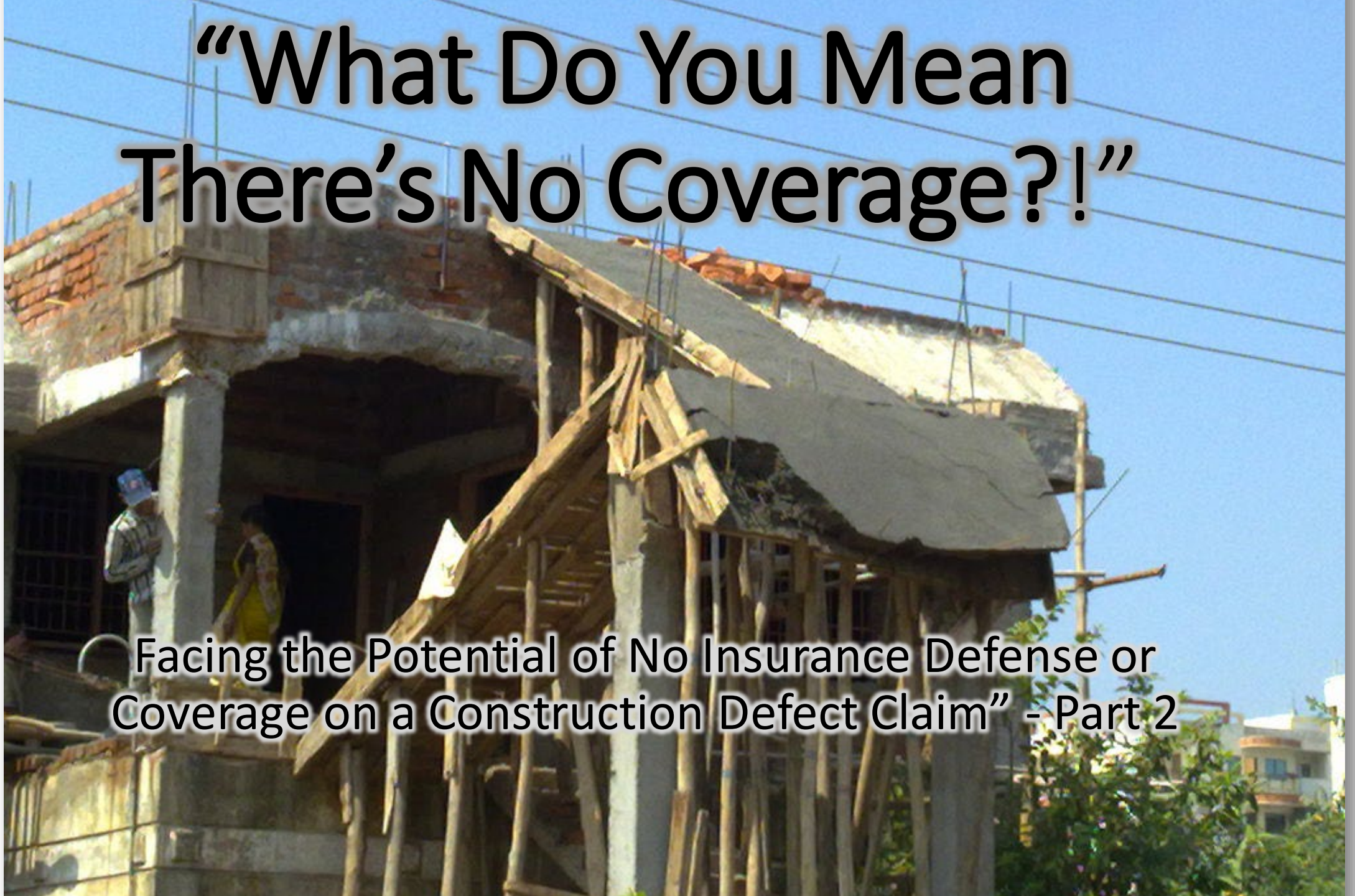


“What Do You Mean There’s No Coverage?!”

Facing the Potential of No Insurance Defense or Coverage on a Construction Defect Claim” - Part 2



Speakers

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I. Pleading to Coverage



PLEADING TO COVERAGE

- Contract language to require submission of full policy and endorsements
- If full policy is unavailable consider the usual requirements:
 - Plead an occurrence
 - Plead dates to include the policy period
 - Plead property damage/personal injury/loss of use
 - Plead damages resulting from the occurrence
 - Plead subcontractor involvement and negligent oversight
 - Plead negligence

PLEADING TO COVERAGE

- Structuring the Complaint
 - Lead with negligence – keep contract/fraud/warranty and similar non-covered claims in later counts
 - Attempt to reduce application of the Economic Loss Doctrine
 - Review your state’s application of the Economic Loss Doctrine
 - Emphasize lack of privity if it exists
 - Emphasize legal or independent duty beyond contractual



How Is A CD Claim Pled?

- Work done by subcontractors

IV. Negligence, Breach of Contract and Implied Warranty of Good and Workmanlike Manner

Defendant and its subcontractors were involved in the construction of the Project. Plaintiff would show that Defendant and its subcontractors' acts and/or omissions of negligence, breach of contract and failure to construct the projects in a good and workmanlike manner was a proximate cause of damages and losses to Plaintiff.

negligence, breach of contract and failure to construct the project in a good and workmanlike manner, and breach of warranty was/were a proximate cause of damages and losses to Plaintiff which are ongoing and continuous to this date.

How Is A CD Claim Pled?

- Resulting property damage

Defendant and its subcontractors' negligence, failure to perform, breach of

*Defendant and its subcontractors' negligence, failure to perform, breach of contract, breach of implied warranties and or acts omissions **have caused physical harm and or damage to tangible property and resulting property damages since construction first started through the date of filing this suit.** The contractors and their subcontractors*

and ongoing. Plaintiff's damages include loss of use of the physically damaged tangible property and loss of use of tangible property that is not physically damaged. Plaintiff's damages include an unexpected increase in energy consumption and commiserate energy expenses caused by and related to the physical damage to tangible property. Remediation of the physical damage to tangible property necessitates tear out of otherwise non-damaged tangible property.

Causes of Action alleged

IV. Negligence, Breach of Contract and Implied Warranty of Good and Workmanlike Manner

("Hanna") by defendant Spaw Glass Contractors, Inc., and

Defendant and its subcontractors were involved in the construction of the Project. Plaintiff would show that Defendant and its subcontractors' acts and/or omissions of negligence, breach of contract and failure to construct the projects in a good and workmanlike manner was a proximate cause of damages and losses to Plaintiff.

Plaintiff would show that Defendant Spaw Glass's acts and/or omissions of negligence, breach of contract and failure to construct the project in a good and workmanlike manner, and breach of warranty was/were a proximate cause of damages and losses to Plaintiff which are ongoing and continuous to this date.

Common Causes of Action

- OWNER v. GENERAL CONTRACTOR / SUBCONTRACTORS
 - Negligence
 - Breach of Contract
 - Breach of Express and Implied Warranty
- GENERAL CONTRACTOR v. SUBCONTRACTORS
 - Negligence
 - Breach of Contract
 - Breach of Express and Implied Warranty
 - Contribution
 - Indemnity



What is and isn't covered? Summary

- **COVERED**

- Construction Defect claims (contract / negligence)
- Work done by insured's subcontractors
- Resulting damages

- **NOT COVERED**

- Some contractual indemnity agreements
- Insured's work



Defenses

- PROPORTIONATE LIABILITY
 - Contributory Negligence
 - Responsible Third Parties
- STATUTE OF LIMITATIONS / REPOSE / LACHES
 - 2-Year Statute of Limitations – negligence/warranty
 - 4-Year Statute of Limitations – contract/warranty
 - 10-Year Statute of Repose
- FAILURE TO MITIGATE DAMAGES
- ECONOMIC LOSS RULE
- BETTERMENT
- INDEMNITY CLAIMS
 - Anti-Indemnity Statute



A photograph showing a brick retaining wall. Water is flowing over the top edge of the wall, creating a small waterfall effect. The water is splashing and creating white foam as it hits a concrete surface below. The area above the wall is grassy with scattered fallen leaves. The area below the wall is a concrete surface, also with some fallen leaves. The text "II. Defense of All or Some Claims" is overlaid on the image in a large, black, sans-serif font.

II. Defense of All or Some Claims

Coverage / Reservation of Rights Letters (ROR)

RESERVATION OF RIGHTS

Re: Claim No.: [REDACTED]
Date of Loss: 11/26/2013
Insured: [REDACTED] Construction Group
Claimant: [REDACTED]
Loss Location: [REDACTED] Retail Shopping Center
[REDACTED]
[REDACTED] TX 76210

Policy: GL [REDACTED] Effective 10/13/2013 to 10/13/2014

Dear Mr. [REDACTED]:

[REDACTED] Insurance Company ("IC") has received notice of a lawsuit filed against [REDACTED] Construction Group ("CG") by [REDACTED] Construction ("C") for defective construction of the [REDACTED] Retail Shopping Center which is located at [REDACTED] [REDACTED] ("the project"). CG has been sued by the owner of the project, Lyle Addicks as trustee of Addicks Family Trust ("Addicks"). The lawsuit is styled [REDACTED] which was filed in the 211th District Court of Denton County, Texas and assigned case number [REDACTED] ("lawsuit"). **As the result of the alleged defective construction, [REDACTED] claims damages to the property, inclusive of damages in connection with the work of [REDACTED] and/or its subcontractors.** The lawsuit has cited the following allegations against CG: negligence, breach of implied warranty, aiding and abetting allegation against [REDACTED], conspiracy, and attorney fees. Within the lawsuit, [REDACTED] is also complaining of exemplary damages against all defendants, inclusive of Jones and [REDACTED]. The amount of damages stated in the lawsuit are \$1,148,513.00 for actual damages, \$1,148,513 for loss of use, exemplary damages, pre and post judgment, court costs, and other relief as decided by the court.

As the damages are allegedly ongoing, there may be coverage for [REDACTED] and/or [REDACTED] with carriers who provided policies subsequent to the expiration of the [REDACTED] policy on 10/13/2014. [REDACTED] requests that CG and/or [REDACTED] report the claims to the subsequent commercial general liability carriers immediately.



Defense of all or some claims

- General liability policy or professional liability policy?
- Duty to defend or duty to indemnify?
- Is there an apportionment clause for loss that applies to defense costs?
- When and how is apportionment decided?
- Is there a right to reimbursement for defense costs for non-covered claims?



General liability v. professional liability policy

Typical general liability policy:

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. **We will have the right and duty to defend** the insured against any "suit" seeking those damages...



General liability v. professional liability policy

Example of contractor's professional liability policy:

We will **pay on your behalf** those sums, in excess of the Self Insured Retention and within the applicable Limit of Liability, that you or we are legally obligated to pay as **Damages** or **Claim Expense** because of **Claims** arising out of actual or alleged **Wrongful Acts** that take place on or after the **Retroactive Date** and prior to the end of the **Policy Period**.



Apportionment provision

- Example:

“If a Claim or Inquiry or any other matter is partially covered under the Policy, the Insured and the Insurer shall use their best efforts to agree upon a fair and proper allocation between such covered matters and not-covered matters based upon the relative legal and financial exposures and the relative benefits obtained by the parties.”



Right to recoupment of defense costs

- Courts are split – *e.g.*:
 - *Berkley Nat'l Ins. Co. v. Granite Telecomm. LLC*, D. Mass. Mar. 28, 2022) (insurer not precluded from seeking reimbursement of defense costs and settlement amount simply because insureds had not agreed to insurer's reservation of rights)
 - *Chem. Equip. Labs, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2022 U.S. Dist. LEXIS 61298 (E.D. Pa. Mar. 31, 2022) (no implied right to recoupment for defense costs in the absence of an express clause in the policy allowing recoupment)

Potential Ethical Issues

- Pleading issues:
- As defense counsel, pleading your client out of coverage
 - i.e. Motion for Summary Judgment knocking out all claims that potentially provide coverage leaving only claims in which carrier does not provide a defense
- As Plaintiff's counsel, not pleading to trigger potential insurance defense obligation when there is a good faith ability to do so
 - i.e. breach of contract only
 - Overplaying fraud and/or intentional bad acts





III. The Declaratory Judgment Action & to Consolidate or Not

A wooden gavel with a handle and a head, resting on a brown leather book. The book is open, and the gavel is positioned diagonally across it. The background is white.

When to File a Declaratory Action: Policyholder Perspective

- Depends on the insurer's coverage position
 - Outright denial
 - Defending under an RoR
 - Constructive denial
- Are the insurer's defenses reasonable? Can your client overcome them?
- Is there an economic need to file now?



Declaratory Judgment: As a Separate Action



Benefits:

- keep insurance issues separate
- Easier to direct court's attention to pro-policyholder rules of interpretation
- Able to move at its own pace
- Control over choice of law and forum



Drawbacks:

- Court hearing insurance case may make conclusions beyond the scope of the underlying complaint
- Could result in stay of construction case



Declaratory Judgment: Consolidated as Single Case



Benefits:

- Easier to reach a global resolution
- Only need to do discovery once
- Avoids inconsistent interpretations of the facts

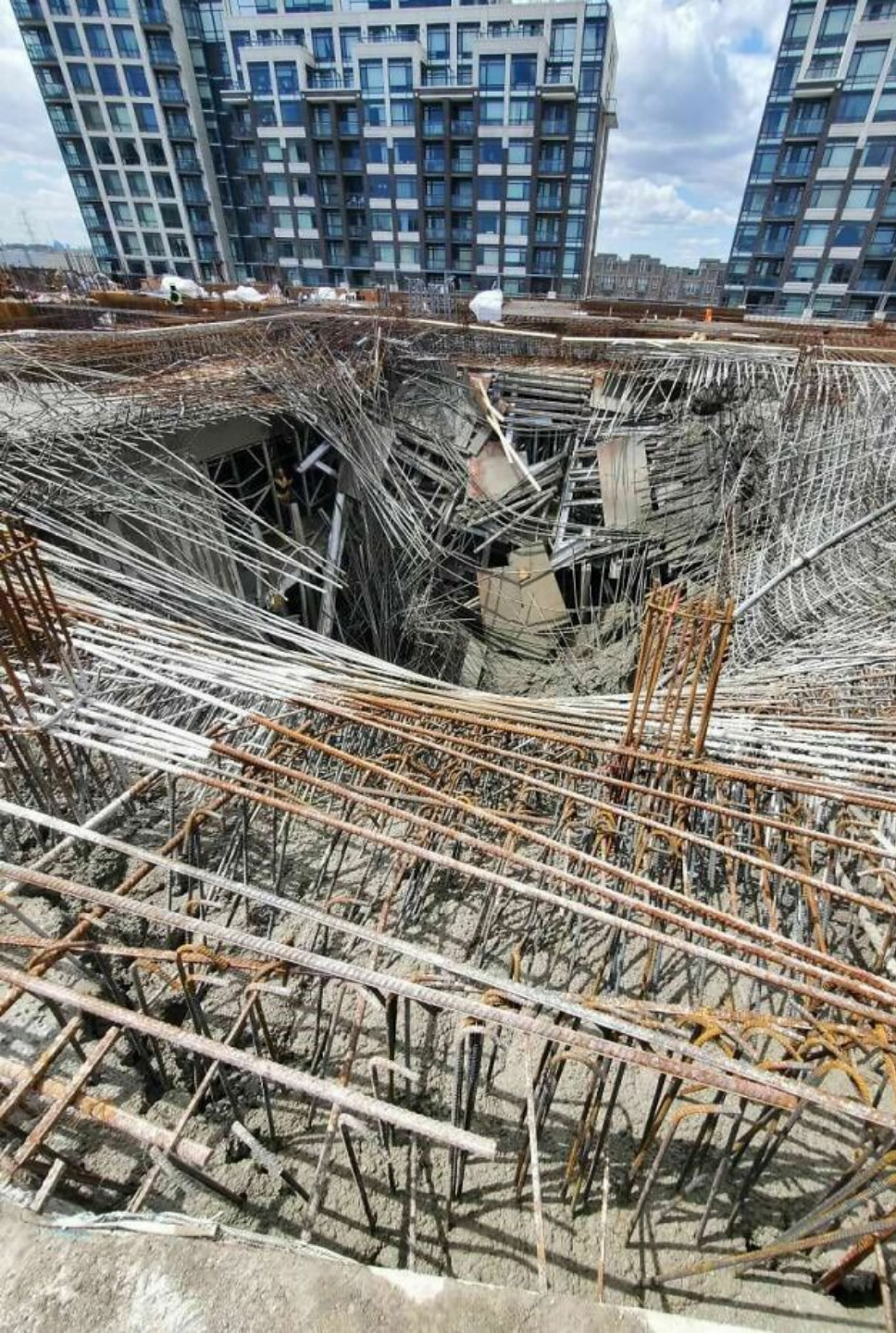


Drawbacks:

- Intermixing of issues and legal standards
- Potential intermixing of applicable law
- Additional insured issues often get lost



IV. Settlement and Assignment
of
Claims to the Plaintiff



Settlement and Assignment of the Claim to the Plaintiff

- Question 1: Is the insurer defending the claim?



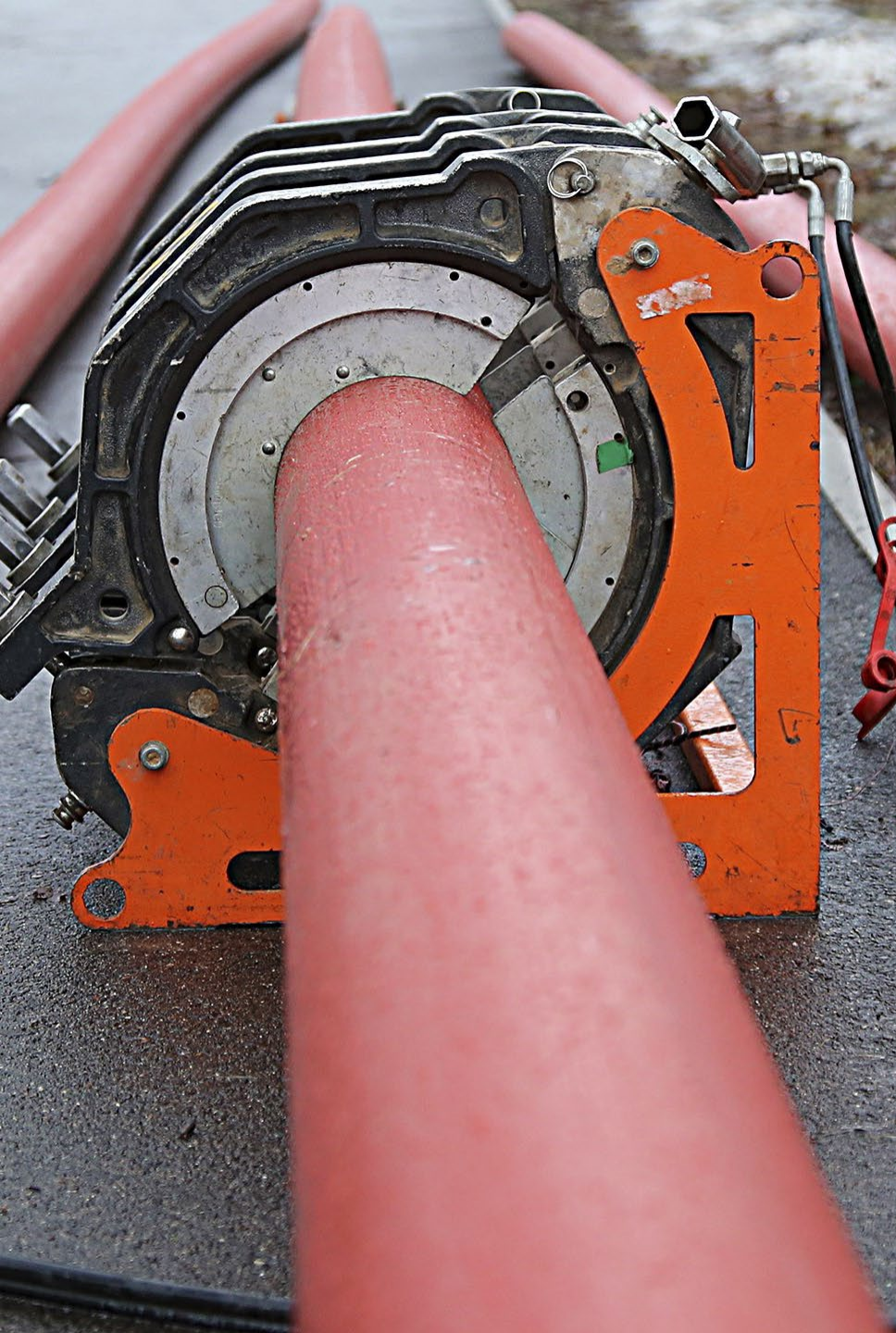
How defense can impact outcome - Arizona

- Where an insurer denies defense, insured may enter “*Damron* agreement”- *Damron v. Sledge*, 460 P.2d 997, 998-1000 (Ariz. 1969)
 - (1) covenant not to execute with the third-party claimant, (2) stipulated or default judgment entered, and (3) assignment of claims against the insurer
- Where an insurer defends under ROR, insured may enter “*Morris* agreement”- *United Servs. Auto. Ass'n v. Morris*, 741 P.2d 246, 250–54
 - same as *Damron* agreement, except insured must give insurer notice of *Morris* agreement and allow insurer to defend unconditionally
 - *Morris* agreement may bind insurer only if insured or claimant shows settlement was reasonable (unlike a *Damron* agreement) and non-collusive



Settlement and Assignment of the Claim to the Plaintiff

- Question 2: If the insurer is defending, is the defense subject to a reservation of rights?



Settlement and Assignment of the Claim to the Plaintiff

- Question 3: If the insurer is defending under a reservation of rights, must the insured advise the insurer before settling and assigning the claim?



Settlement and Assignment of the Claim to the Plaintiff

- Missouri has codified insurer's right to notice:
 - Mo. Rev. Stat. § 537.065 (granting insurers right to written notice of the execution certain consent agreements "before a judgment may be entered")
 - *Aguilar v. GEICO Cas. Co.*, 588 S.W.3d 195, 198 (Mo. Ct. App. 2019) (statute "requires that a tortfeasor and injured party *give notice* to the insurer of a section 537.065 contract before a judgment may be entered, not that the insurer must be allowed to intervene before judgment may be entered")
- Some states will apply a prejudice standard:
 - *Federated Serv. Ins. Co. v. Granados*, 889 P.2d 1312, 1315 (Or. Ct. App. 1995) (if insured breaches a policy by settling without insurer's consent, Oregon courts first inquire "whether the insurer was prejudiced by the [insured's] conduct")



Settlement and Assignment of the Claim to the Plaintiff

- Question 4: If the insured does not give the insurer notice of the insured's intent to settle the claim and assign its rights, what challenges may the insurer make to any obligation to the claimant post-assignment?



Settlement and Assignment of the Claim to the Plaintiff

- Is the claimant seeking the amount of a stipulated judgment?
- If the claimant has a judgment that was entered after a trial, was it a “lay down” trial where the insured presented no defense?
- Can the insurer intervene in the trial to ensure that a defense is asserted to the underlying claims?
- Is there evidence of collusion?
- Is there evidence of fraud?



Settlement and Assignment of the Claims

- When to consider
- Review your state's requirements
 - New Jersey – Griggs v Bertram 88 N.J. 347 (1982)
 - Lack of Reservation of rights or denial of coverage/defense
 - Breach of the contract represented by the policy
 - Plaintiff standing in the shoes of the insured
 - Insured's defense costs
 - Plaintiff's claim/settlement amount – reasonable in amount and entered in good faith
 - Bifurcated burden of proof of reasonableness and not a result of bad faith
- Provide ample notice to the defendant's carrier which has denied coverage and defense

QUESTIONS?

