Walking the Line Without Stepping Off

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Overview

In addition to defending against the principal demands, ethical and other practical issues routinely arise when handling insured claims or litigation involving:

- Multiple insurers.
- Insureds with single or multiple primary or excess or other policies or coverages.
- Additional insureds and indemnitees
- Coverage denials and reservations of rights.
- Brokers representing insureds.
- Panel and non-panel lawyers representing one or more insureds.
- Reinsurers and subscribers.

This paper addresses the separate and divergent priorities, roles and strategies when these common, competing, concurrent, conflicting or joint interests intersect or collide.

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1 Kevin O’Brien, Hall & Evans LLC, Denver, Colorado also contributed to these written materials.
Insurers are in the business of underwriting and issuing policies for risks that give rise to claims and lawsuits that the insurers routinely process and handle on behalf of insureds. Insurers generally owe a variety of policy-based, statutory and other duties to what may often include a wide cast of interests with potentially competing, adverse or complex interests: single and multiple insureds, state and other regulators, reinsurers or subscribers, the insurers’ shareholders or owners, and others.

The insureds’ interests, involvement and stakes vary based on self-insured retentions and deductibles, consent to settlement or similar clauses, right to select or concur with the appointment of counsel, other policy endorsements or provisions, the nature and magnitude of the risk or exposure, and the size and importance of the insured company, as well as many other factors. An all-hands-on-deck lawsuit that is critical or important to the insured company will typically garner close scrutiny and direct involvement by an insured’s executives, law department, risk management, third party administrators, outside counsel and brokers.

Both outside and in-house lawyers have ethical and other duties when addressing and dealing with such matters:

- Providing competent representation to the client(s);
- Abiding by a client’s instructions;
- Communicating with any client about material developments;
- Defining the lawyer’s representation in writing if such is limited or concurrent and obtaining the client’s informed written consent to such representation;
• Maintaining the confidentiality of any information received from or discussed with any client regarding confidential matters;
• Disclosing potential conflicts that may arise, and actual conflicts of interests when such are discovered;
• Exercising independent judgment for any client, irrespective of the source of funding for the representation or the number of clients represented.

This presentation will address and discuss avoiding or dealing with problems and issues that arise when such combinations of interests are involved, as well as the ethical overlay when conflicting or competing interests arise or exist for attorneys involved in such matters.

**Lawyers’ Duties**

Lawyers have multiple duties that arise when they are acting for any client:

**Competent Representation**: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”²

² Rule 1.1, Model Rules of Professional Conduct (hereafter referred to as “MRCP Rule __”).
**Professional Judgment**: “A lawyer shall not permit a person who recommends, employs or pays the lawyer to render services for another to direct or regulate the exercise of the lawyer’s professional judgment in rendering such services.”\(^3\)

**Abide & Consult**: “Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.”\(^4\)

**Disclose and Inform**: This includes the duty to promptly inform any client of any decision or circumstance with respect to which any client’s informed consent is required; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep any client reasonably informed about the status of the matter; promptly comply with reasonable requests for information; and, consult with any client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.\(^5\)

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\(^3\) MRPC Rule 5.4(c).

\(^4\) MRPC Rule 1.2(b).

\(^5\) MRPC Rule 1.4.
Confidentiality: A lawyer may not reveal information relating to the representation of a client unless the client gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation, or if the disclosure is permitted by one of the exceptions described in Model Rule 6.1(b) in order to prevent death or bodily harm, the commission of a crime, prevent damage that may be caused by a client’s fraud or criminal conduct, secure legal advice, defend or prosecute a claim involving the client, or as ordered by any court or competent authority.  

Limiting Representation: A lawyer may only limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed and written consent.

Concurrent Representation: Concurrent representation is not permissible where there is a “significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” Concurrent representation is only permissible if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a

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6  MRPC Rule 1.6(a).
7  MRPC Rule 1.2(c).
8  MRPC Rule 1.7.
tribunal, and, each affected client gives informed consent, confirmed in writing.”\(^9\) Colorado Rule of Professional Conduct 1.7(a)(2) states in relevant part that a lawyer shall not represent a client “if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a third person or by a personal interest of the lawyer.” An attorney by an insurer to represent multiple clients must “withdraw from representation or make full disclosure to both clients in the event of a conflict between them, or risk exposure to liability for harm resulting from his failure so to act, as well as to a charge of professional misconduct.”\(^{10}\)

**Disqualification of Lawyers**\(^{11}\): Courts have not hesitated to disqualify attorneys representing multiple clients with adverse interests in connection with litigated matters.\(^{12}\) Motions to disqualify are generally considered to be substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law.\(^{13}\) “While a motion to disqualify is a substantive motion decided under federal law, a reviewing court also ‘consider[s] the motion governed by the ethical rules announced by the national profession in light of the public interest and the litigants’ rights.”\(^{14}\) Attorneys

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9. *Id.*


11. R. Regulating Fla. Bar 4-1.7.


13. *In re Dresser Industries, Inc.*, 972 F.2d 540, 543 (5th Cir. 1992); “However a lawyer’s motives may be clothed, if the sole reason for suing his own client is the lawyer’s self-interest, disqualification should be granted.” *Id.* at 545.

may also be disqualified if his or her testimony as a witness is essential and necessary and not otherwise permitted by MRC 3.7(a).\textsuperscript{15} Nonetheless, disqualifying a lawyer because an opposing party desires to depose an attorney or call that attorney as a witness generally requires a showing that the lawyer is the only source for the subject matter of the anticipated testimony.\textsuperscript{16} Generally, an attorney may not be called to testify as a witness and continue to act as counsel during trial, though pretrial participation as counsel may be permissible.\textsuperscript{17}

The Insurers

There are a myriad of variations in the laws enacted by the different states and territories of the United States that govern and apply to insurers that typically vary based

\textsuperscript{15} MRPC Rule 3.7(a) states: “(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or, (3) disqualification of the lawyer would work substantial hardship on the client.”

\textsuperscript{16} In Colorado and in most other states, the applicable test for determining whether an attorney is “likely to be a necessary witness” is whether the anticipated testimony is “relevant, material and unobtainable elsewhere.” \textit{World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc.}, 866 F. Supp. 1297, 1301 (D. Colo. 1994). A court must consider “the nature of the case, with emphasis on the subject of the lawyer’s testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently establish the relevant issues.” \textit{Fognani v. Young}, 115 P.3d 1268, 1274 (Colo. 2005) (internal citation omitted); and, Louisiana Code of Civil Procedure Article 1452(B) states: “No attorney of record representing the plaintiff or the defendant shall be deposed except under extraordinary circumstances and then only by order of the district court after contradictory hearing.”

\textsuperscript{17} In limited circumstances, a court has permitted counsel to go forward in a pretrial capacity even after disqualification as trial counsel on the ground Rule 3.7(a) only prohibits acting as an advocate “at trial.” \textit{See Merrill Lynch Bus. Finan. Servs. v. Nudell}, 239 F. Supp. 2d 1170, 1174 (D. Colo. 2003). Disqualification from pretrial matters may be appropriate, however, where that activity includes obtaining evidence which, if admitted at trial, would reveal the attorney’s dual role. \textit{Id.}
on the type of insurance. There are also the laws of the countries in which the insurer is
domiciled or maintains its principal place of business.

The fundamental duties that insurers owe to any insured providing CGL, D&O,
EPL, E&O or other similar coverage include:

- Act in good faith and in the best interests of any insured.\(^{18}\)
- Promptly investigate claims as required by the policy or applicable law.\(^{19}\)
- Furnish a defense to any insured against any possibly covered claim based on
  a review of the allegations of the complaint and the insurance policy.\(^{20}\)
- Consider the insured’s interests as paramount in any settlement.\(^{21}\)

\(^{18}\) Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980)(“[W]hen the insured has
surrendered to the insurer all control over the handling of the claim, including all decisions with
regard to litigation and settlement, then the insurer must assume a duty to exercise such control
and make such decisions in good faith and with due regard for the interests of the insured.”); and,
faith with its insured).

\(^{19}\) Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980); and,
State Farm Mut. Auto Ins. Co. v. Brekke, 105 P.3d 177, 189 (Colo. 2005)(The insured has a contractual duty to
cooperate and report to the insurance provider, while the insurance carrier has a duty to investigate
and adjust a claim in good faith).

2015)(“Moreover, when the third party suit includes some claims that are potentially covered, and
some that are clearly outside the policy's coverage, the law nonetheless implies the insurer's duty
to defend the entire action.”).

denied, 296 So.2d 837 (La. 1974)(“Our own jurisprudence accords with the majority view that the
insurer is the champion of its insured’s interests; that the interests of the insured are paramount to
those of the insurer, and that the insurer may not gamble with the funds and resources of its
policyholders.”); Berges v. Infinity Ins. Co., 896 So.2d 665, 669 (Fla. 2004)(“The insurer must
investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the
facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying
1994)(An insurer has a duty to fairly consider the insured’s interests and potential personal liability
in addition to its own interests when negotiating settlements; and, Lira v. Shelter Ins. Co., 913 P.2d
• An insurer may not gamble with the funds and resources of its policyholders.
• Properly interpret and apply its own policy provisions, bearing in mind the liberal construction favoring coverage and a duty to defend.\textsuperscript{22}
• Face potential bad faith liability for failing to properly interpret policy provisions.\textsuperscript{23}
• Deal fairly in handling claims.\textsuperscript{24}
• Promptly send the insured a reservation of rights or denial letter upon the discovery of information indicating any basis to decline or limit coverage, failing

\textsuperscript{22} \textit{Grissom v. Commercial Union Ins. Co.}, 610 So.2d 1299, 1304 (Fla. 1st DCA 1992)("[I]nsurance policies are to be construed liberally in favor of the insured and strictly against the insurer, and … whenever the language is susceptible of two or more constructions, the court must adopt that which is most favorable to the insured."); \textit{First Am. Title Ins. Co.}, 695 So.2d 475, 476-477 (Fla. 3d DCA 1997)("[A]n insurer is obligated to defend a claim even if it is uncertain whether coverage exists under the policy. Under these circumstances, an insurer may provide a defense under a reservation of rights. An insurer does not breach its duty to defend an insured when it provides a defense under a reservation of rights."); and, \textit{Fire Ins. Exch. v. Bentley}, 953 P.2d 1297, 1301 (Colo. App. 1998)(The insurer has a duty to defend unless the insurer can establish that the allegations in the complaint are solely and entirely within the exclusions in the insurance policy. An insurer is not excused from its duty to defend unless there is no factual or legal basis on which the insurer might eventually be held liable to indemnify the insured).

\textsuperscript{23} "An insurer may challenge claims which are fairly debatable. If . . . an insurer maintains a mistaken belief that the claim is not compensable, it may be within the scope of permissible challenge even if its belief is incorrect." \textit{Brennan v. Farmers Alliance Mut. Ins. Co.}, 961 P.2d 550, 557 (Colo. App. 1998).

\textsuperscript{24} \textit{Sanderson v. Am. Family Mut. Ins. Co.}, 251 P.3d 1213, 1218 (Colo. App. 2010)("While it is clear that an insurer may defend a fairly debatable claim, all that means is that it may not defend one that is not fairly debatable. But in defending a fairly debatable claim, an insurer must exercise reasonable care and good faith."); \textit{Louisiana Maintenance Services, Inc. v. Certain Underwriters at Lloyd's of London}, 616 So.2d 1250, 1253 (La. 1993)("The Louisiana phrase, 'arbitrary, capricious, or without probable cause,' is synonymous with 'vexatious'. Both describe an insurer whose willful refusal of a claim is not based on a good faith defense.").
which the insurer may be deemed to have waived any such coverage or other defense.25

An insurer’s duty to defend an insured usually only when there is an adjudication of non-coverage or based upon specific policy provisions (such as the exhaustion of limits).

An insurer also owes duties in the event that a potential conflict of interest arises between the insurer and an insured, or between multiple insureds to whom an insurer has any duty to defend or indemnify. “If a conflict of interest exists, the insurer ordinarily must pay the costs of independent counsel ‘instead of participating in the defense itself.’”26 “If a conflict of interest exists and the insured nonetheless chooses to defend the insured, the insurer must do so under a proper reservation of rights or risk being estopped from raising coverage defenses.”27 “A proper reservation of rights is one that allows the insured to choose intelligently between accepting the insurer’s defense counsel and retaining his own counsel.”28

25 “Waiver of coverage defenses results when an insurer, with knowledge of facts indicating non-coverage, undertakes to defend an insured without reserving its rights to deny coverage.” Arceneaux v. Amstar Corp., 2010-C-2329 (La. 7/1/2011), 66 So.3d 438, 455; and, Sosebee v. Steadfast Ins. Co., 701 F.3d 1012, 1026-27 (5th Cir. 2012)(“Waiver requires (1) misleading conduct on the part of the insurer and (2) prejudice to the insured. The burden of proving waiver is on the party claiming waiver.”)(internal citation omitted).


27 Id.

Insurers also owe duties to state insurance regulators, including the proper reserving of claims. Insurers have reporting and contractual duties to others that share in the risks and reinsure or participate in any risk insured by the policy. Insurers also owe duties to the shareholders, members or owners of any company that owns the insurance company.

Insurers who pay for the insured’s defense generally expect to be able to supervise and control the defense costs, to require the insured’s attorney to evaluate the merits of the claims and defenses as well as potential liability and exposure ranges, and to be involved in decisions regarding strategy, settlement and other matters. The nature, scope and extent of the information or opinions that an attorney retained by an insurer to represent an insured may disclose or share with the insurer is governed by and subject to the attorney’s ethical duties to the insured.

An insurer’s duties are more complicated and complex in states where the insurer may also be considered a client or a co-client of the lawyer retained to represent the insured. While the exact steps to be taken and consequences for any breach of duty are not uniform, most states require the lawyer and the insurer to promptly act upon learning of a potential conflict of interest. “[T]raditionally, where an insurance carrier is called upon to defend its insured, the attorney retained by the carrier for this purpose owes the same fiduciary duty to the insured as he or she would had the insured made the

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29 Compare Tank v. State Farm, 715 P.2d 1133 (Wash. 1986)(Insured is the only client); Oregon State Bar Formal Ethics Opinions 2005-30, 2005-77, and 2005-121 (Lawyer represents the insured as a “primary” client and the insurer as a “secondary” client).
selection of counsel. The attorney’s primary duty has been said to be to further the best interests of the insured." 30

"As a practical matter, however, there has been recognition that, in reality, the insurer's attorneys may have closer ties with the insurer and a more compelling interest in protecting the insurer's position, whether or not it coincides with what is best for the insured." 31

"The problem arises when the attorney knows, or should know, that a conflict has appeared between the insurer and the insured as to the most beneficial course of action indicated by the developing circumstances. It has long been the law in this state that when a conflict develops, the insurer cannot compel the insured to surrender control of the litigation, and must, if necessary, secure independent counsel for the insured." 32

Accordingly, the lawyer’s ethical duties and the insurer’s contractual or statutory duties to act in good faith in any dealings with the insured mean that both the lawyer and the insurer have to be mindful of conflicts and the potential for competing interests to develop or arise during the course of the handling of any claims or litigation for an insured.

An insurer’s receipt of notice of facts which would cause a reasonable person to inquire further imposes a duty of investigation upon the insurer, and the insurer’s failure to promptly or reasonably investigate matters based on such notice while undertaking the representation of an insured may result in a waiver of all powers or privileges which a


31 Id.

32 Id.
reasonable search would have uncovered. 33 “An insurer’s breach of the duty to defend does not result in a waiver of all coverage defenses when the insured seeks indemnity under the policy. Waiver of coverage defenses results when an insurer, with knowledge of facts indicating non-coverage, undertakes to defend an insured without reserving its rights to deny coverage.” 34

Retaining a Single Lawyer to Represent Multiple Insureds: Insurers who opt to retain a single law firm to represent more than one insured are required to make adequate disclosures to each insured. “We conclude that the Canons of Ethics imposed upon lawyers hired by the insurer creates an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its right to deny coverage.” 35 Some states have not squarely addressed this issue. 36 An insurers’ decision to engage a single lawyer to represent multiple insureds may have coverage implications, such as where one insured may be covered and the other is not. “Waiver principles are applied stringently to uphold the prohibition against conflicts of interest between the insurer and the insured which could potentially affect legal

33 Peavey Co. v. M/V ANPA, 971 F.2d 1168, 1176 (5th Cir. 1992).

34 Arceneaux v. Amstar Corp., 2010-C-2329 (La. 7/1/2011), 66 So.3d 438, 455.


representation in order to reinforce the role of the lawyer as the loyal advocate of the client’s interest.”

_Cumis Counsel_: “And unless the insured agrees otherwise, in a case where—because of the insurer’s reservation of rights based on possible noncoverage under the policy—the interests of the insurer and the insured diverge, the insurer must pay reasonable costs for retaining independent counsel by the insured.”

“Although _Cumis_ counsel must indeed retain the necessary independence to make reasonable choices when representing their clients, such independence is not inconsistent with an obligation of counsel to justify their fees. In numerous settings in our legal system, the attorneys representing their clients know they will later have to justify their fees to a third party—including cases brought under fee-shifting statutes, class action settlements, probate, and bankruptcy.”

**The Insureds**

Insureds likewise have duties to insurers, including compliance with any policies’ lawful terms and conditions, disclosure of material facts that may reasonably affect the risk assumed, reporting or providing notice of claims, and cooperating with the insurer.

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37 _Steptore v. Masco Construction, Inc._, 643 So.2d 1213, 1216 (La. 1994).


39 _Id._, 61 Cal. 4th at 1002 (Allowing an insurer the right to seek recoupment from Cumis counsel for excessive fees).
“A technical or inconsequential lack of cooperation or misstatement to the insurer is immaterial.”\textsuperscript{40} Insureds have the right to expect the insurer will furnish and pay for competent and qualified defense counsel who will diligently and loyally represent the client insured.\textsuperscript{41}

An insured generally has a duty under the policy to promptly notify an insurer of an actual or possible claim or lawsuit, which is often phrased “as soon as practicable.”\textsuperscript{42} The consequences of an insured’s failure to comply with a policy’s notice provisions vary widely based on the type of policy involved (such as “occurrence” or “claims made” policies),\textsuperscript{43} as well as by jurisdiction. Some states require a showing of actual prejudice by reason of the late notice, whereas other strictly uphold the duty to notice and may bar coverage in the event that notice is not provided “as soon as practicable.” “Few courts today strictly adhere to the traditional approach which allowed for no consideration of insurer prejudice in determining whether benefits should be denied due to noncompliance

\textsuperscript{40} \textit{Broussard v. Broussard}, 84 So.2d 899, 902 (La. App. 1st Cir. 1956).

\textsuperscript{41} An insurer has the duty “on the filing of suit against its assured to employ competent counsel to represent the assured and to provide counsel with adequate funds to conduct the defense of the suit.” \textit{Merritt v. Reserve Ins. Co.}, 34 Cal. App. 3d 858, 882 (Cal. App. 2d Dist. 1973).

\textsuperscript{42} “A policy’s requirement of notice ‘as soon as practicable’ means that notice must be given within a reasonable length of time under the circumstances.” \textit{Clementi v. Nationwide Mut. Fire Ins. Co.}, 16 P.3d 223, 226 (Colo. 2001); and \textit{Am. Fire Cas. Co. v. Collura}, 163 So.2d 784, 791-792 (Fla. 2d DCA 1964)(“[A] policy provision as to the time when notice of an accident must be given, such as, ‘as soon as practicable,’ has been construed to mean that notice is to be given with reasonable dispatch and within a reasonable time in view of all the facts and circumstances of the particular case.”).

\textsuperscript{43} \textit{Livingston Parish School Board v. Fireman’s Fund American Insurance Co.}, 282 So.2d 478, 481 (La. 1973)(a “claims-made” insurance policy is one in which coverage attaches only if the negligent harm is discovered and reported within the policy period); \textit{See Also Sigma Financial Corporation v. American International Specialty Lines Insurance Company}, 200 F.Supp.2d 710, 716 (E.D. Mich. 2002)(same).
with an insurance policy’s notice requirements." Courts also differ on whether the insured or the insurer shoulders the burden of proof when an insurer alleges late notice.

Distinguishing decisions addressing occurrence policies, most states uphold the notice and reporting requirements included in claims made policies notwithstanding the prejudice caused to the victim-beneficiary by reason of the insured’s failure to report a claim once it is “first made.” While Louisiana is a “Direct Action” state, an insured’s failure to notify the insurer of a claim as required by the “claims made” policy bars the third party victim’s claim against the insurer. In contrast, for an occurrence policy,

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45  *Id.*, 16 P.3d at 232 (summarizing cases)(Holding that “once . it has been established that an insured has unreasonably provided delayed notice to an insurer, an insurer may only deny benefits if it can prove by a preponderance of the evidence that it was prejudiced by the delay.”); and *Bankers Ins. Co. v. Macias*, 475 So.2d 1216, 1218 (Fla. 1985)(“If the insured breaches the notice provision, prejudice to the insurer will be presumed, but may be rebutted by a showing that the insurer has not been prejudiced by the lack of notice.”).

46  “The major difference between a claims made policy and an occurrence policy is in the risk insured. In the occurrence policy, the risk is the occurrence itself. In the claims made policy, the risk insured is the claim brought by a third party against the insured.” *General Ins. Co. of Am. v. Robert B. McManus, Inc.*, 272 Ill.App.3d 510, 514, 650 N.E.2d 1080, 1083 (Ill. App. Ct. 1st Dist. 1995).

47  *See Craft v. Philadelphia Insurance*, 343 P.3d 951, 961 (Colo. 2015)(“[T]he date-certain notice requirement of a claims-made policy is a fundamental term of the insurance contract, and notice under such a provision is a material condition precedent to coverage. Thus, to apply the notice-prejudice rule to excuse an insured’s noncompliance with a date-certain notice requirement essentially rewrites the insurance contract and effectively creates coverage where none previously existed.”); and, *Sigma Financial Corporation v. American International Specialty Lines Insurance Company*, 200 F.Supp.2d 710, 716 (E.D. Mich. 2002)(“The notice provision of a claims made policy is just as important to coverage as the requirement that the claim [or potential claim] be asserted during the policy period. If the insured does not give notice within the contractually required time period, in the instance case ‘during the policy period,’ there is simply no coverage under the policy.”).

48  *Gorman v. City of Opelousas*, 2013-1734 (La. 07/01/14), 148 So.3d 888, 896 (“Therefore, the enforcement of the policy provisions on the making and reporting of claims does not deprive an injured third party of a right of action under the Direct Action Statute.”).
Louisiana courts will generally require a complete absence of notice to the insurer prior to settlement or before the appeals delays run to demonstrate actual prejudice. 49 Most other states do not have such strict and narrow standards to demonstrate prejudice caused by late notice.50

Four Scenarios to Discuss

Scenario #1: Stemming the Tide with a Finger in the Dike?

There are multiple related federal court lawsuits that involve claims for damage allegedly valued at over $500 million sustained by thousands of residences or businesses by reason of work performed on 10 separately bid and differently sequenced federally-funded projects for the construction of drainage canals and roadways in different phases and in separate areas of a large city that occurred over nearly three years. The insured is Flawless Foundations Inc. (“Flawless”), a subcontractor. Flawless was insured by Stubborn Insurance Company (“Stubborn”), but only for the first two years when the construction work at issue occurred. For one year thereafter, coverage was afforded by Always Covered Insurance Company (“Always”) with $5.0 per occurrence primary limits, a $1.0 self-insured retention, and defense costs in addition to the limits. Flawless

49 Haynes v. New Orleans Archdiocesan Cemeteries, 2001-0261 (La. App. 4th Cir. 12/19/01), 805 So.2d 320, 323-325 (summarizing cases).
Foundations was involved as a subcontractor on 4 of the 10 projects with 2 of the 4 different general contractors. Each subcontract purports to require Flawless to indemnify each general contractor to the extent of Flawless’ fault or negligence and to include each general contractor as an additional insured solely with respect to any liability based on Flawless’ operations. Flawless has forwarded Always and Stubborn tenders of defense and demands for indemnity received from the 2 general contractors requesting the Flawless use and retain counsel selected by the 2 general contractors. Flawless has requested that Always and Stubborn consent to using **High, Rates & Costs** ("HRC"), a non-panel firm, as Flawless' counsel. Marty Mule of Stubborn has advised Always that Stubborn intends on denying any coverage based on late notice, and will not defend Flawless. Flawless’ excess insurer for all three policy years, **Rainy Day Excess Insurance** ("Rainy Day"), has sent a letter demanding to know how Always and Stubborn intend on handling this litigation and whether Always and Stubborn are considering a tender of their respective limits given the magnitude of the potential exposure. Flawless advised Always, Stubborn and Rainy Day that it did nothing wrong, and was merely following the plans and specifications provided by the “owners” involved in the project, the U.S. Corps of Engineers and the City’s Drainage & Canal Commission.

**Scenario #2: Who Has The Hammer?**

**Full-of-Service Bank** ("FOSB") has been defending a class action lawsuit based on allegations that it has for many years systemically paid females less than similarly
situated males. FOSB Enterprises is the parent company and is a financial institution insured by Always Covered Insurance Company ("Always"). After initially issuing a reservation of rights and reluctantly consenting to use High, Rates & Costs as counsel for FOSB, Always recently filed a declaratory action denying coverage. The Always policy has $10.0 million in eroding limits of liability with a $1.0 million self-insured retention. FOSB has satisfied its $1.0 SIR and Always has paid $1.0 million, leaving $1.0 million in unpaid defense costs owed to High, Rates & Costs. Plaintiffs are willing to settle for Always’ remaining limits after deducting defense costs incurred to date; the potential damages are at least twice the amount of Always remaining limits. FOSB’s General Counsel wants to litigate the case to judgment, but has proposed to fully defend, release and indemnify Always against any further risk if it pays: (1) the $1.0 million owed to High, Rates & Costs (for a total of $2.0 million to be paid by Always in defense costs); and, (2) another $3.0 million to be set aside to fund any settlement of the underlying claim. The President of FOSB’s insurance agency has called Always’ Underwriting SVP to remind her of the “huge” amount of business that FOSB generates for Always and suggests that Always “take this great deal” because it will “save” Always $5.0 million off of its limits and “help out a very valuable customer.”

**Scenario #3: Who’s In Charge Anyway?**

After the EEOC issued a right to sue letter, Tabitha Talkback ("Tabby"), a former Vice-President of the temporary employee division ("Best Temps") of Best Outsourcing Anywhere Inc. ("BOA"), filed a state court lawsuit alleging claims against: BOA based on
race discrimination, hostile work environment and retaliation for the conduct of Peter Perfect, IV (PP-IV”), the Best Temps President, who is now BOA’s CEO after his father’s recent retirement; PP- IV for sexual assault, defamation and intentional infliction of emotional distress claims; and, PP-IV’s two younger sisters, Paulette Perfect Prudhomme (“Paulette”) and Pauline Perfect (“Pauline”), for making defamatory remarks about Tabby after she was terminated. After becoming CEO, PP-IV promptly relieved his two younger sisters of their “do nothing” jobs, but they remained board members and shareholders. Always Covered Insurance Company (“Always”) issued a single policy with separate limits of liability and separate terms and conditions for CGL, D&O and EPL coverages. Tabby claims that everything went downhill after she had a one-night fling with PP-IV claiming that he got her so drunk that she “forgot herself.” Each policy included a single $25,000 aggregate deductible and a $5.0 million aggregate single limit of liability for any related claims involving coverage under any combination of any of the policies. Always has been requested to consent to: High, Rates & Costs being appointed as counsel for BOA and PP-IV; Paulette’s husband Keith Paul Prudhomme (“K-Paul”) being appointed as her lawyer; and, Paula’s cousin Knots Sough Perfect (“Knots-So”) being appointed as her lawyer. Tabby’s counsel has sent a settlement demand letter offering to accept $100,000 to settle the claims. Despite their difference and disagreements, BOA, PP-IV, Paulette and Pauline agree on one thing: they want to take the case “all the way.”

**Scenario #4:** Claims Involving Multiple Coverages for Related Insureds?
Plaintiffs Dr. Stitch Emmup and Dr. Do-No Harrim sued University Medical Center (UMC) and City Medical Center (CMC) claiming that their contract with CMC was not renewed because UMC physicians made defamatory comments about Plaintiffs' work and practices. Plaintiffs also claim that UMC tortiously interfered with their contract with CMC. Always Covered Insurance Company ("Always") issued a general liability policy to CMC, and is defending the suit under a reservation of rights with respect to defamation. Stubborn Insurance ("Stubborn") provided a D&O and professional liability policy, and contends that Always has a duty to defend CMC on all counts and that its D&O Policy is excess to Always. The Stubborn policy excludes coverage for defamation. Rainy Day Insurance Company ("Rainy Day") provided an umbrella policy, and has taken the position that it is excess to both other insurers, despite the fact they cover different risks.