SIMPSON THACHER

INSURANCE LAW ALERT

JUNE 2014

This Alert discusses recent decisions relating to the timeliness of a late notice disclaimer, the sufficiency of a reservation of rights, and an insurer's duty to defend administrative agency actions. In addition, we report on rulings addressing the scope of personal and advertising injury coverage and the applicability of a governmental suit exclusion to whistleblower claims. Finally, we discuss notable rulings relating to arbitrator partiality, amount-in-controversy requirements for federal jurisdiction, and the discoverability of loss reserve information, among others. Please "click through" to view articles of interest.

- ***New York's Highest Court Rules That Timely Disclaimer Statute Does Not Apply to Environmental Property Damage Claims***

  The New York Court of Appeals ruled that New York Insurance Law § 3420(d)(2) does not require an insurer to disclaim coverage based on late notice "as soon as reasonably possible" after learning of grounds for disclaimer of environmental property damage claims. *KeySpan Gas East Corp. v. Munich Reinsurance America, Inc.*, 2014 WL 2573382 (N.Y. June 10, 2014). *(click here for full article)*

- ***Reservation of Rights Sufficient to Defeat Estoppel Argument, Rules Eleventh Circuit***

  The Eleventh Circuit found that an insurer adequately reserved its right to deny coverage and was not estopped from asserting coverage defenses under general liability and umbrella policies. *Wellons, Inc. v. Lexington Ins. Co.*, 2014 WL 1978412 (11th Cir. May 16, 2014). *(click here for full article)*

- ***No Duty to Defend Because Environmental Agency Action is Not the "Functional Equivalent" of a "Suit," Rules Washington Appellate Court***

  A Washington appellate court ruled that an insurer had no duty to defend administrative actions against a policyholder that were not the "functional equivalent" of a "suit." *Gull Indus., Inc. v. State Farm Fire & Casualty Co.*, 2014 WL 2457236 (Wash. Ct. App. June 2, 2014). *(click here for full article)*

- ***Exclusion for Suits Brought On Behalf of Government Does Not Apply to Whistleblower Claims, Says New York Court***

  A New York trial court ruled that an exclusion barring coverage for claims brought "by or on behalf of" the government did not apply to whistleblower claims pursuant to the False Claims Act. *Certain Underwriters at Lloyd's London Subscribing to Policy No. QK0903325 v. Huron Consulting Grp., Inc.*, No. 650339-2011 (N.Y. Sup. Ct. May 16, 2014). *(click here for full article)*

- ***Nevada Supreme Court Rules That Pollution Exclusion Does Not Exclude Coverage for Carbon Monoxide Claim***

  The Nevada Supreme Court ruled that a pollution exclusion does not bar coverage for injuries caused by carbon monoxide. *Century Surety Co. v. Casino West, Inc.*, 2014 WL 2396085 (Nev. May 29, 2014). *(click here for full article)*

- ***California Supreme Court Limits Personal and Advertising Injury Coverage for Disparagement Claims***

  The California Supreme Court ruled that a policyholder is not entitled to personal and advertising injury coverage for disparagement claims unless the complaint explicitly asserts or clearly implies that the policyholder derogated another company's product or business. *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.*, 2014 WL 2609753 (Cal. June 12, 2014). *(click here for full article)*

- ***Pennsylvania Court Rules That Class Action Suits Based on Zip Code Collection Do Not Allege Personal and Advertising Injury***

  A Pennsylvania federal district court ruled that insurers had no duty to defend suits alleging violations of state statutes and common law privacy rights based on the collection of personal ZIP code information. *OneBeacon America Ins. Co. v. Urban Outfitters, Inc.*, 2014 WL 2011494 (E.D. Pa. May 15, 2014). *(click here for full article)*

- ***Texas Supreme Court Vacates Award Based on Arbitrator's Evident Partiality***

  The Texas Supreme Court reinstated a district court decision vacating an arbitration award, finding that an arbitrator's failure to disclose certain information demonstrated evident partiality. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 2014 WL 2139215 (Tex. May 23, 2014). *(click here for full article)*

- ***Insurance Claims Cannot Be Aggregated To Meet Diversity Jurisdiction Amount-in-Controversy Requirement***

  The Sixth Circuit ruled that individual insurance claims may not be aggregated to satisfy the federal diversity statute's amount-in-controversy requirement. *Siding and Insulation Co. v. Acuity Mutual Ins. Co.*, 2014 WL 2574788 (6th Cir. June 10, 2014). *(click here for full article)*

- ***Arizona Court Compels Production of Reserve Information in Bad Faith Action***

  An Arizona court ruled that where loss reserve information is based on an insurer's assessment of the merits of a claim it is relevant to a bad faith claim and therefore discoverable. *Paul Johnson Drywall, Inc. v. Phoenix Ins. Co.*, 2014 WL 1764126 (D. Ariz. May 5, 2014). *(click here for full article)*

Disclaimer Alert:

New York's Highest Court Rules That Timely Disclaimer Statute Does Not Apply to Environmental Property Damage Claims

The New York Court of Appeals ruled that New York Insurance Law § 3420(d)(2), which requires an insurer to disclaim coverage based on late notice "as soon as reasonably possible" after learning of grounds for disclaimer, does not apply to environmental property damage claims. *KeySpan Gas East Corp. v. Munich Reinsurance America, Inc.*, 2014 WL 2573382 (N.Y. June 10, 2014).

The dispute arose out of environmental contamination at various sites owned by Long Island Lighting Company ("LILCO"). LILCO sued its insurers, seeking a declaration as to their defense and indemnity obligations. The insurers asserted a late notice affirmative defense and moved for summary judgment. A New York trial court granted the motion as to one site, but found issues of fact as to other sites. An appellate court reversed in part, finding that although LILCO failed to give timely notice with respect to two sites, the insurers were not entitled to summary judgment because of issues of fact as to the potential waiver of the insurers' late notice defense by failing to issue a timely disclaimer. The appellate court referenced language from New York Insurance Law § 3420(d)(2), holding that a jury must decide whether the insurers issued a disclaimer "as soon as reasonably possible after first learning of the accident or of grounds for the disclaimer of liability." The New York Court of Appeals reversed.

The New York Court of Appeals ruled that the heightened standard for late notice disclaimers set forth in § 3420(d)(2) "applies only in a particular context: insurance cases involving death and bodily injury claims arising out of a New York accident under

a New York liability policy." Where the underlying claims allege property damage, an insurer's delay in issuing a disclaimer must be evaluated under common law waiver and/or estoppel principles. Significantly, common law principles impose a higher burden to establish waiver, depending in part on whether the insurers "clearly manifested an intent to abandon their late-notice defense." The decision expressly overrules several New York appellate court decisions applying § 3420(d)(2) to claims outside the bodily injury context.

Coverage Alerts:

Reservation of Rights Sufficient to Defeat Estoppel Argument, Rules Eleventh Circuit

The Eleventh Circuit found that an insurer adequately reserved its right to deny coverage and was not estopped from asserting coverage defenses under general liability and umbrella policies. *Wellons, Inc. v.*

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Lexington Ins. Co., 2014 WL 1978412 (11th Cir. May 16, 2014).

Lexington insured Wellons under general liability and umbrella policies. When Wellons became aware of a possible claim within the scope of coverage, it notified Lexington, which in turn issued a reservation of rights ("ROR"). Lexington subsequently defended Wellons subject to a second ROR. Thereafter, Wellons advised Lexington of another possible claim. Lexington issued another ROR. When a second complaint was filed against Wellons, Lexington defended the action subject to the previously-issued RORs. A verdict was entered against Wellons. Lexington denied coverage on the basis that there was no covered "occurrence" or "property damage." Wellons sued Lexington, asserting that Lexington had not adequately reserved its rights and was therefore estopped from asserting coverage defenses. A Georgia district court granted Lexington's summary judgment motion, and the Eleventh Circuit affirmed.

Under Georgia law, an insurer may be estopped from denying coverage if it assumes the defense of an action without properly reserving its rights. *See* June 2010 Alert (discussing *World Harvest Church, Inc. v. GuideOne Mutual Ins. Co.*, 695 S.E.2d 6 (Ga. 2010)). Here, the court addressed the specificity required for an effective reservation of rights. The court ruled that an ROR "need not specify each and every potential basis for contesting coverage, as long as the reservation fairly informs the insured that, notwithstanding the defense of the insured, the insurer does not waive its coverage defenses." Because Lexington's ROR letters cited to specific policy provisions and offered corresponding explanations, the court found them sufficient as a matter of law. Furthermore, the court held that where, as here, a policyholder continues to accept the insurer's defense after receiving an ROR, the policyholder has implicitly consented to the terms of the ROR, including any non-waiver clause it contains.

The court also ruled in favor of Lexington on its late notice defense with respect to an umbrella policy. The court held that Lexington had no obligation to presume adequate notice under the umbrella policy based on notice received under a general liability policy.

No Duty to Defend Because Environmental Agency Action is Not the "Functional Equivalent" of a "Suit," Rules Washington Appellate Court

A Washington appellate court ruled that an insurer had no duty to defend administrative actions against a policyholder that were not the "functional equivalent" of a "suit." *Gull Indus., Inc. v. State Farm Fire & Casualty Co.*, 2014 WL 2457236 (Wash. Ct. App. June 2, 2014).

Gull Industries, a gas station owner, discovered a hydrocarbon leak from an underground storage

tank. Gull voluntarily remediated and notified the Department of Ecology ("DOE") of the contamination. Gull then tendered a claim for defense and indemnification to Transamerica Insurance Group ("TIG") and State Farm. Both declined Gull's tender. Gull then sued the insurers, alleging breach of contract and bad faith. The suit was consolidated with another action filed against numerous insurers in connection with over 200 contamination sites. State Farm and TIG moved for summary judgment, arguing that they had no duty to defend the administrative actions. The trial court agreed and granted the motion. The appellate court affirmed.

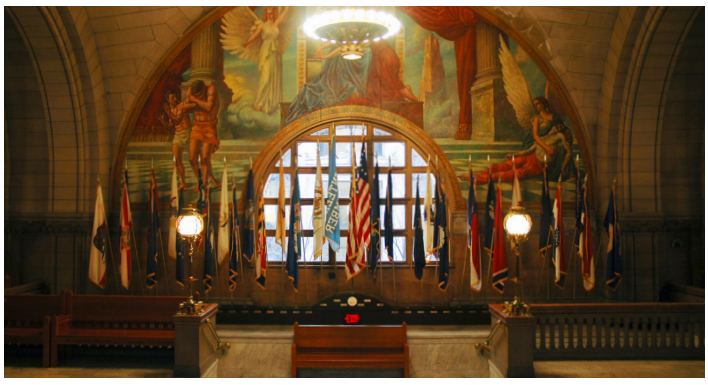
The policies at issue did not define the term "suit." The court concluded that the term was ambiguous and should be interpreted to include administrative enforcement actions that are the "functional equivalent" of a suit. However, the court explained that the mere existence of statutory liability is insufficient to satisfy the "suit" requirement. Rather, agency action must be "adversarial or coercive in nature in order to qualify as the functional equivalent of a 'suit.'" Applying this standard, the court found that Gull had failed to establish a suit because the only communication Gull received from the DOE was a letter confirming receipt of Gull's notice of contamination. The letter demanded no action of Gull and did not make any express or implied threat of consequences that might result from Gull's failure to remediate.

Courts have followed various approaches in interpreting "suit" for purposes of an insurer's duty to defend. Some have adopted a bright-line test based on the filing of a formal complaint, while others have utilized a more flexible approach based on the coercive nature of the administrative actions and/or the potential consequences of the policyholder's non-compliance. *See* January and May 2013 Alerts.

Exclusion for Suits Brought On Behalf of Government Does Not Apply to Whistleblower Claims, Says New York Court

A New York trial court ruled that an exclusion barring coverage for claims brought "by or on behalf of" the government did not apply to whistleblower claims arising under the False Claims Act ("FCA"). *Certain Underwriters at Lloyd's London Subscribing to Policy No. QK0903325 v. Huron Consulting Grp., Inc.*, No. 650339-2011 (N.Y. Sup. Ct. May 16, 2014).

Huron Consulting Group was named as a defendant in a *qui tam* action alleging that the submission of false reimbursement claims resulted in the government's overpayment of medical claims. The action was ultimately dismissed. Thereafter, Huron sought a declaration that Underwriters were obligated to reimburse $2 million expended in defense costs. Underwriters moved for summary judgment, arguing



among other things that the policy excluded coverage for claims brought "by or on behalf of" government agencies. The court denied the motion.

The court ruled that the exclusion did not apply to the whistleblower's FCA allegations for several reasons. First, the court noted that although some courts have characterized FCA actions as being brought "on behalf" of the government, whistleblowers essentially pursue their claims as "private plaintiffs" and, as was the case here, may seek personal damages. Second, the court noted that although the government is entitled to assume primary authority in prosecuting FCA actions, the government declined to participate as a party in this case. Third, the court relied on language in the exclusion requiring a suit on behalf of government "acting in its regulatory or official capacity." The court reasoned that this requirement limited application of the exclusion to actions in which the government has an "active, participatory role in enforcing its statutory rights."

Pollution Exclusion Alert:

Nevada Supreme Court Rules That Pollution Exclusion Does Not Exclude Coverage for Carbon Monoxide Claim

Courts have reached conflicting conclusions as to whether carbon monoxide claims fall within the scope of an absolute pollution exclusion. *See* June 2013 Alert. Last month, the Nevada Supreme Court weighed in, ruling that a pollution exclusion is ambiguous as to whether it is limited to traditional environmental contamination claims or also encompasses claims based on the release of indoor contaminants. Therefore, the court ruled that the exclusion must be construed in accordance with the policyholder's reasonable expectations. Citing to drafting history and case law limiting the exclusion to traditional environmental pollution, the court held that a policyholder would not understand the exclusion to bar coverage for injuries caused by carbon monoxide. *Century Surety Co. v. Casino West, Inc.*, 2014 WL 2396085 (Nev. May 29, 2014). The court imposed a heavy burden on insurers, stating that "[t]o demonstrate that the absolute pollution exclusion applies to nontraditional indoor pollutants, an insurer must plainly state that the exclusion is not limited to traditional environmental pollution." In contrast, the Second Circuit recently affirmed a ruling that under Texas law an absolute pollution exclusion bars coverage for claims alleging injury caused by the off-gassing of spray foam insulation installed inside homes. *Lapolla Indus., Inc. v. Aspen Specialty Ins. Co.*, 2014 WL 2019281 (2d Cir. May 19, 2014)

Personal and Advertising Injury Coverage Alerts:

California Supreme Court Limits Personal and Advertising Injury Coverage for Disparagement Claims

The California Supreme Court ruled that a policyholder is not entitled to personal and advertising injury coverage for disparagement claims unless the underlying complaint explicitly asserts or clearly implies that the policyholder derogated another company's product or business. *Hartford Casualty Ins.*

Co. v. Swift Distribution, Inc., 2014 WL 2609753 (Cal. June 12, 2014).

Hartford's general liability policy provided personal and advertising injury coverage for claims arising from the publication of material that "disparages a person's or organization's goods, products or services." The parties disputed whether allegations of patent and trademark infringement and damage to business, reputation and goodwill set forth a disparagement claim for purposes of triggering Hartford's duty to defend. The California Supreme Court held that they did not.

The court explained that a claim of disparagement requires a false or misleading statement that (1) specifically refers to a competitor's product or business, and (2) clearly derogates that product or business. The court further held that each requirement must be satisfied "by express mention or by clear implication." Here, the underlying suit alleged that the policyholder used the terms "superior," "unparalleled" and "patent-pending" in its advertisements. The court explained that because such phrases did not "expressly assert or clearly imply" the inferiority of a competitor's product, Hartford had no duty to defend. The court clarified that the following allegations, standing alone, do not satisfy the specificity requirement of disparagement: the use of nearly identical markings so as to cause consumer deception; a retailer's steep price reductions of particular products (potentially implying inferior quality as compared to other products); the use of material to create consumer confusion; passing off another's products as one's own; and copyright infringement.

The decision significantly limits the scope of claims that qualify as disparagement for advertising injury coverage purposes. The specificity requirement set forth in *Hartford* should exclude most coverage claims based on advertising that do not explicitly mention a competitor.

Pennsylvania Court Rules That Class Action Suits Based on Zip Code Collection Do Not Allege Personal and Advertising Injury

A Pennsylvania federal district court ruled that insurers had no duty to defend suits alleging violations of state statutes and common law privacy rights based on the collection of personal ZIP code information. *OneBeacon America Ins. Co. v. Urban Outfitters, Inc.*, 2014 WL 2011494 (E.D. Pa. May 15, 2014).

The policyholders sought personal and advertising injury coverage under liability and umbrella policies for three class action complaints. Each alleged that the policyholders violated statutory and common law by collecting customers' ZIP code information for marketing and pecuniary benefit. However, each complaint included different factual allegations as to

the policyholders' use of the information. Addressing each complaint, the court issued the following rulings of law:

First, the court held that allegations that the policyholders collected personal information for their own pecuniary interests failed to establish the requisite "publication" for application of personal and advertising injury coverage. Although "publication" is not defined in the policies, the court held that Pennsylvania law generally requires communication to the public at large in order to satisfy the publication requirement. Therefore, the policyholders' use of personal ZIP code information for their own business-related purposes did not constitute public dissemination. As discussed in our January and March 2014 Alerts, courts have issued mixed decisions on this issue. *Compare Recall Total Information Mgmt., Inc. v. Federal Ins. Co.*, 83 A.3d 664 (Conn. App. Ct. 2014) (loss of personal computer data does not establish "publication" where no evidence that data had been accessed by third parties) *with Zurich American Ins. Co. v. Sony Corp. of America*, No. 651982/2011 (N.Y. Sup. Ct. New York Cnty. Feb. 21, 2014) (finding it irrelevant for purposes of "publication" whether personal information had actually been used or published by third party after website had been "hacked").

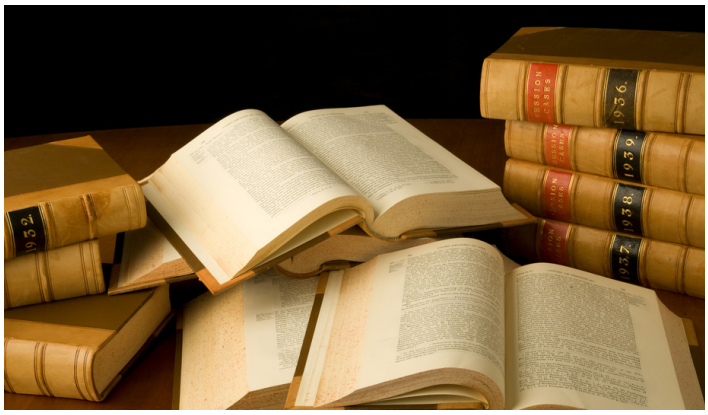
Second, the court held that where publication to third parties is alleged, the dissemination of ZIP code data constitutes a "violation of the right to privacy" under Pennsylvania law. Although Pennsylvania law limits the right to privacy to the right to secrecy (and does not encompass the right to seclusion), the court concluded that a ZIP code constitutes personal identification information. However, the court held that the claims were nonetheless barred from coverage by virtue of a policy exclusion for claims alleging privacy-related statutory violations.

Finally, the court held that where policyholders allegedly used the ZIP code information they collected to send unsolicited "junk mail," there is no violation of privacy under Pennsylvania law. The court cited to fax blasting coverage cases, noting that Pennsylvania courts have held that the right to privacy referenced in personal and advertising injury provisions does not encompass the right to seclusion and is instead limited to the protection of secrecy interests.

Arbitration Alert:

Texas Supreme Court Vacates Award Based on Arbitrator's Evident Partiality

Previous Alerts have discussed the stringent standards required to disqualify an arbitrator and/or to vacate an arbitration award based on arbitrator partiality. *See* June 2013, March 2011, March and April 2010 Alerts. Given the strong deference afforded to the arbitration process, courts frequently deny such motions. Last month, however, the Texas Supreme Court reinstated a district court decision that granted



a motion to vacate an arbitration award, finding that an arbitrator's failure to disclose certain information demonstrated evident partiality. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 2014 WL 2139215 (Tex. May 23, 2014).

In this breach of contract-based arbitration, an arbitrator disclosed several professional connections with the law firm representing the party that had appointed him. Such contacts included his participation

in other arbitration panels at the recommendation of the law firm and several meetings with law firm members regarding his litigation services company. After the panel issued a final arbitration award, the petitioner moved to vacate the award on the ground that the arbitrator exhibited evident partiality by deliberately attempting to minimize his relationship with the law firm involved in the arbitration. A Texas trial court agreed and vacated the award, finding that the arbitrator failed to disclose the true extent of his relationship with the law firm and that the relationship might yield a reasonable impression of partiality. An intermediate appellate court reversed, finding that the arbitrator's disclosures were sufficient to put the petitioner on notice of potential partiality and thus that the petitioner had waived its partiality challenge by not seeking further information. The Texas Supreme Court reversed and reinstated the trial court decision vacating the arbitration award.

An award may be vacated if an arbitrator "fails to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality." The Texas Supreme Court ruled that this standard was met because the arbitrator's relationship with the law firm was "more significant and concerning" than what was disclosed. The court cited to evidence that the arbitrator had arranged meetings with law firm members in addition to those that were disclosed; that the arbitrator had attempted to secure business from the law firm for his litigation services company; and that the law firm had edited the arbitrator's disclosures in the arbitration proceeding. The court explained that viewed in totality, the undisclosed information was not trivial and "might cause a reasonable person to view [the arbitrator] as being partial toward [the law firm]'s client." Significantly, the court noted that a party need not prove actual bias to demonstrate evident partiality. Rather, evident partiality is established where an objective observer would question the arbitrator's neutrality. The Texas Supreme Court also rejected the respondent's waiver argument, noting that waiver cannot be predicated on undisclosed information.

JURISDICTIONAL ALERT:

Insurance Claims Cannot Be Aggregated To Meet Diversity Jurisdiction Amount-in-Controversy Requirement

The Sixth Circuit ruled that individual insurance claims may not be aggregated to satisfy the federal diversity statute's amount-in-controversy requirement. *Siding and Insulation Co. v. Acuity Mutual Ins. Co.*, 2014 WL 2574788 (6th Cir. June 10, 2014).

A class action suit was filed against a company alleging violations of the Telephone Consumer Protection Act. The company and its insurer reached a $4 million settlement which stipulated that separate litigation would resolve a $2 million coverage dispute. Per the settlement, the class representative sued the insurer in Ohio federal district court, seeking a declaration as to coverage. The district court granted the insurer's summary judgment motion. On appeal, the Sixth Circuit raised the federal jurisdiction issue and concluded that the district court lacked diversity jurisdiction in the first instance. Therefore, the Sixth Circuit vacated the district court's ruling and remanded

the matter with instructions to dismiss the action.

The federal diversity statute requires an amount in controversy greater than $75,000. 28 U.S.C. §1332(a). The plaintiff class conceded that there was no "singular interest" exceeding $75,000 but argued that the class members' claims should be considered in the aggregate. The Sixth Circuit disagreed. It explained that aggregation of claims for amount-in-controversy purposes is appropriate only when "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." The court held that multiple claims pursuant to a single insurance policy did not meet this standard and that claim aggregation requires a "pre-existing (pre-litigation) interest in the subject of the litigation," rather than "a single pool of money that will be allocated among the plaintiffs." The court also declined to apply an "either viewpoint rule" under which the amount in controversy can be based not only on the plaintiffs' claims, but also by reference to the defendant's potential costs (here, the $2 million in coverage at stake). The Sixth Circuit sidestepped the larger question of whether the "either viewpoint rule," could ever be used in amount-in-controversy disputes and instead ruled that it could not be applied in this case because to do so would "provide an end run around the longstanding anti-aggregation principles …."

Discovery Alert:

Arizona Court Compels Production of Reserve Information in Bad Faith Action

Our May 2014 Alert summarized a Third Circuit decision ruling that an insurer's loss reserve estimates were not discoverable because they were not relevant to whether a property insurer acted in bad faith during settlement negotiations. *Mirachi v. Seneca Specialty Ins. Co.*, 2014 WL 1673748 (3d Cir. Apr. 29, 2014). The Third Circuit explained that loss reserve estimates reflect only what the insurer "could be" required to pay, rather than an evaluation of coverage based upon a factual investigation and are therefore irrelevant to allegations of insurer bad faith.

Last month, an Arizona court considered the same issue in *Paul Johnson Drywall, Inc. v. Phoenix Ins. Co.*, 2014 WL 1764126 (D. Ariz. May 5, 2014). There, the court explained that the relevance (or lack thereof) of reserve information depends on the insurer's specific method of calculating reserves. If an insurer can establish that reserves are based on "automatic factors" rather than a specific factual or legal analysis of the claims, then the relevance of reserve information is diminished. However, if an insurer fails to demonstrate that the reserve calculations are not based on an analysis of the claim's merit, then a court may deem such information relevant to allegations of bad faith.

In *Phoenix*, the record established that the insurer's reserves were based on its assessment of the merits of the underlying claims. As such, the court deemed the information relevant to proving the insurer's bad faith. *Phoenix* and cases cited therein illustrate that the relevance of reserve information in an insurer bad faith action is a fact-driven inquiry, which in some jurisdictions may depend primarily on how the insurer calculates its reserves.

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"I would say that they're the dean of the insurer-side coverage dispute land. Very, very well regarded."

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