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Has the Playing Field Expanded?
Bad Faith Claims Against Claims Professionals and Defense Counsel[*]

I. Understanding the Current Bad Faith Landscape.

Both policyholders and insurance companies and their representatives must have a keen understanding of the bad faith litigation environment in order to properly assess their place in the claims making and claims handling process. From a policyholder's perspective, it is critically important to understanding the terms and conditions of the policy of insurance and their obligation under the policy. Further, the policyholder must have a grasp of what is required in making a claim and the cooperation duties that flow from the process. Courts are sensitive to the attitudes of policyholders and their counsel. This was best characterized in the case of *White v. Western Title Ins. Co.*, 710 P.2d 309, 328 n.2 (Cal. 1986).

> It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith.

When faced with these types of challenges, a claims representative must be careful and document its file that characterizes a decent, responsive, effective and fair attitude. If a policyholder's claim is not "properly" responded to, the insurance company can find itself in a trap or bad faith set up. While most courts will not countenance a "bad faith set up", an unwary claims professional that does not have a keen understanding of the communications from the policyholder and/or its counsel can find itself in litigation that seeks damages well beyond the policy limits. As discussed below, policyholders and their counsel are seeking to expand the litigation landscape to including claims well beyond the traditional bad faith claim which is historically solely against the insurance company.

II. Bad Faith Claims Against An Insurer's Employee Adjusters.

Until the early 1990's, it was generally accepted that insurance company-employed adjusters were immune from personal liability for bad faith. In 1993, however, the landscape started to change, as courts began to embrace holding adjusters personally liable. *See O'Fallon v. Farmers Insurance Exchange*, 859 *P.2d* 1008, 1015 (Mont. 1993) (holding that individuals, as well as insurers, are prohibited from engaging in statutory unfair trade practices, and that when an

[*] Thanks for the contribution of Goldberg Segalla LLP attorneys: Christian A. Cavallo, Hillary N. Ladov, Tim Sheehan and Patrick J. Mulqueen.

individual breaches the obligations imposed by statute, the claimant who is damaged by that breach has a common law cause of action against that individual). The decisions that followed stirred the pot of uncertainty, inviting jurisdictions to question whether employee adjusters should be personally liable for bad faith. *See Liberty Mutual Insurance Co. v. Garrison Contractors, Inc.*, 966 *S.W.2d* 482, 487 (Tex. 1998) (holding that the term "person," as used in statute prohibiting any person from engaging in any deceptive trade practices in the insurance business, was not limited to business entities, such as insurance companies, but was broad enough to include individual employees).[1] While this area of the law is far from settled, certain guidance-providing trends have emerged. We discuss these trends bellows.

a. Contracts, Tort, or Statutes - How Your Jurisdiction Characterizes Bad Faith Matters

Jurisdictions characterizing bad faith claims as contractual in nature are often less likely to hold an employee adjuster personally liable for bad faith, because adjusters are not parties to the insurance contract. *See e.g. Stallworth v. Hartford Ins. Co.*, No. 3:06-cv-89, 2006 WL 2711597 at *7 (N.D. Fla. Sept. 19, 2006) (finding adjuster not "individually liable under either a breach of contract claim or a claim for breach of the implied covenant of good faith and fair dealing because he was not a party to the insurance contract"); *Natividad v. Alexsis, Inc.*, 875 *S.W.2d* 695, 698 (Tex.1994) (holding that insurance adjuster owed the insured no duty of good faith and fair dealing because he was not party to a contract with the insured); *but see Keodalah v. Allstate Ins. Co.*, 413 *P.3d* 1059 (Wash. Ct. App.), *review granted*, 424 P.3d 1214 (2018) (holding that the duty of good faith imposed on "all persons" involved in insurance applies equally to individuals and corporations acting as insurance adjusters and thus an individual who violates this duty may be liable for the tort of bad faith). Conversely, jurisdictions that characterize bad faith claims as tort-based are more likely to hold an employee adjuster personally liable for bad faith. *See* Chad G. Marzen, *The Personal Liability of Insurance Claims Adjusters for Insurance Bad Faith*, 118 W. Va. L. Rev. 411, 433 (2015). Similarly, jurisdictions with statutes permitting claims against insurers are more likely to hold an employee adjuster personally liable for bad faith, since the statutes often identify specific conduct for which an employee adjuster can be found personally liable. *See USAA Texas Lloyds Company v. Menchaca*, 545 *S.W.3d* 479, 488 (Tex. 2018) ("The [Texas Insurance] Code grants insureds a private action against insurers that engage in certain bad-faith practices, and it permits, insureds to recover 'actual damages' ... caused by' those practices, court costs, and attorney's fees, plus treble damages if the insurer 'knowingly' commits the prohibited act.").[2]

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[1] *See also Taylor v. Nationwide Mutual Insurance Co., 589 S.E.2d 55, 62 (W. Va. 2003)* (in an action against an automobile insurer and its claims adjuster to recover for unfair claims settlement practices in connection with a claim for UIM benefits, the court held as a matter of first impression that a cause of action exists in West Virginia to hold an insurance company's employee claims adjuster personally liable for violation of the West Virginia Unfair Trade Practices Act).

[2] *See* Florida Statute § 624.155(1), which incorporates § 626.9541(1)(i) entitled "Unfair claim settlement practices," but does not permit claims against employee adjusters for bad faith failure to settle, until the insurer's liability has been determined. The rationale for the rule requiring abatement in bad faith failure to settle cases is that if there is no coverage, the insurer could not have acted in bad faith in refusing to settle. *See Hartford Ins. Co. v. Mainstream Constr. Group.*, Inc., 864 *So.2d* 1270, 1272 (Fla. 5th DCA 2004).

b. Suing Employee Adjusters to Defeat Diversity Jurisdiction.

Regardless of how a jurisdiction characterizes a bad faith claim, an increasing number of policyholders are naming employee adjusters as defendants in bad faith lawsuits against insurer to defeat federal diversity jurisdiction under 28 U.S.C. § 1332(a). While a policyholder may not even truly possess claims against the employee adjuster, by adding the adjuster as a defendant, particularly if he or she is a citizen of the forum state, the policyholder may be able to preclude the insurer from removing the matter to federal court, based on either a lack of diversity or the so-called "Forum Defendant Rule", 28 U.S.C. § 1441(b)(2). Interestingly, a court's determination on whether an employee adjuster is fraudulently joined also can provide insight on how the court may rule with respect to the adjuster's liability for bad faith. For example, in *Murray v. Allstate Vehicle*, No. CV H-18-3411, 2018 WL 5634949, at *1 (S.D. Tex. Oct. 30, 2018), the insured, a citizen of Texas, sued in Texas state court both her insurer, an Illinois citizen, and the insurer's employee adjuster, a Texas citizen, for breach of contract, violation of the Texas Insurance Code, and the Deceptive Trade Practice Act, amongst other causes of action. The insurer removed to federal court, contending that the employee adjuster was improperly joined. On its own motion, the U.S. District Court for the Southern District of Texas remanded the case since it found that the insured had sufficiently alleged a bad faith claim against the employee adjuster under the Texas Insurance Code and the Deceptive Trade Practice Act.

III. Bad Faith Claims Against Independent (Non-Employee) Adjusters.

It is common industry practice for insurance companies to retain independent adjusters to investigate losses and evaluate the value of a particular loss. Despite the independent adjuster's limited advisory role,[3] policyholders who dispute the insurer's ultimate coverage decision are increasingly asserting claims against independent adjusters as part of coverage litigation against the insurer. These claims, like claims against employee adjusters, come in a variety of legal theories. For contract-based claims, the theory is that the adjuster breached the duty of good faith and fair dealing. For tort-based claims, theories include negligence in the claim adjustment process and misrepresenting the scope of coverage. *See Caruth v. Chubb Lloyd's Ins. Co. of Texas*, No. 17-2748, 2018 WL 3934030, at *2-4 (N.D. Tex. Aug. 16, 2018) (holding that insureds stated a cause of action against an independent adjuster under a Texas statute governing deceptive insurance practices where they alleged the adjuster misrepresented the scope of coverage provided by the policy and the insureds detrimentally relied on those misrepresentations); *Morvay v. Hanover Ins. Companies*, 506 *A.2d* 333, 335 (N.H. 1986) (holding that an insured has a cause of action for negligence against independent investigators hired by the insurance company where financial harm to the insured was a foreseeable result of negligence in the investigation).[4] While the majority of courts hold that independent adjusters do not owe any independent duties to

[3] *Sanchez v. Linsey Morden Claims Servs., Inc.*, 84 *Cal.Rptr.2d* 799, 801-02 (Cal. Ct. App. 1999) (noting that the "insurer-retained adjuster is subject to the control of its clients" and the "insurer, not the adjuster, has the ultimate power to grant or deny coverage").

[4] *But see Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Ins. Co.*, 586 *S.E.2d* 586, 588 (S.C. 2003) (holding that an insured does not have a cause of action for either negligence or bad faith against an independent insurance adjuster or independent adjusting company).

policyholders,[5] a minority permits certain negligence-based claims.[6] Yet other claims are rooted in state statutes that allow liability against an adjuster for bad faith claims handling. *See Gasch v. Hartford Accident & Indem. Co.*, 491 *F.3d* 278, 282–83 (5th Cir. 2007) (holding that insureds stated a cause of action against an individual adjuster under a Texas statute governing deceptive insurance practices where they alleged the adjuster denied their claim without a reasonable basis and/or failed to reasonably investigate the claim).

A. Most Courts Point to Attenuated Relationship Between Independent Adjusters and Insureds to Insulate Adjuster From Liability.

The vast majority of courts reject bad faith claims against independent adjusters on privity grounds, reasoning that only the insurer—the party with whom the insured has a contractual relationship—owes a duty of good faith and fair dealing to the insured.[7] Courts also refuse to impose such a duty on adjusters on public policy grounds. In particular, these courts emphasize that since it is the insurer, not the adjuster, who has the ultimate authority to grant or deny coverage, the relationship between the adjuster and the insured is too attenuated to justify imposing a duty owed to the insured. *See Sanchez, supra*, 84 *Cal.Rptr.2d* 799, 801-02 (under California law an independent adjuster cannot be held liable to an insured based on any negligence theory because independent adjusters owe no duty of care to insureds); *Meineke v. GAB Bus. Servs.*, 991 *P.2d* 267, 270 (Ariz. Ct. App. 1999) (same holding under Arizona law). Several courts also point out that creating a separate duty of good faith owed to the *insured* would conflict with the adjuster's contractual duty to follow the instructions of the insurer.[8] In addition, courts note that imposing a duty owed to the insured would provide only an illusory benefit to insureds, as in most cases such a claim would be duplicative of the bad faith cause of action against the insurer. *Hamill v. Pawtucket Mut. Ins. Co.*, 892 *A.2d* 226, 230 (Vt. 2005) (holding that an insured has no tort cause of action against an independent adjuster based on an allegedly negligent claims investigation and that the insured's only remedy is against the insurer).

B. Policyholders Ditching Common Law Theories and Turning To State Bad Faith and Deceptive Trade Practices Statutes.

The few jurisdictions that do allow direct claims against individual adjusters hold that an adjuster may be liable to the insured for failing to exercise ordinary care in the investigation of the claim, reasoning that injury to the insured is a foreseeable result of an adjuster's negligence. *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 287-88 (Alaska 1980) (holding that

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[5] *See e.g., Cochran v. Hartford Fire Ins. Co.*, No. 14-00022, 2015 WL 13636677, at *1 (S.D. Ind. Jan. 26, 2015)*; Trinity Baptist Church v. Brotherhood Mut. Ins. Svcs.*, LLC, 341 *P.3d* 75 (Okla. 2014); *Crocker v. American Nat. General Ins. Co.*, 211 *S.W.3d* 928, 937-38 (Tex.App.-Dallas 2007); *Equip. Rental & Contractors Corp. v. N. River Ins. Co.*, No. CIV.A. 07-0158-CG-B, 2007 WL 2081477, at *2 (S.D. Ala. July 20, 2007); *First Specialty Ins. Corp. v. Ward N. Am. Holding, Inc.*, No. 04-2359-JWL, 2005 WL 3447708, at *1–2 (D. Kan. Dec. 15, 2005); *Charleston, supra*, 586 *S.E.2d* at 618*; Dear v. Scottsdale Ins. Co.*, 947 *S.W.2d* 908, 917 *(Tex.App.-Dallas 1997); Flowers v. U.S. Fid. & Guar. Co.*, 367 *So.2d* 107 (La.App.1979).

[6] *See e.g., Morvay, supra*, 506 *A.2d* at 335; *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 *P.2d* 281, 287-88 (Alaska 1980).

[7] *See e.g., Charleston Dry Cleaners & Laundry, supra*, 586 *S.E.2d* at 588; *Sanchez, supra*, 84 *Cal.Rptr.2d* at 801-02.

[8] *See Meineke, supra*, 991 P.2d at 271; *Sanchez, supra*, 84 *Cal.Rptr.2d* at 802 (analogizing this conflict to a lawyer representing the opposing sides in a lawsuit).

an individual adjuster can be held liable to an insured for negligence in investigating a claim, but cannot be held liable to an insured for bad faith); *Morvay v. Hanover Ins. Companies*, *supra*, 506 *A.2d* at 335. Even these courts agree, however, that an insured cannot maintain a bad faith claim against an independent adjuster, as adjusters do not owe a contractual duty of good faith to insureds. Yet in a potentially troubling trend, courts in Texas and Washington have held that while individual adjusters are insulated from common law bad faith liability, they can be held liable under state statutes imposing liability for bad faith claims handling and deceptive trade practices.[9]

IV. Claims Against Insurer-Assigned Counsel.

Other parties retained by insurers, including attorneys assigned to defend insureds and outside attorneys representing the insurer itself, are facing litigation brought by insurers in connection with bad faith claims against the insurer.

A. Claims Against Defense Counsel.

Defense counsel retained to represent insureds are often exposed to "indirect" liability for insurance bad faith in the form of professional negligence suits brought by insurers.[10] A typical fact pattern goes as follows:

> Insurer hires Law Firm to defend Insured against third-party claims pursuant to a liability policy Insurer issued to Insured. As a result of some act of alleged negligence on the part of Law Firm, an excess judgment is entered against Insured, who subsequently files suit against Insurer for bad-faith failure to settle within the policy limits. Insurer settles Insured's bad faith action, and commences a negligence suit against Law Firm seeking to recover excess amounts it paid due to the fault of Law Firm.

A threshold issue is whether the insurer in this fact pattern has standing to sue its assigned counsel for legal malpractice. Historically, a plaintiff could recover against an attorney for malpractice only if there was privity of contract between the plaintiff and attorney. Most, but not all,[11] states have relaxed the "privity" rule, "thus opening the door for attorney liability to nonclients in general and the insurance company that hired the attorney in particular."[12] Accordingly, while the legal theories employed by courts to allow such actions varies, most jurisdictions now permit a liability insurer to file suit against assigned defense counsel based on negligent representation of the insured in an underlying action.[13]

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[9] *Gasch, supra*, 491 *F.3d* at 282–83 (Texas law); *Lease Crutcher Lewis WA, LLC*, 2009 WL 3444762, at *2 (Washington law).

[10] *See* Chad G. Marzen, *Can (And Should) An Insurance Defense Attorney Be Held Liable For Insurance Bad Faith?*, 7 Va. L. & Bus. Rev. 97 (2012).

[11] *See Swiss Reinsurance Am. Corp. v. Roetzel & Andress*, 837 *N.E.2d* 1215, 1223-25 (Ohio Ct. App. 2005)(holding that liability insurer was neither client of defense counsel, nor in privity with the insured in a manner that would permit the insurer to bring a legal malpractice claim).

[12] Johnny Parker, *The Expansion of Defense Counsel Liability to Include Malpractice Claims by Insurance Companies: How the West Was Won*, 46 Tort Trial & Ins. Prac. L.J. 33, 34 (2010).

[13] Ronald E. Mallen, *Legal Malpractice* § 30.39 (2018 ed.)(identifying 24 states in which a cause of action by an insurer against assigned defense counsel for negligent representation of an insured is permitted); *but see Swiss*

i. Insurer-As-Client Theory.

Many jurisdictions hold that under the tripartite relationship between the insured,the insurer, and defense counsel, defense counsel has an attorney-client relationship with the insurer, as well as with the insured, and thus it owes a duty of care to the insurer in the absence of a conflict between the insured's and the insurer's interests. As a result, the insurer may sue assigned defense counsel directly as its client. The principal point of divergence among the courts applying this theory is what degree of conflict is required to eliminate defense counsel's duty to the insurer. *See Hartford Acc. & Indem. Co. v. Foster,* 528 *So.2d* 255, 268 (Miss. 1988)("There is nothing wrong with lawyer representing two clients in same cause of action so long as interests of clients parallel each other."); *Pine Island Farmers Coop v. Erstad & Riemer, P.A.,* 649 *N.W.2d* 444, 452 (Minn. 2002) (observing that both insurer and insured can be clients of retained firm if no conflict of interest exists and the insured consents after consultation).

ii. Insurer-As-Intended-Beneficiary Theory.

Other jurisdictions reject the notion that an insurer is a client of its assigned defense counsel under the tripartite relationship, but nevertheless consider insurers to be non-client beneficiaries of defense counsel, and thus recognize a cause of action by the insurer against defense counsel on this ground.[14] The *Restatement (Third) of the Law Governing Lawyers* § 51 crystallizes such a cause of action. Specifically, Subsection 3 provides that a lawyer owes a duty of care to a non-client when and to the extent that: a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client; b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

While the Restatement does recognize the existence of a duty of care owing to the insurer by the retained attorney, it also makes clear that such a duty evaporates in the event of a conflict jeopardizing the attorney's ability to represent the insured. Comment g to Section 51 indicates that a duty of care is owed to the insurer "with respect to matters to which the interests of the insurer and the insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer", and then illustrates the point with two contrasting situations. On the one hand, if defense counsel negligently failed to oppose a summary judgment motion resulting in an adverse judgment payable by the insurer, the insurer would have a viable claim against counsel since the interests of the insured and the insurer in competent legal services are parallel. Conversely, a duty of care

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Reinsurance Am. Corp., Inc. v. Roetzel & Andress, 837 *N.E.2d* 1215 (Ohio Ct. App. 2005)(concluding that Ohio's "zealous guarding of the attorney-client relationship" compelled the conclusion that insurer could not maintain legal malpractice action against insured's defense counsel); *Continental Casualty Co.*, 709 *F.Supp.* 44, 50 n.7 (D. Conn. 1989)(applying Connecticut law and noting that "[t]he public policy considerations that weigh against assignment of legal malpractice claims would seem to apply with equal force to the equitable subrogation of those claims").

[14] *See, e.g., Paradigm Ins. Co. v. Langerman Law Offices,* 24 *P.3d* 593, 602 (Ariz. 2001)(holding that insurer was intended beneficiary of defense firm's legal representation of the insured, and therefore could pursue legal malpractice action); *Nova Cas. Co. v. Santa Lucia*, 2010 WL 3942875 (M.D. Fla. Oct. 5, 2010)("Under Florida law, an attorney's liability is limited to those with whom the attorney is in privity of contract or intended third party beneficiaries of the attorney client relationship."); *Jordan Coyne, supra,* 357 *F.Supp.2d* at 958 (predicting that Virginia courts would likely embrace the insurer-as-intended-beneficiary theory, in light of the widely-accepted public policy reasons for permitting an insurer to sue its insurance defense counsel for malpractice).

"does not arise when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured."

iii. Equitable Subrogation.

A minority of jurisdictions[15], although unwilling to find that an insurer is either a client of the assigned defense counsel or a non-client beneficiary of defense counsel's legal services, have nevertheless permitted carriers to sue defense counsel based on the theory of equitable subrogation. *See American Centennial Ins. Co. v. Canal Ins. Co.*, 843 *S.W.2d* 480, 483-85 (Tex. 1992) (recognizing excess carrier's right to assert a malpractice claim against defense counsel retained by primary carrier even though Texas law does not allow a non-client to sue for legal malpractice, because permitting an excess carrier to stand in the shoes of its insured and assert the insured's claims would not burden the existing attorney-client relationship with additional duties or create potential conflicts of interest for the attorney). Equitable subrogation "has been described as a 'legal fiction' that permits one party to stand in the shoes of another" and obtain recovery from the true party at fault. *Atlanta Int'l Cas. Co. v. Bell*, 475 *N.W.2d* 294, 298 (Mich. 1991). The justification for recognizing a cause of action for equitable subrogation is the inequity that would result if an insurer was required to absorb the loss due to defense counsel's negligence without a recognized legal remedy. *Bell*, 475 *N.W.2d* at 298 ("[D]efense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer. The only winner … would be the malpracticing attorney.").

B. Claims Against Coverage Counsel.

i. The "Advice Of Counsel" Defense To Bad Faith Liability.

In some jurisdictions, an insurer may seek to defend itself against bad faith claims on the ground that it relied upon the advice of counsel. As a general rule, the "advice of counsel" defense has four elements: (1) the insurer sought counsel's advice in good faith; (2) the insurer disclosed all pertinent information to its attorney; (3) the insurer acted on the advice of counsel in good faith; and (4) the attorney was competent in the particular areas of law and disinterested in the matter. James C. Nielsen, *Advice of Counsel in Insurance Bad Faith Litigation: A Substantive Framework for Pleading, Discovery and Proof*, 25 *Tort & Ins. L.J.* 533, 543 (1990). Even in those states where it is recognized, the advice of counsel defense is not an absolute defense to bad faith liability. Instead, it is usually considered only one factor out of many bearing on whether the insurer acted reasonably under the circumstances. *See Cotton States Mut. Ins. Co. v. Trevethan*, 390 *So.2d* 724, 728 (Fla. Dist. Ct. App. 1980)(holding that reliance on advice of counsel is "evidence to be considered on the issue of bad faith, and it does not insulate the insurer from a bad faith excess judgment").

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[15] Among the states that have acknowledged an insurer's right to bring an equitable subrogation action for legal malpractice against underlying defense counsel are Texas, California, New York, Massachusetts, Illinois, Michigan, and Mississippi. *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 *S.W.3d* 692 (Tex. 2000); *Gallagher Bassett Servs., Inc. v. Aghishian*, 2009 WL 982070, at *3 (C.D. Cal. Apr. 9, 2009); *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 *A.D.3d* 172, 174-75 (1st Dept. 2004); *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 379 *F. Supp. 2d* 183 (D. Mass. 2005)(applying Massachusetts law); *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 *F.Supp.2d* 1013 (N.D. Ill. 1998) (applying Illinois law); *Great Am. E & S Ins. Co. v. Quintairos, Prieto, Wood & Boyer, P.A.*, 100 *So.3d* 420 (Miss. 2012).

Where, as a result of coverage counsel's advice, the insurer incurs liability for bad faith, the insurer's remedy would be a malpractice action against coverage counsel.

ii. Malpractice Claims Against Coverage Counsel.

Counsel retained by insurers to provide coverage advice or to monitor underlying claims also have been subject to malpractice suits for allegedly substandard legal representation. In these types of actions, privity of contract and the existence of an attorney-client relationship between coverage counsel and the insurer is generally not at issue. Accordingly, the claims asserted against coverage counsel are usually standard causes of action for legal malpractice and breach of contract.

Typically, insurers allege that they detrimentally relied on coverage counsel's inadequate opinions to deny coverage to their insureds, causing the insurer to be subject to bad faith litigation or leading the insurer to settle the underlying claims against the policyholder for much more than it would have had in the absence of faulty legal advice, or both.[16] Insurers have also filed suits on the basis that erroneous coverage recommendations from counsel eliminated the opportunity to resolve the underlying litigation, thus leaving the insurer exposed to excess judgments against the insured.[17] However, some cases concern alleged negligence on the part of coverage counsel that resulted in the insurer providing defense or indemnity coverage for claims falling outside the scope of the policy's coverage.[18]

Generally speaking, the alleged acts or omissions by coverage counsel that have given rise to malpractice suits by their insurer clients fall within the following 4 categories:

1) *Failing to identify applicable coverage defenses or limitations*[19]*;*

2) *Conducting an inadequate coverage investigation*[20]*;*

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[16] *Arrowwood Indem. Co. v. Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A.*, 134 *So.3d* 1079, 1080-81 (Fla. Dist. Ct. App. 2014); *Commercial Union Ins. Co. v. Lewis & Roca*, 902 *P.2d* 1354, 1356-58 (Ariz. Ct. App. 1995)

[17] *See e.g., Federated Nat'l Ins. Co. v. Carman, Beauchamp & Sang, P.A.*, No. 502012-CA-003426 (Fla. Cir. Ct. Feb. 23, 2012) (insurer alleged that law firm negligently recommended that insurer deny coverage under auto policy exclusion contrary to overwhelming weight of legal precedent, thus eliminating insurer's opportunity to settle underlying suit in which a $3.7 million judgment was entered against its insured).

[18] *See Norcal Mut. Ins. Co. v. Sedgwick, Detert, Moran & Arnold*, 2009 WL 711765, at *3 (Cal. Ct. App. Mar. 19, 2009)(coverage counsel allegedly failed to advise insurer regarding potential coverage defense based on "known loss" endorsement to renewal policy); *Indiana Lumbermens Mut. Ins. Co. v. Bullivant Houser Bailey*, 2007 WL 9710168 at *3 (D. Mont. July 17, 2007)(insurer alleged that negligent legal advice of coverage counsel exposed it to coverage by estoppel, and therefore insurer was entitled to recover the $4.1 million it paid to settle the underlying lawsuit).

[19] *Lloyd's Syndicate 2987 v. Furman, Kornfeld & Brennan, LLP*, Index No. 160612/2018 (N.Y. Sup. Ct. Nov. 15, 2018) (law firm that prepared coverage disclaimer letter allegedly failed to raise applicability of $1 million per-claim deductible, thus opening the door to the policyholder and its assigned to argue that the insurer waived its right to rely upon the policy's deductible provision).

[20] *Lincoln Gen. Ins. Co. v. Ryan Mercaldo LLP*, 2014 WL 1877456, at *2 (S.D. Cal. May 9, 2014) (law firm allegedly provided written opinion recommending that insurer deny coverage under a CGL policy for an underlying lawsuit, without reviewing or analyzing separate business auto policy also issued by the insurer).

3) *Ignoring controlling precedent*[21]*; and*

4) *Compromising potential coverage defenses*[22]*.*

These types of claims are extremely fact specific and open coverage counsel's file to a detailed scrutiny.

[21] *Commercial Union Ins. Co. v. Lewis & Roca*, 902 *P.2d* 1354 (Ariz. Ct. App. 1995) Law firm's coverage opinion recommending that insurer deny coverage based on policy exclusion had overlooked an Arizona Supreme Court decision holding a similar exclusion to be unenforceable); *Gray Ins. Co. v. Heggy*, 2012 WL 4128034, at *4 (W.D. Okla. Sept. 19, 2012) (insurer disclaimed duty to defend its insured based on coverage counsel's opinion letter erroneously advising that gross negligence was tantamount to intentional conduct under Oklahoma law).

[22] *Certain Underwriters at Lloyd's of London v. Mandell, Menkes, & Surdyk*, 2008 WL 4291160, at *2-4 (E.D. Cal. Sept. 18, 2008) (coverage counsel's recommendation that insurer file a declaratory judgment action to recover defense costs attributable to non-covered claims against the insured allegedly foreclosed the insurer's ability to unilaterally rescind the policy based on the insured's material misrepresentations, since unilateral rescission was purportedly no longer available once the insurer commenced an action on the contract); *Indiana Lumbermens Mut. Ins. Co.*, 2007 WL 9710168, at *3 (attorney allegedly recommended that insurer deny coverage to insured for pending ERISA litigation without advising that a carrier who wrongfully refuses to defend its insured may be estopped under Montana law from disputing indemnity coverage).