitions." Now, I have no problem with that. In a denial letter, we often have as a last paragraph or a closing paragraph -- essentially, if we haven't relied on a certain section of the policy and it later comes into play, we're reserving our rights to later rely on

that section at a later time. That's standard and that's approved and that's prudent. But when she wrote it this way, she's saying, we don't have any responsibility to indemnify you but we reserve our rights not to indemnify you. It makes no sense.

Q. You've reviewed the depositions of Mr. Cronk and Mr. Duch?

A. I'm not sure that I have those.

Q. So as you sit here today, you don't know one way or the other whether they were confused at all as to whether a defense was going to be provided or not, correct?

A. I don't think they were confused they weren't going to get a defense because they didn't get one. Nobody hired a lawyer for them.

Q. Anything else we haven't talked about the failure to settle? I think last point goes to defense rather than settlement.

Anything else on the failure to settle?

A. I think that Mid-Continent had an obligation once the appellate court ruled the way it did on the duty to defend. It knew that it was going to owe some indemnity and I just didn't see any attempts while -- you know, the CRN had a 60-day window for it, for them to legitimately approach and try to get this thing done.

Q. Let's talk about that for a little bit.

We're now at the time period from the date of the CRN to the 60 days; are you with me on the time period?

A. Yes, sir.

Q. Based upon -- strike that.

In this case, how much money should Mid-Continent have offered in that 60-day period?

A. I don't have an opinion on how much money should have been offered, I only have an opinion that an offer should have been made.

Q. So hypothetically speaking, let's say Mid-Continent made an offer of -- strike that.

An offer should have been made or a payment should have been made?

A. Well, we had two components to the judgement. You had some fixed numbers, attorneys fees with interest calculated upon it and they went ahead and paid those items. That was outside of the 60 days because 6/25 was the CRN and 8/28 was the payment. But I didn't see anything in between where they made an effort to attempt to settle and correct their claim practices.

Q. But going back to my question, hypothetically, Mid-Continent pays $30,000 -- strike that.

In order to cure the CRN, they have to make

payment, correct?

A. If there's monetary damages alleged in the CRN, correct.

Q. Was there monetary damages alleged in the CRN?

A. I don't remember.

Q. There is. Take a look at Page --

A. Do you have the exhibit? I don't.

Q. I'm sorry, I do have the exhibit. $91,572.

A. Yeah. Right, they hadn't paid anything to that date despite the fact that there was a judgement that was rendered.

Q. Okay. Hypothetical question --

A. Or offered to pay.

Q. In this case, if Mid-Continent had paid $30,000 to Judge Carithers for his damages and the Court awarded less than that, which was the case here, would it be your opinion that at that point Mid-Continent would have to go and get the overage back from the plaintiff?

A. If they paid the money?

Q. Yes. They have to pay to cure, right?

A. They have to pay to cure when it's a fixed sum, yes.

Q. Was there a fixed sum in this case?

A. No, it was subject to appeal. There was a fixed sum in a judgement but it was not a final

judgement, in the sense that appellate review could still be undertaken.

Q. Or in this case, trial review could still be undertaken as to what the amount of the final judgement would be?

A. On remand, yes.

Q. And when you have the amended final judgement entered, that's when there's a legal obligation to pay, correct?

A. Yes.

Q. So going back to my question, during the 60-day period, is it your opinion that Mid-Continent Casualty Company should have tendered, IE paid money, to Mr. and Mrs. Carithers even though no final judgement or amended final judgement had been entered?

A. I would like to look at Mr. Neff's adjustments to the reserves four days after the civil remedy notice to be able to answer that completely. That's first, I would like to read Mr. Neff's deposition. Second, if that issue was addressed.

Q. I'm embarrassed to tell you that I don't recall one way or the other whether that was addressed at Mr. Neff's deposition or not. It may have been. I don't recall. And the sad thing is, I reviewed his deposition in preparing for your deposition and I still don't recall.

A. I haven't had a chance to read it so --
Q. I understand that.
A. -- I don't know if I could answer your question.
Q. And I don't remember how the case was reserved at this late date.
A. Right. You know, there were corrections to the civil remedy notice that were made by Mr. Warren --
Q. Correct. Because the civil remedy notice was inaccurate. Keep going.
MR. BOYLE: Was that a question? I move to strike. That was not a question.
THE WITNESS: Let's just say, Mr. Catizone threw his --
BY MR. KAMMER:
Q. I'll stop you right there.
A. They had some differences in opinion about what the CRN needed to say. It was amended. And then Mid-Continent responded on August the 11th, and their response did not offer to pay any money.
Q. They referred back to the fact that the case was remanded pending the entry of an amended final judgement?
A. Yes, Mr. Catizone referred to the fact that there were still proceedings ongoing.
(Defendant's Exhibit Number 14, McIntosh,

Sawran & Cartava, P.A. Article, was marked for identification.)

BY MR. KAMMER:

Q. Mr. McIntosh, I pulled off your firm's website an article that was authored by the firm, of which you're the first named partner, "Florida Supreme Court Issues Far-Reaching Bad Faith Opinion in Harvey Versus GEICO."

Was this written by you?

A. Yes.

Q. In the last paragraph you say, "Florida courts are now faced with a potential avalanche of 'contrived bad faith claims' where the hindsight testimony of claimants, policyholders and their counsel can be used to provide evidence of 'what would have happened' if a certain fact or issue was made known to them in the claims handling process"; did I read that right?

A. Yes.

Q. And you obviously would not have written it and posted it on your firm's website if you didn't believe that, correct?

A. Right. Now, I said I wrote it, there was a committee that also went through it but I believe that was mine.

Q. Okay. And it wouldn't be on your firm's website unless you believed that statement?

A. Right.

Q. In your experience, have you had a civil remedy -- have you, on behalf of a client, had to respond to a civil remedy notice in a third-party context where a case had been remanded for the entry of an amended final judgement but where the final judgement had not been entered into before the end of the 60-day period?

A. I can't remember if that was the case -- if I've had that happen.

Q. Okay. Are you aware of a single case in Florida that has addressed that issue?

A. The issue of whether someone needs to pay before a final judgement is entered?

Q. Let me rephrase. That's a fair comment.

Are you aware of any case which is addressed how an insurance company cures a civil remedy notice where the CRN is served before the entry of an amended final judgement, as was the case here?

A. First of all, there are not a lot of reported decisions, at least that I'm sitting here aware of right now, about civil remedy notices and compliance with or not compliance with. But there are many cases that are resolved within the 60 days of the filing of a civil remedy notice where the case has not proceeded to final judgement and in fact final judgement doesn't happen for

years after the civil remedy notice.

Q. I agree with that but my question was very specific.

Are you aware of any Florida decision where an insurance company was held to be in bad faith where the CRN was served while the Court was still considering -- or a case had been remanded back so that the Court could enter an amended final judgement in a case that would determine an amount that was actually owed?

A. You mean where -- the reported decision you're saying that I might be aware of says that the company could be in bad faith for waiting for that to happen?

Q. Yes.

A. No, I'm not aware of such.

Q. Are you aware of any treatise or other type of learning authority that -- where an author has said that an insurance company in a third-party context is in bad faith where a civil remedy notice is served but where the amended final judgement is not entered until after the 60-day period?

A. I can't speak to a specific decision. Although, I can say there are decisions where if the carrier refuses to correct its prior claims practices and it refuses -- for example, once it received this decision, has MCC gone back and corrected all of the

many denials that it may have made under manifestation that should not be paid?

Q. That's not an issue in this case.

A. Well, it could very well be in the sense of under a civil remedy notice, if it's made aware that its claims practices were inferior and were not proper then maybe it does have an obligation to go back and examine how many times it denied claims on straight up manifestation and for later policy procedures, pushing it into later policy years, when it should have been undertaking the analysis under its occurrent year for the damages in question. But I may have gone afield there so I apologize if I did.

Q. Right. That's not an issue in the case that we presently have. At least, not currently.

So again, going back to my question because I don't think you've answered it yet. Are you aware of any treatise or similar type of authority in insurance coverage or bad faith which has found or espoused that an insurance company is in bad faith when a CRN is served and they're waiting for an amended final judgement to come down before paying that amended final judgement?

A. I'm not aware of a case.

Q. And in fact, based upon your experience in the third-party context, insurance companies wait until an

amended final judgement comes down in cases that are tried before they do pay; that's commonplace, correct?

A. That's normally the way it works. Yes, sir. If there's a component to the judgement that's fixed and there may be another component to the judgement that has to be determined then I've also seen and I believe the obligation is to pay the fixed amount so that it doesn't have to accrue interest and the person gets the money that they're entitled to.

Q. In the third-party context, you've seen that?

A. Yes, sir.

Q. Okay. And is there a particular policy provision that triggers that obligation or is the payment made on occasion by insurance companies in order to simply cutoff interest?

A. It's twofold, I think. One benefit is to cutoff interest, that benefits the carrier. The other benefit is to put the money into the hands of the aggrieved party, which the carrier has an obligation to do. So they're mitigating the exposure to that, whether it's a third-party or their own insured, they're mitigating the continued exposure by getting rid of that exposure. Here, we're going to give you the money on the uncontested part of the judgement, we'll pay you when the contested part of the judgement gets worked

out.

Q. Are you aware of a single reported case in Florida in the third-party context where an insurer was held in bad faith by not making such a payment?

A. No.

MR. KAMMER: Can we take a break?

THE WITNESS: Yes.

(A break was taken.)

BY MR. KAMMER:

Q. Is it your opinion that Mid-Continent failed to adopt and implement standards for the proper investigation of claims? I didn't see that in your report so --

A. Yeah, I'm looking to see if --

(Multiple speakers.)

BY MR. KAMMER:

Q. I presume if it's not in your report then you have no opinion, right?

A. Well, I don't have an opinion that it didn't implement standards for the adjustment of claims. I do have an opinion that it did not follow the standards -- strike that.

It had a process in place that I think is reasonable in the industry. That is, review by a claims handler, oversight review and then committee review. What I think and what my opinion is is that that was

formality and they didn't pay attention to and look at the substance. They were doing form over substance.

They were putting it through the riggers of the procedure without actually focussing on, we have four policies, let's start with policy one, let's go to policy two, let's go to policy three and let's go to policy four. Instead, they went straight into manifestation pool, straight into policy four, put it in the last year and denied coverage based on that.

Q. I did not see this in your report. Is it safe to assume that you have no opinions regarding misrepresentation of any facts or insurance policy provisions?

A. The only opinion I have is that which is in here and that is that in the denial letter -- let me just look at it to make sure I'm correct. Yeah, she referenced the '08 to early 10/6/08 termination of the CGL form, policy 8330, in the last four letters.

Q. Right. And you're looking at the initial denial letter?

A. Right. And then she goes on -- this is the December 22, 2011 denial.

Q. And that letter references all four policies, correct?

A. She goes onto Page 2 to recognize that four

policies were issued, yes.

Q. And not to belabor the point but 2010 is after 2008?

A. Sure.

Q. And after 2007?

A. So what?

Q. After 2006?

A. Yeah.

Q. And after 2005?

A. Sure.

MR. BOYLE: We stipulate.

MR. KAMMER: Good.

BY MR. KAMMER:

Q. Anything else on the misrepresentation of pertinent facts or insurance policy provisions that we haven't talked about?

A. The reference on Page 8 of her letter to 2294 is a misrepresentation to the insured because that 2294 did not appear in the --

(Multiple speakers.)

BY MR. KAMMER:

Q. In the first policy.

Okay. Did Mid-Continent disclaim a duty to defend based on the 2294; based upon the testimony you've reviewed in this case?

A. What they said on Page 8 was it may not be covered damage.

Q. Going back, as you sit here today, are you aware of any letter received from Cronk Duch or its counsel that Mid-Continent did not respond to; acknowledge and promptly respond to?

A. I'm not aware of any.

Q. As you sit here today, are you aware of any verbal communications that Mid-Continent received from either Cronk Duch or its counsel that it did not promptly respond to?

A. Sitting here today, I'm not aware of one.

Q. As you sit here today, other than what you've previously testified to, is there any other basis for your opinions that Mid-Continent did not conduct a reasonable investigation?

A. Just what I've already told you.

Q. As you sit here today, do you have any evidence that Mid-Continent failed to promptly notify the insured of any additional information necessary for the processing of a claim?

A. I lost you there.

Q. As you sit here today, are you aware -- strike that.

Did Mid-Continent fail to notify the insured of

any additional information necessary for the processing of the claim?

A. I don't know of any.

Q. I want to make sure I understood your prior testimony.

You have no opinion as to how much Mid-Continent should have paid to the Carithers between the date of the CRN and the amended final judgement being entered, correct?

A. I don't have an opinion as to the exact amount. I have an opinion that it could have been calculated and paid.

Q. Did you do that calculation yourself?

A. No, but I could.

Q. And if you're calculation -- strike that.

In your practice, have you ever made a settlement payment and tried to recover some or a portion -- some or all payment back from a claimant?

A. I'd have to say over 37 years the answer to that is yes.

Q. And in any of those instances where that has happened to you, were you able to recover 100 percent of the money that was paid?

A. I don't remember. I'm sure I've made recoveries in such a setting, yes.

Q. And there were sometimes where you haven't made recoveries in such a setting?

A. Sure.

Q. Because after you pay the money to a claimant, sometimes the money's spent?

A. For sure.

Q. Okay. And that's perhaps a reason why it's the custom and practice in the industry to wait for an amended final judgement before making a payment?

MR. BOYLE: Objection to form.

MR. KAMMER: You may answer.

THE WITNESS: One reason is so that you don't underpay or overpay, yes.

BY MR. KAMMER:

Q. Before the entry of the amended final judgement, do you have an opinion as to the amount MCC clearly owed to Cronk Duch and to Mr. Carithers pursuant to the assignment?

A. I'd have to look at the amended final judgement to be able to answer that.

Q. So as you sit here today, you have no opinion as to that amount, correct?

A. No.

Q. That's correct?

A. Only that there was an amount that it was

going to clearly owe and it could have been calculated.

Q. And that is your opinion, even though Mr. Warren calculated two different amounts, Mr. Catizone or his colleagues calculated a third amount and the Court entered a fourth amount; that's still your opinion?

A. My opinion is that there could have been discussions and a number could have been arrived at. Yes, sir.

(A discussion was held off the record.)

MR. BOYLE: I stipulate that if the Judge allows furtherer proceedings, you'll be allowed to reexamine the expert or whatever other experts we use on the pattern and practice issues.

BY MR. KAMMER:

Q. Other than reviewing Mr. Neff's deposition, do you have any current plans to do any additional work on this case and to prepare for trial testimony if needed?

A. They only thing I will do is read whatever counsel sends to me. I understand that there's a deposition tomorrow so I expect that I'll be asked to read that. I have to read Mr. Neff's deposition and that's about it.

Q. Page 8 of your report.

A. Yes, sir.

Q. "Documents Reviewed", I just want to make sure

that -- there's five bullet points of the documents that you reviewed. So at the time that you prepared your report, there was a confidentiality agreement in order. The amended complaint with exhibits, would that be the amended complaint in this case?

A. Yes, it's a docket entry in this --

Q. Just making sure. "Documents produced by Mid-Continent", that was -- and that Bates number range, correct?

A. Yes, sir.

Q. You read the 11th Circuit's opinion in Carithers versus Mid-Continent Casualty Company?

A. Yes, sir.

Q. And you read the summary judgement in Carithers versus Mid-Continent; did I read that correctly?

A. Yeah, I probably meant the order.

Q. Okay. So that's the summary judgement order rather than someone's brief on that issue; that's the best of your recollection?

A. Yes, sir.

Q. At the time you rendered your initial report, had you done any of the research found in Exhibit 6?

A. No.

Q. At the time you rendered your report, had the timeline, that's I think contained in Exhibit 8, been

prepared?

A. No, sir. I'm sorry, this chronology?

Q. Yes.

A. No, yeah. My chronology, this is an evolving document but some form of it was available to me when I did my report, yes.

Q. Going to Exhibit 8 -- and I'm almost finished.

These are documents that you selected to place in that folder?

A. Yes.

Q. And how did a document get selected by you to be in that folder; would those be key documents?

A. They were documents that when I went back through my chronology, instead of just looking at the general description, I wanted to see the document itself so I asked my assistant to grab them.

Q. When would the documents that are contained in Exhibit 8 put in that folder?

A. Sometime in the last month.

Q. And how about the documents contained in Exhibit 7, same thing?

A. No, 7 was to the best of my recollection before me preparing my expert report.

Q. So just for the record, 7 was put together by you before you prepared your expert report and 8 was in

the last month, right?

A. Yes, sir.

Q. Now we talked about this order; do you remember that testimony?

A. Yes.

Q. There are two -- I don't know what you want to call it, Post-it notes, whatever they are, you see the flags?

A. Yes.

Q. Were those flags put on Judge Magnuson's order by you?

A. Yes.

Q. Why were the flags put in those two places?

A. I figured you'd ask me about those two areas, which you have.

Q. So I take it by your prior testimony that you disagree with Judge Magnuson's statement in his order that had the manifestation trigger applied, Mid-Continent would not have a duty to defend; fair statement?

A. I'm not sure that I agree or disagree with that except to say that that's dicta and I don't think he was holding that or finding that in his decision in the duty to defend category. He says -- he's concluded because there is no dispute that the damage was not manifest until two years after the Mid-Continent policy

expired. I think that's a wrong statement of the law and the word "manifest", which Judge Antoon clearly pointed out and clarified for the bar.

Q. In 2012?

A. Yes, sir.

Q. If the case is not in Exhibit 6, is it fair to say that you haven't reviewed the case?

A. A case law report?

Q. Yes.

A. No, that's not fair. I mean, I read cases every day in my practice but...

Q. Are you aware of any other trigger of coverage cases decided by Judge Magnuson before his decisions in 2013 referenced in his 2014 order?

A. I think there's two or --

Q. There's not.

A. None in here?

Q. No. Trust me, I looked for it twice.

A. So he's not rendered any decisions before those?

Q. No, I'm not telling you that either.

A. Oh. I don't know, to answer your question.

MR. KAMMER: I have nothing else.

CROSS-EXAMINATION

BY MR. BOYLE:

Q. Counsel asked you some questions about whether you have an adjusting license. Do you have to have a license to adjust claims in Florida if you're an attorney?

A. No.

Q. Is there a statutory exception for lawyers to adjust claims without a license?

A. Yes, there is.

Q. Have you been asked to adjust claims, high-value claims, for insurers?

A. Many, many times over the last 25 years plus.

Q. Have some of those included defective construction claims?

A. Yes.

Q. For bodily injury?

A. Yes.

Q. Some property damage?

A. Yes.

Q. This would be a property damage claim?

A. Yes.

Q. The one you're here about today?

A. I have adjusted large claims, window claims.

Q. Counsel asked you if you had any published decisions about -- he used the term "CD", I think.

The Zurich Southern Owners case you had is a CD case involving bodily injury, it's a construction --

A. Yeah.
Q. Correct?
A. That's right.
Q. It's not a property damage claim?
A. It's not a PD case, no.
Q. Now he asked about published opinions, this is kind of a good segway to this area.

Do most insurance disputes, first- or third-party, make their way to an published opinion?
A. No.
Q. Let's talk about some of the ways they get resolved. We talked about some of this earlier in the deposition -- you did with Mr. Kammer.

Most claims get resolved before lawyers even get involved, correct?
A. That's correct.
Q. So there's an insurance policy where the insurance company has accepted risk?
A. Yes.
Q. The insurer's made aware of a claim?
A. Correct.
Q. There's a claims professional, usually called an adjuster, that evaluates the facts and compares it to the risk accepted in the policy?
A. Correct.

Q. And either on a duty to defend or a duty to indemnify, those claims can and are frequently handled without the intervention of the legal process, whatever?

A. Yes, that's fair to say.

Q. Do you have a sense in a construction defect context how high that percentage is; whether it's very high or very low?

MR. KAMMER: Object. Asked and answered.

THE WITNESS: I have a sense that most of your property damage claims in the construction defect arena, especially first-party, are reserved on a high level of a number of claims versus those that make it to litigation.

BY MR. BOYLE:

Q. I'll be more specific. The Carithers' claim, where you have about a hundred thousand dollars of property damage in dispute. Do most of those claims get resolved at the adjustment stage; do they even get into suit?

MR. KAMMER: Form.

THE WITNESS: It's very rare for a claim of that little to go into suit.

BY MR. BOYLE:

Q. Okay. Now let's assume such a claim such as the Carithers' claim gets into suit and it's being defended by

an insurer under a reservation of rights. Do such claims usually make it to judgement even in the underlying construction case?

MR. KAMMER: Form.

THE WITNESS: The statistics are 99 percent of all cases settle in the system now. It used to be 97, it's now up to 99. So the answer to your question is, 99 percent of those cases settle.

BY MR. BOYLE:

Q. There were a whole series of questions asked to you about when you do or don't pay a judgement on appeal so I want to now switch to the coverage litigation. You already answered some questions about the underlying construction on --

If you get into a coverage litigation, do those cases typically make it all the way to judgement most of the time or do they settle?

A. Those cases also, like most, are subject to mediation and most times do settle.

Q. Okay. And even if a party takes an appeal, do those cases have to go all the way to appellate final opinion all of the time or can they settle on appeal as well?

A. They can and they do settle on appeal.

Q. Frequently?

A. Frequently.

Q. Even if the appeals {sic} court enters a final opinion on what should happen and remands it to the trial court, do you have to go all the way to a final judgement or can cases settle between the time of the appellate opinion and the time you go back to the Court for whatever remand has been issued?

A. Cases can and I believe carriers have an obligation to approach whether in fact settlements can be achieved rather than drawing it out in the manner that you've described.

Q. Counsel asked you, by my count, it was 14 questions with the following lead-in language, I may be paraphrasing but it's pretty close, "Are you aware of any Florida case that has held", and then he gave some hypotheticals about -- that he wanted you to fill in an answer to the question.

Are you aware of any Florida case that holds that you can't be in bad faith unless there is an exact set of circumstances similar to yours where another carrier has already been found to be in bad faith?

A. No.

MR. KAMMER: Form.

BY MR. BOYLE:

Q. Is that the way bad faith works?

MR. KAMMER: Form.
THE WITNESS: No.
BY MR. BOYLE:
Q. You talked about the totality in the circumstances test. What's the totality in the circumstances test?
A. The totality in the circumstances test derives from the Florida case law and it requires a carrier to engage in an investigation and to measure all of the facts and circumstances that are present surrounding a claim when it makes a decision whether, in the first instance, to defend its insured and in the second instance, to protect its insured by offering a settlement where the reasonably prudent person would do so under all of the circumstances.
Q. So under the totality of the circumstances test, can a carrier be in bad faith even if there's never been an exact set of facts that's the same as the one where they're denying the claim?
MR. KAMMER: Form.
THE WITNESS: Sure. I mean, that's how precedent gets established.
BY MR. BOYLE:
Q. Otherwise no one would ever have been in bad faith, right?

MR. KAMMER: Form.

BY MR. BOYLE:

Q. Someone would have to do it first?

A. Someone has to go first.

Q. Have you audited claims for insurance companies?

A. Yes, sir.

Q. What's the process -- tell the Judge and maybe the jury, I suppose, what auditing claims for insurance companies means.

A. When I'm asked to audit a claim for a carrier, I start with the basics to the claim. I start with the insuring agreement, the policy that's been issued. I then look at the claims file and what has been presented to the company as far as presentation of a claim, whether formally with counsel or without. I then look at the actions of the claim handler and the company above the claim handler to see if it has met its obligations under Florida law to fairly and honestly adjust the claim with all due regard and interest of the insured in mind and whether it attempted to resolve the case where a reasonably prudent person would resolve the claim when presented with all of the circumstances of the claim.

The audit involves looking at, many times it's electronic notes these days, but the claims notes of the

adjuster that are made contemporaneous with their file handling activity, the supervisor's review. I always look for the supervisor or some sort of oversight for someone's actions. And then, in my completion of the audit, I provide an opinion to the carrier, whether in my opinion, based upon my experience in this area and doing this for the many years that I have, the company met or surpassed its obligations under Florida law in its handling of the claim.

Q. How do you end up auditing a claim file; does some government flunky from -- order you to go do this or are you invited to do this by the insurers in question?

A. I have audited files both at policyholder requests, when they've hired me to go do it. But nine times out of ten, the insurance company and someone high up in an AVP position of the company hires my services. AVP meaning, Assistant Vice President.

Q. Have you audited claim files for construction defect claims?

A. I have.

Q. The coverage committee in this case, are you aware of any testimony in the record in this case that discussed whether or not any notes or record was kept of the coverage committee?

A. I looked for that and I found somewhat to my

chagrin that they did not keep notes.

Q. You said somewhat to your chagrin, why do you say that?

A. I have represented insurance carriers for the predominance of my career and I can't say in any instance, except here, that I have not seen some memorandum or capture of the claims committee review who was in attendance when it occurred and how the case was presented by -- normally, it's a file handler that's invited to participate, whether it's by phone or in person.

Q. Mr. Kammer asked you a series of question about in a third-party case when you settle. Do you remember him asking like, when do you pay, or do you wait for an appeal to be complete; do you remember a series of questions about that?

A. Yes, sir.

Q. Is this case a classic third-party case because of -- I'll withdraw that question.

Are you aware that this -- a coverage case was filed based on a stipulating vouching judgement, what we in Florida call a Coblentz agreement?

A. Yes.

Q. What's a COB agreement?

A. A Coblentz agreement is an agreement that's

named after the 5th U.S. Circuit Court of Appeals case that came out of Florida which allows an insured who has abandoned, as that term is defined, in the case law by its carrier and left to its own devices to enter into a consent judgement with an adverse party and assign -- you normally assign its rights to recovery of that judgement under the policy of insurance that the carrier who abandoned the insured wrote for that insured and the agreement is set up so that the insured does not get harmed by the effect of the judgement. That is, it usually is not able to be executed upon and the only source of recovery would be the carrier.

Q. Is that what happened between Judge Carithers and Cronk Duch in the underlying cases; is that how it settled?

A. Yes. At a mediation, I believe they came up and agreed to a Coblentz agreement.

MR. KAMMER: Just note my objection to the form of the last question. I'm not sure that Coblentz agreement is a settlement but either here nor there.

MR. BOYLE: As opposed to a judgement, you mean?

MR. KAMMER: Yeah.

MR. BOYLE: Okay.

BY MR. BOYLE:

Q. So when Judge Carithers is pursuing his assigned rights from Cronk Duch against Mid-Continent, is it really a third-party claim anymore completely?

MR. KAMMER: Form.

THE WITNESS: One of the features of Coblentz is that the third-party, that is the victim if you will, the person who's been harmed by the insured in some way, steps into the shoes of the insured and has the same rights as the insured has under the policy of insurance. So it takes on the flavor, if you will, of a first-party claim.

BY MR. BOYLE:

Q. Counsel asked you some -- in your case law binder, I think you have a copy of -- it's actually Judge Magnuson's decision in the Borin Craig {phonetic} --

MR. KAMMER: I don't think it's there. If I, missed it, I missed it.

(Multiple speakers.)

THE WITNESS: Right here (handing).

MR. KAMMER: I apologize. It's there.

BY MR. BOYLE:

Q. So Judge Magnuson, can you read the citation of the Borin Craig decision? It finally made it's way to Westlaw after all of these years.

A. Yeah, it's 2009 WL 106 70 850.

Q. Does -- is Mid-Continent one of the litigants in that case?

A. Yes, represented by --

Q. Ronald Kammer.

Did Judge Magnuson -- and to be clear since dates were important. Mr. Kammer wanted to prove that 2005 was before 2006, which I agree the dates in this case are important.

What's the date of this opinion?

A. February 19, 2009.

Q. Does Judge Magnuson make any findings about whether the duty to defend is controlled by the injury in fact trigger or not or make any reference to that -- forget whether or not he makes any findings.

Does he make any reference to that?

A. I remember reading under the trigger theory -- let me see. Yeah, he comments that, "Although Trizec adopts the injury in fact theory, that case dealt only with an insurers duty to defend, it's inapplicable to the question of the duty to indemnify." And then he said that, "The Auto-Owners Court was aware of Trizec when it held Florida law, used the manifestation trigger theory. The Middle District of Florida has since followed Auto-Owners and the Court will follow suit."

Q. So would you agree that that opinion at least places Mid-Continent on notice that the injury in fact trigger may well be applicable to the duty to defend?

MR. KAMMER: Form.

THE WITNESS: Yeah. This is one of the cases that I put in my folder because as you could see, I wrote "manifestation" on here but I highlighted that section of the decision because it did show that Mid-Continent was involved in a piece of litigation where it was pointed out to them that injury in fact could govern the question of duty to defend.

BY MR. BOYLE:

Q. That case predates the tender of defense by Cronk Duch or any of the underlying complaints; does it not?

A. Yes, I believe it's almost by two years.

Q. Just so the jury understands how the court system works, in case this is read to a jury -- so the jury has heard about the 11th Circuit and federal district courts.

Generally, tell the jury how the federal court system is arranged and what the relationship is between district courts and the appellate court in the 11th Circuit.

A. So the federal court system is comprised of trial courts, which are the United States District Court trial level courthouses. In Florida, there are three districts; the Southern, the Middle and the Northern District comprising the United States District Court trial level. Each of those courts are subject to appellate oversight by the 11th US Circuit Court of Appeals, which is based in Atlanta and they have the oversight and ability to overturn or overrule decisions of the US District Court trial level decisions.

Q. So in terms of the weight you would give authority if there's competing case law versions, do you, as a practitioner, weigh the appellate decisions from the 11th Circuit more than the trial court decisions?

MR. KAMMER: Form.

BY MR. BOYLE:

Q. At the district court?

MR. KAMMER: Objection to form.

THE WITNESS: Yes, as lawyers when we're analyzing an issue for a client, if they're -- let's say there's five or ten decisions in the US District Court, trial decisions, each split, they can be what's called persuasive precedent to their sister court, to the other trial court, but it's not binding precedent. The 11th Circuit Court of

Appeals decision on those issues is binding precedent so you would look to the 11th Circuit decisions, when you can, to be able to adjudge which issues are going to be determinative.

BY MR. BOYLE:

Q. So this Trizec decision that both you've spoken about and is referenced in some of these cases, is this a construction case involving property damage?

A. Yes, it was a construction contractor sued against it's insurers for coverage for negligence and breach of contract for construction of a shopping mall.

Q. And it's from 1985?

A. '85.

Q. My senior year of high school.

A. 11th US Circuit Court of Appeals, 1985. Yes, sir.

Q. And did that case adopt the injury in fact trigger for the duty to defend as you read it?

MR. KAMMER: Form. You may answer.

MR. BOYLE: Can I ask what the form is?

MR. KAMMER: That's not what the case holds.

BY MR. BOYLE:

Q. Can you tell the jury -- I'll withdraw my question.

What, if anything, you think this case holds

relative to the trigger of coverage for the duty to defend in a construction defect property damage, CDL claim?

MR. KAMMER: Form.

THE WITNESS: The Trizec case has been cited in almost every opinion we've talked about today as the 11th Circuit precedent that holds the injury in fact trigger of coverage for a construction defect claim. That's the way I understand it.

BY MR. BOYLE:

Q. And do you understand that the 11th Circuit believed that was the holding in its own case as a result of Footnote 13 in the Boardman Petroleum case?

MR. KAMMER: Objection to form.

THE WITNESS: Yes, the footnote in the Boardman decision, which is a 1998 11th Circuit case, indicates that courts applying Florida law have rejected the manifestation trigger of coverage approach in favor of an approach under Trizec applying Florida law.

BY MR. BOYLE:

Q. And the last case I want to ask you about, in my office we jokingly call this case the battle of the Lumbermens'.

Can you read the style of that case and the citation for the Judge and the jury?

A. Yes, this case is out of Fourth District Court of Appeal, which is a State intermediate appellate court that sits over the trial courts here in Broward County or Palm Beach and this is a 2010 decision where one of the carriers elected not to provide a defense or participate in settlement of the case.

MR. KAMMER: One of the Lumbermens'.

THE WITNESS: Yeah, one of the Lumbermens'. I think it was in Pennsylvania.

BY MR. BOYLE:

Q. Would you agree that that case, much to the consternation probably of everyone, did not decide the trigger of coverage in a CD latent defect case?

MR. KAMMER: Form. You may answer.

THE WITNESS: The Court did not take that up as I read the decision.

BY MR. BOYLE:

Q. Does that opinion tell you anything about the state of the law -- I'll withdraw the question.

Does the Pennsylvania Lumbermens versus Indiana Lumbermens decision in your mind show that the trigger issue wasn't resolved as it relates to injury in fact versus manifestation as of the date of the opinion?

MR. KAMMER: Objection to the form of the question.

THE WITNESS: From the Fourth District Court of Appeals position, Judge Taylor wrote the decision it was not.

BY MR. BOYLE:

Q. I know you looked at more than just the cases we ran through in this deposition. Based on your experience as a lawyer in this field, was there at least some doubt about which trigger would apply in a latent defect CD case in a CGL context at the times that Mid-Continent determined not to defend Cronk Duch in this case?

MR. KAMMER: Form.

THE WITNESS: I could say with certainty that in 2010 there was a split and it was undecided in the State of Florida whether, and to what extent, injury in fact or manifestation triggers would apply to CD cases. And I had several cases that I worked on during that time where that issue was involved.

BY MR. BOYLE:

Q. Should Mid-Continent have defended Cronk Duch from the underlying case?

MR. KAMMER: Objection. Asked and answered. Form.

THE WITNESS: There's no question in my mind that the prudent course of action for a carrier

acting reasonably and responsibly to its insured, in this instance Cronk Duch, should have defended the claim, issued a reservation of rights clarifying it's position on whether damages were manifest at one time or another, known at one time or another or discovered at one time or another and not left it's insured to its own devices and having to enter into a consent judgement and a Coblentz agreement.

BY MR. BOYLE:

Q. We've talked generically about the defend but tell me how the defend really works in a context like this. Does the -- how does the case actually get defended if an insurer defends? If say, Mid-Continent stepped in to defend Cronk Duch in this case; what do they do?

MR. KAMMER: Form. Outside the scope.

THE WITNESS: Under the insuring agreement, the carrier, once the insureds paid premium, is reposed with the obligation to defend its insured and it must provide a full and complete defense to its insured including hiring counsel, competent counsel -- it has an obligation to hire competent counsel to defend its insured in the proceedings and to afford, by way of payment of defense costs, the necessary moneys to pay for that defense,

including expert fees, investigative fees, discovery fees, court reporters and the like.

BY MR. BOYLE:

Q. You said "full and complete", I want to make sure the Judge and the jury understand what that means. In a case like where some of the claims may be covered and some of the claims may not, does the carrier's duty to defend include the entire cost of the defense in investigation that you just set forth?

MR. KAMMER: Form.

THE WITNESS: Yes, Florida law is well settled, as is most other states, that even if only one of many counts in the complaint are covered and the others are not covered, the carrier has the obligation to defend the entire action.

BY MR. BOYLE:

Q. Is defending -- strike that.

Does your firm also defend some defective construction claims?

A. Yes.

Q. Are you familiar with the types of costs -- strike that.

As to a claim of this size, has your firm historically defended claims of this size?

MR. KAMMER: Objection. Outside the scope.

THE WITNESS: Of a $100,000 construction defect, yes we've had those size cases.

BY MR. BOYLE:

Q. Is it inexpensive to defend these cases?

MR. KAMMER: Form. Outside the scope.

THE WITNESS: In fact, many times the defense cost, we have to budget these cases for the carriers and sometimes, I won't say many, sometimes defense cost will exceed the exposure, the estimated defense costs. They get expensive.

BY MR. BOYLE:

Q. Cases of this size -- I already asked this question. Let me go back through my notes.

MR. BOYLE: I have no furtherer questions for the witness at this time.

MR. KAMMER: A couple of quick follow-ups.

REDIRECT EXAMINATION

BY MR. KAMMER:

Q. In response to questions, Mark asked you if you had adjusted claims for insurers; do you recall that testimony?

A. Yes, sir.

Q. Have you ever adjusted a claim for an insurer in the CD context regarding whether it did or did not have a duty to defend; CD property damage context and whether it

did or did not have a duty to defend?

A. I'm misunderstanding your use of the word "adjust". When I testified before that I've adjusted claims for carriers, I have actually been hired to and stepped in for the claims handlers adjusted the claim for the carrier executing its good faith obligations under Florida law.

Q. And those are claims in which the insurers already picked up a defense?

A. No, not necessarily. There may not be anything to defend. It still could be just a claim.

Q. When was the last time you stepped into the arena to adjust a claim for an insurer?

A. I do it every week in my practice.

Q. Do any of those cases -- have you ever been called upon in any of those cases whether the carrier should or should not provide a defense?

A. I have.

Q. And how many times?

A. Over what length of time?

Q. In the last year, how many times?

A. Probably eight.

Q. Did any of those involve a construction defect property damage claim?

A. Probably not. Probably most of them were

bodily injury claims.

Q. And typically, when you're adjusting claims in your capacity, is that to evaluate what the potential value of the claim may be?

A. When we're using the term "adjustment of claims", Mr. Kammer, I want to make sure we're working on the same page, it's not the same as being hired to consult with and analyze a claim. Sometimes, as you know, we're asked to oversight defense counsel who are defending the claim and make sure their analysis is sound. Sometimes we're asked to look at the claims handling and give an opinion. I'm talking more in the sense of when we were talking about being a licensed adjuster, I have acted and do act as an adjuster in claims and actually frontline handle the negotiation, the adjustment and the settlement of the claim for the company.

Q. Including determining what matters should be investigated and not investigated?

A. Yes.

Q. And sometimes you do that for primary carriers?

A. I have. Yes, sir.

Q. And also, oversight role for an excess carrier?

A. I have acted for excess carriers. Yes, sir.

Q. And when you've done it in those roles, it's to

-- primarily to determine liability versus no liability, correct?

A. That's one component of the analysis.

Q. And whether settlement offers should be made or not made, correct?

A. That goes to the damages function of the adjustment.

Q. So you're adjusting claims that the insurance company felt was a covered claim?

A. No, because you left out the first step. I will always also look at coverage to beginning with and make sure their coverage determination was sound.

Q. Okay. But after that coverage determination, making sure that it was sound, then it becomes to adjusting issues such as liability and damages?

A. Yes, sir.

Q. And where you've made those coverage determinations to see whether it was sound or not, in the last year you do not recall any involving construction defect property damage claims, correct?

A. To be honest and as clear as possible, I'd have to go through a case list for the last year to see if any involved a CD property damage claim. I'm sure there has been a property damage claim, whether it was a construction defect I don't know.

Q. Can you give me a number without guessing as to the number of claims you have adjusted, as you've use the term here, involving construction defect property damage claims in the last five years?

A. It's a true guesstimate, but it's over a dozen.

Q. A dozen claims?

A. Yes.

Q. For how many different carriers?

A. Two or three.

Q. Can you name those carriers without disclosing the attorney/client privilege?

A. No, because they weren't in litigation. I didn't appear of record.

Q. Did any of those claims involve a situation where the carrier was accused of bad faith?

A. Normally, when I get asked to become involved in a claim on that level, there have been, if not, threats, at least overtures of bad faith.

Q. Did any of those claims involve the application of any trigger theory?

A. I mean, I have been involved in claims over the last five years where trigger was a question.

Q. And claims that you have adjusted?

A. Claims that I have adjusted, as well as

consulted and assisted in the adjustment of.

Q. Did any of those cases involve a trigger theory for property damage CD claims?

A. Sure.

Q. Do you recall without divulging -- what trigger theory was advocated by the carriers in those cases?

A. I do.

Q. And can you disclose what that theory was without violating the attorney/client privilege?

A. The only thing I could do without violating the privilege is that the question that has always been raised is is there a manifestation trigger that's to be applied here or an injury in fact trigger to be applied in which policy is in plan. I've given them an opinion on that.

Q. And again, you can't share that opinion because to do so would violate the attorney/client privilege; fair statement?

A. Yes, sir.

Q. Mr. Boyle also asked you whether you audited claims?

A. Yes, sir.

Q. These would be claims that were audited that were open, closed or both?

A. I've done both. I've done active open claims

and predominately, those types of audits we've talked about or after the claim is closed.

Q. Have you audited closed files that would involve construction -- CD, construction defect cases, involving property damage?

A. I think only in the context -- I haven't audited a claim that way, I don't believe. But in the context of the carrier being accused of bad faith, I've had to go through and essentially, audit the file.

Q. And without guessing, could you tell me how many of such files you've audited?

A. I can't. I don't know.

Q. More or less than five?

A. Over what period?

Q. The last three years.

A. Yeah, it's probably in the range of five.

Q. And that would be for both opened and closed claims involving construction defects for property damage claims?

A. I can't remember if they were all closed or -- at least one that I could think of was open.

Q. Can you disclose without violating the attorney/client privilege which carriers you did that for?

A. No.

Q. Do you recall the last time you audited either

an opened or closed CD property damage claim?

A. It's over a year or two ago.

Q. Did any of your audits that you did assess that particular carrier's trigger of coverage theory that that carrier applied in handling CD construction defect claims?

A. Yes, I was asked to analyze and opine about whether the proper trigger was applied.

Q. And again, you can't disclose what you advised your clients without waiving the attorney/client privilege?

A. Correct.

Q. Mr. Boyle asked you questions about whether most cases settle or go to final judgement; do you recall those questions?

A. Yes, sir.

Q. Would you agree with me that an insurer is allowed to take a case to trial to contest liability or damages?

A. Sure.

Q. Is a carrier allowed to take a case to trial to contest whether something is covered or not covered?

A. Yes.

Q. And a carrier is allowed, if it loses on appeal, to appeal that case as well, correct, as long as there's a valid basis to do so?

A. As long as there's a valid basis, it could seek recourse from the highest course it could get to.

Q. Right. So the fact that most cases resolve, that does not mean that an insurance company is in bad faith for litigating coverage or taking an appeal rather than settling a case; fair statement?

A. Fair statement.

Q. You were asked questions about the 11th Circuit and you were shown the Trizec decision from '85 and the Boardman decision --

MR. KAMMER: Mark, what's the date of --

MR. BOYLE: '98.

BY MR. KAMMER:

Q. '98. And without belaboring that, both of those cases before 2002, correct?

A. They were.

Q. And would it be fair, Mr. McIntosh, Doug, that when you're advising a client as to what the law is, that if the law changes over time that you would advise a client, generally speaking, of how that law has changed over time?

A. Normally, your charged as an attorney to be able to bring them up to speed on the current law, yes.

Q. And as a lawyer, it's fair that sometimes the law changes over time?

A. The law changes. Yes, sir.
Q. That's one of the things that makes this profession kind of fun from my point of view.
A. We learn something every day.
Q. And I think you agreed with me before that in this particular case, you know, based upon your review of the Trizec and Boardman decisions, those appear, for the sake of argument according to Mr. Boyle, to maybe apply to injury in fact trigger?
A. That's how I've read them. Yes, sir.
Q. And then the case law from 2002 after the Reliance or the Travelers Amerisure case, whatever you want to call it, up to and including the Axis case, I think we've established that -- as Judge Hodges has observed in Sierra, that the case law during that period of time in the state appeared to apply a manifestation trigger?
A. I believe most of those cases were federal court cases and that was the trend. Yes, sir.
Q. You were asked a lot of questions about the hierarchy of decisions, correct?
A. Yes, sir.
Q. Would you agree with me that the federal trial court, when they're deciding what the law is that they're charged with trying to predict what the Florida Supreme

Court would rule on an issue; is that your understanding?

A. My understanding of the 11th when they --

Q. Not the 11th, the trial --

A. Oh, the trial judges.

Q. The trial judges.

A. I don't think the U.S. District Court should be in the business and is in the business of trying to predict what the Florida Supreme Court would announce on unsettled area of law, rather what they should do is in their decision accommodate the unsettled nature of the law. And then, as an umpire calling a ball on a strike, making a decision one way or another and then letting the appellate court decide and if the appellate court needs to certify the question to the state court, the highest here would be the Florida Supreme Court, it will do that.

Q. But it's position is -- but when the trial court, the federal trial court, looks at the law and makes its call, would you agree with me that when it makes that call, it should try and predict what the highest court of that state and then whether the parties appeal that decision or not to, in this case, the 11th Circuit is up to the parties; but the trial court is to make that call, correct?

A. The trial court has to apply the law of the

forum state under a lex loci analysis. So if it's Florida law that it's going to apply or if the forum is Florida where the accident occurred for example, then it has to do it's best to see what Florida Supreme Court, and then if there's no Supreme Court decision, Intermediate Appellate Court decision has pronounced on that issue. And then I think it's obliged to follow that.

Q. Obliged to follow what it believes either the Florida Supreme Court or the appellate courts have ruled?

A. The highest state court precedent that it could find. Yes, sir. In other words, it can't have a Florida Supreme Court case and then say, but the fourth district decided this this way. It can't have a fourth district case and then say but the trial judge in Broward County decided the same issue this way, I'm going to go with that trial judge's decision. It has to apply the highest precedent.

Q. And if the highest precedent is an appellate court decision, it applies that and if the highest precedent is a Supreme Court decision, it applies that; correct so far?

A. Yes, sir.

Q. And if there's no intermediate court or Florida Supreme Court, then would you agree with me it has to do

its best job to predict what the highest court, in this case the Florida Supreme Court, would do?

A. Based on rational with other decisions, it will have to try to decide what the substantive law would be for that state, yes.

Q. And is that your understanding of what the Middle District of Florida was doing between 2002 and 2012?

A. I think that because most cases found their way to the Middle District, it was trying to discern which was the most consistent and best theory to use in trying to adjudicate these cases.

Q. And there were also some Southern District cases on manifestation as well; fair comment?

A. There were, yes.

MR. KAMMER: I have nothing else. Thank you very much for your time. You've been very accommodating.

MR. BOYLE: We'll read.

(Deposition concluded at 4:15 p.m.)

CERTIFICATE OF OATH

STATE OF FLORIDA)
COUNTY OF BROWARD)

I, the undersigned authority, certify that DOUGLAS M. MCINTOSH personally appeared before me and was duly sworn/affirmed.

WITNESS my hand and official seal this 26th day of November, 2018.

_____
Chanelle Stracuzza
Notary Public, State of Florida
Commission Number: FF227112
Expiration: May 05, 2019

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF BROWARD)

I, CHANELLE STRACUZZA, Certified Court Reporter and Notary Public, HEREBY CERTIFY that I was authorized to and did stenographically report the deposition of DOUGLAS M. MCINTOSH; that a review of the transcript was requested; and the foregoing transcript is a true and accurate record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 26th day of November, 2018.

_____

Chanelle Stracuzza
Notary Public, State of Florida
Commission Number: FF227112
Expiration: May 05, 2019

E R R A T A S H E E T

IN RE: HUGH A. CARITHERS and KATHERINE S. CARITHERS, as the Assignees of CRONK DUCH MILLER & ASSOCIATES, INC., CRONK DUCH ARCHITECTURE, LLC, CRONK DUCH CRAFTSMAN, CRONK DUCH PARTNERS, LLC, CRONK DUCH HOLDINGS, INC., and JOSEPH S. CRONK V. MID-CONTINENT CASUALTY COMPANY
DEPOSITION OF: DOUGLAS M. MCINTOSH
TAKEN: NOVEMBER 26, 2018
REPORTER: CHANELLE STRACUZZA

DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES HERE

PAGE #	LINE #	CHANGE	REASON

Under penalty of perjury, I declare that I have read the foregoing document and that the facts stated are true.

DATE:_____

SIGNATURE OF DEPONENT:_____
SIGNATURE OF DEPONENT:_____

J

T

Hugh A. Carithers and Katherine S. Carithers, as The Assignees of Cronk Duch Miller & Associates, Inc., Cronk Duch Architecture, LLC, Cronk Duch Craftsman, Cronk Duch Partners, LLC, Cronk Duch Holdings, Inc., and Joseph S. Cronk,

Plaintiffs,

v.

Mid-Continent Casualty Company,

Defendant.

In the United States District Court
Middle District of Florida
Jacksonville Division

Case No. 3:16-cv-00988-TJC-MCR

Expert Report
Submitted by
William D. Hager
On Behalf of
Defendant, Mid-Continent Casualty Company

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APPENDICES

I. Introduction.

Introduction. I have been retained as an expert witness in this case by the law firm of Hinshaw & Culbertson LLP (sometimes, just the "Hinshaw Law Firm") on behalf of the defendant Mid-Continent Casualty Company ("Mid-Continent").

Ongoing Considerations. I am submitting this report on the specific issues stated herein. I reserve the right to amend and otherwise modify this report, including its summaries, opinions, and all other elements. Specifically, it is possible that additional information and documents will require subsequent consideration in connection with (i) the opinions expressed in this report and (ii) possible opposing expert opinions. As to the opinions set out below in this report, I have reached these opinions based upon a reasonable degree of professional certainty.

Qualifications to Render These Expert Opinions. My opinions are based on my skill, knowledge, training, education, expertise, and experience, which are detailed in the attached Curriculum Vitae (see Appendix A), as well as on my specific expertise set out below under Section II of this Report.

Sources of Information. I obtained documents and used resources from: (i) the Hinshaw Law Firm, as more fully detailed below; (ii) standard commercial general liability insurance (sometimes, CGL policies) reference materials; and (iii) certain regulatory materials including, among others, materials from State of Florida (including rules and regulations of the Florida Office of Insurance Regulation ("FL-OIR") and from the National Association of Insurance Commissioners (sometimes "NAIC") as utilized by the FL-OIR.

Foundation to All of the Opinions. Thus, each of the expert opinions and conclusions in this report is based on a combination of (i) my skill, knowledge, training, education, expertise, experience and working knowledge of the specific areas and matters at issue herein, (ii) prevailing standards in the industry including custom and practice and (iii) documents cited.

Reasonable Degree of Professional Certainty. I have reached these opinions based on a reasonable degree of professional certainty.

Prudent Commercial General Liability Insurer. These opinions are based on what a reasonably prudent commercial general liability insurer should and would do in comparable circumstances.

Ongoing Discovery. I am submitting this report on the specific matters set out below in connection with this litigation. I understand that this case is in ongoing discovery and as such, I reserve the right to amend and otherwise modify this report including its summaries, opinions and all other elements.

Limitations of All of These Expert Opinions. These entire expert opinions and conclusions relate to and are specifically limited to the unique facts of this case; as such, these opinions do not have applicability beyond the facts of this case.

Compensation. I am being compensated at the rate of $550 per hour for my work on this case. This is my usual and customary rate.

II. SUMMARY OF MOST RELEVANT EXPERTISE.[1]

In connection with these opinions, I have drawn on my expertise (i) as summarized immediately below here in Section II of the report and (ii) as set forth in my Curriculum Vitae, attached.

This case calls for expertise as to, among other things, the following matters: (i) commercial general liability insurance policies (sometimes, "CGL policies" or just "policies") as they are applied by the insurance industry and the regulations of such policies,[2] (ii) an insurer's claim settlement obligations and responsibilities (inclusive of issues of good faith and bad faith; in this report I sometimes refer to these collective matters as the insurer's "obligations and responsibilities"), (iii) an insurer's related coverage obligations and responsibilities under such policies and (iv) an insured's obligations under such policies.[3]

CGL Expertise: State Insurance Regulation. My expertise as to these matters can be found as follows: I am a former:

- Commissioner of Insurance (Iowa), as appointed by the Governor of Iowa;
- First Deputy Commissioner of Insurance, as appointed by the Commissioner of Insurance;
- Administrative Law Judge ("ALJ")[4] to the Department of Insurance, as appointed by the Commissioner of Insurance; and
- Assistant Attorney General assigned on a full-time basis to the Department of Insurance, as appointed by the Attorney General of Iowa.

In those capacities, on a daily basis, I had full regulatory oversight and responsibility for and I dealt directly with commercial general liability insurers and their policies and their obligations and responsibilities to insureds and insureds' obligations under such policies as set out above.[5]

[1] In summary fashion, I set out here my qualifications as to this matter. These qualifications should be read together with my Curriculum Vitae as set forth at Appendix A of this report, including my website at www.expertinsurancewitness.com and materials therein relating to CGL matters.

[2] Mid-Continent Casualty Company issued the CGL policies at issue in this matter. In this Report, I refer to these policies simply as the commercial general liability policy or the CGL policy and sometimes simply as the policy.

[3] I do not enter legal opinions in this report. My opinions are based on custom and practice in the industry that come to bear on this matter. At the same time, insurance is perhaps one of the most highly regulated areas of commerce in the U.S. and as such, it is not possible to review an insurer's handling of a claim/defense without reference to rules and regulations that apply to the insurer and the transactions at issue.

[4] Then known as a hearing officer.

[5] Because the insurance business is conducted across state lines and more specifically, nationally, the Insurance Codes and Department of Insurance rules and regulations (by whatever name and by whatever state) are substantially similar state over state. This is so because much of insurance regulation, though conducted primarily at the state level, is a result of adoption of national model statutes and administrative regulations as promulgated by the nation's Insurance Commissioners through the National Association of Insurance Commissioners (NAIC) so as to

As a regulator for eight years in four Iowa positions ((i) Administrative Law Judge to the Department of Insurance, (ii) Assistant Attorney General assigned to the Department of Insurance, (iii) First Deputy Commissioner of Insurance and (iv) Commissioner of Insurance), along with my staff, I approved (or disapproved) of the language of commercial general liability insurance policies used by each of the 1,000 property casualty insurance companies doing business in the state,[6] selling among other coverages, commercial general liability insurance policies, including the type of policies at issue in this case.

This regulatory action also included the approval of most all policy application forms and policy forms themselves in use today. These responsibilities also included oversight over the insurers claim handling obligations including issues like that here. In addition, I regularly served as an Administrative Law Judge[7] in matters relating directly to commercial general liability insurance policies.

CGL Expertise: National Insurance Regulation. My expertise as to these matters can be found as follows: I am a former:

- Member of the National Association of Insurance Commissioners ("NAIC");

- Elected Member of the NAIC Executive Committee.

In those capacities, on a regular basis, I had national regulatory oversight and responsibility for and I dealt directly with commercial general liability insurers and their policies and their obligations and responsibilities to insureds and insureds' obligations under such policies as set out above. This is so because the NAIC "C" Committee, the committee dealing with property casualty issues, reported directly to the Executive Committee. Included in the "C" Committee's jurisdiction are CGL matters, including policy forms and insurer obligations.

- **NAIC Property Casualty Insurance (C) Committee.** As a member of the NAIC and more to the point as a Member of the Executive Committee, I had oversight responsibility over the so –called NAIC "C" Committee, which was responsible for most all property casualty issues, including as here, property issues. The responsibilities and mission of the "C" Committee are as follows[8]

assure uniformity state over state. By way of example, Iowa's unfair claims practices act, by whatever formal name, is substantially similar to that throughout the U.S., including Florida, because it is based on the NAIC Model Act, the statutory equivalent of which I enforced in Iowa. My point is that my regulatory experience is substantially similar to parallel experience and positions throughout the U.S. (e.g., the position of Commissioner of Insurance or its titled equivalent in each of the other 49 states) including the State of Florida. This experience is bolstered by my 45 years of direct insurance experience, including that of being a CEO of a major property casualty entity doing based in Florida and doing business throughout the U.S. and my eight years of experience as an elected Member of the Florida House of Representatives where I have served a Member and as Vice Chairman of the Insurance Committee and currently serve on its upstream parent committee, the Commerce Committee, with statutory oversight over CGL insurance, including its regulation (as executed by the Florida Office of Insurance Regulation – "FL-OIR").

[6] Some, but not all of whom sold CGL policies.

[7] Then known as a Hearing Officer.

[8] As set forth by the NAIC itself on its website.

> **Mission:** "to monitor and respond to problems associated with the products, delivery and cost in the property/casualty insurance market and the surplus lines market as they operate with respect to individual persons and businesses. The Committee also is to monitor and respond to problems associated with financial reporting matters for property/casualty insurers that are of interest to regulatory actuaries and analysts and to monitor and respond to problems associated with the financial aspects of the surplus lines market."

CGL Expertise: Current Legislative.[9] In addition to my state and national insurance regulatory background, I am serving in the following capacities, each of which includes daily knowledge of and interaction with commercial general liability insurers and their obligations and responsibilities to their insureds under such policies:

- Elected Member of the Florida House of Representatives (currently – I was first elected in 2010 and re-elected in 2012 and 2014 and 2016) where I have served as a Member and Vice Chairman of the Insurance Committee and am serving as a Member of its upstream parent committee, the Commerce Committee (among other committees), which has legislative oversight over all insurance operations in the state (as administered by the Florida Office of Insurance Regulation) including those relating to commercial general liability insurance and related insurer and insured obligations.

- In addition, I have served as Vice Chairman of the Civil Justice Subcommittee of the Florida House, which has responsibilities as to Florida laws that establish (among other things) liability,

CGL Expertise: Prior Legislative. In addition to my state and national insurance regulatory background and my current legislative work as set out above, I also have served in the following legislative capacities, each of which included ongoing knowledge of and interaction with commercial general liability insurers and their obligations and responsibilities to their insureds under such policies:

- Legal Counsel to the Iowa House of Representatives;

- Chief of Staff at the U.S. House of Representatives,

- Elected Member of the Boca Raton City Council, where I served as an elected Member and as Deputy Mayor, in circumstances where I was the Council's lead Member as to all insurance matters.

CGL Expertise: Industry. In addition to my state and national insurance regulatory background and my current and prior legislative background as to CGL matters, I have served or am serving

[9] My background at both the U.S. Congress and with the Florida House of Representatives could be construed as regulatory in nature but I include it here under my non-regulatory experience because it seems to be a better fit. In addition to these legislative positions, I have also served as Deputy Mayor and Member of the City Council of the City of Boca Raton, Florida, where I headed up the Council's insurance oversight function.

in the following capacities, each of which included daily knowledge of and interaction with CGL insurers and their obligations and responsibilities to their insureds under such policies.

- President and Chief Executive Officer of the National Council on Compensation Insurance (NCCI; Boca Raton, Florida), a major U.S. property casualty insurance company doing business throughout the United States;

- I served as President and Chief Executive Officer for the National Council on Compensation Insurance ("NCCI"), which has and is conducting business throughout the U.S, including Florida, where it is based. NCCI is a nationwide industry owned organization with about 1,000 employees with annual revenues of about $150 million.

- This means while CEO, NCCI was subject to the full regulatory authority of the FL-OIR and subject as well to the Florida Insurance Code as well as the jurisdiction of all Florida courts, state and federal. In addition to Florida, NCCI was subject as well to the authority of the various state departments of insurance as well as the state and federal courts of each of these states.

- Among my responsibilities at NCCI was (together with my staff) to formulate all workers compensation insurance policy forms as used in our 40 states of operation. This work included drafting all policy language (tailored to the specific state's insurance code) as well as drafting all endorsements and all other policy forms. In addition, my responsibilities included gaining state insurance department approval of all such policy forms as a condition precedent to their use as submitted by some 600 insurance companies. I am very familiar with the meaning and relevance of specific state approval of policy forms, endorsements and applications and related documents and matters and related insurer and insured obligations under policy forms.

CGL Expertise: Actuarial. In addition to my state and national insurance regulatory background and my current and prior legislative background and my industry background as to CGL matters, I have served or am serving in the following actuarial/ industry capacities, each of which included daily knowledge of and interaction with CGL insurers and their obligations and responsibilities to their insureds under such policies.

- *American Academy of Actuaries,* Washington D.C. I served as general counsel and chief lobbyist to the Academy, whose role to actuaries is parallel to that of the AMA to physicians and the ABA to lawyers. Academy members determine pricing for CGL matters at issue in this matter.

- *Actuarial Standards Board (ASB).* I served as well as counsel to the Interim Actuarial Standards Board, the forerunner to ASB. ASB, which is to the actuarial profession as to what the Financial Accounting Standards Board (FASB) is to the accounting profession, promulgates and enforces professional standards upon the work product of actuaries. Those standards include rate making standards that apply to the pricing of CGL matters at issue in this matter.

- *Commissioner of Insurance; First Deputy Commissioner of Insurance/ Actuarial*. In these two positions, in which I served for a total of six years, I had full regulatory responsibility over the pricing of CGL policies.

CGL Expertise: Insurance Arbitration. In addition to my state and national insurance regulatory background and my prior and current legislative and my industry background and my actuarial background as to CGL matters, I have served or am serving in the following capacities, each of which included daily knowledge of and interaction with CGL insurers and their obligations and responsibilities to their insureds under such policies.

- *Nationally Certified Insurance Arbitrator* (ARIAS-US), where I sit as an insurance arbitrator on disputes between (among others) commercial general liability insurers and other insurers;

CGL Expertise: Reinsurance Arbitration. In addition to my certification as an *insurance* arbitrator, I am also certified as a *reinsurance arbitrator* as follows - which included daily knowledge of and interaction with CGL insurers and their obligations and responsibilities to their upstream reinsurers under such policies.

- *Nationally Certified Reinsurance Arbitrator* (ARIAS-US), where I sit as a reinsurance arbitrator on disputes between (among others) commercial general liability insurers and their reinsurers;

CGL Expertise: Insurance Lawyer. In addition to my state and national insurance regulatory background and my current and prior legislative background and my industry background and my actuarial background and my insurance and reinsurance arbitration background as to CGL matters, I am serving in the following legal capacities, each of which included current and ongoing knowledge of and interaction with CGL insurers and their obligations and responsibilities to their insureds under such policies.

- Florida insurance lawyer (Hager Law Firm, Boca Raton, Florida), currently in private practice, with my practice limited to insurance and reinsurance matters;

CGL Expertise: Prior Legal Work. In addition to my state and national insurance regulatory background and my current and prior legislative background and my industry background and my actuarial background and my reinsurance arbitration background as to CGL matters, I have served or am serving in the following legal capacities, each of which included current and ongoing knowledge of and interaction with CGL insurers and their obligations and responsibilities to their insureds under such policies.

- As stated, I am an insurance lawyer admitted to practice, all by examination in Iowa, Illinois[10] and Florida.

[10] This license is currently in inactive status at my request and is eligible for reactivation at any time upon my request. This is so because I continue to be in good standing with the Illinois Bar.

- Legal Counsel to the Iowa House of Representatives;
- Assistant Attorney General (IA);
- Local Counsel to the Professional Insurance Agents Association, whose members sell CGL as retail insurance agents;
- Local Counsel to the Property Casualty Insurance Association of America (PCIAA), smaller stock insurance company, many of whose members are CGL insurers;
- Insurance lawyer with the firm of Hager and Schachterle, Des Moines;
- General Counsel to the American Academy of Actuaries, Washington D.C.;

CGL Expertise: Undergraduate Educational Background. In addition to my state and national insurance regulatory background and my current and prior legislative background and my industry background and my actuarial background and my reinsurance arbitration background and my legal background as to CGL matters, the following formal undergraduate educational background was also helpful in this matter:

- Bachelor's degree (B.A.) in mathematics (University of Northern Iowa);

CGL Expertise: Graduate Educational Background. In addition to my undergraduate background, my graduate educational background was also helpful in this matter:

- Master's degree (M.Ed.) in education (University of Hawaii);
- Juris Doctorate: (J.D.) University of Illinois, Champaign Urbana;

CGL Expertise: Insurance Certifications. In addition to all of the above, the following certifications were helpful to me in connection with this assignment:

- Certified *Insurance* Arbitrator by ARIAS-US;
- Certified *Reinsurance* Arbitrator (one of about 400 such arbitrators in the U.S) by ARIAS-US;

CGL Expertise: Licensure. In addition to all of the above, the following licensures were helpful to me in connection with this assignment:

- Members of the following bars, all by examination: Illinois, Iowa and Florida;
- Admitted to practice before the U.S. Supreme Court;

CGL Expertise: CGL Insurer Obligations. Having discussed CGL policies, I next discuss insurer obligations under such policies. In this regard, I have also had significant experience and

responsibility in connection with determining and passing judgment on commercial general liability insurers' responsibilities as to their defense and coverage and claim duties such as those involved here. In particular, in my four regulatory positions previously described, I had daily responsibility to assure and to hold accountable all of the state's 1,000 property casualty insurers[11] for their related obligations and responsibilities, inclusive of defense and coverage obligations. I did so through a series of action steps and tools. The action steps and tools included the following:

1. Coverage[12] and Claims Obligations: Unfair Claims Settlement Act. Like most every other state including Florida, Iowa has enacted the model NAIC Unfair Claims Settlement Practices Act ("UCSA")[13] which set forth standards against which the Insurance Commissioner could pass judgment on a commercial general liability insurer's defense and coverage and claims obligations. As Commissioner and as First Deputy and earlier as Assistant Attorney General assigned to the Department and as a Department ALJ, I had daily responsibility to enforce this act and assure all insurance companies were in compliance with the act. That was the same act as adopted in most every other state in substantially similar form and enforced on regular basis by the state Departments of Insurance (DOIs), including the IDOI.

2. Coverage and Claim Obligations: NAIC Market Regulation Handbook. In addition to the standards set out in the UCSA, as Commissioner, I had as an available tool, the NAIC Market Regulation Handbook ("Examiners Handbook" or "Handbook"). This Handbook sets forth standards to assess insurer claim settlement behavior and is used by every department of insurance in the United States including the FL-OIR. The standards have been universally agreed to by all of the nation's Commissioners of Insurance as adopted formally by them through the NAIC. The defense and coverage and claim standards of the Handbook are universally recognized as appropriate standards against which to judge insurer claim behavior.

3. Coverage and Claim Obligations: NAIC Financial Examiners Handbook. As Commissioner, I had available another tool, namely the NAIC Financial Examiners Handbook ("Financial Examiners Handbook"). Among other things, the Financial Examiners Handbook sets forth standards to assess property casualty (inclusive of those property casualty insurers who sold commercial general liability insurance policies) insurer solvency on a triennial basis. Among other documents reviewed by examiners in reaching financial conclusions are agent contracts and policyholder matters. The Financial Examiners Handbook is used by every department of insurance in the United States including the FL-OIR. Similarly, these standards have been universally agreed to by all of the nation's Commissioners of Insurance as adopted formally by them through the NAIC, including Florida's Commissioner of Insurance The standards of the Financial Examiners Handbook are universally recognized as appropriate standards against which to judge commercial general liability insurance insurer behavior and used by the FL-OIR in that regard.

[11] Not all property casualty insurers sold CGL policies, but many did.
[12] This term, as used in my Report, is inclusive of an insurer's defense and indemnity obligations.
[13] By whatever formal name known.

4. Coverage and Claim Obligations: Complaints from the Public. On a daily basis, my Department received incoming consumer complaints as to insurance company defense and coverage practices. This division was staffed by Department lawyers who resolved the individual complaint but equally important, those lawyers also determined whether an insurer evidenced unacceptable defense and coverage practices. That is to say, staff lawyers determined whether the incoming consumer complaints in fact constituted a red flag as to the insurance company's potential behavior across the board.

5. Coverage and Claim Obligations: Prosecution. To the extent insurer behavior required formal action (whether a result of complaints from the public or a result of Department investigation through a Market Conduct Examination), my Department prosecuted such insurers under the state's civil Administrative Procedures Act. In connection with such prosecutions, I served in various capacities during my eight years as a regulator as (i) prosecutor (as Assistant Attorney General), (ii) as the decision maker as to whether to initiate prosecution in the first instance and (iii) as the Administrative Law Judge ("ALJ") who presided over the prosecution and defense of the case and entered findings of fact and conclusions of law as to insurer defense and coverage practices. I have served as an ALJ in scores of such cases where the insurer's defense and coverage and claim practices in CGL matters were the primary issue and entered final decisions in such matters.

B. Expertise as to Claim Adjustment Obligations and Responsibilities of Insurance Companies from the Perspective of an Industry Executive. In addition to my experience as a regulator, as reflected above, I have had specific industry experience (in other positions) as to insurer defense and coverage practices. Some of those positions included the following:

1. Coverage and Claims Obligations: CEO of a Major Florida Based US Insurance Organization, Regulated Throughout the US; **NCCI**; President and Chief Executive Office of the National Council on Compensation Insurance (NCCI; Boca Raton, Florida), 1990 – 1998). I referenced above, under policy expertise, my experience at NCCI. In addition to exposure as to insurance policy forms, this same NCCI experience also provided significant background as to insurer defense and coverage obligations. In addition, and relevant to this case, NCCI had a vested interest in member insurer claim practices in that the industry's reputation for fair defense and coverage practices ultimately impacted regulatory attitudes toward NCCI's premium approval process. While President and CEO of NCCI, I visited and physically toured and reviewed in excess of 400 insurance companies and gained direct exposure to the procedures and processes and standard industry practices of the U.S. insurance community and its defense and coverage practices. I have had extensive exposure to insurer practices and procedures. As stated, NCCI is based in Boca Raton, Florida, it is regulated fully by the FL-OIR and subject to the state and federal courts of Florida and it does business throughout the U.S., including most states. In that capacity, it is regulated by the State Department of Insurance of the respective states and subject to the authority of the state and federal courts of such states.

2. Coverage and Claim Obligations: General Counsel and Director of Government Relations to the American Academy of Actuaries (Washington D.C.), 1980 – 1983. I served as General Counsel and Director of Government Relations for the American Academy of Actuaries, including advising on admissions, discipline, federal antitrust and general corporate law. I

represented the 20,000-member professional organization before Congress (e.g., Senate Committees on Banking, Commerce, Finance and Labor, and House committees on Education, Labor, Energy, and Ways and Means) and the various federal regulatory agencies.

The Academy is the professional organization of actuaries and includes qualified actuaries from all disciplines and all forms of insurers. Academy members included affiliation with virtually every commercial general liability insurance company in America. Such actuaries had duties relating to policy language and policy pricing. The Academy's Board of Directors was likewise made up of leading insurance company executives from such property companies.

3. Coverage and Claim Obligations: Attorney in Private Practice. As an attorney in private practice, I represented a number of insurer interests and became familiar with applicable regulatory and industry defense and coverage standards of practice. Those interests included the position of Iowa Counsel to the Property Casualty Insurance Association of America (PCIAA) as discussed below. Those interests also included intimate involvement with commercial general liability insurance, as counsel to the:

- Professional Insurance Agents of Iowa (property casualty insurance agents, who sold, among other coverages, commercial general liability insurance policies);

- Iowa Association of Life Underwriters, however formally named (life, health and annuity insurance agents); and

- The Property Casualty Insurers Association of America ("PCIAA"); as stated above, I served as Iowa Counsel to this insurance trade group, the trade association of smaller stock property casualty insurers (who sold, among others, commercial general liability insurance policies).

Specific duties as counsel at both the Professional Insurance Agents of Iowa (who sold, among other coverages, commercial general liability insurance) and the Iowa Association of Life Underwriters (life, health and annuity insurance agents) included in-depth familiarity with commercial general liability insurers, their defense and coverage practices. Specific duties at the PCIAA included daily counsel to member insurers as to their defense and coverage duties.

Other Expertise.

Other Expertise. The above expertise should be read together with the balance of my background as set forth at this website https://expertinsurancewitness.com/ and, more specifically as to commercial liability expertise as set forth at https://expertinsurancewitness.com/commercial_auto_homeowner_policy.html and as set forth in my attached CV. The above website, among other things, includes click through expertise as to (i) insurer bad faith, (ii) industry standards and custom and practice, (iii) policy interpretation and (iv) unfair claim practices.

III. ASSIGNMENT AND EXPERT OPINIONS AND FURTHER DISCUSSION

Assignment. My assignment was to read and review various records and documents in this case and then enter expert opinions, if any as to the following: (1) Mid-Continent's claim handling in the underlying matter; and (2) whether Mid-Continent met its obligation of good faith in the underlying matter.

Facts. It may be helpful to set out some of the facts that can be gleaned from the record in this matter. The facts below are not a finding of facts or statement of facts or anything of the sort. The facts below are simply some of the facts that relate to my opinions below. The presence or absence of any fact is simply that - and nothing more.

- The policies at issue are commercial general liability policies with per occurrence limits of $1 million and aggregate limits of $2 million;[14] and a $2,500 deductible per claim;

- The general liability policies at issue provide coverage in relevant part for damages for "property damage" caused by an "occurrence", subject to the policies exclusions and conditions;

- The CGL policies were issued to the insured for the following policy periods:

    - 3/09/2005 – 3/09/2006;[15]

    - 3/09/2006 – 3/09/2007;[16]

    - 3/09/2007 – 3/09/2008;[17]

    - 3/09/2008 – 10/06/2008 (partial year);[18]

- With an exception or two, the policies for each of the four policy years were near identical;[19]

- The policies contained some 20 or so Forms and Endorsements;

- The CGL policy form (CG 00 01 12 04) itself included certain Exclusions.

[14] There are some internal coverage limits in addition to these.
[15] The following relevant entity is a named insured under the 2005-2006 policy: Cronk Duch Miller & Associates Inc.
[16] The following relevant entities are named insureds under the 2006-2007 policy: Cronk Duch Partners LLC; and Cronk Duch Holdings Inc.
[17] The following relevant entities are named insureds under the 2007-2008 policy: Cronk Duch Partners LLC; and Cronk Duch Holdings Inc.
[18] The following relevant entities are named insureds under the 2008-2009 policy: Cronk Duch Partners LLC; and Cronk Duch Holdings Inc.
[19] There are three full policy periods and one partial policy period.

Lawsuit #1: Underlying Action and Related Facts.

- The Insured, Cronk Duch Partners, LLC ("Cronk Duch")[20], in the underlying matter, sought defense and liability from Mid-Continent under related CGL policies - in a lawsuit entitled Carithers v Cronk Duch et al. in Duval County, Florida, filed March 2011.[21]

- In that lawsuit, Carithers alleged they entered into a relationship with Cronk Duch to design and construct a single-family residence for the Carithers at Atlantic Beach, Florida, with the parties then executing a standard form contract between owner and contractor, as executed on April 1, 2003;

- In the design and construction of the residence, Cronk Duch utilized various subcontractors;

- After taking occupancy in 2005 of the residence, Carithers alleged much later - they discovered in 2010 damage as a result of contractors' and/or subcontractors' defective work, including (1) water damage and wood rot on a balcony and adjacent structural framing; (2) paint-like coating defectively mixed and applied to external brick causing damage to the brick; (3) an underlying surface defectively prepared so that the tile became cracked and unattached in numerous locations ; and (4) negligently installed electrical circuits resulting in electrical current anomalies;[22] [23]

- In all of this, it is noted that work began under the contract in 2003 and the Carithers allege in their Third Amended Complaint that the damage was latent and was discovered by the Carithers in 2010 and could not have been discovered by reasonable inspection in a prior year.

- Mid-Continent's last CGL policy period insuring Cronk Duch ended on 10/06/2008, some two years or so before the discovery of the alleged defects or when they were discoverable;

- In essence, Mid-Continent (as further discussed below) denied that it had a duty to defend and denied that they had a duty to indemnify as the damages were not discovered nor were they discoverable until 2010, well after the end of the last policy period.

- Ultimately, this underlying lawsuit (Lawsuit #1: Carithers v Cronk Duch) was settled through mediation with final judgment of $98,872 entered against Cronk Duch, and the

[20] The Third Amended Complaint names Cronk Duch Miller & Associates and Cronk Duch Holdings. When referring to the Third Amended Complaint and events that took place after that complaint was filed, "Cronk Duch" includes all three entities that were insured by MCC.

[21] The Citation of which is well known to the parties.

[22] The allegations cited in this paragraph come from the Third Amended Complaint.

[23] In their subsequent Civil Remedy Notice dated 6/25/2015, Carithers restated the allegations as follows: "During construction of the new residence, certain work was defectively performed by the subcontractors Cronk Duch which caused damage to other property owned by the Carithers and to portions of the residence which had not been defectively constructed." In terms of payment of damages, Carithers also amended the related CRN to state: "To date, Mid-Continent has not paid anything, including attorneys' fees and costs."

Carithers taking an assignment of Cronk Duch's rights against Mid-Continent as to the CGL policies at issue.

Lawsuit #2. Carithers, as Assignees of Cronk Duch, v Mid-Continent in the U.S. District Court.

- The Carithers, as assignees of Cronk Duch, then brought an action against Mid-Continent in Florida state court, which was ultimately removed to the U.S. District Court, Middle District of Florida.

Mid-Continent's Attempt to Settle. Prior to trial, Mid-Continent engaged in good faith settlement offers. Specifically, as documented on 12/19/2013, Mid-Continent offered to settle the matter for $150,000. This offer was rejected by the Plaintiffs. Specifically, on 12/13/2013, Gary Renneckar of Mid-Continent emailed Raymond Corley of Great American and stated as follows to Corley:

> "Ray, … We offered $150,000. That was rejected. We plan to try the case. Thanks … (signed) Renneckar." MCC002386-B.

Rejection by the Plaintiffs. As stated above, the Plaintiffs rejected this offer and stated that as recently as November 2013, they did not intend to continue negotiations. See their counsel's letter of 12/14/2013 so stating. Plaintiffs had demanded $250,000. See the letter referenced letter at MCC 002362-B et al.

Reasonable Offer. As one measure of the reasonableness of Mid-Continent's offer, the record shows that final judgment on damages was entered by the Court in this case on 8/27/2018 in the amount of $26,684.77, plus attorneys' fees ($14,609.99).

In the non-jury trial, an order was entered finding that Mid-Continent owed a duty to defend to the insured, with Mid-Continent taking appeal of the matter to the U.S. 11th Circuit Court; where that Court affirmed the duty to defend but struck most of the damages awarded by the trial court as not covered under the policy. In light of the Appellate Court's decision, an Amended Judgment was issued by the U.S. District Court against Mid-Continent, reducing the amount of covered damages from $98,252.83 to $26,684.77;

Civil Remedy Notice Served by Carithers against Mid-Continent: Filed 6/25/15.

- After the 11th Circuit issued its decision, but before the district court issued its order establishing the amount owed, the Carithers filed a Civil Remedy Notice against Mid-Continent. Mid-Continent timely responded on August 11, 2015. The Amended Judgment was not issued by the U.S. District Court, reducing the amount of damages awarded against Mid-Continent from $98,252.83 to $26,684.77 in light of the Appellate Court Decision, until August 27, 2015;

Lawsuit #3. Carithers, as assignees of Cronk Duch, v Mid-Continent: Filed 9/25/2017.

- In 2017, following their Civil Remedy Notice, the Carithers, again as assignees of Cronk Duch, filed a subsequent lawsuit against Mid-Continent seeking extra-contractual

damages allegedly caused by Mid-Continent's handling of the claim in the underlying matter (per Lawsuit #1). In this Lawsuit #3, Plaintiffs alleged, among other things, a breach of the duty of good faith.

EXPERT OPINIONS.

Structure of Expert Opinions. The structure of my below expert opinions - is as follows: (1) analysis of Mid-Continent's claim handling in the underlying matter; and (2) my opinions as to the good faith issue.

No. 1: EXPERT OPINIONS AS TO CLAIM HANDING IN THE UNDERLYING ACTION

First Review: The Internal Claim Analysis and Recommendation to the Claims Committee. In connection with the insured's request for a defense and indemnity in the underlying matter, Mid-Continent first analyzed and internally recommended denial of the claim, by way of an inter-office memo dated 9/9/2011. That inter office memo analyzed the claim and made recommendations to Mid-Continent's Home Office Claim Committee ("Claim Committee"). The Memo's analysis and recommendation makes clear that Mid-Continent carefully evaluated the applicable pleading and the policy terms. That Memo recommended that the Claims Committee deny the claim based on the totality of circumstances, including that the damages were not discovered or discoverable until 2010, well after the last coverage date (10/06/2008).

First Review: The Claims Committee. The Claims Coverage Committee reviewed this recommendation on 9/14/2011 and the Committee agreed with the recommendation of denial. The Committee further directed staff to write the denial letter. The Committee's direction to the staff as to the elements of the denial letter included that of: (1) a citation to the insuring agreements; (2) the policy effective dates; (3) a statement of allegations and claims for damage per the Amended Complaint; (4) that the claims for defective work of the Defendants were not discovered or discoverable until 2010, significantly after the last effective date of the policy at issue; and (5) in addition, that in Florida, defective work is not covered property damage per the policy and all defective work or damage to the insured's work is excluded by Endorsement Exclusion CG 2294 "Damage to Work Performed by Subcontractors on Your Behalf" and that the following policy exclusions relate to this matter as well: Exclusions 2.b; f.2; k; m; and n as well as Endorsement/Exclusion ML 1217. Staff followed up with a conforming letter to the insured.

Second Review: The Internal Claim Analysis and Recommendation to the Claims Committee. After receiving the Third Amended Complaint, Mid-Continent re-evaluated the claim based on Mid-Continents' internal Inter-Office Memo dated 12/06/2011. That Memo, dated 12/06/2011, like the first, was directed to the Claims Committee for determination of the duty to defend and the duty to indemnify; in the Memo's evaluation, after considering the third amended complaint, Mid-Continent recommended that the Claims Committee determine that there was no duty to defend nor a duty to indemnify and to deny the claim.

Second Review: The Claims Committee. The Claims Committee, by way of its memo dated 12/12/2011, considered this second recommendation and again directed staff to write a letter to the insured to provide to the insured, all policy periods and all insureds during the various policy periods, of which there were four policy periods that Mid-Continent is denying coverage for all insureds under all of the policies.

Staff followed up with a conforming letter dated 12/22/2011 to the insured. This nine-page single spaced letter included the items recommended by the Claims Committee and further to the point, met Mid-Continent's obligations as to claim denials. This is so because the letter: (1) states Mid-Continent completed its claim investigation under the policies, which is a fair statement; (2) summarizes the possible policies at issue; (3) reiterates the general allegations; (4) specifically cites to the policy coverages/exclusions/endorsements/definitions that come to bear on the matter; (5) provides an analysis of policy provisions as against the claim which Mid-Continent states precludes responsibility to defend or indemnify; and (6) includes a reservation of rights. In all of this, based on custom and practice in the industry, Mid-Continent met its obligations in denying the claim in that its denial letter contains those elements required of it in such a denial.

Both of these internal memos (the first dated 9/09/2011 and the second internal memo of recommendation dated 12/06/2011) to the Claims Committee show the following: (1) policy coverage details, i.e., operative policy provisions and exclusions and endorsements and policy periods; (2) allegations in the underlying matter against its insured, Cronk Duch; (3) Location of the Loss; (4) Alleged Date the Defects/Damages were Discovered or Discoverable; (5) Description of the Loss; (6) Coverage Analysis and (7) Recommendation. In both determinations of denial - the Claim Committee had in hand the above and brought to bear on the denial decision, its experience.

As a Commissioner of Insurance (former) and as a Member of the Florida Legislature (current) handling insurance matters and as a CEO of a Florida based non-traditional property casualty insurer (former), this is the very type of claim analysis that would be expected of an insurer under similar circumstances. That is to say, these claim analysis and recommendations (with the claim analysis and recommendations date 9/09/2011 and 12/06/2011) and claim denials (with the denials of the Claim Committee dated internally 10/06/2011 and 12/12/2011) met Mid-Continent's obligations and responsibilities.

Mid-Continent's Claim Process. In connection with my work in assessing Mid-Continent's claim handling in the underlying matter, I have also reviewed certain claims materials it uses in connection with claim handling, which I understand were produced by Mid-Continent in this case. That review, which is summarized in the chart below, supports my above opinion that Mid-Continent met its claim handling obligations in the underlying matter.

As a Commissioner of Insurance (former) with daily responsibility of the claim handling obligations of all property casualty insurers doing business in the state, Mid-Continent's claim handling methods comply with their related obligations and responsibilities and the manner in which Mid-Continent handled the claim in the underlying matter met its claim handling obligations in the underlying matter.

Observations of Some of
Mid-Continent's Claims Processes[24]

Bates	Item/ Comments/Summary/ Paraphrasing of Document
MC00006	Claims Reports to include significant details
MC000064-69	Recorded statement guideline to be used by claims adjusters
MC000070-71	Components to be included in Inter-Office Correspondence as to claim analysis and claim recommendations to the Claim Committee; claim number; insured; claimant; date of loss; coverage as to policy; policy effective date; policy named insured; policy additional insureds; policy form number; applicable limits; location of the loss; town; state; description of the loss; suit?; evaluation of the claim;
MC000073-79	Comprehensive questionnaire directed at the builder re the claim at issue; this is a 7-page detailed questionnaire designed to ferret out the operative claim circumstance;
MC000081-83	Comprehensive questionnaire directed at the claimant/homeowner re the claim at issue; this is a 3-page detailed questionnaire designed to ferret out the operative claim circumstance;
MC000084-88	Comprehensive questionnaire directed at the subcontractor re the claim at issue; this is a 5-page detailed questionnaire designed to ferret out the operative claim circumstance;
MC00007	Two tier review of adjuster recommended denials
MC00008	Coverage issues to be submitted to the adjuster's supervisor;
MC000010	Obtain and review the policy form at issue as part and parcel of the claim analysis;
Mc00011; 53; 58	For adjusters, be sure to ask about damage to homeowners' property re items not installed by the insured;
MC000012-31	RORs must be timely; the document included relevant statutes and cases; it also underscored the duty to provide timely notice of defenses re claims;

[24] This portion of my opinion is based on my review of the totality of documents in this matter and in particular, the following documents, which represent only some of the several documents in the record reflecting Mid-Continent's claim handling processes.

MC000033	To claim adjusters: continue to provide pervasive loss detail
MC000037	To claim adjusters: in duty to defend litigation, provide comprehensive data;
MC000041-46	Protocol in terms of responding to discovery requests
MC000050-52	Claim information to be gathered
MC000057	Wood rot is caused by fungi; note then the applicability of ML 1212, exclusion of fungus caused damage;
MC000060	Reminder to claims adjusters as to Mid Continent's FL Statutes section 627.426 duties
MC000063	Reminder of Mid Continent duties re asserting defenses as against an insured claim;

Overall Conclusion to Expert Opinion No. 1. In all of this, Mid-Continent met its obligations to utilize appropriate standards in the claim settlement process and Mid-Continent met its claim handling obligations as to the claim at issue.

No. 2: EXPERT OPINIONS; MATTERS OF GOOD FAITH

In its Civil Remedy Notice in this matter dated 6/25/2015, Plaintiffs allege Mid-Continent, in its claim handling in the underlying matter, breached a series of statutory provisions. Plaintiffs repeat these allegations in their Amended Complaint in this current case. Below, I set out these allegations and my expert response to the allegations.

Taking these one at a time as it relates to the facts, we have the following:

- *Plaintiffs' Allegation.* Not attempting to settle in good faith when the insurer should have done so if it acted fairly toward its insured;

  Hager Response. Here, Mid-Continent reasonably concluded it had no duty to defend and no duty to indemnify. In addition, as to underlying litigation (i.e., Lawsuit #2), Mid-Continent took appeal to the 11th Circuit and prevailed on some of its policy defenses. In all of this, no obligation arose to so settle at that time. This is so as articulated in Mid-Continent's response to the Plaintiff's CRN in that, with the Appeal pending to the 11th Circuit, damages were yet, at that point in time, still up in the air. Indeed, damages were not final until much later when the matter was remanded, and the District Court entered judgment.

Furthermore, the record shows that Mid-Continent did attempt to settle in good faith in connection with Lawsuit #2. In this regard, see the discussion above, which I repeat here:

- *Mid-Continent's Attempt to Settle.* Prior to trial in Lawsuit #2, Mid-Continent engaged in good faith settlement offers. Specifically, as documented on 12/19/2013, Mid-Continent offered to settle the matter for $150,000. This offer was rejected by the Plaintiffs. Specifically, on 12/13/2013, Gary Renneckar of Mid-Continent emailed Raymond Corley of Great American and stated as follows to Corley:

  > "Ray, … We offered $150,000. That was rejected. We plan to try the case. Thanks … (signed) Renneckar." MCC002386-B.

- *Rejection by the Plaintiffs.* As stated above, the record shows confirmation that the Plaintiffs rejected this offer. Furthermore, Plaintiffs stated that as of November 2013, they did not intend to continue negotiations. Plaintiffs had demanded $250,000. See Plaintiffs' counsel's letter referenced letter dated 12/14/213 at MCC 002362-B et al.

- *Reasonable Offer.* As one measure of the reasonableness of Mid-Continent's offer, the record shows that final judgment on damages was entered by the Court in this case on 8/27/2015 in the amount of $26,684.77, plus attorney's fees ($14,609.99).

Weight of Authority. Further to Mid-Continent's obligations and specifically to its duty to defend, the position Mid-Continent took as to coverage, Mid-Continent did not act contrary to the weight of authority at the time those decisions were made vis-à-vis the trigger matter.

- *Plaintiffs' Allegation.* Failing to adopt and implement standards for proper investigation;

  Hager Response. A fair reading of both the procedures Mid-Continent uses as to claim handling (see the chart above) and the process used by Mid-Continent in the underlying claim, make clear that Mid-Continent (1) has adopted and (2) has used in this case, appropriate standards for proper investigation.

- *Plaintiffs' Allegation.* Misrepresenting pertinent facts or policy provisions;

  Hager Response. Mid-Continent's claim handling in the underlying matter makes clear that that it did not misrepresent pertinent facts nor policy provisions. Mid-Continent consistently set forth in a fair manner, the facts of the claim and policy provisions. They did so in internal documents and did so in communication with the insured. See, e.g., the claim denial letters from Mid-Continent to the insured in this matter.

- *Plaintiffs' Allegation.* Failing to timely acknowledge and act promptly in communications with the insured;

Hager Response. There is nothing in the file that I can locate that shows untimely response to communications with the insured.

- *Plaintiffs' Allegation.* Denying claims without conducting reasonable investigations;

  Hager Response. The record in this matter shows that Mid-Continent did in fact conduct a reasonable investigation of the underlying claim as a condition precedent to reaching its claim decision. See, e.g., the claim denial letters and the internal workup of the claim as manifested in the related Inter Office Memos and related Claims Committee's work as to the claim.

- *Plaintiffs' Allegation.* Failing to properly notify the insured of additional required information;

  Hager's Response. There is nothing I could find in the record in this matter showing that Mid-Continent failed to notify the insured of additional information required to complete its claim investigation. To the contrary, the record shows timely request for information and timely provision of information between the insured and insurer.

- *Plaintiffs' Allegation.* Engaging in general business practices that are willful and malicious and/or in reckless disregard for the rights of the insured;

  Hager's Response. Based upon the Court's ruling in this matter, I have not been asked to opine on this.

Mid-Continent's actions in handling the underlying matter were in good faith and not in bad faith. As discussed elsewhere in this report, Mid-Continent's claim denial was based on the fact that - it insured Cronk Duch[25] only up to October 2008, and as such, was not liable for the 2010 damage/defects as alleged by the Carithers. The Carithers alleged in their underlying lawsuit that the damage was not discovered and could not have been discovered reasonably upon inspection before 2010.

The Carithers and Mid-Continent litigated these matters in the US District Court and at the 11th Circuit, with the District Court awarding the Carithers all of their claimed damages and the 11th Circuit affirming in part and reversing in part.

The 11th Circuit accepted one or more of Mid-Continent's coverage defenses, and as a result, the trial court reduced the damages considerably, by about 75% from that originally awarded at the District Court level, from $98,252.83 to $26,684.77, in affirming one or more of Mid-Continent's asserted defenses.

That is to say, Mid-Continent prevailed in large part on its coverage defenses. An insurer, whose claim actions and assertion of coverage defenses is affirmed at least in significant part, cannot be

[25] As set forth above, the following relevant entities were insured by MCC: Cronk Duch Miller & Associates Inc.; Cronk Duch Partners LLC; and Cronk Duch Holdings Inc. Cronk Duch Miller & Associates Inc. and Cronk Duch Holdings Inc. were added as parties to the Third Amended Complaint.

said to act in bad faith; indeed, that insurer is rightfully said to have acted in good faith. In none of this, did Mid-Continent breach its duty of good faith. In none of this, did Mid-Continent act in bad faith.

It was reasonable for Mid-Continent to rely on the trigger theory it did and more specifically to rely on the point in time when the damage was discovered or discoverable in connection with the policy periods at issue.

In addition, it was reasonable for Mid-Continent to deny the duty to defend in the underlying action when they did based upon the allegations in the four corners of the complaints it was sent. The insurer must defend when the complaint alleges facts that fairly and potentially bring the suit within coverage. Here, given Plaintiffs' allegation in the underlying Amended Complaint and Third Amended Complaint, wherein the Plaintiffs allege that they could not, by reasonable examination have observed the damage – nor was it discernible - until well after the end of the policy period at issue, thus coverage in Mid-Continent's reasonable conclusion, was not triggered under any of its policies and thus it was reasonable under the totality of the circumstances for Mid-Continent to deny the duty to defend.

OVERALL CONCLUSION.

Mid-Continent met its claim handling obligations in the underlying matter; Mid-Continent acted in good faith and not in bad faith; Mid-Continent acted reasonably in denying the insured's request to defend and indemnify; Mid-Continent had good grounds to support its reasonable action including the facts, the policy language, the state of the law as reasonably interpreted by Mid-Continent; and Mid-Continent did not breach its obligations.

Signed electronically and dated this 27th day of August 2018.

William D. Hager

William D. Hager

APPENDIX A

CURRICULUM VITAE

WILLIAM D. HAGER

WILLIAM D. HAGER
CURRICULUM VITAE
(to be read together with my websites including https:/www.expertinsurancewitness.com)

PRESIDENT, INSURANCE METRICS CORPORATION
BOCA RATON, FLORIDA - JANUARY 2000 to PRESENT

Mr. Hager formed Insurance Metrics Corporation in early 2000. The focus of this Corporation is three-fold:

1. The provision of reinsurance arbitration service,
2. The provision of expert insurance witness services, and
3. The provision of non-litigation insurance consulting.

CERTIFIED REINSURANCE ARBITRATOR

Certified by ARIAS (AIDA Reinsurance and Insurance Arbitration Society) as one of some 400+ certified reinsurance arbitrators in the U.S. ARIAS certifies qualified arbitrators and serves as a resource for parties involved in related disputes. ARIAS provides procedural guidelines, best practices and a code of ethics for its members. Certified arbitrators must be knowledgeable and reputable and meet minimum criteria as follows:

1. Industry Experience. At least 10 years of significant specialization in the insurance/reinsurance industry;
2. Arbitration Experience. Completed at least three ARIAS conferences or workshops; and
3. Member of ARIAS. Be an individual member in good standing of ARIAS.

ELECTED MEMBER OF THE FLORIDA HOUSE OF REPRESENTATIVES
NOVEMBER 2010 to PRESENT

Mr. Hager was first elected in November 2010 to a two-year term to the Florida House of Representatives in Tallahassee Florida and re-elected to that same position in 2012, and again in 2014 and in 2016. Hager represents House District No. 89, which consists of the South and Central beach communities of Palm Beach County. Cities represented in Palm Beach County include Boca Raton, Boynton Beach; Briny Breezes; Delray Beach; Town of Gulfstream; Highland Beach; Hypoluxo; Lantana; Manalapan; Ocean Ridge; the Town of Palm Beach; the Town of West Palm Beach and Singer Island. The District encompasses about 170,000 Floridians. Some of the Legislative Committees Hager serves or has served on are the following, all by appointment by Speaker of the House: Insurance and Banking; Judiciary; (parent committee); Civil Justice Subcommittee; Criminal Justice Subcommittee; Taxation; Charter Schools; and Commerce, among others. Hager has also chaired Judiciary Appropriations, consisting of some $5 billion in annual appropriations for Florida's judicial system, including all

of the courts and public defenders and prosecutors and prison system and the Attorney Generals Office.

PRINCIPAL, COMP PREMIUM WIZARDS
NOVEMBER 2008 to PRESENT

Workers' compensation consultation services are offered for high risk industries such as construction, mining, and hazardous waste, as well as professional employer organizations (PEOs). Audits, the workers comp classification system, e-mod analysis, high deductibles, retros, and scheduled ratings are analyzed by Mr. Hager and skilled actuaries who are highly experienced in workers compensation.

DEPUTY MAYOR (2004-2005) AND CITY COUNCIL MEMBER
CITY OF BOCA RATON, FLORIDA - APRIL 2002 to 2009

Mr. Hager was elected to a two-year term on the Boca Raton City Council, effective April 1, 2002. During his successful first term Council Member Hager focused on the city budget, quality of citizen services, increased educational opportunities and development plans. He was reelected to a second two-year term without opposition, effective April 1, 2004. At the same time Councilman Hager was also appointed Deputy Mayor, and he held this position for one year until 2005. Mr. Hager was subsequently re-elected to a third term of office in March of 2006, also without opposition, with that term running through March of 2009. As City Councilman and Deputy Mayor, Mr. Hager participated in the oversight of the Boca Raton City Government. He served as an elected member of the Boca Raton City Council through early 2009.

CENETEC, L.L.C.
BOCA RATON, FLORIDA - JANUARY 2000 to JANUARY 2002

In early 2000, Mr. Hager co-founded Cenetec along with a group of entrepreneurs serving as its CEO and Chairman of the Board. Cenetec served as a for profit accelerator designed to help pioneering entrepreneurs turn their most innovative Internet and high technology products and services into successful companies. Cenetec enabled a number of early stage companies to effectively transform themselves into revenue producing enterprises. Cenetec currently held positions in a number of such companies.

CO-FOUNDER, RISK METRICS CORPORATION
BOCA RATON, FLORIDA - 1998 to 1999

Co-founded this information company in 1998. Risk Metrics gathers and sells public data to a wide range of customers. Some time ago, Mr. Hager sold his shares in Risk Metrics and no longer holds a position in the Company.

PRESIDENT AND CHIEF EXECUTIVE OFFICER, NCCI, INC.
BOCA RATON, FLORIDA - 1990 to 1998

Mr. Hager was appointed President and CEO of the National Council on Compensation Insurance (NCCI) in May 1990. NCCI is the nation's largest workers compensation and health care informatics corporation. Headquartered in Boca Raton, Florida, the corporation provides rate making services, database products, software, publications and consultation services to state funds, self-insureds, independent bureaus, agents, regulatory authorities, legislatures and more than 700 insurance companies. While under Mr. Hager's leadership, NCCI had annual revenues approaching $150 million, NCCI employed 1,000 people located in 20 offices around the United States and was and is the licensed statistical and rate advisory organization in nearly 40 states. During Hager's leadership, NCCI had annual pricing responsibility for some $16 billion of workers compensation premium and responsibility to gain regulatory approval of that pricing.

During Hager's tenure, NCCI doubled revenues (from $70 million to $150 million), reduced loss cost inadequacy to nearly zero (down from 25% inadequacy), brought residual markets to an underwriting break-even point (down from $2 billion in annual underwriting losses) and provided the intellectual foundation for $1.5 billion in statutory reform. Concurrently, the organization was right-sized (head count reduced from 1,500 to 1,000), firepower was substantially increased (technical and professionals increased from 40% to 85% of the employment base), and the organization was converted from a rate bureau to a contemporary, competitive information company.

Specific expert skills that emanate from this position include:

Reported to a Board of Directors consisting of the lead insurance industry CEOs;

Oversaw an actuarial department with 150 employees;

Directed rate filings totaling about $100 billion of premium consisting of about 500 complex rate filings; as such, I am very familiar with the rate making-process, the strategy relating to filings and the organizational intent of all rate making organizations;

Intensive management of the federal antitrust exposure of NCCI. As an organization that lawfully promulgated rates on behalf of competitors, this exposure was intensive and pervasive;

Positioned to provide pivotal strategic guidance and testimony A either the as to resistance to a proposed rate filing or its approval. Working with former NCCI FCAS', we are able to zero in on the relevant features of these rate filings;

Positioned to provide pivotal expert testimony as to whether an insurer's behavior conforms or fails to conform to industry practices; Damages, including punitive damages as appropriate, regarding workers' compensation insurers; and RICO matters.

INSURANCE COMMISSIONER, STATE OF IOWA
DES MOINES, IOWA - 1986 to 1990

As Insurance Commissioner appointed by Governor Terry Branstad in July 1986, Mr. Hager was responsible for the regulatory oversight of all insurance companies, agents and brokers authorized to conduct business in the state of Iowa. He directed departments responsible for solvency oversight, consumer protection, agency licensing, and the administration of property and casualty, life and health insurance industries. In addition, Mr. Hager oversaw state regulation of the securities industry with Iowa's Supervisor of Securities reporting directly to him.

Mr. Hager brought contemporary technology to the Insurance Division. He pushed for aggressive legislation resulting in increased prosecution of agents and companies. For example, in 1986, $16 million was recovered from insurers for Iowa consumers. Under his direction, the division spearheaded an effort to attract new insurance operations to Iowa. Under this program, 3,000 new insurance jobs were added in 1988 alone. The program continues to date and is nationally recognized as a model of a constructive environment for attracting insurer operations. He was also responsible for implementing an assertive senior citizens advocacy program to educate the elderly on insurance purchases. Mr. Hager also strengthened rate oversight by leading the effort to hire an FCAS within the Department. Under Hager's leadership the FCAS was paid substantially more than Hager and even more than the Governor of the State.

The most important and yet least visible regulatory tool for an insurance commissioner is regulating for solvency. Mr. Hager was recognized for tenacious solvency regulation. During his term, several preexisting insolvencies were brought to completion and closed out. Furthermore, a number of marginal domestic insurers were declared insolvent and liquidated. Mr. Hager also facilitated a preemptive sale of a $4 billion Iowa domestic insurance company (Integrated Resources Life Insurance Co.) when its parent teetered on insolvency. The department worked with the insurer when a "run on the bank" was imminent and led a rapid sale of the insurer preempting a probable major insolvency. Under the terms of the sale all policyholders were made whole.

The department also recommended and supported state and federal prosecution of several insurance executives (e.g., American Excel) who committed financial fraud.

Specific expert skills that emanate from this position include:

- Responsible for oversight, interpretation and application of entire Iowa insurance code, which is analogous to most states;

- Interpretation and application of insurance laws and regulations to specific fact settings on a daily basis;

- Functioned frequently as an APA Administrative Law Judge, f/k/a hearing officer, applying insurance law to specific contested facts and rendering scores of written opinions. Topics included rate proposals for workers comp, property/casualty, life and health; agents and insurer license revocations; unfair trade practice matters; and declaration of insolvencies;

- Working familiarity with SAP (vs. GAAP);
- Merger/acquisition approvals;
- Examination process;
- Reinsurance/ Bulk Reinsurance approvals.

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (NAIC), 1986 – 1990.

Concurrent with his service as Iowa Insurance Commissioner, Mr. Hager served as a member of the NAIC. The NAIC is an organization of the insurance commissioners of all 50 states and meets regularly in locations throughout the U.S. to consider and evaluate national insurance issues. The NAIC considers all major insurance issues and formulates responsive model insurance laws and regulations, which are then routinely (but optionally) adopted at the individual state level. In addition, the NAIC promulgates and updates the key insurer financial reporting format, namely the NAIC Annual Statement Blank. The organization is based in Kansas City, Missouri and is staffed by well over 100 personnel.

NAIC Chairmanships – Chairman of the Midwest Zone. Mr. Hager was elected by his fellow Insurance Commissioners from the Midwest Zone (composed of the Midwest states, constituting about one quarter of all of the states) to provide leadership and representation of the Midwest before the balance of the states. This position included a position on the Executive Committee of the NAIC as well as major responsibilities relating to the assignment of states (and their related examiners) to specific examinations, both triennial and Market Conduct.

NAIC Leadership: Member of the Executive Committee. Mr. Hager also served as an elected member of the Executive Committee of the NAIC, the body that served as the steering committee of the organization, providing leadership between full membership meetings and providing recommendations to the full membership as to complex or politically charged issues within the organization.

NAIC Chairmanships – Chairman of the Life Insurance Committee. As a member of the NAIC, Mr. Hager served as both Vice Chairman and Chairman of the NAIC Life Insurance Committee. The charge of this Committee was oversight over all issues relating to life insurance products (including illustrations) as well as life insurers. This position and my four years of service at the NAIC exposed me to Mr. Hager to all aspects of life insurer operations and responsibilities.

NAIC Chairmanships: Chair of the Universal Life Insurance Task Force. In addition to chairing the Life Insurance Committee, Mr. Hager also chaired the Universal Life Insurance Task Force. The responsibility of this Committee included oversight of emerging life insurance products such as universal life.

NAIC Chairmanships: Chair of the Life Insurance Product Development Task Force. Mr. Hager also chaired the Life Insurance Product Development Task Force. While chairman of this task force, he led the development of model disclosure statements for universal and indeterminate premium life products designed to assist consumers in their comparison of different types of interest sensitive life insurance products, after a survey of the states determined regulatory problems existed with these products.

NAIC Chairmanships Chair of the Financial Services and Insurance Regulation Task Force. Mr. Hager also served as Chair of the Financial Services and Insurance Regulation Task Force and Member of the Executive Committee. Working with the other U.S. financial industries, this Task Force had responsibility to reconcile issues relating to non-insurance financial matters (e.g., banking and securities) in their intersection with insurance and insurance regulation.

NAIC – Other Committees. In addition, he also served on the following NAIC committees:

- Member, the Blanks Committee
- Member, Guarantee Fund Committee
- Member, Rehabilitator and Liquidators Committee
- Member, Casualty Actuarial Committee
- Member, Commercial Lines Committee
- Member, Valuation of Securities Committee,
- Member, International Insurance Relations Committee
- Member, Accounting Practices and Procedures Committee
- Member, State and Federal Legislative Committee.
- Specific expert skills in regard to NAIC include:
- Eight years of direct hands on experience at the NAIC as a regulator
- Very familiar with the NAIC mechanisms
- Conversant with and adept at applying NAIC publications to litigation (e.g., Examination Manuals; Liquidation Manuals; Accounting Manuals; SVO Office, etc.)
- Working with recognized regulatory focused CPA's, Mr. Hager is able to provide specific and finite insurance/liquidation accounting expert testimony.

Ongoing Regulatory Involvement. In the years since leaving the regulatory ranks, he has continued to be closely involved with the NAIC and the regulatory community. As President and CEO of NCCI, he was in regular attendance at meetings of the NAIC and continues to currently attend these meetings and to be actively engaged with the regulatory process.

PRACTICING ATTORNEY, HAGER & SCHACHTERLE
DES MOINES, IOWA - 1983 to 1986

Following his time in Washington, D.C., Mr. Hager returned to Des Moines and opened his own law firm in 1983. The firm specialized in corporate insurance, regulatory insurance and employee benefit matters. The firm also provided general legal services. Mr. Hager represented numerous clients (companies and agents) in regulatory matters before the Iowa Insurance Department. Representative matters included:

- Policy forms approval
- Rate approval
- Insurer disciplinary matters
- Agent disciplinary matters, and
- Insurer merger acquisition and holding company matters

Mr. Hager also lobbied on behalf of insurers at the state legislature and NAIC level. Representative clients included the:

- Property Casualty Insurance Association of America ("PCIAA");
- The Iowa Professional Insurance Agents Association (PIA), and the
- Iowa Association of Life Underwriters (IALU)

GENERAL COUNSEL AND DIRECTOR OF GOVERNMENT RELATIONS
AMERICAN ACADEMY OF ACTUARIES
WASHINGTON, D.C. - 1980 to 1983

Mr. Hager served as General Counsel and Director of Government Relations for all Academy activities, including advising on admissions, discipline, federal antitrust and general corporate law. He represented the 20,000-member organization before Congress (e.g., Senate Committees on Banking, Commerce, Finance and Labor, and House committees on Education, Labor, Energy, and Ways and Means). He also represented the Academy before federal regulatory agencies, including the:

- Pension Benefit Guaranty Corporation
- Health Care Financing Administration, and
- The United States Department of Labor
- His additional duties included daily monitoring and reporting of all Congressional and regulatory activities affecting the profession.

While at the Academy Mr. Hager was also chief staff support to the following Academy Committees/functions:

- Committee on Discipline
- Committee on Risk Classification
- Committee on Guides to Professional Conduct
- And several others

Actuarial Standards Board. Mr. Hager worked with Academy committees that subsequently provided the impetus for the creation of a national actuarial standards board that later became the Actuarial Standards Board (ASB).

Specific expert skills in this position include:

- Author of "The Emerging Law of Actuarial Malpractice"
- Working knowledge of Actuarial Professional Standards, including conversance with the pronouncements of the Actuarial Standards Board
- Adherence of the particular work product (or professional ethics) to actuarial professional standards
- Applicable expert conclusions
- Knowledge of the organization and structure of the actuarial profession; the profession's players; and the interaction of actuarial science and insurance
- Ability to optimize actuarial malpractice and rate proposal cases ○ Cross examination assistance of opposing actuarial experts ○ Expert testimony as to standards (work product and ethics).

ACTUARIAL STANDARDS BOARD (ASB).
Washington D.C. 1980 – 1983.

As stated, concurrent with his service at the American Academy of Actuaries, Hager served as lead counsel to the Interim Actuarial Standards Board, the forerunner of the Actuarial Standards Board. This Board promulgates the professional standards that come to bear the actuary's professional work product, including professional demeanor. It parallels actuarially, the Financial Accounting Standards Board (FASB) as it relates to the accounting profession.

CHIEF OF STAFF AT THE UNITED STATES CONGRESS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. - 1979 TO 1980

Mr. Hager served as Chief of Staff, f/k/a Administrative Assistant, in Washington D.C. to Iowa Congressman Tom Tauke (Republican from Dubuque) for one year. His duties included the following:

- Coordinated district operations from Washington, D.C.
- Supervised office accounts
- Supervised district grant applications and
- Managed a staff of 14

CHIEF DEPUTY, IOWA INSURANCE DEPARTMENT
DES MOINES, IOWA 1976 TO 1978

Reported directly to Commissioner Herb Anderson. Mr. Hager supervised the following divisions within the Department:

Life and Health Division. The Life and Health Division was responsible for oversight of all life and health policy forms approvals as submitted by insurers. Additionally, this division was also responsibility for all related Life/Health rate change proposals.

Property Casualty Division. The Property Casualty Division was responsible of oversight of all property casualty policy forms approvals as submitted by insurers. Additionally, this division was responsible for all related property/casualty rate change proposals.

Complaints Division. This division was responsible for the processing and oversight of all consumer complaints received by the Insurance Department. In the Department's resolution of such complaints and where patterns of insurer and agent wrong doing arose, to prosecute the insurers/agents under the Iowa Administrative Procedures Act. Mr. Hager personally led the Administration Prosecution of scores of such cases.

Agents Licensing Division. This application was responsible for overseeing all agent-licensing applications.

Examination Division. Hager's duties included that of oversight of the examination division in connection with insurer annual statement filings and audits and solvency matters.

In addition to the above, Mr. Hager supervised initiation of formal administrative actions relating to departmental rules, companies (i.e., mergers, holding company activities and disciplinary activity), and agents (i.e., disciplinary).

IOWA ASSISTANT ATTORNEY GENERAL
DES MOINES, IOWA - 1975 TO 1976

Assigned to the Department of Insurance, serving as the Department's General Counsel. In that capacity, he:

- Represented the Department in all state and federal litigation;
- Prepared briefs for the Department's use in agency administrative hearing
- Provided day-to-day legal guidance to the Commissioner as to all relevant matters
- Prepared and issued Attorney General Opinions relative to insurance matters
- Interpreted state insurance law and regulations
- Prosecutor for APA hearings on behalf of the Insurance Department

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LEGAL COUNSEL TO THE REPUBLICANS, IOWA HOUSE OF REPRESENTATIVES
DES MOINES, IOWA - 1975 SESSION

Retained by the Republicans of the Iowa House of Representative as their legal counsel for 1975 Session. In this position, Mr. Hager provided legal counsel on all relevant caucus issues and provided the following staff support:

- Researched pending legislation
- Prepared memorandums in support of proposed legislation
- Provided legal advice, and

- Participated in bill drafting
- Worked the floor of the legislature as to specific legislation

MATHEMATICS TEACHER, KALAKAUA INTERMEDIATE SCHOOL
KALIHI DISTRICT, HONOLULU HAWAII - 1970-1972

Taught junior high mathematics and Hawaiian history in a school with a significant population of Hawaiian students during academic years 1970-71 and 1971-72.

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EDUCATIONAL BACKGROUND

- University of Northern Iowa, Cedar Falls, Iowa

Bachelor of Arts degree, Secondary Mathematics Education, 1969

- University of Hawaii, Honolulu, Hawaii

Master of Education Degree, Psychological Counseling, 1972

- University of Illinois, Champaign, Illinois

Juris Doctor, 1974

BAR ADMISSIONS AND OTHERS

Florida, by exam 2004;
Illinois, by exam 1975 (this license is currently in inactive status, placed there by myself at my volition; it is eligible for reactivation at any time. This is so because I am in good standing with the Illinois Bar.);
Iowa, by exam 1975;
United States Supreme Court 1978

Member, the Iowa State Bar Association, Sections[1] on:

- Administrative Law,
- Commercial and Bankruptcy Law,
- Corporate Counsel,
- Government Practice,
- Health Law,
- Litigation,
- Trade Regulation and
- Workers Compensation.

Member, American Bar Association, and Member of the following Sections:

- Administrative Law and Regulatory Practice,
- Antitrust Law,
- Health Law and
- Tort, Trial and Insurance.

[1] Committee and section membership varies from year to year with each bar membership.

Member, South County Bar Association, Palm Beach County, and Member of several Sections of the Florida Bar

COMMUNITY

- Member of the Board and Past Vice Chairman of the Board, Boca Raton Regional Hospital
- Co-Chairman (w/ Beth and Mr. Richard Gold) of the 2001 American Cancer Society's Ball (Boca Raton)
- Ball Chairman (w/ Beth) 1999 Boca Raton Community Hospital
- Ball Co-Chair (with Beth and with Mike and Kathy Arts and John and Susan Welchel) of the 1998 Boca Raton Historical Society Ball
- Ball Chair (w/ Beth) of the 1997 American Heart Association Ball
- Board of Directors, National Conference of Christians and Jews of Southeast Florida
- Board Member, past Chair, Boca Raton Chamber of Commerce
- Member of the Session and current Stewardship Campaign Chairman, First Presbyterian Church (Delray Beach)
- Past Board Member, Past Chair, Florida Atlantic University Executive Advisory Board, College of Business
- Past Board Member, Past Campaign Chair, United Way of Palm Beach County
- Past Chair, March of Dimes Walk America
- Advisory Committee to the Board: Pinecrest School, Fort Lauderdale, Florida

AWARDS

- Sun Sentinel Excalibur Award for Business Leaders in South Florida (awarded for excellent business practices)
- Silver Medallion Award, National Conference of Christians and Jews (awarded for ecumenical work in the community between all ethnic groups)
- Business of the Year (to NCCI), as CEO
- Scores of others

PROFESSIONAL

- Partner, Silicon Beach Venture Capital, Inc., a venture capital firm located Boca Raton.
- Elected Councilman of the City of Boca Raton; term ran through 2009.

AUTHOR

- Numerous Iowa Attorney General Opinions (1975-76)
- Antitrust Guide, American Academy of Actuaries (1982)

- Numerous other articles in various publications while General Counsel and Director of Government Relations to the American Academy of Actuaries (1980-1983)
- Numerous articles in various publications while Iowa Commissioner of Insurance (19861990)
- Author (and lecturer) of the Insurance Course of the Iowa Bar Review (@ 1985- 1991)
- Numerous Hearing Officer Decisions under the Iowa Administrative Procedures Act (19781980; 1986-1990)
- Numerous articles about the US Workers Compensation System while President and CEO of NCCI (1990-1997)
- Law Review Article: William D. Hager, ***"The Authority of the States over Debtor Coercion by the Federal Savings and Loan Associations,*** "27 Drake Law Review 651 (1977)
- Law Review Article: William D. Hager and Paul Noel-Chretien, ***"The Emerging Law of Actuarial Malpractice,"*** 31 Drake L.Rev. 831 (1982)
- Law Review Article: William D. Hager & Larry Zimpleman, ***"The Norris Decision, Its Implications and Applications,"*** 32 Drake L. Rev. 913 (1983)
- Numerous other articles

PRESENTATIONS

- Numerous presentations to various groups while Iowa Assistant Attorney General
- Numerous presentations to various groups while Iowa First Deputy Insurance Commissioner
- Numerous presentations to various actuarial organizations/programs while General Counsel and Director of Government Relations of the American Academy of Actuaries
- Numerous presentations to various groups/organizations while a practicing attorney in Des Moines
- Numerous presentations to various groups while Commissioner of Insurance
- Numerous presentations to various groups while President and CEO of NCCI
- Numerous presentations to the high technology community in recent positions;
- Numerous presentations before the Florida House of Representatives and its various committees;

PERSONAL

Bill resides in Boca Raton and is the proud father of two daughters, both graduates of the University of Florida (Go Gators!!); Bill is a highly marginal golfer, and he has taught Sunday School at the First Presbyterian Church in Delray Beach, where he has also served as an Elder.

CONTACT INFORMATION

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Websites
Expert Insurance Witness
www.expertinsurancewitness.com

Workers Compensation Expert
www.comppremiumwizards.com

Reinsurance Arbitrator
www.insurance-metrics.com

APPENDIX B

REPRESENTATIVE ARTICLES AND SPEECHES

WILLIAM D. HAGER

William D. Hager
Founder
Insurance Metrics Corporation
https://www.expertinsurancewitness.com

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bhager@expertinsurancewitness.com

Representative Articles and Speeches of William D. Hager

I have given many speeches and written numerous articles. Set out below is a representative sample of his articles and speeches.

Law Review Articles

1. William D. Hager & Paul-Noel Chretien, "The Emerging Law of Actuarial Malpractice," 31 *DRAKE L. REV*. 831 (1982).

2. William D. Hager & Larry Zimpleman, The Norris Decision, Its Implications and Application, 32 *DRAKE L. REV*. 913 (1983).

3. William D. Hager, The Authority of the States Over Debtor Coercion By the Federal Savings and Loan Associations, 27 *DRAKE L. REV*. 651 (1977).

4. William D. Hager & James G. Leach, An Unsolicited Addition to the Wachtell, Lipton Takeover Response Checklist: The Merger of Revlon and McCarran-Ferguson, 41 *Federation of Insurance & Corporate Counsel* 189 (1991).

Amicus Curiae Brief

5. Brief of Amicus Curiae American Academy of Actuaries, ***Arizona Governing Comm. v. Norris***, 463 U.S. 1073 (1983)(No. 82-52).

6. William D. Hager, Actuarial Malpractice - The Emerging Law and Growing Exposure, 32 Conf. of Actuaries in Pub. Prac. Proc. 480 (1982).

7. William D. Hager, The Emerging Law of Actuarial Malpractice, 32 Conf. of Actuaries in Pub. Prac. Proc. 496 (1982).

8. William D. Hager, Actuarial Liability, 35 Conf. of Actuaries in Pub. Prac. Proc. 627 (1985).

9. William D. Hager, The Emerging Law of Actuarial Malpractice, 35 Conf. of Actuaries in Pub. Prac. Proc. 643 (1985).

10. William D. Hager, The Workers' Compensation Crisis, 41 Conf. of Consulting Actuaries 351 (1992).

Periodical Articles

12. William D. Hager, Three Questions Regarding Enjoining Operations of RRGs and PGs, *Risk Retention Rep.*, Sept. 1989 at 155.

13. William D. Hager, Breathe Life Into Safety Education Programs, *The Bus. J. of Jacksonville*, Oct. 21, 1996.

15. William D. Hager, Prepare Employees For Overseas Travel Risks, *The Bus. J. of Jacksonville*, Oct. 25, 1996.

16. William D. Hager, States Provide Incentives for Drug Free Workplaces: Workers Comp Offers Discounts, *Cincinnati Bus. Courier*, May 9, 1997.

17. William D. Hager, Return to Work Programs, *Rough Notes Rep*.

18. William D. Hager, Stress Busters Designed to Relieve On the Job Burnout, *Rough Notes Rep.*

19. William D. Hager, Quality Process in the Workplace, *Rough Notes Rep*.

20. William D. Hager, Modifying the Workplace to Eliminate Repetitive Stress Syndrome, *Rough Notes Rep*.

21. Megan Santosus, Cross Purposes, *CIO Mag*., Nov. 1, 1994 (chronicling the technological transition Hager led while President of Nat'l. Council Comp. Ins. (NCCI), Boca Raton, Fla.).

22. William D. Hager, Lifting Awareness on Experience Ratings, *PRSIM Points* (WCSIT and ISDA, Springfield, Ill.), Spring / Summer 1996.

23. William D. Hager, NCCI States Its Case, *Indep. Agents Mag*., May, 1994.

24. William D. Hager, Introduction to Bruce N. Barge and John G. Carlson, the Executive's Guide to Controlling Health Care and Disability Costs (1993).

Speeches

25. William D. Hager, Perspectives of the Nineties, Address at Connecticut Insurance Day (Apr. 4, 1995).

26. William D. Hager, The State of Workers Compensation, Address at the American Association of State Compensation Insurance Funds Conference (Aug. 1993).

27. William D. Hager, The State of Workers Compensation, Address Before the Minnesota Chapter of the Chartered Property Casualty Underwriters Society (Nov. 4, 1993).

28. William D. Hager, Major Workers Compensation, Address Before the Chartered Property Casualty Underwriters Society (Nov. 8, 1995).

29. William D. Hager, Workers Compensation Fraud, Address at the American Risk and Insurance Association Annual Meeting (Aug. 11, 1997).

30. William D. Hager, Cycles in Workers Comp, Address at the American Association of State Compensation Insurance Funds Annual Conference (Aug. 18, 1997).

31. William D. Hager, NCCI: Enhanced Products and Services, Address at the Annual Corporate Advisory Board of the PMA Insurance Group (May 2, 1997).

32. William D. Hager, The State of Workers Compensation, Address at the Independent Insurance Agents of Iowa Convention (May 15, 1997).

33. William D. Hager, The Future of Rating Bureaus, Address at the Casualty Actuarial Society Spring Meeting (May 19, 1997).

34. William D. Hager, The State of Workers Compensation, Address Before the Maryland Workers Compensation Educational Association (Sept. 15, 1997).

35. William D. Hager, The Future of Workers Compensation, Annual Address at the Meeting and Annual Issues Symposium of NCCI (1991-1997).

36. William D. Hager, What State Departments of Insurance Should Expect from Casualty Loss Reserve Specialists. 1987 Casualty Loss Reserve Seminar.

37. William D. Hager, The Unfair Claims Practices Act – Sword and Shield; The Corporate Compliance and Executive Planning Super Conference - Governance: Sarbanes-Oxley and Beyond; (September 4, 2003).

38. William D. Hager, Actuarial Malpractice; The Conference of Consulting Actuaries; (November 3, 2003)

39. William D. Hager, Contributor and Periodic Guest as to Insurance Issues: the Nationally Syndicated Weekly Radio Show: It's Your Money with host Bill Bailey (2003).

A. 2011 Legislative Session Presentations.

Presentation to the House Insurance and Banking Committee;
Presentation to the House Regulatory Affairs Committee;
Presentation on the House Floor;
Surplus Lines Law Revisions - proposed legislation;
2011 Session, Florida House of Representatives;

Presentation on the House Floor;

Modernization of the Florida Insurance Agents and Adjusters Laws - proposed legislation;

Presentation to the House Insurance and Banking Committee;
Reform of the Catastrophic Reinsurance Fund ("CAT") - proposed legislation;
2011 Session, Florida House of Representatives;

B. 2012 Legislative Session Presentations.

Presentations to the House Insurance and Banking Committee;
Presentations to the House Regulatory Affairs Committee;
Presentations on the House Floor;
Reform of the Catastrophic Reinsurance Fund ("CAT") - proposed legislation;
2012 Session, Florida House of Representatives;

C. 2013 Legislative Session Presentations.

Presentation to the House Insurance and Banking Committee;
Presentation to the House Regulatory Affairs Committee;
Presentation on the House Floor;
Workers Compensation High Deductible - proposed legislation;
2013 Session, Florida House of Representatives;

Presentation to the House Insurance and Banking Committee;
Presentation to the House Regulatory Affairs Committee;
Presentation on the House Floor;
Modernization of the Florida Workers Compensation law – proposed legislation;
2013 Session, Florida House of Representatives;

Presentation to the House Insurance and Banking Committee;
Presentation to the House Regulatory Affairs Committee;
Presentation on the House Floor;
Reform of the Catastrophic Reinsurance Fund ("CAT") - proposed legislation;
2013 Session, Florida House of Representatives;

D. Other 2013 Presentations

"Securing Florida's Property Insurance Future"
Insurance Day Summit Bermuda 2013 Annual Conference
June 25-26, 2013
Hamilton, Bermuda

"Florida's 2013 Legislative Session and Florida's Future Insurance Market"
Florida Insurance Council 2013 Summer Symposium
June 9-11, 2013
Fort Lauderdale, Florida

"How the Florida Legislature is Building Infrastructure to Assure Optimum Out-Year Commerce"
Economic Council of Palm Beach County, Board of Directors Meeting
June 12, 2013
Boca Raton, Florida;

Presentation to the House Insurance and Banking Committee;
Presentation to the House Regulatory Affairs Committee;
Presentation on the House Floor;
Various items of legislation;
2013 Session, Florida House of Representatives;

E. 2014 Presentations.

Participation in the Florida Chamber of Commerce's
Legislative Pre-Session Panel on Insurance;

Presentation to the House Insurance and Banking Committee;
Presentation to the House Regulatory Affairs Committee;
Presentation on the House Floor;
Various items of legislation;
2014 Session, Florida House of Representatives;

Presentation to the Florida Insurance Counsel:
"State of Affairs of the Florida Insurance Marketplace"
November 2014

F. 2015 Presentations;

Moderated the panel on Worker's Compensation Insurance,
State of the Florida Insurance Marketplace;
January, 2015;

Participated on the legislative panel Florida Chamber of Commerce
Annual pre-legislative seminar;
January, 2015

Presentation to the House Insurance and Banking Committee;
Presentation to the House Government Operations Appropriations Committee;
Presentation to the House Regulatory Affairs Committee; Funding the Florida Catastrophic Storm Risk Management Center at Florida State University for research and mitigation purposes;

Presentation to the House Insurance and Banking Committee;
Presentation to the House Regulatory Affairs Committee;
Presentation on the House Floor;
Various items of legislation, including Uber and Title Insurance

2015 Session, Florida House of Representatives;

Lecturer at the Annual Florida State University College of Law Insurance Symposium on Regulatory and Legislative Matters, March 2015

Participated on the legislative panel Florida Chamber of Commerce
Annual pre-legislative seminar;
November, 2015

G. 2016 Presentations.

Lecturer at the Annual Florida State University College of Law
Insurance Symposium on Regulatory and Legislative Matters,
March 2016;

Presentation to the House Insurance and Banking Committee;
Presentation to the House Regulatory Affairs Committee;
Presentation on the House Floor;
Various items of legislation, including Title; Life Insurance and No Fault Auto
2016 Session, Florida House of Representatives;

H. 2017 Presentations.

Lecturer at the College of Law; Florida State University;
Insurance Symposium on Regulatory and Legislative Matters,
March 2017;

Lecturer at the Palm Beach County CPCU Society;
Topic: 2017 Florida Legislature Insurance Issues;

2017 Session: Florida House of Representatives
Presentations and Debate on Insurance Issues before the House Commerce Committee;
Presentations to the House Regulatory Affairs Committee;
Presentations and Debate on Insurance Issues before the entire House of Representatives;
Various items of legislation, as sponsor and co-sponsor, including No Fault Auto; Workers Compensation Reform; Drug Houses and Opium Overdoses;

2017 (November): Presenter, FAU's Veteran's Entrepreneurship Seminar

2017 (November): Presentation to the Boca Chamber of Commerce's Political Action Committee;

I. 2018 Legislative Session Presentations.

Presentation to the House Insurance and Banking Committee;

Presentation to the House Regulatory Affairs Committee;
Presentation on the House Floor;
Various Items of Legislation

Risk Retention Litigation

40. ***Frontier Insurance Company, Inc. et al. v. William D. Hager, Commissioner of Insurance of the State of Iowa***, #F87-645-E (U.S. District Court for the Southern District of Iowa).

41. ***Swanco Insurance Company v. Hager***, 877 F.2d 353 (8th Cir. 1989), cert. Denied, 493 U.S. 1057, 110 S.Ct. 866, 107 L.Ed. 2d. 361 (11th Cir. 1990).

END OF THIS DOCUMENT.

APPENDIX C

WILLIAM HAGER PRIOR TESTIMONY

ACN v. United, Superior Court, State of California, Los Angeles Division, Case No. BC431355, 4/15 D;

Aiken v. Allianz Life Insurance Company of North America, In the District Court of Oklahoma County, State of Oklahoma, Case 10-2560, D 5/14; T 8/14;

Allstate v. Adams, In the Western District Court of Missouri, Case 3:15-05121, D 1/17

American K-9 v. Rutherford, Circuit Court of Orange County of Florida, Case No. 2011-CA-7669, 1/16 D;

American Home vs. Victaulic Co., Arbitration, 1/15 D,

Victaulic v American Home: 5/15D; 7/15 T;

AUCRA v. Mike Rose Auto, Arbitration 9/17;

Balsamello v. Allstate, Supreme Court of the State of New York, County of Kings, Case No. 502320; 2/17 D;

Charleston Diocese v. Century Indemnity, In the United States District Court of South Carolina, Case No. 2:14-01289, D 7/16

DCD v. Transamerica, United State District Court, Central District of California, Case No. 2:15-cv-03238, 7/17 D

Electric Power Sys v. Zurich, In the United States District Court for the Eastern District of Missouri, Case No. 15-01171, D 7/16;

Emerald Coast v. Sunrise Produce, Case No. 2:14-cv-00166; 3/16 D, USDC Southern Mississippi Eastern Division

Fort Benning v. American Management Services; In the Superior Court of Muscogee County, State of Georgia; Case No. SU10CV2025-F; 2/14 D;

Fox Haven v. Nationwide; United States District Court, Middle District of Florida, Case 2:13-cv-399; 10/14 D;

Gold v. State Farm; Circuit Court for Brevard County, Florida, 05-2011-ca-11196; 10/14 D; 4/16 D;

Harrison v. Continental Western, In the Iowa District in and for Polk County, Case 134978; 10/17 D;

Hass & Wilkerson, In the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, Case No. 10-023913, T 8/16;

Herrera v. AAA Insurance, In the Circuit Court of the County of Jackson, at Kansas City, State of Missouri, Case No. 1516-CV24368, 4/17 D;

In Re: Clarence DePass, In the United States Bankruptcy Court for the Southern District of Florida, Case No. 14-37130, T 1/17

In the Matter of Stockholm Town Mutual Ins. Co.; The Office of Commissioner of Insurance; Case No. 13-C35653; 2/14 D;

JK Harrison v. Continental Western, In the Iowa District Court in and for Polk County, LACL134978, 10/17 D

Kendall Healthcare v. Aetna, 3/17 Arbitration

Leporace v. New York Life and Annuity, United States District Court for the Eastern District of Pennsylvania, Case No. 11-2000, T 5/14;

Levine v. Continental, United States District Court District of Massachusetts, Case No. 1:14-11099, D 10/16

Loukas v. Metropolitan Life Insurance Company; In the Judicial Circuit Court of FL; DT

Merriweather v. Anderson, Circuit Court Duval County, FL, Case No. 16-2012-CA-011944; D 3/15, T 11/15,

Moran v. ILU, Circuit Court of Cook County, IL, Case No. 2013 L 13317; D 11/15;

Nelson v. Connor & Gallagher Ins., Circuit Court of Cook County, IL, Case No. 2011L000203; D 11/15

Northend v. Southern Trust, US District Court for the Western Di;strict of Tennessee, Eastern Division, Case 1:16-cv-01137; 5/17 D;

Northrup v. Wausau, In the Circuit Court of Jackson County, Missouri, at Kansas City, Case No. 1316-cv-27418, 7/17 D; 11/2017 T;

Penn Mutual v. Espinosa, USDC District of Delaware, Case No. 09-300; T 9/15,

Regency Cab v. Travelers, In the Circuit Court for the County of Fairfax, Case No. 2015-0011335; 10/17 D; 11/17 T;

Delia Reyes v. Infinity Indemnity Insurance Company, In the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, Case 13-19660, D 7/14;

Schmidt v. Northwestern, District Court of Oklahoma County, OK; Case No. CJ-2013-4090; D 7/15,

SeaBright v. Euro Paint; In the Court of Common Pleas of Mahoning County, Ohio, 2012 cv 3023 D 11/14;

Smith v. Am Pioneer, District Court of Oklahoma County, Case No. CJ-2014-6062; OK; D 3/16;

Spring Social Club, Inc. v. Greenwood Insurance, In the District Court of Harris County, Texas, Case No. 2015-46905; 7/17 D;

Suarez v. Liberty Mutual, Circuit Court of Miami-Dade County, FL, Case No. 10-13100, D 6/15;

Timbervest v. Lanier, Superior Court of Fulton County, GA, Case No. 2014-CV-24820, D 1/16;

Tolentino v. Health Care Service Corp., Circuit Court of Miami-Dade County, FL, Case No. 3:14-CV-00017, D 2/15;

Travelers v. Jet Midwest; US District Court for the Western District of Missouri, Western District, Case 5:16-06084; 4/17 D;

Vance v. Homeowner's Choice Ins. Co., Circuit Court of Palm Beach County, FL; 2/16 T;

U.S. v. Crithfield, In the United States District Court for the Middle District of Florida, Case No. 8:13-237, T 6/16;

U.S. v. Sklar, In the United States District Court for the Northern District of Illinois, Case No. 10-5583, D 10/16

Western Heritage v. Morstan, USDC District of Arizona, Case No. CV-14-023424, D 10/15;

NYU v FM Global; USDC; So District of NY; 3/2018 D;

Mirfashihi v Travelers; Circuit Court of Jackson Co. MO; at Kansas City; 3/2018 T;

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APPENDIX D

Carithers, et al. v. Mid-Continent Casualty Company

Documents Reviewed by William Hager

1. Carithers MCC Responsive Documents (MCC00001-814);
2. Plaintiff's Expert Witness Disclosure;
3. Claim File documents produced (MCC000815- 1065);
4. Confidentiality Agreement;
5. Amended Complaint;
6. Documents Produced (MCC1085-B – 3498-B);
7. Documents Produced (MCC001066-1101);
8. Mid Continent Motion for Summary Judgment and memo of law "Responsive Documents" (MCC001153 – 1292);
9. All Documents Reviewed by the Opposing Expert;
10. Judgment and Amended Judgment entered in *Carithers v. Mid-Continent Casualty Company*, Case No. 3:12-cv-890-J-34PDB;
11. Appellate Decision, *Carithers v. Mid-Continent Casualty Company*, Case No. 14-11639;
12. Certain Florida Insurance Code Statutory Provisions;
13. Certain FL-OIR Administrative Provisions; and
14. National Association of Insurance Commissioners (NAIC) Market Regulation Handbook.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO. 3:16-cv-00988-TJC-MCR

HUGH A. CARITHERS AND KATHERINE S. CARITHERS, as The Assignees of CRONK DUCH MILLER & ASSOCIATES, INC., CRONK DUCH ARCHITECTURE, LLC, CRONK DUCH CRAFTSMAN, CRONK DUCH PARTNERS, LLC, CRONK DUCH HOLDINGS, INC., AND JOSEPH S. CRONK,

Plaintiffs,

vs.

MID-CONTINENT CASUALTY COMPANY,

Defendant.
_____/

THE CARITHERS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF DOUGLAS MCINTOSH

Plaintiffs, Hugh A. Carithers and Katherine S. Carithers, as assignees of Cronk Duch Miller & Associates, Inc., Cronk Duch Architecture, LLC, Cronk Duch Craftsman, Cronk Duch Partners, LLC, Cronk Duch Holdings, Inc., and Joseph S. Cronk ("the Carithers"), submit the following response in opposition to Defendant, Mid-Continent Casualty Company's ("Mid-Continent" or "MCC") Motion *in Limine* to Exclude Expert Testimony of Douglas McIntosh and Supporting Memorandum of Law [D.E. 106]:

INTRODUCTION

This action seeks to hold Mid-Continent liable for myriad violations of Section 624.155, Florida Statutes, and incorporated provisions of Florida's unfair claims practices act, Section

626.9541(1)(i), not just in the handling of the Carithers claim, but in scores of other similar construction defect claims in Florida.

To this end, the Carithers will present the testimony of Douglas McIntosh, Esq. as an expert witness at trial. Mr. McIntosh is a lawyer with decades of first-hand, relevant experience. He is routinely hired by insurance companies for his counsel on insurance coverage for construction defect claims, as well as to adjust such claims directly on behalf of carriers such as Mid-Continent.

Despite retaining a far less experienced, non-practicing lawyer to offer a mirror-image of Mr. McIntosh's opinions,[1] Mid-Continent now seeks to exclude McIntosh's testimony under *Daubert*, arguing: (1) McIntosh is unqualified to "testify on construction defect claims handling standards;" (2) McIntosh employed an "inherently unreliable" methodology since, in Mid-Continent's view – his opinions are either wrong as a matter of fact or "unsupported by any authority or treatise;" and (3) McIntosh's opinions do not assist the trier of fact because they "consist of nothing more than legal conclusions and opinions on legal issues." D.E. 106, pg. 2.

Mid-Continent's motion reads like an outline of its trial cross-examination, and consistently misconstrues the basis on which McIntosh's testimony will be offered. As Mr. McIntosh's deposition testimony and corresponding record evidence confirms, he will testify, based on decades of experience adjusting claims on behalf of insurance companies and handling construction defect litigation in Florida, that:

[1] Mid-Continent retained William Hager, a lawyer, former Florida Legislature member, and former insurance commissioner for the state of Iowa turned professional expert witness to tow Mid-Continent's company line. As was obvious in his deposition testimony, Hager has never worked inside an insurance company, adjusted or rendered advice to an insurance company in the construction defect context, or adjusted a claim under a commercial general liability policy. Hager Dep., D.E. 105-1 at 30:6-32:4. These flaws and others in Hager's opinions will be demonstrated at trial. *Jones v. Otis Elevator Co*., 861 F.2d 655, 662-63 (11th Cir. 1988) (cross examination is the appropriate tool to ferret out weaknesses in an expert opinion).

1. Construction defect claims of the size presented by the Carithers are expensive to defend, such that the cost of defense exceeds the amount of the claim (McIntosh Dep., D.E. 106-2 at 194:17-195:10[2]);

2. It is rare in the construction insurance industry that claims such as the Carithers' (i.e. those with approximately $100,000 in property damage) reach litigation; most are resolved during the normal and ordinary course of routine claims adjustment (McIntosh Dep., D.E. 106-2 at 176:8 – 178:8);

3. Despite the cost involved, the proper "weight of authority" – both as to the standard under which a defense must be offered and as to the appropriate "trigger" theory under Florida law – overwhelmingly demonstrated that Mid-Continent should have offered a defense to Cronk Duch under a reservation of rights instead of denying coverage (McIntosh Dep., D.E. 106-2 at 185:14);

4. Mid-Continent failed to recognize case law that would have supported the application of "injury-in-fact" trigger, making the law at best uncertain and requiring Mid-Continent to offer a defense (McIntosh Dep., D.E. 106-2 at 88:10 – 89:16, Expert Report, D.E. 106-1 at pg. 6);

5. In making its decision, Mid-Continent failed to recognize that by implication, the Carithers' lawsuit against Cronk Duch raised the possibility that damages to the Carithers' home manifested themselves during Mid-Continent's policy periods, obligating Mid-Continent to defend even under its pre-ordained "manifestation" theory (McIntosh Dep., D.E. 106-2 at 71:14 – 77:23);

6. Industry custom and practice dictates that a carrier in doubt as to its defense obligations should agree to defend under a reservation of rights while also pursuing a declaratory action to determine its coverage obligations, thereby protecting both the rights of the insured to a full defense and the rights of the carrier to have its coverage obligations determined (Expert Report, D.E. 106-1 at pg. 4-6);

7. Mid-Continent failed to investigate facts pertinent to coverage, as evidenced by the lack of careful study by Mid-Continent's claims handlers when the carrier made and reaffirmed its decision (McIntosh Dep., D.E. 106-2 at 98:17 – 100:5);

8. Mid-Continent's sanitation of its decisions through a claims committee put form over substance, which is relevant to Mid-Continent's failure to fairly and honestly evaluate coverage (McIntosh Dep., D.E. 106-2 at 164:16 – 165:9);

[2] A complete copy of Mr. McIntosh's deposition transcript was previously filed by Mid-Continent. D.E. 106-2. His testimony amplifies and expounds upon the opinions contained in his Rule 26 expert report and disclosure, which was also previously filed. D.E. 106-1.

9. Even after its coverage determination had been found wrongful by the Eleventh Circuit, Mid-Continent had a clear obligation to attempt to settle, but it failed to do so (McIntosh Dep., D.E. 106-2 at 125:8 – 126:17).

Simply stated, Mr. McIntosh's testimony will frame the facts in light of insurance industry standards, custom, and practice, without telling the jury what to decide. This is exactly how experts are to be used in insurance bad faith cases. *See, e.g., Wiggins v. Gov't Emp. Ins. Co.*, Case No. 3:16-CV-1142-J-32MCR, 2019 WL 338945 at *2, n. 2 (M.D. Fla. Jan. 29, 2019) (Corrigan, J.) (allowing a lawyer with insurance industry experience to testify regarding relevant industry custom and practice in a bad faith case). Mid-Continent's motion should be denied.

ARGUMENT AND MEMORANDUM OF LAW

The admissibility of expert testimony is governed by Federal Rule of Evidence 702, which provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702. As explained by the Eleventh Circuit, expert testimony is admissible if:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998). The "*Daubert*" factors do not necessarily apply in every instance in which the reliability of expert testimony is challenged. *See, e.g., Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151 (1999).

> Expert testimony is admissible which connects conditions existing later to those existing earlier provided the connection is concluded logically. Whether this

> logical basis has been established is within the discretion of the trial judge and the weaknesses in the underpinnings of the expert's opinion go to its weight rather than its admissibility.

Jones v. Otis Elevator Co., 861 F.2d 655, 662-63 (11th Cir. 1988).

Whatever factors are considered, the Court's focus should "be solely on principles and methodology, not the conclusions they generate." *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1312 (11th Cir.1999). "It is therefore error to conflate admissibility with credibility, as by considering the relative weight of competing experts and their opinions." *Bray & Gillespie IX, LLC v. Hartford Fire Ins. Co.*, No. 6:07-CV-326-ORL-DAB 2009 WL 1046354, at *2 (M.D. Fla. Apr. 20, 2009). Where opposing counsel disagrees with the conclusions reached by an expert, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking" admissible evidence. *See, e.g., Gonzalez v. Cooperativa de Seguros Multiples de Puerto Rico, Inc.*, No. 8:08-CV-1910-T-30TGW, 2009 WL 3781492, at *3 (M.D. Fla. Nov. 10, 2009).

I. McIntosh is Qualified to Render his Opinions.

"The qualification standard for expert testimony is 'not stringent,' and 'so long as the expert is minimally qualified, objections to the level of the expert's expertise [go] to credibility and weight, not admissibility.'" *Vision I Homeowners Ass'n Inc. v. Aspen Specialty Ins. Co.*, No. 08-81211-CIV, 2009 WL 5103606 at *2 (S.D. Fla. Dec. 28, 2009) (quoting *Kilpatrick v. Breg, Inc.*, No. 08-10052-CIV, 2009 WL 2058384, at *3 (S.D. Fla. June 25, 2009)). Rule 702 requires that a testifying expert be "qualified as an expert by knowledge, skill, experience, training, or education." FED. R. EVID. 702. Indeed, the advisory committee notes emphasize a broad conception of expert qualifications, recognizing that "[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." *See* FED. R. EVID.

702, Adv. Comm. Note. A witness who possesses general knowledge of the subject may qualify as an expert despite lacking specialized training or experience, so long as his testimony would assist the trier of fact. *See Eberli v. Cirrus Design Corp*., 615 F. Supp. 2d 1357, 1362 (S.D. Fla. 2009) (collecting cases).

McIntosh has practiced law in Florida for more than thirty-six (36) years, the last twenty-five (25) of which have focused on the representation of insurance companies, defending their insureds when faced with liability, and counseling insurers on coverage obligations and claims handling related issues. D.E. 106-1, pg. 2. This includes counsel on prudent claims handling practices and assisting claims handlers in meeting their good faith obligations. *Id*. He is also a certified instructor with the Florida Department of Insurance, and teaches courses to adjusters on exactly what is expected of them when deciding whether to defend under a reservation of rights or deny coverage. D.E. 106-1, pg. 12.

McIntosh has also actively defended and handled construction defect cases in two ways: (1) as coverage counsel representing the insurer and (2) as defense counsel appointed by the insurer to represent the insured. D.E. 106-1, pg. 2; McIntosh Dep., D.E. 106-2, at 194:18-195:10. McIntosh is also asked by insurers to audit claims files and to actually adjust claims on the insurance company's behalf. McIntosh Dep., D.E. 106-2 at 175:1 – 176:5; 181:3-183:11.

This makes Mr. McIntosh far more qualified to testify here than Mid-Continent's expert, who has never held an adjusting license, worked inside an insurance company, adjusted a claim under a commercial general liability policy, or adjusted a claim in Florida or a construction defect claim anywhere in the country. Hager Dep., D.E. 105-1 at 30:6-32:4; 47:1-15. Nor has Mid-Continent's expert prepared claim guidelines for the evaluation of the duty to defend under a commercial general liability policy. Hager Dep., D.E. 105-1 at 47:16-48:10. Mid-Continent

nevertheless makes much of the fact McIntosh never worked in-house for an insurance company, or "authored a claims manual," or "developed procedures for insurance companies on how to respond to a civil remedy notice when the amount of the claim is contested." D.E. 106, pg. 8.

McIntosh has decades of relevant experience which forms the foundation for his opinions, which arose based upon a review of all materials produced in discovery by Mid-Continent and the fact-witness testimony in this case.[3] This connects the foundation for his opinions to the opinions themselves, demonstrating how his industry experience leads to the opinions reached. McIntosh's experience in the state of the law, how construction defect cases are handled, and the associated expense does not require him to have authored a claims manual or worked in-house at an insurance company. This is the stuff of cross-examination and weight, not exclusion under *Daubert*.

In *Wiggins*, this Court recently allowed the opinion of a lawyer (Michael Callahan) to testify regarding the actions of counsel in a failure to settle case "based on his years of experience dealing with lawyers who handle [the type of claim], and the minimum competence required of those lawyers." *Wiggins*, 2019 WL 338945 at *3. This experience included "his experience dealing with insurance cases, including assisting insurance companies with claims practices and procedure and developing strategies for dealing with bad faith cases." *Id.* at n. 3; *see also Royal Marco Point I Condo. Ass'n v. QBE Ins. Corp*., No. 2:07-CV-16-FtM-99SPC, 2011 WL 470561 at *4 (M.D. Fla. Feb. 2, 2011) (qualifying attorney as an expert with over 20 years of insurance experience representing the insurance industry, including experience in how claims are handled); *Kemm v. Allstate Prop. & Cas. Co*., No. 8:08-CV-0299-T-EAJ, 2010 WL 11507365 at *4 (M.D. Fla. May 14, 2010) (expert (James Kadyk) was qualified based on his

[3] To the extent the Carithers' pending motion to compel is granted (D.E. 96), McIntosh will review additional discovery produced by Mid-Continent prior to trial.

review of claim files, prior advice given on claims handling, and training of other professionals on standard of care despite his relative lack of experience litigating bad faith cases); *Kearney v. Auto-Owners Ins. Co.*, No. 06-CV-595-T-24TGW, 2009 WL 3712343 (M.D. Fla. Nov. 5, 2009) (finding attorney qualified to give opinions about reasonableness of insurers' actions, whether it acted fairly and honestly toward its insured, and that the insurer was justified in paying when it did despite lack of experience working inside an insurance company); *Am. Gen. Life Ins. Co. v. Schoenthal Family*, LLC, 248 F.R.D. 298 (N.D. Ga. Jan. 15, 2008) (finding an expert qualified based upon his general experience in the industry and his review of the documents and testimony of the insurer at issue) ; *Talmage v. Harris*, 354 F. Supp. 2d 860, 866-67 (W.D. Wis. 2005) (finding attorney with 20 plus years' experience as a lawyer defending insurance companies against claims made by policyholders and who also spoke on the issue of bad faith was qualified to render an opinion on insurer's claim handling).

Mid-Continent principally relies on two orders from Judge Marcia Cooke in the Southern District of Florida in an effort to justify McIntosh's exclusion based on a purported lack of experience. In *Estate of Arroyo v. Infinity Indemnity Co.*, Case No 15-20548-CIV-COOKE/TORRES, 2016 WL 4506991 (S.D. Fla. Aug. 29, 2016), the insurer sought to strike the expert testimony of a lawyer (Lewis Jack) retained by the insured to testify on various claims handling issues in a bad faith case. In finding Jack unqualified, Judge Cooke was careful to note that lawyers with insurance law expertise could opine on claims handling issues in certain circumstances, and her holding did not "impinge on a lawyer's ability to opine about other areas of a bad faith insurance case." *Id.* at *3, n. 2.

In the same order, Judge Cooke found the insurer's expert (James Schratz) qualified to opine on "national industry standards of insurance company claims handling and investigation

processes, and how [the insurer] applied them in this case" despite Schratz' lack of Florida-specific experience. *Arroyo*, 2016 WL 4506991 at *3. Here, of course, McIntosh has been handling, adjusting, and litigating the precise type of claim presented by the Carithers in Florida for decades, including advising insurers on how such claims should be handled. If Schratz is qualified, then so is McIntosh.

Judge Cooke's order in *Arroyo* relied principally on her prior order prior order in *Lopez v. Allstate Fire & Casualty Insurance Co*., Case No. 14-20654-CIV-COOKE/TORRES, 2015 WL 5584898 (S.D. Fla. Sept. 23, 2015). The insurer hired a lawyer (James Kadyk) to opine on claims handling issues in a bad faith case who – despite his decades of experience representing insurance companies – had never published on the subject, adjusted a claim, or been employed by a carrier. The court found general insurance law experience – without more – did not qualify a lawyer to serve as a claims handling expert. *Id*. at *5.

McIntosh is more than just an insurance lawyer practicing insurance law. He has represented carriers and their insureds in the precise type of dispute at issue in this case (construction defect litigation in Florida) and actually adjusted claims and given advice to insurers on how they can fulfill their good faith obligations in such cases. This is the type of experience needed under Rule 702, regardless of whether he ever worked in-house for an insurance company or published his own treatise[4] on claims handling.

[4] *Butler v. First Acceptance Insurance Co*., 652 F. Supp. 2d 1264 (N.D. Ga. 2009) – cited by Mid-Continent as supporting exclusion – makes this point forcefully. *Id*. at 1273 ("While the law does not require that an expert point to any particular treatise or policy to bolster his opinions, the expert must be able to explain how his background and experience allow him to offer an opinion as to the matter at hand"). In *Butler*, the court found that narrow insurance experience (handling auto claims) did not qualify an expert to opine on the broader insurance industry. *Id*. McIntosh's experience in construction defect claims handling and litigation, however, qualifies him to opine on how Mid-Continent handled "the matter at hand."

II. McIntosh's Opinions – Based on his Experience – are Reliable.

Standards of scientific reliability (such as testability and peer review) do not apply to all forms of expert testimony. *Schoenthal Family, LLC*, 555 F.3d at 1338 (citing *Kumho Tire*, 526 U.S. at 151). For non-scientific expert testimony, "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id*. Accordingly, the mere fact that an expert's methodology is not quantitative, testable by scientific method, or subject to peer review and publication is not grounds for excluding expert testimony that is otherwise sufficiently reliable. *United States v. Brown*, 415 F.3d 1257, 1267 (11th Cir. 2005).

An expert such as McIntosh who relies upon his experience as the foundation for his opinions must explain how his experience supports the opinions. *Wiggins*, 2019 WL 338945 at *2 (citing *Hughes v. Kia Motors Corp*., 766 F. 2d 1317, 1329 (11th Cir. 2014)). This means it must be shown that the expert's experience "[leads] to the conclusion he reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case." *Wiggins*, 2019 WL 338945 at *2 (quoting *United States v. Frazier*, 387 F.3d 1244, 1265 (11th Cir. 2004)).

Again, in *Wiggins*, this Court recently found reliable expert testimony presented by a lawyer in a bad faith case despite the fact his expert report failed to explain how his experience led to the opinions reached because he testified that his opinions were based upon "years of experience dealing with lawyers handling these types of claims and the minimum competence required of those lawyers." *Wiggins*, 2019 WL 338945 at *2; *see also Royal Marco Point 1 Condominium Ass'n*., 2011 WL 470561 at *4 (expert testimony that compared the carrier's

claims handling to what he experienced in the industry was reliable; objections as to the extent of his review of similar claims went to weight, not admissibility).

Mid-Continent principally complains that McIntosh's opinions are wrong or insufficiently supported, and therefore unreliable. But disagreement over an expert's conclusions is best tested on cross-examination or through the presentation of other contrary admissible evidence. *See, e.g, Allison*, 184 F.3d at 1312; *Gonzalez*, 2009 WL 3784192 at *3.[5] And McIntosh's opinion that the duty to defend is triggered by doubts and inferences drawn in favor of the insured is a correct statement of Florida law, and has been for decades. *Jones v. Fla. Ins. Guar. Ass'n*, 908 So. 2d 435, 442-43 (Fla. 2005) (an insurer's duty to defend its insured against a legal action arises "when the complaint alleges facts that fairly and potentially bring the suit within policy coverage"); *Pepper's Steel & Alloys, Inc. v. U.S. Fid. & Guar. Co.*, 668 F. Supp. 1541, 1545 (S.D. Fla. 1987) ("[T]he duty to defend exists so long as the allegations against the insured *even arguably* come within the policy coverage."). Any uncertainty as to the duty to defend – whether in the meaning of policy language, the allegations of the underlying pleadings, or the state of the law – must be resolved in favor of a defense. *Carithers v. Mid-Continent Cas. Co.*, 782 F.3d 1240, 1246 (11th Cir. 2015); *Bear Wolf, Inc. v. Hartford Ins. Co. of SE*, 819 So. 2d 818, 820 (Fla. 4th DCA 2002). This is particularly true when the defense turns on when property damage occurred. *Trizec Properties, Inc. v. Biltmore Const. Co., Inc*., 767 F.2d 810 (11th Cir. 1985) (duty to defend exists when the complaint alleges damages occurred during policy period, even if manifested later).

[5] In *Lopez*, Judge Cooke found Kadyk's opinions unreliable because he failed to show how his work as an attorney could be reliably applied to the facts of the case. *Lopez*, 2015 WL 5584898 at *6. McIntosh's experience in the world of construction defect claims handling and litigation, however, leads to the opinions expressed in this case, all of which relate directly to how insurers typically handle similar claims in Florida, particularly where the insurer's defense obligations turn on when coverage is triggered.

If Mid-Continent continues to disagree with the Eleventh Circuit's clear holding on the issue, it may present contrary evidence at trial.[6] But that is not enough to prevent McIntosh from testifying to the contrary.[7]

III. McIntosh's Opinions Will be Helpful to the Jury.

Expert testimony is helpful to the trier of fact if it concerns matters beyond the understanding of the average lay person. *See, e.g., United States v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004). This factor goes primarily to relevance, and requires that the opinion offered relate to an issue in the case in order to be helpful. *Quiet Tech DC-8, Inc. v. Hurel-Dubois UK Ltd*., 326 F.3d 1333, 1347 (11th Cir. 2003). An expert may opine on an ultimate issue of fact, but may not tell a jury the result it should reach. *Montgomery v. Aetna Cas. & Sur. Co*., 898 F.2d 1537, 1541 (11th Cir. 1990).

Expert testimony about the ordinary practices of a profession or trade is generally admissible since it enables a jury to evaluate the conduct of the parties against the accepted standards of practice in the industry. This rationale has been applied consistently in claims practices litigation. *Royal Marco Point 1 Condominium Ass'n,* 2011 WL 470561 at *4 (expert opinion of lawyer with insurance industry experience is helpful in a bad faith case, as "standards for handling insurance claims is not a matter of common knowledge"); *Harrison v. State Farm Fire & Cas. Co.,* Case No. 2:12-CV-205-FtM-38UAM, 2013 WL 12158377 at *2 (M.D. Fla. Dec. 11, 2013) (allowing lawyer with insurance experience to testify as to requirements of Florida law, the importance of the law, and insurance industry custom and practice because such

[6] Hager's opinions are based entirely on his belief that the Eleventh Circuit's earlier *Carithers* opinion was wrongly decided. Hager Dep., D.E. 105-1 at 53:16-54:10 and 121:6-12.

[7] Counsel for Mid-Continent asked certain questions of McIntosh at this deposition that would clearly call for the disclosure of privileged communications between McIntosh and his clients, and now Mid-Continent claims McIntosh's refusal to answer on the basis of privilege justifies his exclusion. The Carithers' and McIntosh cannot control the questions asked of McIntosh at deposition. At trial (as is clear from his report), McIntosh's opinions will not be based upon advice given to his clients, but rather his first-hand, decades long experience in the field.

testimony would be helpful in a bad faith case); *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017-18 (9th Cir. 2004) (district court properly admitted expert witness testimony on the practices and norms of insurance companies in the context of bad faith); *Whiteside v. Infinity Cas. Ins. Co.*, 2008 WL 3456508, *7-9 (M.D. Ga. Aug. 8, 2008) (expert testimony concerning appropriate claim handling practices in an insurance bad faith case "will be helpful to the jury, as lay jurors are not likely to be familiar with the intricacies of insurance claims handling").

It should be obvious these issues – and the state of the law on the duty to defend and trigger theory in Florida – are outside the scope of understanding of the average juror. *See Frazier*, 387 F.3d at 1262. Mid-Continent nevertheless urges exclusion of McIntosh's opinions as to the state of the law, stating "it is well-settled that expert testimony regarding issues of law is inappropriate and should be excluded." D.E. 106, pgs. 14-15.

This is curious; by defending its conduct on the basis that it was in accord with the "greater weight of legal authority" under *State Farm Mutual Automobile Insurance Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995), Mid-Continent has placed the state of the law relevant to its coverage decision at issue. Not only is the state of the law critical evidence in light of Mid-Continent's position, to exclude it from the jury's consideration would be an abuse of discretion.

In *Garcia v. GEICO General Insurance Co.*, 807 F.3d 1228 (11th Cir. 2015), the insurance company defended its claims handling on the basis that its coverage position under an automobile policy was in line with Florida law when it was denied. Geico proffered the testimony of an expert witness on the state of the law on the coverage question, and the insured successfully excluded the expert's testimony at trial. *Id*. at 1231-32.

The Eleventh Circuit reversed, finding "[a] jury would no doubt find it exceedingly relevant that Florida law on [the coverage issue] was in a state of flux…or that [various courts]

supported Geico's conclusion regarding [the coverage issue]…." *Id*. at 1235. Expert opinion evidence "considering, applying and clarifying [the weight of legal authority] is therefore relevant, and its exclusion from the jury's consideration was an abuse of discretion." *Id*.

Mid-Continent's motion ignores *Garcia*. Its expert (Hager) will offer opinions that Mid-Continent acted in good faith, but Hager is not a construction defect coverage lawyer, and he will be of little use to the jury on the state of the law. The absence of McIntosh's testimony as to the state of the law will rob the jury of critical evidence it needs to evaluate the defense to Mid-Continent's behavior raised by Mid-Continent. Mid-Continent's other authority is inapposite and does not support exclusion. *See Am. Home Assurance Co. v. Devcon Int'l. Inc*., No. 92-6764-CIV, 1993 WL 401872, at *4 (S.D. Fla. Sept. 28, 1993) (affidavit stricken of expert retained by insurer in action to determine coverage for pollution liability, who opined coverage was excluded, thereby merely stating a legal conclusion); *Clarendon Am. Ins. Co. v. Bayside Rest. LLC*, No. 8:05-CV-1662-T-17-TGW, 2006 WL 2729486 (M.D. Fla. Sept. 25, 2006) (striking affidavit proffered by insured in coverage dispute as to ambiguity of coverage terms); *Lopez*, 2015 WL 5584898 at *6 (in *dicta*, excluding opinions that "relate to issues of fact that the jury is capable of determining" without expert assistance as unhelpful).

McIntosh's testimony – whether as to ultimate factual issues in the case or otherwise – will assist the jury tasked with evaluating specialized issues without telling it what result to reach. His opinions are therefore helpful under *Daubert*, and should be admissible at trial.

CONCLUSION

Mr. McIntosh is qualified, his opinions are reliable and based on decades of relevant industry experience, and his testimony will assist the trier of fact by placing Mid-Continent's behavior in context thereby allowing the jury to appropriately consider whether, under the

totality of the circumstances, Mid-Continent handled the Carithers' claim fairly and in good faith. For these reasons and the others set forth herein, Mid-Continent's motion should be denied.

Respectfully submitted,

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I hereby certify that on February 14, 2019, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served via Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing listed on the Service List below.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

HUGH A. CARITHERS and KATHERINE S. CARITHERS, etc.,

Plaintiffs,

CASE NO. 3:16-cv-988-TJC-MCR

vs.

MID-CONTINENT CASUALTY COMPANY,

Defendant.
_____/

DEFENDANT MID-CONTINENT CASUALTY COMPANY'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF DOUGLAS McINTOSH

In seeking to carry their burden that the opinion testimony of their own expert, Douglas McIntosh, passes muster under *Daubert*, Plaintiffs attack MCC's expert, despite not having filed their own *Daubert* motion. Additionally, Plaintiffs' argument that MCC's objections to McIntosh's testimony go to weight rather than admissibility is just plain wrong. Under the pertinent *Daubert* factors—qualification, reliability, and relevance—McIntosh's testimony simply cannot pass through the Court's *Daubert* gate.

Plaintiffs have failed to establish that McIntosh, a lawyer, is qualified to opine on the internal claims handling practices of MCC. They have further failed to establish how McIntosh's extremely limited experience with construction defect property damage claims and trigger of coverage provides a sufficient basis for his opinions—opinions for which he has otherwise provided no authoritative support. Finally, while his opinions on the weight of legal authority as the applicable trigger of coverage are relevant given this is an issue in the case, many of his other opinions consist of legal conclusions and opinions on legal issues, all of which are inadmissible and should be excluded.

A. McIntosh Is Not Qualified to Opine on Claims Handling Practices.

Plaintiffs contend that the Court's recent order in *Wiggins v. Government Employees Insurance Co.*, No. 3:16-cv-1142, 2019 U.S. Dist. LEXIS 12794 (M.D. Fla. Jan. 28, 2019), demonstrates that McIntosh is qualified to opine on an insurer's construction defect claims handling practices. However, the proposed expert in *Wiggins*, Michael T. Callahan, was an attorney who was retained to testify not about claims handling, but rather about the necessity of personal counsel to assist the insured in settling the claim within policy limits. 2019 U.S. Dist. LEXIS 12794, at *3. While the court allowed Callahan to testify about the role of personal counsel—which he was obviously qualified to do having served in that capacity—Callahan was not, like McIntosh, offered as an claim handling expert. Unlike the Carithers here, the insured in *Wiggins* retained another expert who was qualified to testify about claim handling.[1] In fact, at the hearing on the motion to strike Callahan as an expert, the insured's counsel informed the Court that Callahan would not be testifying "on whether [the insurer's] actions complied with insurance industry custom and practice." *Id.* at *4 n.2.

Plaintiff next rely on *Royal Marco Point 1 Condominium Ass'n v. QBE Insurance Corp.*, No. 2:07-cv-16, 2011 U.S. Dist. LEXIS 14521 (M.D. Fla. Feb. 2, 2011). However, as another court subsequently found, that case contains too little analysis to be helpful. The decision simply states that the expert was an insurance attorney and had experience with how claims are handled—without ever explaining that experience, other than mentioning a lack of first-hand claims handling experience. *Id.* at *8-9. Here, not only does McIntosh have no first-hand claims experience (having never worked for an insurance company), but also his experience as a lawyer handling the issues

[1] That expert was Peter Knowe, who worked for Infinity Insurance Group and Aetna Casualty and Surety before becoming a consultant. A copy of Knowe's CV from *Wiggins* is attached.

upon which he opined (trigger of coverage in a construction defect case) is either very limited or is simply non-existent.

Kemm v. Allstate Property & Casualty Insurance Co., No. 8:08-CV-0299, 2010 U.S. Dist. LEXIS 148324 (M.D. Fla. May 14, 2010), another case cited by the Carithers, did not involve a motion in limine seeking to exclude the attorney's testimony. Rather, it involved a motion for new trial in which the insured argued that the court had erred in allowing the attorney to testify as an insurance claims handling expert. *Id.* at *4. Although the court—with not much more analysis than *Royal Marco Point*—found the attorney to be qualified, it held that any error in permitting the attorney to testify did not meet the standard required to justify a new trial. *Id.* at *12. Notably, this very same attorney was excluded as a good faith claims handling expert in *Lopez v. Allstate Fire & Casualty Insurance Co.*, No. 14-20654, 2015 U.S. Dist. LEXIS 127498 (S.D. Fla. Sep. 23, 2015), a case cited in MCC's motion, and one in which the court found *Royal Marco Point* to be "unpersuasive" because it "fail[ed] to provide extensive analysis on the issue." *Id.* at *15 n.1. Despite the attorney's thirty-six years as an attorney specializing in insurance law, the court in *Lopez* found that the attorney's particular expertise in insurance law did "not match the type of expertise needed to render an expert opinion on the internal standards for handling an insurance claim." *Id.* at *15. That is precisely what is at issue in the present case. McIntosh's experience in insurance law, which is only a segment of his practice, similarly does not qualify him to opine on such internal standards.

Plaintiffs point out that in *Kearney v. Auto-Owners Insurance Co.*, No. 8:06-cv-595, 2009 U.S. Dist. LEXIS 108918 (M.D. Fla. Nov. 5, 2009), cited by MCC in its motion, former Florida Supreme Court justice Charles T. Wells was permitted "to give opinions about [the] reasonableness of [the] insurers' actions." (DE111:8.) However, Wells was actually permitted to give opinions on the reasonableness of advice given by the insurer's attorney, and whether the

insurer followed that advice. *Kearney*, 2009 U.S. Dist. LEXIS 108918, at *14. The overall import of *Kearney* is that Wells was precluded from opining on what McIntosh intends to testify here—claims processing and handling—because, like McIntosh, there was "nothing in his experience or background that qualifies him as an expert regarding claims processing and handling. *Id.* at *12-13.

American General Life Insurance Co. v. Schoenthal Family, L.L.C., 248 F.R.D. 298 (N.D. Ga. 2008), involved the underwriting of a life insurance policy. The expert whose testimony the court found admissible was a university professor—not an attorney. Although the professor was not an underwriter, the court nevertheless found him qualified based on his "lengthy and distinguished career as an academic and consultant studying all aspects of the insurance industry, including financial underwriting." *Id.* at 303. The court detailed that career, which included the professor's authorship of "the leading college textbook on life insurance operations" and his service as a consultant with the National Association of Insurance Commissioners and with several government commissions and committees on underwriting. *Id.* at 303-04. The court found that based on this experience, the professor was qualified to testify regarding the economic rationale that underlies underwriting. *Id.* at 304. McIntosh's experience practicing insurance law does not even remotely approach that of the expert in *American General*.

Plaintiffs finally cite *Talmage v. Harris*, 354 F. Supp. 2d 860 (W.D. Wis. 2005). *Talmage* was not a bad faith action. Rather, it was a legal malpractice action brought by the insured against his attorney in connection with an alleged negligent failure to bring a bad faith claim against the insurer. *Id.* at 861. As another court that barred an attorney's bad faith opinion testimony observed of *Talmage*, a legal malpractice case is "one of the rare circumstances where courts entertain attorney opinions." *Benefit Res. Group, Inc. v. Westfield Ins. Co.*, No. 2:11-CV-64, 2013 U.S. Dist. LEXIS 202093, at *6 (N.D. Ind. Jan. 7, 2013). Further, the attorney in *Talmage* was qualified to

testify as to the reasonableness of the insurer's handling of the insured's claim because it did not involve any "complex industry practices or procedures." 354 F. Supp. 2d at 866. However, the court observed that if it were a complex case, then the attorney would ***not*** be qualified to offer opinions regarding insurance company practices and procedures. *Id.* As set forth in MCC's motion, McIntosh is similarly unqualified to testify to insurance industry practices and procedures.

McIntosh's lack of qualifications is similar to that of the proposed expert in *Trident Web Offset, Inc.. v. Employers Mutual Casualty Co.*, No. D040133, 2003 Cal. App. Unpub. LEXIS 5504 (Ct. App. June 5, 2003). In *Trident Web*, the trial court excluded the declaration of an attorney who opined that the insurer had unreasonably delayed payment of insurance benefits after the insured's commercial property was damaged by a runaway truck. *Id.* at *43. The trial court found that although the attorney's practice consisted of first party and third party insurance defense and insurance coverage, he did not have the expertise to render an opinion that the delay in payment was unreasonable. *Id.* at *44.

On appeal, the appellate court relied upon *California Shoppers, Inc. v. Royal Globe Insurance Co.*, 175 Cal. App. 3d 1 (Ct. App. 1985), in which the trial court allowed an attorney to testify on the subject of insurance company practices to show bad faith. *Trident Web*, 2003 Cal. App. Unpub. LEXIS 5504, at *45. The appellate court in *California Shoppers* had found this testimony inadmissible and prejudicial:

> [N]o foundation whatsoever was laid to demonstrate that Aitkin had any special knowledge, skill, experience, training or education such as would qualify him as an expert on insurance company practices. It is no answer, that certain of his professional efforts are aimed at discovering insurance company derelictions of duty, and then taking them to task. An objection was made to his giving opinions on how California Shoppers' claim was handled. Indeed, as Aitkin candidly admitted, he had never been employed nor even retained as counsel by an insurance company. . . . It is well settled that an expert's qualifications must be established with respect to the subject matter of his testimony. . . .

Id. at *45-46 (quoting *California Shoppers*, 175 Cal. App. 3d at 66-67).

The insurer in *Trident Web* argued the attorney had only general expertise on coverage issues, and did not have particular knowledge of business interruption coverage or commercial property damage. *Id.* The appellate court agreed, finding that the trial court "was within its discretion to conclude that the matters addressed by the declaration would more appropriately have been addressed by a person who worked in claims handling for an insurer, rather than an attorney who dealt with actions based on such claims." *Id.* at *47.

McIntosh is similarly unqualified to testify as to MCC's handling of the claim against Cronk Duch. He has never been employed by an insurance company. In addition, and unlike MCC's expert, he has never regulated insurance companies. What limited experience he has as a lawyer involved in construction defect property damage claims or trigger issues is simply insufficient to permit him to offer his intended opinions here. Like the expert in *Trident Web*, his employment as counsel by insurance companies simply does not qualify him to opine on whether MCC handled the construction defect property damage claim against Cronk Duch in good faith.

B. McIntosh's Methodology Is Unreliable.

Asserting that the methodology used by McIntosh is reliable, Plaintiffs again rely on *Wiggins v. Government Employees Insurance Co.* Again, however, *Wiggins* involved an attorney opining on "what actions personal counsel [for the insured] would have taken," 2019 U.S. Dist. LEXIS 12794, at *3, not the insurer's claims handling practices. That the expert's report in *Wiggins* did not explain how his experience supported his opinions does not somehow excuse McIntosh from demonstrating how his experience as an insurance lawyer supports his opinions as to MCC's practices in handling construction defect property damage claims. The Court was clear that the expert's opinions on the actions of personal counsel were "based upon years of experience dealing with lawyers handling these types of claims and the minimum competence required of

those lawyers." *Id.* at *5. McIntosh has not made a similar demonstration in connection with the good faith handling of construction defect claims.

Plaintiffs note that in *Lopez v. Allstate Fire & Casualty Insurance Co.,* No. 14-20654, 2015 U.S. Dist. LEXIS 127498 (S.D. Fla. Sep. 23, 2015), the attorney expert's opinions were found unreliable because the attorney had failed to show how his experience as an attorney handling insurance matters provided a sufficient basis for the opinions he proffered. (DE111:11 n.5.) According to Plaintiffs, McIntosh's opinions are reliable because his "experience in the world of construction defect claims handling and litigation . . . lead to the opinions expressed in this case." (*Id.*) Here, McIntosh has not shown ***how*** his limited experience in both handling construction defect property damage claims and litigating construction defect cases allows him to opine—without citing any treatise or other supporting authority—that MCC allegedly breached its good faith obligations by following the weight of legal authority when it denied a defense to is insured Cronk Duch.

Moreover, McIntosh rendered his opinions effectively immune from any sort of experience-based testing by repeatedly invoking attorney-client privilege at deposition. Although Plaintiffs note that neither they nor McIntosh could control the questions asked at deposition, McIntosh nevertheless provided opinions purportedly based upon "his first-hand, decades long experience in the field." (DE111:12 n.7.) Yet he did so without showing ***how*** that experience provides a sufficient basis for these opinions. Plaintiffs cannot carry their burden of demonstrating that McIntosh's methodology is reliable under *Daubert*.

C. McIntosh's Opinions Would Not Assist the Trier of Fact.

Plaintiffs assert that McIntosh's opinions satisfy the third *Daubert* factor of relevance or "fit" because the Eleventh Circuit found in *Garcia v. GEICO General Insurance Co.*, 807 F.3d 1228 (11th Cir. 2015), that where, as here, the "weight of legal authority on the coverage issue"

is at issue, it "would expect opinions considering, applying, and clarifying such legal authority to be relevant." *Id.* at 1235.

McIntosh's testimony consists of far more than an opinion on the weight of legal authority as to the applicable trigger theory in 2011—which he acknowledged had for nearly ten years supported the application of the manifestation trigger. (DE107-12:84-85, 90.) He opined that because the Carithers had alleged in their complaint that the defects in their home were latent, MCC breached its duty to defend when it denied a defense to Cronk Duch. (DE107-12:86-88, 102-03.) He also opined that the allegation of a latent defect alone creates a duty to defend even under the manifestation trigger. (DE107-12:103-04.) He further ventured the opinion that the present case actually involved a first-party claim rather than a third-party claim because Cronk Duch entered into a *Coblentz* agreement with the Carithers. (DE107-12:185.)

All of these opinions are legal conclusions that have nothing to do with the weight of legal authority regarding the applicable trigger of coverage theory in 2011. While it may be permissible for an expert to give an opinion on this weight of authority, that expert is still otherwise precluded from offering legal conclusions. *Commodores Entm't Corp. v. McClary*, 879 F.3d 1114, 1128-29 (11th Cir. 2018) (experts may not testify to legal implications of conduct and court must take adequate steps to protect against the danger that expert's opinion would be accepted as legal conclusion). To avoid misleading the jury in the event this case is tried, the law requires that McIntosh be precluded from offering such legal conclusions as expert opinion.

For the foregoing reasons, MCC respectfully requests that the Court grant its Motion and preclude Douglas McIntosh from testifying in this case.

Respectfully submitted,

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I hereby certify that on March 15, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record. I am unaware of any non-CM/ECF participants.

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List of cases with reports, deposition and/or trial testimony for Knowe Consulting LLC for last 5 years

1. Stone Flood and Fire Restoration v Safeco Insurance Company of America

   Client- Safeco Insurance Company

   Judicial District Court in and for Salt Lake County, Utah

   Case 070907640

   Breach of Contract on Commercial Fire Loss and claimed bad faith adjustment

   Report, trial testimony and verdict for client finding carrier did not act in bad faith

2. Kevin Wilson v State Farm and Casualties Company

   Client- Kevin Wilson

   In The Circuit Court of the City Of Roanoke, State of Virginia

   Case 06002308-00

   Breach of contract of Fire policy on rental property and bad faith

   Report, Deposition, Trial testimony, Jury verdict for client

3. Jeriana and Michael Perrien v Nationwide Mutual Fire Insurance Company

   Client- Jeriana and Michael Perrien

   United States District Court For the Middle District of Florida, Tampa Division

   Case 8:08 CV-02586-T-30-TW

   Missed opportunity to settle within limits and resulting bad faith excess judgment

   Report and Deposition, Trial testimony, Jury verdict for client

4. The Hackman Corporation v Western Agricultural Insurance Company

   Client- the Hackman Corporation

   In The District Court of Leavenworth County, Kansas

   Case 2006-CV-549

   Failure to provide an adequate defense and failure to settle within limits

   Deposition Testimony and case settled

5. Robin Baxley, as personal representative of the estate of Michael Scarberry vs GEICO

   GEICO Insurance Company

   Client- Estate of Michael Scarberry

   In The Circuit Court Of The Fourteenth Judicial Circuit In and For Jackson County, Florida

   Case- 09-868 CA

   Failure to settle liability claim post auto accident within the policy limits and bad faith

   Report, Deposition

6. Christy Toler v First Acceptance Insurance Company of Georgia

   Client- Christy Toler

   In The State Court of Ware County, State Of Georgia

   Civil Action 09-v-0519

   Excess Liability Verdict with a claimed missed opportunity to settle within policy limits, breach of contract and bad faith claimed

   Report, deposition testimony and case settled

7. Lori Ann Davidson, Steven Lee Davidson and Wendy Anne Bruessow v Government Employees Insurance Company

   Client- Lori Davidson, Steven Davidson and Wendy Bruessow

   In The United States District court Middle District of Florida, Tampa Division

   Civil Action 08:09 CV 00727-T33-EAJ

   Excess Liability Verdict with a claimed missed opportunity to settle within policy limits, breach of Contract and bad faith claimed

   Report, deposition, case settled

8. Sue Russell v Fire Insurance Exchange Fire Underwriters Association

   Client- Sue Russell

   Case A547605

District Court of Nevada, County of Clark

Homeowners claim partially paid and partially denied with disputed scope and claimed bad faith

Report, deposition, trial testimony, Jury verdict for client

9. Fine Papers Inc. v Lafayette Insurance Company

   Client- Fine Papers Inc.

   Case 636-007

   24th Judicial District Court for the Parish of Jefferson, State of Louisiana

   Hurricane Katrina denied business interruption claim with claimed bad faith

   Report, deposition and case settled

10. William Rynd v. Nationwide Mutual Insurance Company

    Client William Rynd

    Case 53-2009 CA 007415-0000LK Sec 15

    In The Circuit Court of the Tenth Judicial Circuit in and for Polk County, Fl

    Liability Claim with a missed opportunity to settle within policy limits and later

    Excess judgment with claims of bad faith handling by carrier

    Report, deposition, trial testimony, jury verdict for client finding carrier acted in bad faith

11. Cecelia Dellavachia v GEICO General insurance Company

    Client- Cecelia Dellavachia

    Case 8:09CV2175-T-27TGW

    In The United States District Court Middle District of Florida, Tampa Division

    Excess Judgment against responsible party with claims of bad faith handling by the carrier

    Report, Deposition, case settled

2. Howard Lender v GEICO General Insurance Company

   Client- Howard Lender

   Case 09-22303

United States District Court Southeastern District of Florida, Miami Division

Excess Judgment against responsible part with claim of bad faith handling by the carrier

Report, deposition

13. Steadfast Insurance Company v Terracon Consultants

Client- Terracon Consultants

Carrier- Steadfast Insurance Company

Case-2008 CV 5270

District Court, County of Jefferson, State of Colorado

Subrogation effort post settlement of homeowner damage claims against builder from warranty damage 86 million plus resulting construction defects against Geo-tech Engineering firm

Report, deposition and case settled

14. Erskin Bell II v GIECO General Insurance Company

Client- Erskin Bell II

Carrier- GEICO

Case-6:09 –CV-00876-MSS-KRS

Venue-In the Circuit Court for the Ninth Judicial Circuit, in and for Orange County, Florida

Claimed bad faith for failure to settle UMBI claim timely or within available policy limits

Report, deposition testimony

15. Paolo Moschini v Progressive Express Insurance Company

Carrier- Progressive Express Insurance Company

Client- Paolo Moschini

Case- 09-8018 CI 07

Venue- In the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, State of Florida

Excess verdict in tort injury suit and failure to settle for primary policy limits with claimed bad faith

Report, deposition, and trial testimony

16. Navigator Insurance Company v Mintzer, Sarowitz

Testimony for the defendant in deposition and trial testimony

Carrier- Navigators Insurance Company

Client- Mintzer, Sarowitz

Venue- In the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida

Case- 10022615

Expert disclosure, deposition and trial testimony

17. Nolan Goins v Nationwide Mutual Fire Insurance Company

Client- Nolan Goins

Case- 8:11-CV-2771-T-27AEP

Venue- In the United States District Court Middle District of Florida, Tampa Division

Claimed bad faith by insured for failure to settle case for a demand within policy limits resulting in an excess award of $3 M plus

Report and deposition

18. Kenneth Woolbright and Chelsea Woolbright v GEICO Insurance Company

Client- Kenneth Woolbright and Chelsea Woolbright

Case- 1:12-CV-21291-UU

Venue- United States District Court, Southern District of Florida, Miami Division

Claimed bad faith for failure to settle case for a demand within policy limits resulting in an excess

Award of $ 1.2 M

Report, deposition and trial testimony, case settled in trial

19. Caleb Gates V Travelers Insurance Company

Client- Caleb Gates

Case- 3:12-CV-00349-TCJ

Venue- United States Middle District of Florida, Jacksonville Division

Claimed Bad Faith for Failure to settle case for demand within policy limits resulting in an excess Award of $1.73 M

Report and Deposition

20. Clint Lewis v Atlantic States Insurance Company

Client- Clint Lewis

Case- 08-CV-01040

Venue- In the United States District Court in and for the Western District of Pennsylvania

Claimed bad faith denial for commercial property damage claim

Report, Deposition and Trial Testimony, verdict for client and carrier acted in bad faith

21, Patriot General Insurance Company v Carmen McReynolds

Client- Patriot General Insurance Company

Case- 1:12-CV-0997-RWS

Venue- United States District Court, Northern District of Georgia, Atlanta Divison

Claimed bad faith for handling of personal automobile liability policy

Report, Rebuttal Report, Deposition and case settled

22. Okland Construction v Travelers Insurance and Everest National Insurance Company

Client- Okland Construction

Case-11-CV-2652-LTB-BVB

Venue- In the United States District Court, for the District of Colorado

Claimed bad faith for failure to pay policy benefits on construction defect case

Report, Rebuttal Report and Deposition, case settled

23. Jesus Camacho v Nationwide Insurance Company

Client- Jesus Camacho

Case-1:11-CV-03111-AT

Venue-In the United States District Court of Northern District of Georgia, Atlanta

Claimed bad faith for failure to settle within limits with limited liability release within policy limits

Report, Deposition, Trial, verdict for client finding carrier acted in bad faith

24. Orleans Parish School System v Westchester, RSUI

Client- Orleans Parish School System

Case- 06-7342

Venue- 24th Judicial Circuit for the Parish of Orleans, Louisiana

Claimed breach of contract for failure to settle and make any payment post Hurricane Katrina

Report and Deposition, case settled for 77.5 million

25. Vincent Quiroz v Arch Insurance Company

Client- Arch Insurance Company

Case-CV 2010 091813

Venue- In the Superior Court of Arizona, Maricopa County

Claimed bad faith wrongful denial of benefits under UMBI commercial policy

Report and Deposition, case settled

26. Abigail Sowell v GEICO General Insurance Company

Client- Abigail Sowell

Case-3:12-CV-00226-MCR/EMT

Venue- United States District Court, Northern District of Florida

Claimed bad faith for failure to settle liability claim within policy limits

Report, Deposition and trial testimony

27. Michael Ramsey v National Indemnity Insurance Company

Client- Michael Ramsey

Case-09-056-CA-52

Venue- In the Circuit Court of the Seventh Judicial Circuit, State of Florida, Putnam County

Claimed bad faith for failure to settle liability claim within policy limits

Report and Deposition, case settled

28. Hotel Motel Inc. V United Fire Insurance Company

Client- Hotel Motel Inc.

Case-6:13-CV-03069-DPR

Venue- In the United States District Court for the Western District of Missouri

Claimed breach of contract benefits post tornado damage to Hotel and claimed bad faith handling

Report and Deposition, case settled

29. Cory Kapral v GEICO Insurance Company

Client- Cory Kapral

Case- 8:13-CV-02967

Venue-In the United States District Court Middle District of Florida

Claimed bad faith for failure to settle the liability claim within policy limits, excess judgment

Report, Deposition and trial testimony

30. Justin Wimberly v Lloyd's of London

Client- Justin Wimberly

Case- CV-2014- 900014

Venue- In the Circuit Court for Franklin County, Alabama

Claimed wrongful denial due to vacancy and denied owed contract benefits plus bad faith

Report, Deposition, case settled

31. Marcia Dunn, as Chapter 7 Trustee for Emeraldo Lorenzo and Ralph Stewart vs United Automobile

Client- Marcia Dunn

Carrier- United Automobile Insurance Company

Case- 12-14844 CA 30

Venue- In and for the Eleventh Judicial Circuit in and for Miami-Dade County

Claimed missed opportunity to settle all claims within a property damage only policy with 3.5M

Excess judgment for BI as demand was for all claims with claims of bad faith

Report and Deposition

32. Grant Nelson V Progressive Northwestern Insurance Company

Client- Progressive Insurance

Carrier- Progressive Insurance

Case- 2:15-CV-07454

Venue- United States District Court for the District of Kansas

Claimed missed opportunity to settle liability damages within policy limits prior to excess Judgment against Progressive insured

Report and Deposition

33. Christian Leonhardt v GEICO Casualty Company

Client- Christian Leonhardt

Carrier- GEICO

Case- 2011-CA-006318 NC

Venue- Circuit Court Twelfth Judicial Circuit, Sarasota, Florida

Claimed missed opportunity to settle liability damages within policy limits prior to excess judgment against GEICO insured

Report. Deposition and Trial testimony

34. Casey Runolfson v SAFECO Insurance Company

Client- Safeco Insurance

Carrier- Safeco

Venue-United States District Court for Utah

Case- 2:14-CV-00588-DBP

Homeowner's pit bull attack and rescission for material misrepresentation claimed bad faith

Report and Deposition, client won MSJ

35. Manual Gonzales, Ishmael Ramjohn and Aleli Gonzales v GEICO Insurance Company

Client- Manual Gonzales

Carrier- GEICO

Venue- United States District Court Middle District of Florida, Tampa Division

Case- 8:15-CV-00240-ISM-TBM

Auto liability claim with missed opportunity to settle within limits and claimed bad faith

Report , Deposition and Trial testimony, verdict for client

36. Dennis Kemp. as Personal representative of the Estate of Lisa Kemp, Deceased and Andrew Booth Buckman v USAA Casualty Insurance Company

Client- USAA

Carrier-USAA

Venue- In the United States District Court for the Southern District of Florida

Case- 0:15-CV-60212-RLR

Auto Liability claims with missed opportunity to settle within the limits and claimed bad faith

Report and Deposition, client won MSJ

37. Mark Darragh v Nationwide Mutual Fire Insurance Company

Client- Darragh

Carrier- Nationwide

Venue- Circuit Court of Eighteenth Judicial Circuit, in and for Seminole County, Florida

Case- 2006-CA-002655

Auto underinsured motorist claim where primary carry tendered policy limits and claimed

Bad faith conduct on UMBI carriers handling and refusal to pay policy limits timely resulted

In excess verdict

Report and Deposition

38. Shirley Kwaitkowski v Allstate Insurance Company

Client- Shirley Kwaitkowski

Carrier- Allstate

Venue- United States District Court for the Middle District of Florida

Case- 2:14-CV-00575

Auto liability claim where carrier offered limits and then failed to meet disclosure conditions and Policy limits of $100,000 rejected and parties agreed to a stipulated verdict claimed bad faith Report and Deposition

39. Lefferts Mabie, receiver for Tampa Auto Service, LLC d/b/a Tampa Auto Service v Universal Underwriters Insurance Company

Client- Tampa Auto Service

Carrier- Universal Underwriters Insurance

Venue- The Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida

Case-2012-14007

CGL liability claim where direct negligence alleged against a faulty tire repair which the jury concluded in a blowout which caused the car to flip resulting the paraplegic injury to the driver claimed failure to offer 1.3 million in coverage timely where coverage was in order, liability clear and damages exceeded available policy limits, tort judgment 12.4 million claimed bad faith Report and Deposition, case settled day after my deposition

40. Dierdre Levesque v GEICO Insurance

Client- Dierdre Levesque

Carrier- GEICO

Venue- In the United States District Court for the Southern District of Florida

Case- 2:15-CV-14005

Expert Review

Claimed missed opportunity to settle UMBI case with the insured within policy limit of

$100,000 within the Civil Remedy Notice with undisputed liability and primary carrier tender of its $100,000 liability limits under personal car policy and bad faith handling

Report and Deposition

41. Inez Sanchez v Security National Insurance Company

Client- Inez Sanchez

Carrier- Security National

Venue- Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida

Case- 2012-CA-3926

Expert Review

Car liability policy with claimed failure to investigate and offer policy limits of $100,000 timely with Clear liability with DUI and catastrophic injuries to motorcyclist which resulted in an excess verdict against insured and claimed bad faith

Report and Deposition, settled in Trial

42. Southern Brain and Spine v Steadfast Insurance

Client- Southern Brain and Spine

Carrier- Steadfast

Venue- 24Th Judicial District Court for Jefferson Parish, Louisiana

Case-723-119

Specialty lines Commercial Mold claim with business interruption claimed and denied for 3rd party tenant

Report and Deposition Testimony/ then case settled

43, Josuha Moore v GEICO Insurance Company

Client – Joshua Moore

Carrier- GEICO

Case 8:13-CV-1569

Venue – United States District Court for the Middle District of Florida, Tampa

Auto policy missed opportunity to pay limits within a written demand and conditions

Resulted in an excess tort verdict

Report, Deposition and trial testimony resulted in a jury verdict of bad faith on carrier

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO. 3:16-cv-00988-TJC-MCR

HUGH A. CARITHERS AND
KATHERINE S. CARITHERS, as
The Assignees of CRONK DUCH
MILLER & ASSOCIATES, INC.,
CRONK DUCH ARCHITECTURE,
LLC, CRONK DUCH CRAFTSMAN,
CRONK DUCH PARTNERS, LLC,
CRONK DUCH HOLDINGS, INC.,
AND JOSEPH S. CRONK,

Plaintiffs,

vs.

MID-CONTINENT CASUALTY COMPANY,

Defendant.
_____/

THE CARITHERS' SUR-REPLY IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF DOUGLAS MCINTOSH

Plaintiffs, Hugh A. Carithers and Katherine S. Carithers, as assignees of Cronk Duch Miller & Associates, Inc., Cronk Duch Architecture, LLC, Cronk Duch Craftsman, Cronk Duch Partners, LLC, Cronk Duch Holdings, Inc., and Joseph S. Cronk ("the Carithers"), submit the following sur-reply in opposition to Defendant, Mid-Continent Casualty Company's ("Mid-Continent" or "MCC") Motion *in Limine* to Exclude Expert Testimony of Douglas McIntosh and Supporting Memorandum of Law [D.E. 106]:

INTRODUCTION

The Carithers have already demonstrated how each of Douglas McIntosh's opinions pass muster under *Daubert*, such that McIntosh should be permitted to testify at trial. Indeed, perhaps in recognition of the Eleventh Circuit's decision in *Garcia v. GEICO General Insurance Co.*,

807 F.3d 1228 (11th Cir. 2015) - ignored by Mid-Continent in its motion - Mid-Continent now admits that McIntosh's opinions on the greater weight of legal authority "are relevant given this is an issue in this case." D.E. 121, pg. 1.

Mid-Continent nevertheless continues to misconstrue the other opinions McIntosh will offer in an effort to justify exclusion. But McIntosh is qualified, his experience tailored to the facts rendering his opinions reliable, and each of his opinions will help the jury evaluate the ultimate issues to be decided.

ARGUMENT AND MEMORANDUM OF LAW

I. Mr. McIntosh is experienced to opine on insurance industry custom and practice.

McIntosh's experience is not disputed; he's been handling, litigating, and advising insurance companies in Florida for decades on the precise type of claim presented by the Carithers under the same type of insurance policy sold to Cronk Duch. Mid-Continent continues to ignore his other experience including his training of and counsel to property and casualty insurers (like Mid-Continent) on claims handling practices and upholding their good faith claims handling obligations. This includes – but is not limited to – serving as a certified instructor for the Florida Department of Insurance and teaching courses to in-house insurance personnel on these topics. *See* D.E. 106-1, pg. 12.

This experience separates McIntosh from the lawyers Mid-Continent has unearthed from the case law whose experience as a lawyer has been found insufficient to qualify them as experts in cases where an insurer's claims practices are at issue. This includes the lawyer (Kenneth Greenfield) in the unpublished, non-citable decision cited by Mid-Continent styled *Trident Web Offset, Inc. v. Employers Mutual Casualty Co*., No. D040133, 2003 WL 21291039 (Cal. Ct. App. 4th June 5, 2003). In *Trident Web*, the insured suffered a business interruption loss after its

printing business shut down from a runaway truck that crashed into the insured's building. Trident Web sued its property insurer for breach of contract and bad faith under California law. The trial court granted summary judgment to the insurer, and in so doing ignored the affidavit of Greenfield as to the delay inherent in the carrier's business interruption payment. Greenfield's experience was that of an attorney "whose practice consists of first party and third party insurance coverage." *Id*. at *15. The trial court's decision to ignore Greenfield's affidavit was within its discretion either because of Greenfield's lack of experience with business interruption claims, or perhaps because the opinion lacked foundation regarding the harm suffered by Trident. *Id*. at *16.

McIntosh's firsthand experience both as a lawyer and as someone who adjusts and advises insurance companies on the adjustment of the precise type of claim presented by the Carithers' is different.

Benefit Resource Group, Inc. v. Westfield Insurance Co., Case No 2:11-CV-64, 2013 WL 12199941 (N.D. Ind. Jan. 7, 2013) actually supports admissibility of McIntosh's opinions. The insurer retained an expert (Lee McNeely) to testify that its decision on coverage was correct, and was made in good faith. The insured sought to exclude McNeely under each *Daubert* factor. The district court found him qualified as sufficiently "knowledgeable about the law" based on his experience and training. But the court barred him from testifying as to legal conclusions regarding "whether [the carrier] acted in bad faith]" or correctly denied coverage. *Id*. at *3.

In so doing, the court noted that "testimony regarding the reasonableness of [the carrier's] handling of a claim" – as opposed to a legal conclusion of "good" or "bad faith" – would be admissible as a fact issue. *Id* (citing *Talmage v. Harris,* 354 F. Supp. 2d 860 (W.D. Wisc. 2005)). The court also recognized that expert testimony as to whether the insurer's actions

conformed to industry standards and practices based upon his experience and the facts of the case would be proper. *Benefit Resource Group*, 2013 WL 12199941 at *3.

This is exactly the type of testimony the Carithers will solicit from McIntosh at trial. And, he has more than general experience in insurance law unlike the plaintiff's lawyer hired by the insured in the other California case cited by Mid-Continent. *See California Shoppers, Inc. v. Royal Globe Ins. Co*., 175 Cal. App. 3d 1 (Cal. Ct. App. 1985) (no foundation laid that plaintiffs' attorney who had litigated against insurance companies "had any special knowledge, skill, experience, training, or education such as would qualify him to be an expert on insurance company practices" where the expert "had never been employed nor even retained as counsel by an insurance company").

II. McIntosh's experience and review of the relevant evidence in this case leads to his opinions, which will be helpful to the trier of fact.

Feigning confusion, Mid-Continent claims it cannot discern how McIntosh's decades of experience dealing with the same type of claim presented by the Carithers under Florida law, when combined with his review of the factual record, documentary evidence, and deposition testimony, leads to his opinions.

Under established law, however, nothing more is required to meet *Daubert's* "reliability" factor when the opinion testimony is based on experience. *See, e.g., Wiggins v. Gov't Emp. Ins. Co*., Case No. 3:16-CV-1142-J032MCR, 2019 WL 338945, at *2 (M.D. Fla. Jan. 29, 2019) (citing *Hughes v. Kia Motors Corp*., 766 F.2d 1317, 1329 (11th Cir. 2014)); *United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004).

It is the nexus between McIntosh's experience in the world of insurance coverage and claims handling for construction defect claims that fits with the facts of this case, which of

course involves how (and why) Mid-Continent handled the claim presented by the Carithers' in the way it did.

Mid-Continent admits the manner in which insurers handle these types of claims – along with the nature of construction defect litigation and the weight of authority on numerous legal issues – are outside the understanding of the average juror. McIntosh can give each of his opinions without saying what the law is, or telling the jury what result to reach. Nothing further is required to deny Mid-Continent's motion.

CONCLUSION

For these reasons and those set forth in the Carithers' response brief, Mid-Continent's motion to exclude the opinion testimony of Douglas McIntosh should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4th, 2019, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served via Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing listed on the Service List below.

/s/ *Matthew B. Weaver*
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DABBLING WITH *DAUBERT*: ADMISSIBILITY OF ATTORNEY EXPERT TESTIMONY IN INSURANCE CLAIMS HANDLING AND BAD FAITH CASES

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The leading case on admissibility of expert opinion is *Daubert v. Merrill Pharmaceuticals*, 509 U.S. 579 (1993). *Daubert* resolved the conflict among the Federal circuits as to whether the *Frye* standard of "general acceptance" of scientific knowledge was the dispositive test for expert opinion. The Supreme Court rejected the *Frye* standard in favor of a more flexible test under Federal Rule 702 with the trial court as the gatekeeper of admissibility to determine that the expert testimony is "not only relevant, but reliable." *Ibid.*, 509 U.S. at 589. More than 10,000 subsequent cases interpret some portion of the *Daubert* decision.

Rule 702 defines an expert as someone who is qualified "by knowledge, skill, experience, training or education." The expert must have sufficient "scientific, technical or other specialized knowledge" to assist the trier of fact" to understand the evidence or to determine a fact in issue." *Ibid.* The expert's testimony must be "based on sufficient facts or data," "the product of reliable principles and methods," and the expert must "reliably appl[y] the principles and methods to the facts of the case." *Ibid.* The Supreme Court in *Daubert* rejected the bleak statements of *amici* – that mere reliance on Rule 702 would allow in pseudoscientific opinion – and stated that the preventive would be "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." 509 U.S. at 596.

So how does *Daubert* fit with expert opinion in insurance cases? After all, *Daubert* dealt with the scientific question of whether Bendectin caused birth defects. Insurance litigation only rarely concerns scientific opinion. The Supreme Court answered this question by holding in a later case that the court's gatekeeper function applies to all expert testimony, including technical and other specialized knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). In *Kumho*, the Court also emphasized that the trial court has considerable latitude in applying the various factors of reliability to expert testimony. The Court affirmed the trial court determination that although the technical expert has sufficient qualifications, his conclusion that the involved tire had a factory defect was not backed up by sufficient data and technical support.

In the 246 published Federal cases following *Daubert* in which there was an issue regarding expert testimony, most courts found – or the litigants conceded – that the person proferred as the expert had adequate qualifications. One notable exception pre-dating *Daubert* is in a California case called *California Shoppers v. Royal Globe*, 175 Cal.App.3d 1 (Cal.App. 1985) in which the policyholder used a well-known bad faith plaintiff's attorney, Wiley Aiken, as an expert on custom and practice in insurance claims handling. The court concluded that Mr. Aiken was not qualified and stated:

> Attorney Wylie A. Aitkin was allowed to testify as a so-called expert on the subject of insurance company practices, the purpose of such testimony obviously

> having been designed to show that Royal Globe had not only breached the implied covenant of good faith and fair dealing, but had also gone further and behaved or failed to behave in such a way as to make it answerable in exemplary damages.
>
> In other words, Aitkin's testimony was essentially that everything Royal Globe did with reference to California Shoppers was wrong. He was permitted to refer to California Shoppers' exhibit 19 (not placed in evidence), a chart prepared by Mr. Hafif, one of the attorneys for California Shoppers, and represented to be "statements of good insurance practices." Over objections by defense counsel, the court permitted the chart to be used before the jury to "illustrate" Aitkin's testimony. The chart itself was highly prejudicial because it set forth selected excerpts of legal propositions in a misleading manner. Aitkin's testimony contained some accurate statements of law, some incomplete statements of law, and some palpably erroneous statements of law. Whatever, almost all of this testimony was wholly incompetent.
>
> The crux of the error here was that Aitkin in no sense was qualified as an expert to testify about the subject on which he purported to testify. There is no question both on the record and as a matter of repute at the bar, but that he is a highly qualified trial attorney, and a particularly aggressive advocate of plaintiffs' cases against insurance companies. However, no foundation whatsoever was laid to demonstrate that Aitkin had any special knowledge, skill, experience, training or education such as would qualify him as an expert on *insurance company practices.* It is no answer, that certain of his professional efforts are aimed at discovering insurance company derelictions of duty, and then taking them to task. An objection was made to his giving opinions on how California Shoppers' claim was handled.
>
> Indeed, as Aitkin candidly admitted, he had never been employed nor even retained as counsel by an insurance company. Small wonder.

California Shoppers, 175 Cal.App.3d at p. 66.

In a very recent case, *Hansen Construction Inc. v. Everest National Ins. Co.* (D. Colo. June 25, 2019) the court reached a similar conclusion under the *Daubert* rules. The court precluded an attorney from testifying. His qualifications consisted of teaching insurance and risk management courses, and working in the insurance industry as a consultant. The court did not focus on the lightness of the qualifications but rather the expert's propensity to use the same written opinion in every case. The court found four cases in the District of Colorado in which this happened, noting that what the expert uses "is effectively a form opinion that recycles substantive sections and inserts facts specific to the particular case." The court declined to parse out the admissible portions of the attorney's testimony from the inadmissible portions. As to two additional experts, one for the plaintiff and one for the defendant, the court disallowed testimony because the attorneys' opinions were entirely based on the interpretation of the law rather than custom and practice in the industry.

Similarly, in *Baumann v. American Family Mutual Ins. Co.*, 836 F.Supp.2d 1196 (D.Colo. 2011), the court disallowed the expert's opinion because he purported to opine as to the insurer's legal obligations rather than custom and practice. The parties conceded that the expert was sufficiently qualified to testify, having worked as a claims adjuster, and then as a lawyer over many years, frequently lecturing in insurance coverage and bad faith, and testifying as an expert in at least 58 cases. However, he veered too far into the judge's territory in trying to instruct the jury on what the law is. The court noted that the expert could have testified as to what insurance industry standards were on the payment of undisputed claims, but opinions as to legal duties or obligations "usurp the function of the trial judge to instruct the jury on the law." *Baumann*, 836 F.Supp.2d at 1202. The court concluded that the expert's opinions were not helpful, which is one of the important requirements of *Daubert*.

Another case in which attorney testimony was curtailed was in *Lone Star Steakhouse and Saloon, Inc. v. Liberty Mutual Ins. Group*, 343 F.Supp.2d 989 (D.Kan. 2004). In response to motions in limine by both sides, the court excluded the insurer's expert and allowed limited testimony from the plaintiff's expert. *Id.* at 1012-1016. Both experts were lawyers. The insurer retained Prof. George Priest of Yale Law School, who has written numerous articles on law, insurance and economics. Prof. Priest opined as to the interpretation of the term "accident." The plaintiff selected Donald Dinsmore, who was a claims adjuster, then a lawyer engaged in legal practice and consulting work. Mr. Dinsmore also opined on the term "accident" but testified more expansively as to the custom and practice of claims handling in the industry.

The court noted in *Lone Star* that expert lawyer testimony could "explain claims handling practices generally and insurance industry standards relating to timely investigations, reservations of rights and coverage determinations." However, a lawyer could not testify as an expert regarding "construction of contract terms that can be adequately explained to the jury without expert testimony … or factual conclusions as to which a jury is fully qualified to make on its own determination from the evidence presented." *Lone Star*, 343 F.Supp.2d at 1015. Because Prof. Priest did not fall within these parameters, his testimony was excluded entirely. With respect to Mr. Dinsmore, the court concluded that his testimony would be allowed as to claims practices but not policy interpretation.

These cases illustrate that in the post-*Daubert* world, attorneys often meet the qualification of experts suitably knowledgeable about insurance industry practices. However, the expert testimony may be curtailed if the attorney opines on the law or encompasses areas that are not reliable or helpful to the jury.


2019 Insurance Law Symposium
November 1, 2019 | Nova Southeastern University | Davie, FL

SPEAKERS

Robert D. Allen
The Allen Law Group

BOB ALLEN founded the Dallas Texas based The Allen Law Group on March 1, 2013 after spending nearly 30 years with top firms, including Meckler Bulger Tilson Marick & Pearson, Baker & McKenzie and Vial, Hamilton, Koch & Knox.

Mr. Allen's practice is primarily focused in representing parties in trial court and appellate proceedings in insurance, commercial and tort litigation in Texas and other regions of the United States. This includes complex insurance coverage, bad faith, fraud, and reinsurance disputes. Mr. Allen also serves as a mediator, arbitrator, and neutral in insurance, reinsurance, commercial and tort disputes. His expert witness work includes attorneys' fees and insurance and bad faith issues.

Bob Allen is active in several Professional Associations, including the ABA and State Bar of Texas Insurance Law Section. He was a founder and a past Chair of the Dallas Bar Association's Tort & Insurance Practice Section. He is a Fellow in the American College of Coverage and Extra Contractual Counsel.

Bob is a graduate of Denison University and SMU Dedman School of Law.

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Walter's practice focuses on complex insurance litigation, counseling and reinsurance arbitrations and expert witness testimony.

As the head of the firm's insurance coverage practice, Walter offers clients more than 25 years of experience managing insurance-related issues, including program audits, policy manuscripting, counseling, litigation and arbitration. He works with companies in a diverse range of industries, including financial services, consumer products, food and beverages, chemicals, real estate and municipalities.

Walter is admitted to practice before courts and arbitral bodies across the United States and abroad, including the United States Supreme Court, US Courts of Appeal for the Second, Third, Fourth, Sixth, Seventh, Eighth and Eleventh Circuits, and US District Courts for the Eastern and Western Districts of Virginia, Eastern District of Washington, Western District of Washington, District of North Dakota, Southern and Middle Districts of Florida, Southern District of New York, and Eastern District of North Carolina. He litigates insurance coverage and bad faith disputes around the nation, involving business interruption, product liability, construction defect, reinsurance matters, cyberinsurance and e-commerce issues, and other emerging claims. These matters involve a variety of insurance contracts, including professional liability, first party property, general liability insurance policies, cyberinsurance, and various reinsurance agreements.

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Michael F. Aylward is a senior partner in the Boston office of Morrison Mahoney LLP where he chairs the firm's complex insurance claims resolution group. For nearly thirty years, Mr. Aylward has represented insurers and reinsurers in coverage disputes around the country concerning the application of liability insurance policies to commercial claims involving intellectual property disputes, environmental and mass tort claims and construction defect litigation. He also consults frequently on bad faith and ethics disputes and has served as an arbitrator and testified as an expert in various matters involving coverage and reinsurance issues arising out of such claims.

In addition to his trial and appellate practice, Mr. Aylward often testifies as an expert on insurance related-issues.

He is also a AAA-certified neutral and has served as a party-appointed arbitrator in a number of large insurance disputes.

In addition to his legal practice, Mr. Aylward is a prolific author and speaker on insurance coverage issues. He is a contributing author to several leading insurance treatises, including two chapters in the New Appleman Insurance Law Practice Guide (2008) and a chapter in the 2012 ABA treatise on environmental liability and insurance coverage disputes. He also published an e-newsletter that is circulated each Tuesday to over a thousand claims professional and in-house counsel and is a co-editor of co-editor of the Insurance Law Forum blog that has been ranked among the Top 50 insurance blogs annually since it was founded in 2008.

John C. Bonnie
Weinberg Wheeler Hudgins Gunn & Dial

John Bonnie leads the firm's Insurance Coverage Practice Group. This national practice is devoted exclusively to complex commercial disputes, arbitration and litigation, particularly matters addressing obligations arising out of insurance contracts, written agreements to indemnify and other means of shifting and allocating risk.

John's practice runs the gamut of insurance coverage obligations implicated by first-party insurance claims and third-party liability claims, including claims advice and counseling, representation of carriers in coverage arbitration and litigation, and defense of claims alleging insurer bad faith and extra-contractual liability. His experience includes complex commercial and insurance arbitration matters, multi-party insurance litigation, London and Bermuda market policies and disputes, and national coordinating counsel roles for insurers involved in large dollar risk litigation matters.

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Mark A. Boyle
Boyle, Leonard & Anderson, P.A.

Mark A. Boyle is the managing shareholder of Boyle, Leonard & Anderson, P.A., with offices in Fort Myers, FL, Tampa, FL, and Charleston SC. He began his legal career working as an Assistant County Attorney for Pasco County in New Port Richey, Florida. Mr. Boyle began his foray into the world of insurance when he became associate general counsel for Armor Insurance Company in Tampa, Florida. In 1996, he entered into private practice with Fink & Lane, P.A., which is now known as Boyle & Leonard, P.A.

Mr. Boyle's current areas of practice include civil litigation, with a concentration in first and third party insurance disputes, including extra-contractual and bad faith matters. Mr. Boyle represents corporate and individual policyholders in insurance and risk management counseling, claims presentation, and litigation. Mr. Boyle was the principal attorney in *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla.2007), at trial and through all phases of appeal. *J.S.U.B.* is the seminal decision in Florida as to what constitutes a covered "occurrence" and "property damage" under commercial general liability policies in a construction defect setting. Recently, with the assistance of co-counsel, the firm prevailed in the matter of *Sebo v. American Home Assurance Co.*, 208 So. 3d 694 (Fla. 2016). The *Sebo* decision reaffirmed Florida's fealty to the Concurrent Cause Doctrine in first party insurance disputes and disallowed the insurers attempt to apply the highly restrictive Efficient Proximate Cause Doctrine.

Mr. Boyle is a 1993 graduate from Stetson College of Law, located in St. Petersburg, Florida. In 1990, Mr. Boyle received a Bachelor of Arts in History and a Bachelor of Science in Natural Sciences from the University of South Florida.

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David L. Browne
Goldberg Segalla LLP

David L. Brown serves as co-chair of the Global Insurance Services Practice Group. David represents insurers and insurance brokers in complex disputes throughout the country in matters involving environmental claims, construction defect claims, broker/agent issues, and directors' and officers' liability coverage. He has also handled very large and complex property coverage matters involving fires and other catastrophic losses. David is regularly called upon to represent insurers and brokers with respect to their most sensitive matters involving their business practices and their institutional interests. He is also a certified mediator and maintains an active mediation practice.

In addition to being nationally recognized as an insurance expert, David has been consistently recognized by his peers and by judges as a preeminent trial and appellate lawyer. David has tried more than 75 cases to verdict, and has been lead counsel in over 50 appeals to state and federal appellate courts. Highly regarded among his colleagues, he is rated AV Preeminent — the highest possible rating — by Martindale-Hubbell.

A frequent speaker and writer on recent developments affecting the insurance industry, David has authored numerous articles for insurance industry publications, particularly on issues related to insurance coverage issues and civil trial practice. He regularly speaks on these issues to industry and legal groups.

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Amanda M. Foster
Nova Southeastern University
Shepard Broad College of Law

Amanda M. Foster became a full-time faculty member at Nova Southeastern University Shepard Broad College of Law in 2010. Her courses include Insurance Law, Civil Procedure, Disability Law, and Legal Research and Writing. Professor Foster's scholarship interests are in the areas of Disability Rights Law and insurance coverage issues related to children and adults with disabilities.

Prior to entering academia, Professor Foster enjoyed a career as a litigator in the Princeton, New Jersey area. Professor Foster represented insurers in complex insurance coverage litigation. Further, she assisted in providing coverage opinions and advice to insurance carriers concerning their coverage obligations under various types of policies. In addition, she represented clients in state and federal courts in New Jersey and Pennsylvania in matters including commercial litigation, products liability, and premises liability cases. Immediately following graduation from law school, Professor Foster served as a judicial law clerk to the Honorable Jane Grall, JAD in the Superior Court of New Jersey, Appellate Division. Professor Foster is admitted to practice law in New Jersey, Pennsylvania, the United States District Court for the District of New Jersey, and the United States District Court for the Eastern District of Pennsylvania. She received her Juris Doctor degree from the Roger Williams University School of Law in Bristol, Rhode Island and her Bachelor of Arts degree from Loyola University Maryland in Baltimore, Maryland.

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Marialuisa Gallozzi
Covington & Burling LLP

Marialuisa (ML) Gallozzi serves as lead counsel for policyholders in resolving complex, high-value claims. She also helps clients with insurance placements, transactional risk transfer and strategic risk management.

ML's experience spans a wide range of first-party and third-party coverages issued by domestic, foreign, insolvent and captive insurers. Her work includes cyber, product recall/contamination, property/business interruption, cargo, stock throughput, clinical trials, employee theft, E&O, D&O, terrorism, and representations and warranties insurance. She has a particular interest in emerging risks and insurance products.

ML's professional recognitions include Chambers USA, Business Insurance's "Women to Watch" and Washington DC Super Lawyers' "Top 100 Lawyers" and "Top 50 Women Lawyers."

ML has extensive experience in mediation and has also served as a D.C. Superior Court mediator. She is co-chair of the ACCC ADR Committee.

She has an active pro bono practice and previously received the Charles F.C. Ruff pro bono lawyer of the year award at Covington.

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Michael B. Gerrard
Columbia Law School

Michael B. Gerrard is Andrew Sabin Professor of Professional Practice at Columbia Law School, where he teaches courses on environmental and energy law and founded and directs the Sabin Center for Climate Change Law. He is also former Chair of the Faculty of Columbia University's Earth Institute. Before joining the Columbia faculty in January 2009, he was partner in charge of the New York office of Arnold & Porter; he is now Senior Counsel to the firm. He practiced environmental law in New York City full time from 1979 to 2008. He was the 2004-2005 chair of the American Bar Association's Section of Environment, Energy and Resources. He has also chaired the Executive Committee of the New York City Bar Association, and the Environmental Law Section of the New York State Bar Association. He has served on the executive committees of the boards of the Environmental Law Institute and the American College of Environmental Lawyers.

Since 1986, Gerrard has written an environmental law column for the *New York Law Journal*. He is author or editor of thirteen books, two of which were named Best Law Book of the Year by the Association of American Publishers: *Environmental Law Practice Guide* (twelve volumes, 1992) and *Brownfields Law and Practice* (four volumes, 1998). Among his other books are *Global Climate Change and U.S. Law* (with Jody Freeman) (2d ed. 2014); *The Law of Clean Energy* (2011); *Climate Engineering and the Law: Governance and Liability for Solar Radiation Management and Carbon Dioxide Removal* (with Tracy Hester) (2018); and *Legal Pathways to Deep Decarbonization in the United States* (with John Dernbach) (2019).

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Robert M. Gross
Appellate Court Judge, Fourth District Court of Appeal

Robert M. Gross, Appellate Court Judge, Fourth District Court of Appeal (1995 - present) (served as Chief Judge December, 2008 – July, 2011); B.A., (magna cum laude, Phi Beta Kappa) Williams College; J.D., Cornell Law School. Circuit Judge, Palm Beach County (1991 - 1995); County Judge, Palm Beach County (1984 - 1991); Assistant State Attorney, Fifteenth Judicial Circuit; Assistant District Attorney, New York County; Vice-chair, District Courts of Appeal Budget Commission (2010 – 2011); Faculty, Florida Judicial College (1990 - present), teaching courses in "Evidence" and "Developing a Judicial Style"; frequent lecturer at continuing legal education seminars for the Florida Bar, the Palm Beach County Bar Association, and the Academy of Florida Trial Lawyers; Member, Committee on Standard Jury Instructions – Civil (2013 – present); Member, Florida Court Education Council (2004 – 2008; 2015 – present); Member, Task Force for the Review of the Criminal Justice and Corrections Systems (1993 - 1995); Jurist of the Year Award from American Board of Trial Advocates, Palm Beach Chapter (2015); Member, Craig S. Barnard American Inns of Court (2016 – present) (President-elect 2017 – 2018; President 2018 – 2019).

Tracy Hester
University of Houston Law Center

Professor Hester teaches environmental law courses at the University of Houston Law Center. His research focuses on the innovative application of environmental laws to emerging technologies and risks, such as climate engineering, nanotechnologies, artificial intelligence, genetic modification, advanced wind and other renewable power projects, and on novel compliance and liability issues.

Prior to joining the University of Houston Law Center, Prof. Hester served as a partner in Bracewell LLP for sixteen years and led the Houston office's environmental group. He has previously taught classes on Environmental Law, Natural Resource Damages Liability, Environmental Law in Oil & Gas, Climate Change Liability and Litigation, Emerging Technologies and Environmental Law, Advanced Hazardous Waste Law, and Practice of Environmental Law. He also teaches the first year course on Statutory Interpretation and Regulatory Practice.

During the summer of 2014, Prof. Hester served as the interim Director of the North America Commission on Environmental Cooperation's Submission on Environmental Matters Unit in Montreal, Canada. The Environmental Law Institute also named him as its Environmental Scholar in Residence for 2015.

Prof. Hester was inducted into the American College of Environmental Lawyers in 2015, elected as a member of the American Law Institute in 2004, and named the Top Environmental Lawyer in Houston in 2011 by Best Lawyers of America. He was also elected to the Council of the American Bar Association’s Section on Environment, Energy and Resources (SEER) in 2011, and he currently co-chairs SEER's new Law Professors Committee and its Climate Change, Sustainable Development and Ecological Services Committee. Prof. Hester is the past chair of SEER’s Special Committee on Congressional Relations as well as its Environmental Enforcement and Crimes Committee, and he is currently vice-chair of the Greater Houston Partnership's Sustainability Advisory Committee.

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Hugh Lumpkin
Ver Ploeg & Lumpkin

Hugh Lumpkin was born in San Tomé, Venezuela, eventually making his home in Miami, Florida. He received his undergraduate degree from Duke University in 1977 and his law degree from the University of Miami in 1980. Since 1983, a substantial portion of his practice included representing both insurers and insureds in coverage and collateral litigation; a focus which became exclusive to top policy holder representation beginning in 1999.

In 1999, Hugh made the decision to limit his practice to insurance consulting, litigation, trials and appeals and joined Brenton Ver Ploeg in forming the current firm, Ver Ploeg & Lumpkin, P.A. Maintaining two offices in Florida, the firm nonetheless has a national practice, exclusive to limiting its practice to policyholder insurance work, including extra-contractual recoveries.

Mr. Lumpkin earned his AV rating from Martindale in 1994, has been honored as a SuperLawyer since 2006, a Best Lawyer since 2010, was recognized as the top insurance lawyer in Miami in 2013 and 2016, and has been repeatedly recognized by the South Florida Legal Guide and Florida Trend as one of the best lawyers in Florida for insurance coverage and bad faith litigation on the policyholder side of the versus. He was appointed to the American College of Coverage Counsel in 2014, where for several years he has served as co-chair of the first party insurance section. He has written and lectured extensively on a variety of topics; not limited to insurance, though the majority of his published and teaching work for the past twenty years has concerned insurance coverage and litigation.

Meghan Magruder
King & Spalding

Meghan Magruder is a Partner in King & Spalding's Atlanta office and a member of the Trial and Global Disputes Practice Group. She has more than thirty-five years of experience handling complex litigation matters. Ms. Magruder is regularly listed in *The Best Lawyers In America, Georgia Super Lawyers*, and *Top Women Attorneys in Georgia*.

Ms. Magruder is a fellow in the Litigation Counsel of America, which is an invitation-only trial lawyer honorary society and represents one-half of one percent of American lawyers. Fellows are selected based upon excellence and accomplishments in litigation, trial work and superior ethical reputation. Ms. Magruder is also a fellow and a member of the Board of Regents in the American College of Coverage Counsel for her work representing policyholders in connection with claims in negotiation, litigation and arbitration including international arbitration.

Ms. Magruder has substantial experience advising clients on corporate governance and risk management issues. She serves as general counsel for the Institute of Nuclear Power Operations and the North American Transmission Forum. She advises clients with respect to all types of insurance policies and all matters of claims, including commercial liability, all risk, property, directors and officers, cyber, crime, employment, and pollution liability policies. She handles property loss and business interruption claims, and she has been retained by companies to assist with insurance strategies in situations where large numbers of cases and class actions, such as consumer class actions, asbestos and other toxic tort litigations have been filed.

Ms. Magruder is a member of the American Law Institute and was an officer of the American Bar Association Section of Litigation for several years. Ms. Magruder was both President and Vice President of the Environmental Commission for the Union Internationale des Avocats. Ms. Magruder is also active in *pro bono* work and community activities. In 2013, she was honored as one of "Georgia's Most Powerful and Influential Female Lawyers" by Looking Ahead Publications. In 2001, she was awarded ABC News "Toyota Working Woman Award" for outstanding contributions to her profession and community. She is a member of Leadership Atlanta and currently serves on the Board of Directors for the Atlanta Symphony Orchestra, the United Way of Greater Atlanta, and the Board of Trustees of the Rabun-Gap Nacoochee School. She is a past member of the Board of Directors for the Atlanta Women's Foundation, the Board of Directors of the Atlanta Children's Shelter, and the Board of Visitors for Emory University. She received her B.A. from Emory College and her J.D. from Emory University School of Law.

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Brian S. Martin
Thompson, Coe, Cousins & Irons, LLP

Brian S. Martin is a partner in the Houston office of Thompson, Coe, Cousins & Irons. He represents clients in insurance coverage matters and has extensive experience including trials and appeals of general liability and bad faith coverage cases. He handles complex coverage and bad faith cases in jurisdictions across the United States. He also frequently testifies as an expert in insurance and bad faith cases.

Before practicing law in Houston, Mr. Martin earned his B.A. in History from The University of Texas in 1984 and a J.D. from The University of Texas School of Law in 1987.

Mr. Martin is a former Chairman of the State Bar of Texas Insurance Section and Reinsurance Section. He has been a columnist for the *Insurance Journal* magazine, a contributing editor to *LexisNexis' Texas Annotated Insurance Code* and a frequent author and speaker on insurance coverage.

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Jason S. Mazer
Cimo Mazer Mark PLLC

Jason S. Mazer, a founding shareholder of Cimo Mazer Mark PLLC, concentrates his practice in insurance recovery, exclusively representing policyholders and third-party claimants in disputes with insurance carriers. In addition to his trial and appellate practice in the areas of Insurance Coverage Litigation, Insurer Bad Faith, Unfair Insurance Practices, and Employment Law, Mr. Mazer negotiates with insurance carriers to achieve cost-effective resolutions for his clients. He routinely represents individual, corporate, and municipal policyholders and claimants in all types of first and third-party insurance coverage and bad faith disputes, and has tried insurance coverage and bad faith cases to policyholder verdicts. His industry experience includes commercial, financial, professional, marine, hospitality, manufacturing, healthcare, construction, media, entertainment, aviation, food services, and retail. Mr. Mazer's practice also includes the representation of Bankruptcy Trustees, Receivers, and court-approved fiduciaries in complex business litigation matters involving Director and Officer, Error and Omission, and Commercial General Liability Insurers. Additionally, Mr. Mazer represents health care providers and hospitals in reimbursement disputes with commercial payors. He is a published author on insurance law and unfair insurer practices and frequently lectures in these areas.

A member of the Florida Bar, Mr. Mazer is admitted to practice before the United States District Court, Southern, Middle, and Northern Districts of Florida, and the United States Court of Appeals, Eleventh Circuit. He has received a 5.0 AV-Preeminent performance rating by Martindale-Hubbell, and has been selected by his peers for inclusion in *Best Lawyers in America* since 2013. Mr. Mazer has also been annually recognized as a Florida *Superlawyer* and is a Florida *Top Lawyer*.

Born in Fort Leonard Wood, Missouri, and raised in New York, Mr. Mazer graduated from Tufts University in 1994 with a Bachelor of Arts and received his Juris Doctor, Order of the Coif, from Washington University School of Law in 1998. Mr. Mazer served as a volunteer in the Department of Justice Civil Rights Division, prosecuting pattern or practice employment discrimination cases. After leaving the Department of Justice, he joined the Miami office of Morgan, Lewis & Bockius, LLP, representing management in labor and employment disputes. Mr. Mazer joined Ver Ploeg & Lumpkin in 1999, and became a shareholder in 2004. In April 2018, Mr. Mazer proudly announced the formation of Cimo Mazer Mark PLLC, a boutique law firm that represents policyholders in the areas of insurance recovery and insurer bad faith as well as court-appointed fiduciaries and other plaintiffs in director and office liability, professional liability, complex avoidance, and bank litigation liability.

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Douglas M. McIntosh
McIntosh Sawran & Cartaya, P.A.

Founding Shareholder Douglas M. McIntosh has extensive experience in a wide range of areas: personal injury, product liability, commercial and professional negligence litigation, including legal, dental and medical malpractice defense, product liability and insurance coverage litigation. His current focus is on catastrophic damage claims, insurance coverage matters and bad faith litigation.

Mr. McIntosh has assisted insurance companies on bad faith, professional errors and omissions, general liability and all-risk policies of insurance issues for many years. He has also served as a testifying expert in state and federal courts in bad faith, primary and excess insurance coverage cases. He is a state qualified arbitrator and has served as selected mediator, panel and sole arbitrator, in a number of legal disputes, including bad faith and insurance coverage litigation.

He is admitted to practice in the state and federal courts in Florida and is admitted to practice before the United States Supreme Court. He speaks often on insurance law, professional ethics, and jury selection techniques, around the country. He presently co-chairs the ACCC Professionalism & Ethics Committee, and co-chairs the ACCC 2019 Symposium at Nova Southeastern University, Shepard Broad College of Law in Fort Lauderdale, Florida.

Julia A. Molander

Julia A. Molander is rated AV Pre-eminent by her peers and has been recognized as a "Super Lawyer" since 2005.

Julia represents the insurance industry in virtually all aspects of their business, including insurance coverage litigation, insurance counseling, extracontractual (bad faith) liability, insurance fraud, underwriting matters, policy drafting, regulatory compliance, brokerage and agency liability, insurance insolvency and legislative issues. She has served as first-chair in more than 20 bench trials, jury trials and arbitrations.

Julia has more than 30 years of experience in strategically managing insurance risk, on an enterprise-wide basis (state, regional and national), in areas such as construction defects, class actions, cyber risks, trucking and cumulative trauma. Julia was elected a fellow of the American College of Coverage and Extracontractual Counsel in 2014 and the Insurance Litigation Institute of America, where she currently serves as chair.

Julia has lectured at major professional conferences sponsored by the American Bar Association, Association of Defense Counsel, Defense Research Institute, Association of California Insurance Companies, the California Continuing Education of the Bar, the American Conference Institute, the Property Law Research Bureau, the Insurance Risk Management Institute and the Practising Law Institute. She is a contributing editor the CEB publication California Liability Insurance Practice: Claims and Litigation. She has published numerous articles and scholarly discussions on a variety of insurance topics.

Peter K. Rosen
JAMS

Peter K. Rosen, Esq. joined JAMS in January 2019 following his prestigious legal career handling high-profile insurance matters covering a wide range of commercial issues and policies, including directors and officers (D&O) liability, general liability, property, cyber, employment, professional liability, construction, fidelity, environmental, representations and warranties insurance, and reinsurance. Mr. Rosen has deep expertise in handling coverage issues arising out of mass disasters. His role in the World Trade Center insurance coverage litigation gained him worldwide recognition. He received accolades from *The Legal 500* and *Chambers USA*, which noted, "He is recognized for his 'wealth of expertise' and is described as 'someone you would bring in as a big hitter.'"

Throughout the course of his career, Mr. Rosen has driven hundreds of matters to a mediated resolution and has been involved in numerous high-stakes domestic and international arbitrations.

Mr. Rosen is the author of leading texts on D&O liability and business interruption claims. He teaches insurance law at USC Gould School of Law and Pepperdine University School of Law. He has also taught corporate governance at USC Gould School of Law. Mr. Rosen coaches UCLA Law School's Vis International Moot team and will be teaching a preparatory course on International Arbitration for the UCLA Law School Vis Competition participants.

David Schoenfeld
Shook Hardy & Bacon

Dave Schoenfeld has represented insurers in high-stakes insurance coverage and bad faith litigation across the country for more than 30 years. He has guided clients in complex multi-party mediations that resolved several billion dollars in claims involving coverage for asbestos, silica, environmental, and construction defect liabilities. In his general commercial litigation practice, Dave also settled major director and officer liability, employment, and non-compete disputes in mediation. Dave recently completed Northwestern University's 40-hour Mediation Skills program.

Nancy Sher Cohen
Lathrop Gage

Nancy Sher Cohen leads Lathrop Gage's Insurance Recovery and Counseling practice team and is the Partner in Charge of the firm's Los Angeles office. She practices in the area of insurance coverage, product liability, toxic & mass tort, class actions, and general commercial litigation. Her insurance practice includes prosecuting insurance coverage cases, providing counsel to clients with regard to designing insurance coverage strategies, conducting policy review, advising on policy implications resulting from a merger or acquisition, and other insurance related issues.

Nancy has been lead counsel in the prosecution of many insurance coverage lawsuits related to life insurance claims and environmental and product liabilities, resulting in recoveries in excess of $1.5 billion. Her extensive insurance coverage practice has included first-party claims involving business interruption, third-party claims involving reimbursement for environmental liabilities and prosecution of claims by Holocaust survivors against insurance carriers that failed to pay life insurance benefits. She was lead counsel for the lender on the World Trade Center in prosecuting claims for insurance coverage for the towers. She is also trial counsel for an international bank on prosecuting coverage claims involving life insurance policies. Nancy also advised on insurance issues related to Los Angeles' successful bid for the 2028 Summer Olympics. Nancy is also lead counsel in complex environmental litigation including cost recovery litigation in connection with a Southern California Superfund Site.

Melissa McMillan Sims
Berk, Merchant & Sims, PLC

Melissa McMillan Sims is an "AV" rated, Founding member of the law firm of Berk, Merchant & Sims, PLC. Ms. Sims received her BA from Louisiana State University and her J.D. from St. Thomas University in Miami, Florida. She has been admitted to the Louisiana State Bar since 1992 and the Florida Bar since 1996. She is also admitted in the United States District Court for the Eastern, Western and Middle Districts of Louisiana since 1992 and the Eleventh Circuit, the U.S. District Court, Southern, Middle and Northern Districts of Florida since 1996. She is a member of the American Bar Association, Federal Bar Association, Louisiana State Bar Association, Florida Bar (member Tort & Insurance Section) and American College of Coverage and Extracontractual Counsel. Ms. Sims has tried insurance coverage cases involving arson, windstorm damage, jewelry theft, and a variety of property losses to defense verdicts for the insurance company. She has presented on insurance issues at the Florida Advisory Committee on Arson Prevention Conference, the Windstorm Insurance Network Conference, Miami Bench & Bar Conference and the American Bar Association Insurance Litigation Section Conference. Ms. Sims' areas of practice include: Insurance Bad Faith Litigation, Commercial Insurance Coverage and Litigation, First and Third Party Insurance Coverage Litigation and Pre-Suit Property Claims Investigation.

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Fort Lauderdale, Florida

Attendee List, as of October 29, 2019

Krystal Acosta
Litchfield Cavo LLP
Ft. Lauderdale, FL

Gerald Albrecht
Albrecht Mediation Services
Tampa, FL

Robert Allen
The Allen Law Group
Dallas, TX

Paige Allen
The Allen Law Group
Dallas, TX

Walter Andrews
Hunton Andrews Kurth, LLP
Miami, FL

Samuel Arena, Jr.
Stradley Ronon Stevens & Young, LLP
Philadelphia, PA

Ayla Arshad
Nova Southeastern University Shepard Broad College of Law
Plantation, FL

Michael Aylward
Morrison Mahoney LLP
Boston, MA

Marta Bakas
SafePoint Insurance Company
Tampa, FL

David Baldwin
Potter Anderson & Corroon LLP
Wilmington, DE

Mike Baniak
Litchfield Cavo LLP
Chicago, IL

William Berk
Berk, Merchant & Sims PLC
Coral Gables, FL

Kamaria Binns
Nova Southeastern University Shepard Broad College of Law
Tamarac, FL

John Bonnie
Weinberg Wheeler Hudgins Gunn & Dial
Atlanta, GA

Mark Boyle
Boyle, Leonard & Anderson PA
Ft. Myers, FL

David Brown
Goldberg Segalla LLP
Greensboro, NC

Richard Bryan
Jackson & Campbell, PC
Washington, DC

MariaElena Caldera
Nova Southeastern University Shepard Broad College of Law
Boca Raton, FL

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Carlos Carmona, Jr.
Bronstein & Carmona, P.A.
Ft. Lauderdale, FL

Bruce Celebrezze
Clyde & Co US LLP
San Francisco, CA

Nancy Cohen
Lathrop Gage LLP
Los Angeles, CA

Camilla Cohen
Reed Smith, LLP
Miami, FL

Linda Dedman
Dedman Law, PLLC
Dallas, TX

Alejandra Diaz
Nova Southeastern University Shepard Broad College of Law

Dale Dobuler
McIntosh, Sawran & Cartaya, P.A.
Ft. Lauderdale, FL

Andres Ferrando
Nova Southeastern University Shepard Broad College of Law
Miami, FL

Jamie Finizio Bascombe
The Law Offices of Jamie Finizio Bascombe
Ft. Lauderdale, FL

Allison Forster
Nova Southeastern University Shepard Broad College of Law
Lake Worth, FL

Richard Foster
Dario, Albert, Metz, Eyerman, Canda, Concannon, Ortiz & Krouse
Davie, FL

Amanda Foster
Nova Southeastern University Shepard Broad College of Law
Davie, FL

Amanda Foster
Nova Southeastern University Shepard Broad College of Law
Davie, FL

Marialuisa Gallozzi
Covington & Burling LLP
Washington, DC

Karla Garcia
Nova Southeastern University Shepard Broad College of Law
Coral Springs, FL

Michael Gerrard
Columbia Law School
New York, NY

Mitchell Glidewell
Nova Southeastern University Shepard Broad College of Law

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Sidney Goldberg
Goldberg & Hirsh, PA
Miami, FL

Noah Goldberg
Reed Smith, LLP
Miami, FL

Jason Goldberg
Parker & Lynch

Judith Goldstein
Berk, Merchant & Sims PLC
Coral Gables, FL

Jessica Gopiao
Reed Smith, LLP
Miami, FL

Philip Greer
Nova Southeastern University Shepard Broad College of Law

Hon. Robert Gross
Florida Fourth District Court of Appeal
West Palm Beach, FL

Yelena Guerra
Nova Southeastern University Shepard Broad College of Law

Dina Gutierrez
Nova Southeastern University Shepard Broad College of Law

Dana Harbin
Dedman Law, PLLC
Dallas, TX

Christian Hernandez
Nova Southeastern University Shepard Broad College of Law
Davie, FL

Tracy Hester
University of Houston Law Center
Houston, TX

Mike Huddleston
Munsch Hardt Kopf & Harr, PC
Dallas, TX

Michael Iles
Weisbrod Matteis & Copley PLLC
Ft. Lauderdale, FL

Stephanie Jankie
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Dedman Law, PLLC
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Yosef Klein
Klein Firm PLLC
Southfield, MI

Christopher Kuleba
Reed Smith, LLP
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Taylor Lang
Nova Southeastern University Shepard Broad College of Law

2019 ACCC
Insurance Law Symposium

Nova Southeastern University Shepard Broad College of Law, Panza Maurer Law Library

Fort Lauderdale, Florida

Attendee List, as of October 29, 2019

Nicole Langesfeld
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Cimo Mazer Mark PLLC
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Robinson Pecaro & Mier, P.A.
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Midkiff, Muncie & Ross, P.C.
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John Mumford, Jr.
Hancock, Daniel & Johnson, P.C.
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2019 Insurance Law Symposium
November 1, 2019 | Nova Southeastern University | Davie, FL

ATTENDEES