

Strafford

Presenting a live 90-minute webinar with interactive Q&A

Combating the Bad Faith Set-Up In Insurance Litigation

Strategies to Minimize the Risk of Excess Judgments and Punitive Damages

WEDNESDAY, MARCH 13, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Julie Buonocore, Attorney, **Rebar Bernstiel**, Blue Bell, PA

C. Scott Rybny, Partner, **Rebar Bernstiel**, New York, NY

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FOR LIVE EVENT ONLY

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The Evolution of the Bad Faith Set-Up in Insurance Litigation

Balancing Aggressive Policyholder Advocacy
and Responsible Claim

Handling to Minimize Extra-Contractual
Exposure



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PRESENTERS

- C. Scott Rybny
 - Partner Rebar Bernstiel
 - 20 years of insurance litigation experience
- Julie Buonocore
 - Associate Rebar Bernstiel
 - Practice focuses on third-party insurance coverage & litigation



By the end of this session you will be able to

- ✓ Recognize the warning signals
- ✓ Understand how the Restatement of Law-Liability Insurance is changing the claim process
- ✓ What states recognize the “set-up” as a defense to extra-contractual litigation
- ✓ Identify & implement proactive steps across multiple policy lines





THE WARNING SIGNALS

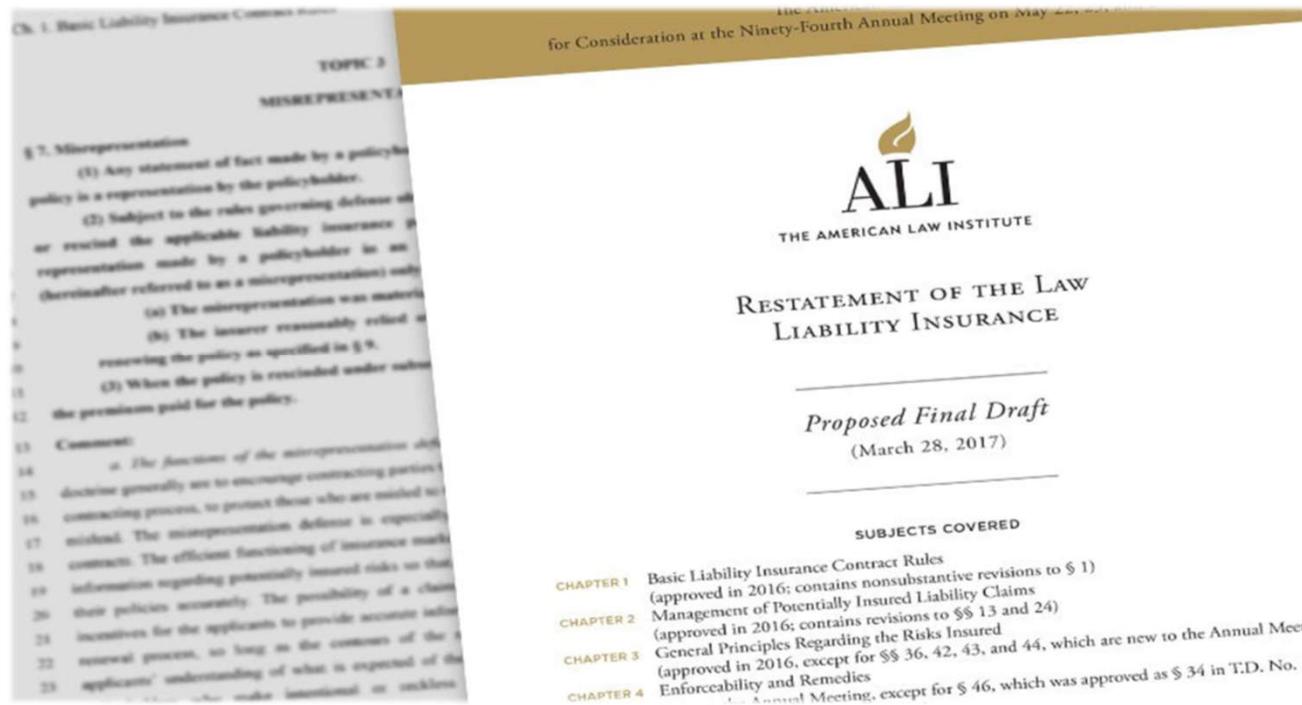


THE WARNING SIGNALS

- Early & timed settlement demands;
- Little value driving information provided prior to settlement window expiration;
- Effort to settle with insured in exchange for assignment;
- Refusing access to the premises (1st party property claim) in a timely manner; or
- Refusing access to insured (1st party claims).



THE NEW WARNING SIGNALS



THE NEW WARNING SIGNALS

- ALI was founded in 1923
- Its stated mission: “To promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”



THE NEW WARNING SIGNS

ALI's Stated Purpose

Restatements aim to provide “clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.”



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How the ALI views itself

In the Restatement of Insurance the ALI describes itself as a “*law reform*” organization



THE NEW WARNING SIGNS

Restatement of Insurance's Applicability

“These rules are drafted for application only to liability insurance features of such policies (although some of the rules may also be usefully applied to other forms of insurance).”



THE NEW WARNING SIGNS

- THE NEW SIGNS FROM THE RESTATEMENT – LIABILITY INSURANCE
 - References to custom, practice and usage evidence.
 - Lack of sophistication by policyholder.
 - Claims that insurer's letters lack specific and supporting facts or are not understandable by person in position of insured.



THE NEW WARNING SIGNS

- THE NEW SIGNS FROM THE RESTATEMENT – LIABILITY INSURANCE
 - Letters construing insurance policy language with reference to dictionaries, statutes, regulations & secondary legal authorities
 - Demands for settlement in the absence of a specific demand
 - Demands that allocation in long-tail harm claims be based on pro-rata basis



THE NEW WARNING SIGNS

- Restatement's take on Settlement Offers
 - Section 24, comment f: Where a claimant has not made a settlement demand, the insurer may be obligated to make a settlement offer.
 - Section 25: A Reservation of Rights does not relieve an insurer of the duty to make reasonable settlement decisions; however, an insurer is not required to cover a judgment on a non-covered claim.



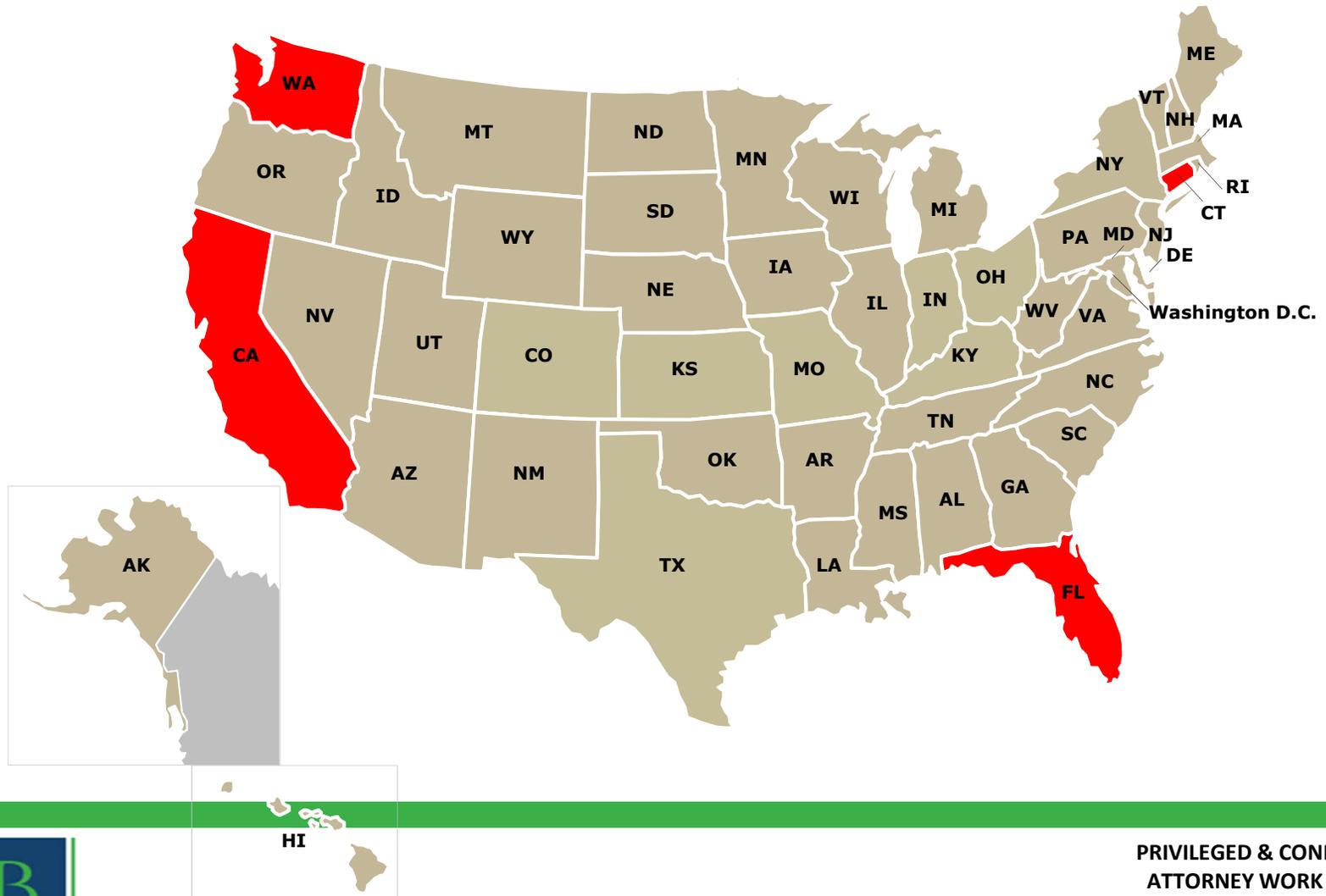


THE COURT'S RESPONSE



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JURISDICTIONS THAT DO NOT RECOGNIZE A BAD FAITH "SET-UP" DEFENSE





ALTERNATIVES TO BAD FAITH “SET-UP” DEFENSE



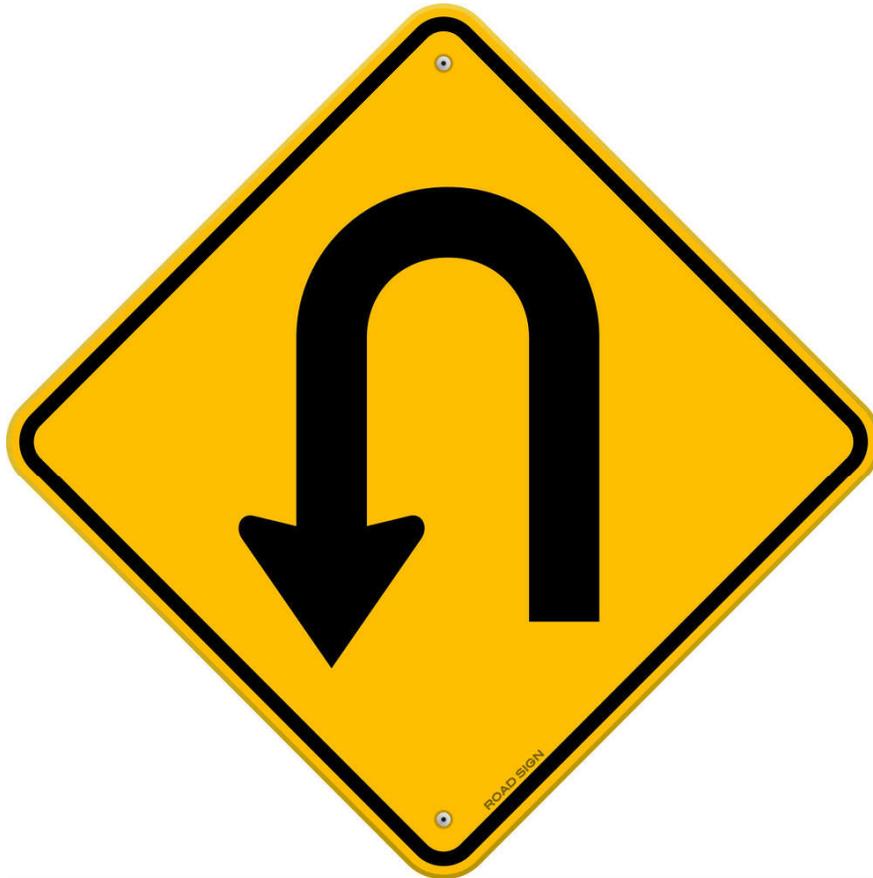
COMPARATIVE BAD FAITH



- Based upon the standards of comparative fault
- Designed to apportion damages between the insurer's and the insured's bad faith conduct.



REVERSE BAD FAITH



- The affirmative right to proactively sue an insured for breach of the good faith covenant of fair dealing.
- An independent tort that allows an insurer to seek affirmative relief for an insured's breach of good faith and fair dealing.
- Some courts reluctant to adopt because of disparity in bargaining power because of insured and insurer.



MINIMIZING THE SET-UP UNDER DIFFERENT POLICY LINES





1ST PARTY PROPERTY INSURANCE

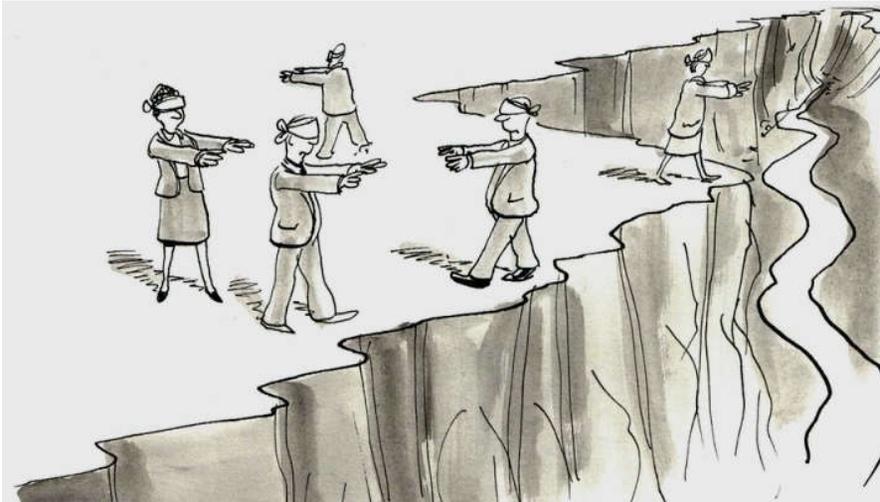


AVOIDING THE COLLISION – 1ST PARTY PROPERTY

- Gaining access to property



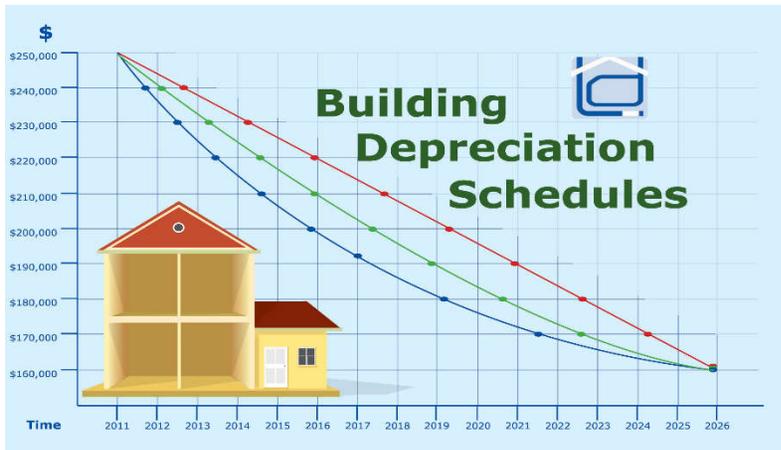
AVOIDING THE COLLISION – 1ST PARTY PROPERTY



- Gaining access to property
- Consistent handling between offices



AVOIDING THE COLLISION – 1ST PARTY PROPERTY



- Gaining access to property
- Consistent handling between offices
- Depreciation of labor or specific line items



AVOIDING THE COLLISION – 1ST PARTY PROPERTY



- Gaining access to property
- Consistent handling between offices
- Depreciation of labor or specific line items
- Overhead & Profit





3RD PARTY LIABILITY INSURANCE



AVOIDING THE COLLISION – 3rd PARTY LIABILITY

- Proactive use of litigation holds
- Proactive use of evidence preservation letters
- Timely updates to Reservation(s) of Rights
- Timely response to letters



This includes letters from claimants, excess insurers & other horizontal primary insurers



AVOIDING THE COLLISION – 3rd PARTY LIABILITY

- Objective support for damage valuations
 - Software based v. verdict based
 - If property damage involved, appropriate experts or supporting documentation





D&O / E&O / EPLI INSURANCE



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AVOIDING THE COLLISION – D&O / E&O / EPLI INSURANCE

The Set-Up: Erode the Limits

- Overly aggressive litigation intended to increase litigation expenses
- Pressure to appoint multiple counsel where limits are shared



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The Set-Up: Erode the Limits

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The Response

- Active litigation management & counsel oversight
- Insured “buy-in”
- Appropriate conflict analysis

