2023 Insurance Recovery

Gordon Tilden Thomas & Cordell LLP

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In Loving Memory

Charles “Chuck” Gordon

September 8, 2023

Has IFCA Fulfilled its Promise?

Considering the Impact of Washington's Insurance Fair Conduct Act

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Life before IFCA…

The insured's options for holding insurers accountable outside of the insurance contract were:

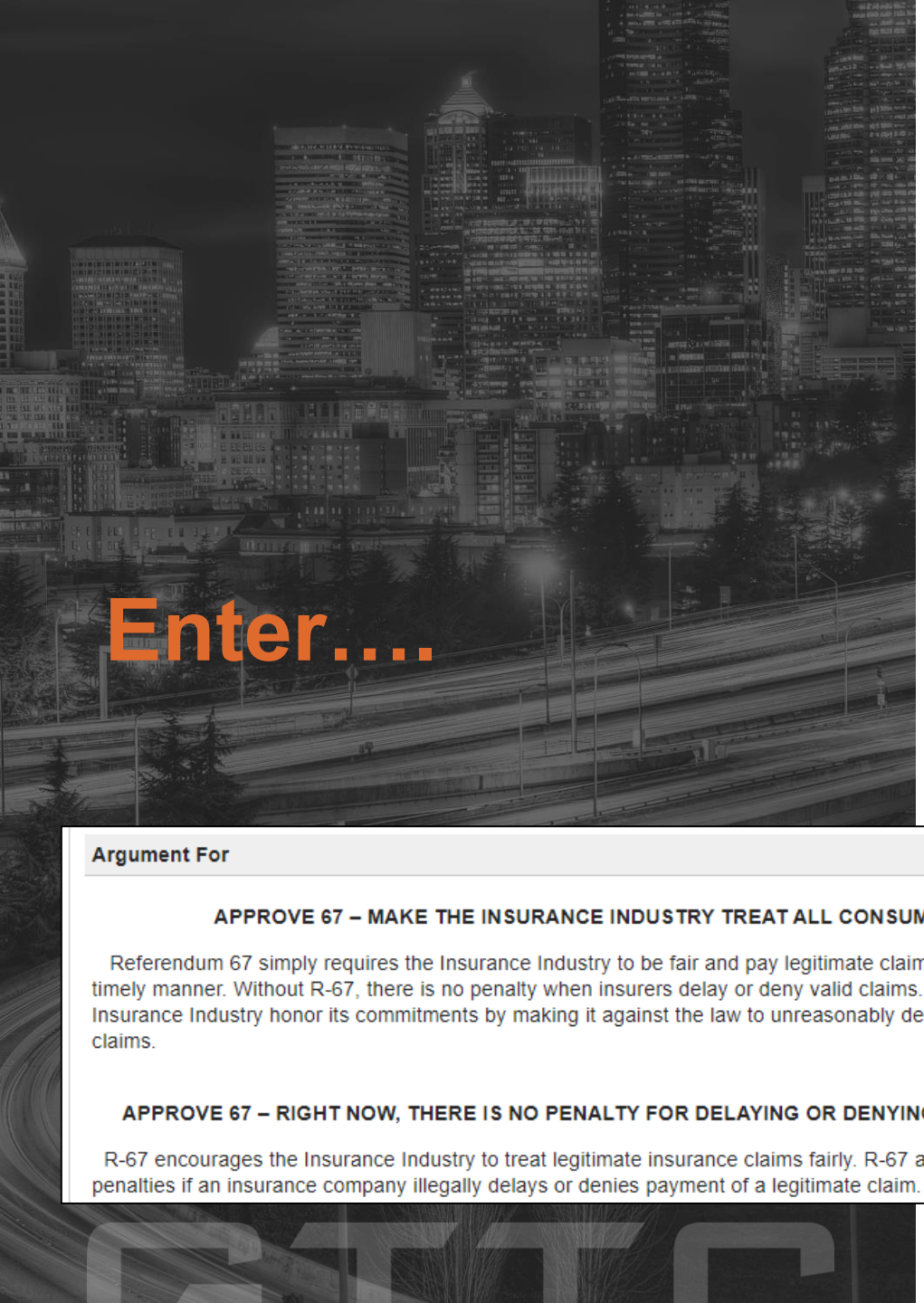
- Common law bad faith
- Consumer Protection Act

Common Law Bad Faith

- The duty of good faith is separate from insurer's contractual duties under the policy. It is based on the "fiduciary relationship existing between the insurer and the insured." *Tank v. State Farm*, 105 Wn.2d 381, 385 (1986).
- Good faith is broad—not limited to an insurer's duty to pay, settle, or defend under the policy. An insured may have a bad faith claim even when there is no coverage.
- The insured must show the insurer breached its duty of care and that the breach was unreasonable, frivolous, or unfounded.
- Damages may include expenses, consequential damages, and general tort damages, including damages for emotional distress. But not attorneys' fees or punitive damages.

Consumer Protection Act

- “Any person who is injured in his or her business or property” by “unfair or deceptive acts or practices in the conduct of any trade or commerce” can seek injunctive relief or seek to recover “actual damages sustained by him or her ... together with the costs of the suit, including a reasonable attorney's fee.” RCW 19.86.090; RCW 19.86.020.
- Permits the trial court to treble the actual damages, up to a maximum of $25,000.
- CPA damages are limited to injuries to business or property, so the CPA does not allow plaintiffs to seek recovery for personal injuries.
- *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 318 (1993); *Beasley v. GEICO Gen. Ins. Co.*, 23 Wn. App. 2d 641, 661 (2022)



The Insurance Fair Conduct Act

- Passed by the legislature and ratified by voters in 2007
- Its purpose was to "provide insureds with another legal resource against their insurer for wrongful denials", *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 679, (2017), and make it "illegal to unreasonably delay or deny legitimate claims." *Beasely v. GEICO*, 23 Wn. App. 2d 641 (2022).
- It is independent from bad faith and the CPA, and all three may be pursued simultaneously.
- Allows for recovery of attorneys' fees and trebling of damages.

Argument For	Argument Against
APPROVE 67 – MAKE THE INSURANCE INDUSTRY TREAT ALL CONSUMERS FAIRLY. Referendum 67 simply requires the Insurance Industry to be fair and pay legitimate claims in a reasonable and timely manner. Without R-67, there is no penalty when insurers delay or deny valid claims. R-67 would help make the Insurance Industry honor its commitments by making it against the law to unreasonably delay or deny legitimate claims. **APPROVE 67 – RIGHT NOW, THERE IS NO PENALTY FOR DELAYING OR DENYING YOUR VALID CLAIM.** R-67 encourages the Insurance Industry to treat legitimate insurance claims fairly. R-67 allows the court to assess penalties if an insurance company illegally delays or denies payment of a legitimate claim.	**REJECT FRIVOLOUS LAWSUITS. REJECT HIGHER INSURANCE RATES. REJECT R-67.** As if there weren't enough frivolous lawsuits jacking up insurance rates, Washington's trial lawyers have invented yet another way to file more lawsuits to fatten their pocketbooks. They wrote and pushed a law through the Legislature that permits trial lawyers to threaten insurance companies with *triple damages* to force unreasonable settlements that will *increase insurance rates for all consumers*. The trial lawyers also included a provision that *guarantees payment of attorneys' fees*, sweetening the incentive to file frivolous lawsuits. There's no limit on the fees they can charge. What does this mean for consumers? You guessed it: *higher insurance rates*. **TRIAL LAWYERS WIN. CONSUMERS LOSE.**

The IFCA Cause of Action

- Claim arises solely out of the statute, RCW 48.30.015.
- Insured may assert claims in state court, or, if there is diversity jurisdiction, in federal court.
- Requires an *unreasonable* denial of coverage or denial of payment of benefits. Violations of WA insurance regulations alone are not enough. *Perez-Crisantos v. State Farm Fire and Cas. Co.*, 187 Wn.2d 669, 684 (2017)
- Insured must give the insurer 20-days' notice and opportunity to cure before filing a lawsuit. The OIC must be copied on the notice.
- Health plans are exempted.

Who may assert an IFCA claim?

- "Any first party claimant to a policy of insurance…may bring an action in the superior court of the state…" RCW 48.30.015(1).
- "First party claimant" means "any individual, corporation, association, partnership, or other legal entity asserting a right to payment *as a covered person under an insurance policy*". RCW 48.30.015(4)
- IFCA claims may be brought by insureds under both first-party and third-party type insurance policies.
  - A few cases from 2014/2015 that limited IFCA claims to first-party policies have not been followed.
- An insured may assign its IFCA claims to someone else. *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 202 (2013).
- Insurers may not assert IFCA claims against each other without an assignment. *Id.*

Damages Available Under IFCA

- "Actual Damages Sustained"
  - Includes non-economic damages like emotional distress. *Beasley v. GEICO Gen. Ins. Co.*, 23 Wn. App. 2d 641 (2022).
- Costs, including expert witness fees
- Attorney Fees
- Multiplied Damages: "The superior court *may*, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages."

Interplay of IFCA and the Washington Administrative Code

- Violations of certain WAC provisions are automatically violations of IFCA
- (a) WAC 284-30-330 - "specific unfair claims settlement practices"
- (b) WAC 284-30-350 - "misrepresentation of policy provisions"
- (c) WAC 284-30-360 - "failure to acknowledge pertinent communications"
- (d) WAC 284-30-370 - "standards for prompt investigation of claims"
- (e) WAC 284-30-380 - "standards for prompt, fair and equitable settlements applicable to all insurers"
- (f) An unfair claims settlement practice rule adopted under RCW 48.30.010 by the insurance commissioner
- BUT: a violation of one of these WACs, standing alone, is not enough to give rise to an IFCA cause of action. There must also be an “unreasonable denial of a claim for coverage for payment of benefits.” *Perez-Crisantos v. State Farm Fire and Cas. Co*., 187 Wn.2d 669, 684 (2017)

What conduct violates IFCA?

YES

- Unreasonable blanket denials of coverage.
- Unreasonably low offers that are *de facto* denials or compelling the insured to litigate to get the benefits of its policy create an IFCA claim.
- Acknowledging coverage but failing to pay benefits when they become legally due. *Traulsen v. Cont'l Divide Ins. Co.*, 26 Wn. App. 2d 1012 (2023)

NO

- Low but reasonable offers
- Delay of payment because amount owed is disputed, when the insurer has made a good faith effort investigate and value the loss

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Our Policy Says *What*!?

Top Ten Terms to Reject When Placing Coverage

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Introduction and Goals

- Washington law is generally excellent for policyholders—thanks to the Washington appellate courts interpreting foundational, standardized policy forms in use for decades.
- Insurers have not been shy about introducing non-standard policy forms and endorsements aimed at negating important policyholder protections.
- Often, these terms can be rejected during placement/renewal, for little or no additional premium (The Lesley Cordell Rule).
- Come away with a list of terms to watch for and reject (if possible).

Recoupment of Defense Costs

- Washington duty to defend is robust—easy to trigger, hard to terminate, and broader than the duty to indemnify.
- Insurer cannot recoup defense costs, even if indemnity coverage ultimately held not to apply. *Nat'l Sur. Corp. v. Immunex Corp.*, 162 Wn. App. 762, 768 (2011), *aff'd*, 176 Wn. 2d 872 (2013).
- "So, worst case, our entire defense will be paid by the insurer—*whew*!"

Our policy says *what*?!

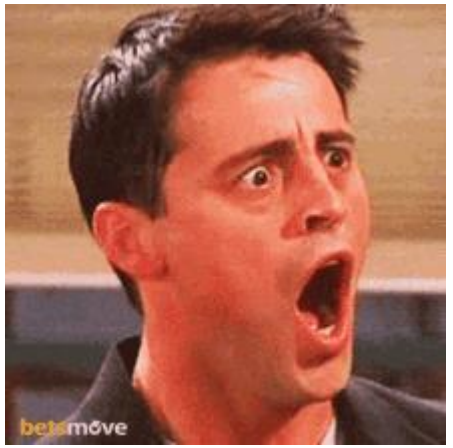
Recoupment of Defense Costs

- Endorsement frequently being added to policies in Washington reverses this rule, expressly requires return of defense costs if indemnity coverage is not established.
- Enforceability has been challenged, but unsuccessfully. *Massachusetts Bay Ins. Co. v. Walflor Indus., Inc.*, 383 F. Supp. 3d 1148 (W.D. Wash. 2019).
- Practical impact: gives insurer tremendous leverage.

Negating Prejudice Rule

- Washington courts preclude insurers from "gotcha" defenses—breach of conditions does not void coverage except to the extent insurer proves "actual and substantial prejudice." *E.g.*, notice under occurrence-based policies, reporting/cooperation.
- "Ugh—we forgot to notify the insurer of this claim, but they will never be able to show prejudice—*whew*!"

Our policy says *what*?!



Negating Prejudice Rule

- Insurers have introduced terms purporting to negate the prejudice rule—coverage is voided for any breach of a condition.

> B. For all policies, including but not limited to Claims Made Policies, the **Named Insured** or the AICSA, on the **Named Insured's** behalf, must:
>
> (1) Provide a summary of all claims, on a loss run form approved by the **Company**, on a monthly basis. This requirement also applies after cancellation or nonrenewal until all matters are closed or settled.
>
> (2) Compliance with these reporting requirements is a condition precedent to coverage. In the event of non-compliance, the **Company** shall not be required to establish prejudice resulting from reporting non-compliance and shall be automatically relieved of liability with respect to any matter, **Claim** or **Suit** involved.

Excess Policies Above High SIRs—Duty to Settle?

- Large policyholders: excess program above high SIR
- Excess insurers pressure policyholder to settle liability case within SIR, threaten not to pay if PH goes to trial and loses.
- Courts and commentators agree—PH has no such insurer-like duty to excess insurers, and need not act reasonably to settle. *Whew*!

Excess Policies Above High SIRs—Duty to Settle?

- Excess insurers increasingly introducing terms reversing that rule, and effectively turning the policyholder into an insurer.
  - The Insured shall use diligence and prudence to settle all such claims and suits which in the exercise of sound judgment should be settled, provided however, that the Insured shall not make or agree to any settlement for any sum in excess of the deductible amount without the approval of the Company.[1]
  - The Insured shall have the obligation to provide at its own expense adequate defense and investigation of any claim and to accept any reasonable offer of settlement within the Self–Insured Retention. In the event of failure of the Insured to comply with this clause, no loss, cost or expense will be paid by the Company.[2]

[1] *N. Am. Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325, 1329 (Fla. Dist. Ct. App. 1996)
[2] *Nat'l Cas. Co. v. Green*, 711 So. 2d 609, 610 (Fla. Dist. Ct. App. 1998)

Subrogation—Undoing the Made-Whole Rule

- The made-whole rule: insurer does not share in any subrogation recovery until the policyholder is made whole—i.e., paid for any out-of-pocket costs such as deductibles, uninsured damages, etc.
- Insurers commonly include terms reversing that rule, and requiring recoveries to be shared proportionally or even to go first to pay back the insurer.

> Any recovery as a result of subrogation proceedings arising out of an **Occurrence**, after expenses incurred in such subrogation proceedings are deducted, shall accrue to the Insured in the proportion that the Deductible amount and/or any provable uninsured loss amount bears to the entire provable loss amount.

- Strong argument that made-whole rule is matter of public policy, so such terms probably are unenforceable.

Multi-Layer Towers: *Qualcomm*/*Quellos* Language

- Conventional view and *Zeig* rule: settling for less than full policy limit does not immunize higher-layer insurers—PH can make up the difference.
- In *Qualcomm* (CA) and then *Quellos* (WA Court of Appeals), courts ruled that if attachment-point language says underlying insurers must have "paid or be held liable to pay" their full limit, then PH cannot make up the difference and next layer is not triggered.
- Brokers generally have done a good job eliminating the "bad" language, but it is still frequently seen.

Multi-Layer Towers: Qualcomm/Quellos Language

The Company shall provide the Insureds with insurance during the Policy Period excess of the Underlying Limit. Coverage hereunder shall attach only after the insurers of the Underlying Insurance shall have paid in legal currency the full amount of the Underlying Limit for such Policy Period.

. . .

All Underlying Insurance shall be maintained in full effect during the Policy Period and shall afford the same coverage provided by all Underlying Insurance in effect upon inception of the Policy Period, excess for any depletion or exhaustion of the Underlying Limit solely by reason of payment of losses thereunder.

Only in the event of exhaustion of the Underlying Limit by reason of the Insurers of the Underlying Insurance, or the Insureds in the event of financial impairment or insolvency of an insurer of the Underlying Insurance, paying in legal currency loss which, except for the amount thereof, would have been covered hereunder, this policy shall continue in force as primary insurance.

Quellos Group LLC v. Federal Ins. Co., 177 Wn. App. 620 (2013) (italics in original).

Efficient Proximate Cause

- EPC doctrine: In first-party and liability coverage claims (liability coverage: *Xia v. ProBuilders Specialty Ins. Co.*, 188 Wn. 2d 171 (2017), *as modified* (Aug. 16, 2017)), if a causal chain of events leads to a loss/covered harm, the fact that one of those causal links is excluded does not void coverage if the "efficient proximate cause" is covered.
- Washington courts have severely restricted insurers' ability to contract around this rule via exclusion.
- The Hartford is undaunted:

Efficient Proximate Cause Aggregate Limit:	$ 5,000.00

"Defense expense" is payable within, not in addition to, the Efficient Proximate Cause Aggregate Limit shown in the Schedule of this endorsement.

A. This endorsement applies only to the extent that "bodily injury", "property damage" or "personal and advertising injury" under this policy is determined under the substantive law of the State of Washington.

B. The following is added to Paragraph **2. Exclusions** of **Section I - Coverage A - Bodily Injury And Property Damage Liability,** Paragraph **2. Exclusions** of **Section I - Coverage B - Personal And Advertising Injury Liability** and Paragraph **2. Exclusions** of **Section I - Coverage C - Medical Payments:**

When:

1. "Bodily injury", "property damage" or "personal and advertising injury" is caused, in whole or in any part or in any sequence, by an act, omission, event, accident or cause that is addressed in or is the subject of an exclusion to this Policy; and

2. The efficient proximate cause of the "bodily injury", "property damage" or "personal and advertising injury", as determined in accordance with the substantive law of the State of Washington, is not excluded under the terms of this Policy;

then such exclusion referenced in Paragraph **B.1.** above shall not apply to such "bodily injury", "property damage" or "personal and advertising injury", and coverage provided under this Policy for such "bodily injury", "property damage" or "personal and advertising injury" is subject to the Efficient Proximate Cause Aggregate Limit as described in Paragraph **C.** of this endorsement.

C. For purposes of the coverage provided under this endorsement, the following provisions are added to **Section III - Limits Of Insurance:**

1. Subject to Paragraph **2.** or **3.** of Section **III** - Limits Of Insurance, whichever applies, the Efficient Proximate Cause Aggregate Limit shown in the Schedule is the most we will pay for the sum of:

a. Damages under Coverage **A;**

b. Damages under Coverage **B;**

c. Medical expenses under **Coverage C;** and

d. "Defense expense";

because of all "bodily injury", "property damage" and "personal and advertising injury" described in Paragraph **B.** of this endorsement.

2. Paragraph **4.**, the Personal And Advertising Injury Limit, Paragraph **5.,** the Each Occurrence Limit, Paragraph **6.,** the

London Market Policies

- Typically contain arbitration clauses (Bermuda, New York, or London) and often contain law-selection clauses (New York).
- Such clauses generally are enforceable under international treaty—preempting RCW 48.18.200's protections. *CLMS Mgmt. Services L.P. v. Amwins*, 8 F.4th 1007 (9th Cir. 2021).
- Policyholders should strive to negate arbitration and law-selection clauses entirely. At a minimum, policy should select WA law and forum for arbitration.

Our policy says *what*?!

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After the Pandemic

The Impact of COVID-19 Litigation on Business Interruption Claims

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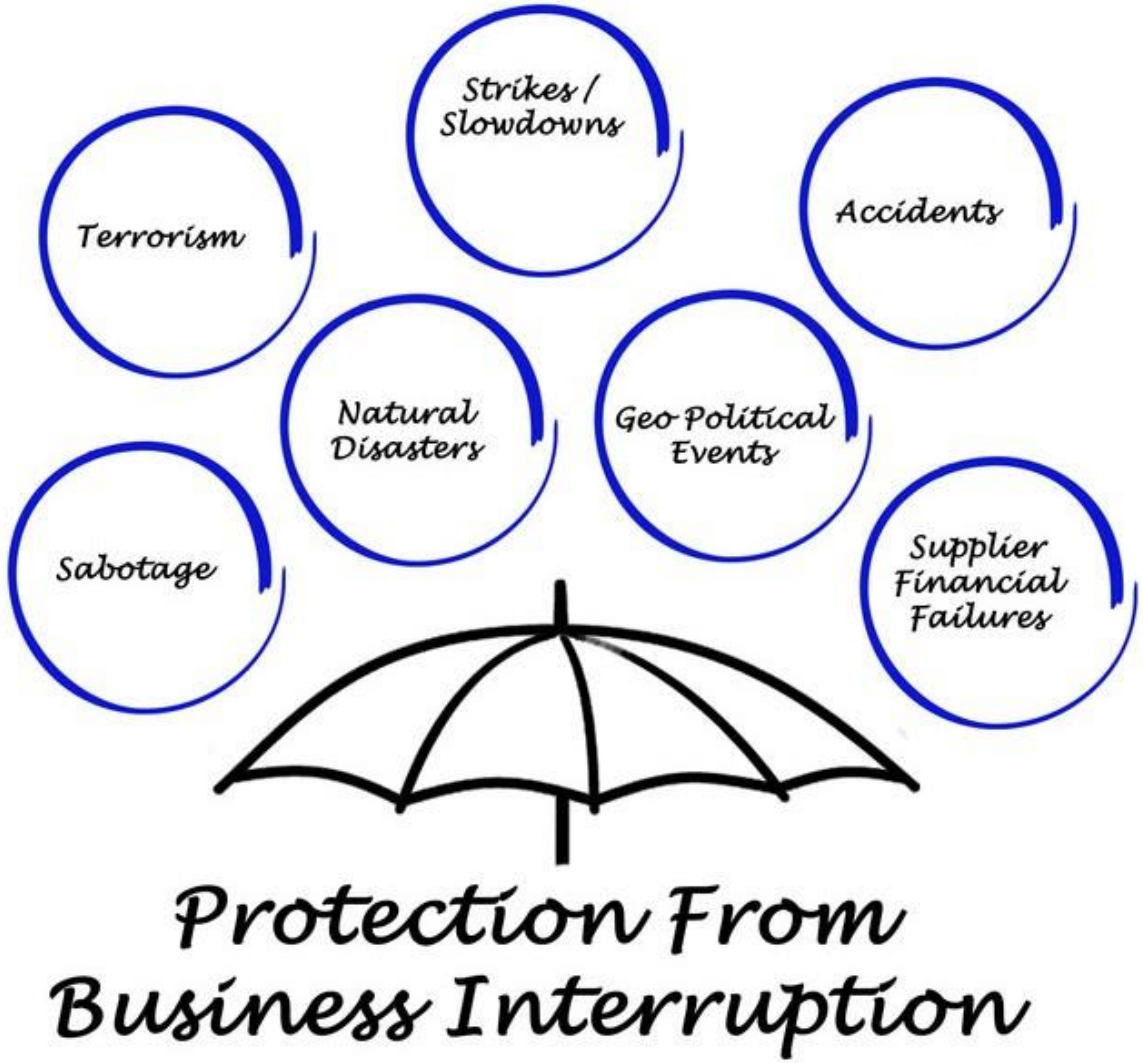
Overview

- What is Business Interruption Coverage
- Business Interruption Claims & the COVID-19 Pandemic
- Washington: *Hill & Stout, PLLC v. Mutual of Enumclaw Ins. Co*.
- Business Interruption Claims after *Hill & Stout*

What is Business Interruption Coverage

- Key Elements
- Physical Loss or Damage to Covered Property
- Suspension of Operations
- Period of Restoration



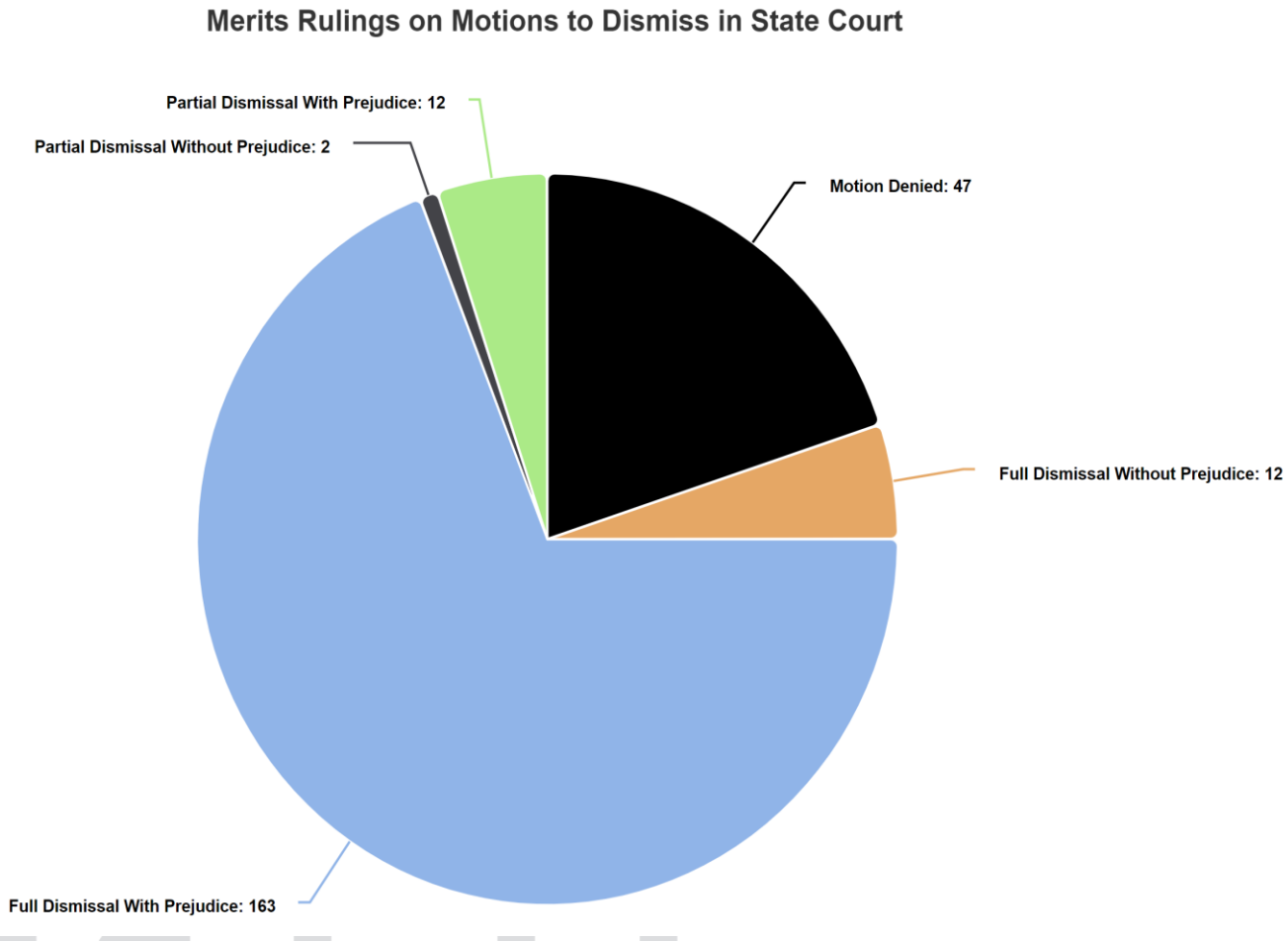
Business Interruption Claims and the COVID-19 Pandemic

Theories of Recovery

- Physical Damage Caused by the Virus
- Physical Loss Caused by Loss of Use

Business Interruption Claims and the COVID-19 Pandemic

Outcomes Outside of Washington

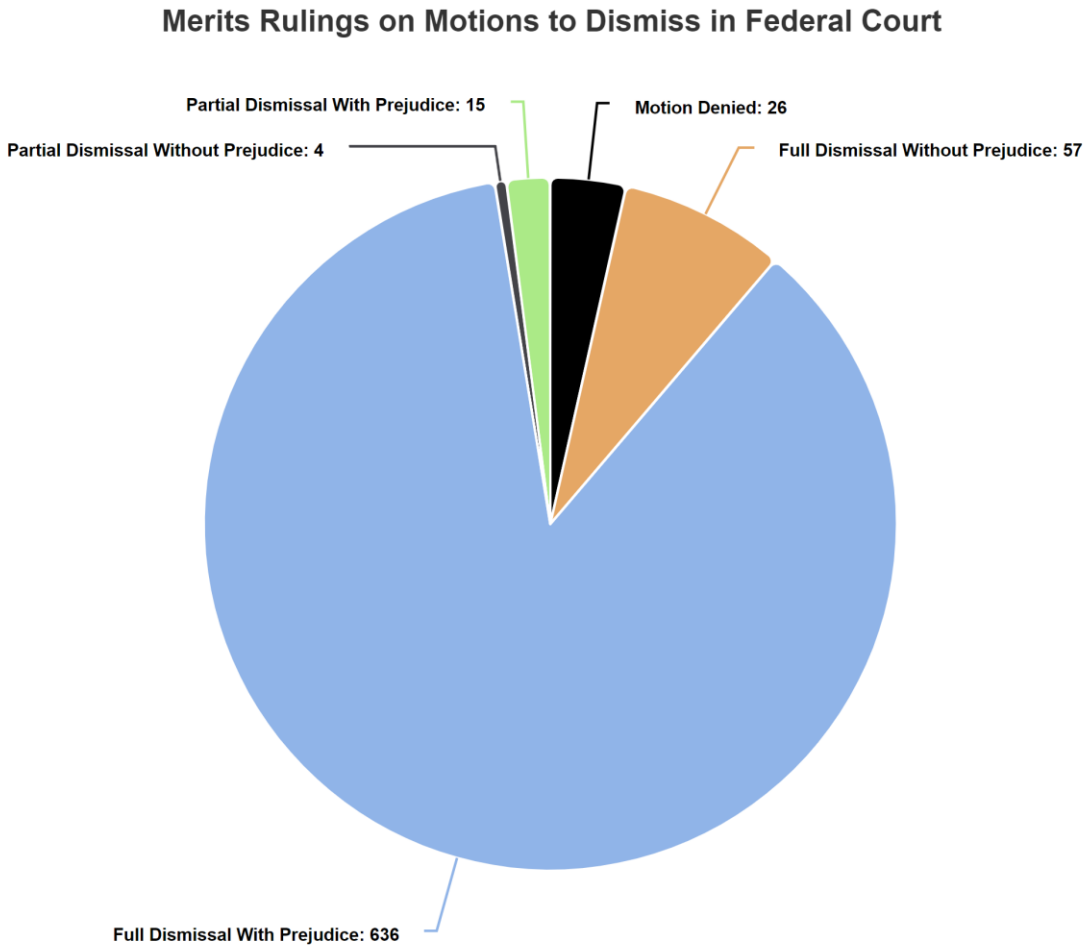


- Full Dismissal with Prejudice: 69.1%
- Motion Denied: 19.9%
- Full Dismissal without Prejudice: 5.1%
- Partial Dismissal with Prejudice: 5.1%
- Partial Dismissal without Prejudice: 0.8%

Covid Coverage Litigation Tracker, UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL, https://cclt.law.upenn.edu/judicial-rulings/ (last visited Sept. 7, 2023)

Business Interruption Claims and the COVID-19 Pandemic

- Full Dismissal with Prejudice: 86.2%
- Motion Denied: 3.5%
- Full Dismissal without Prejudice: 7.7%
- Partial Dismissal with Prejudice: 2.0%
- Partial Dismissal without Prejudice: 0.5%



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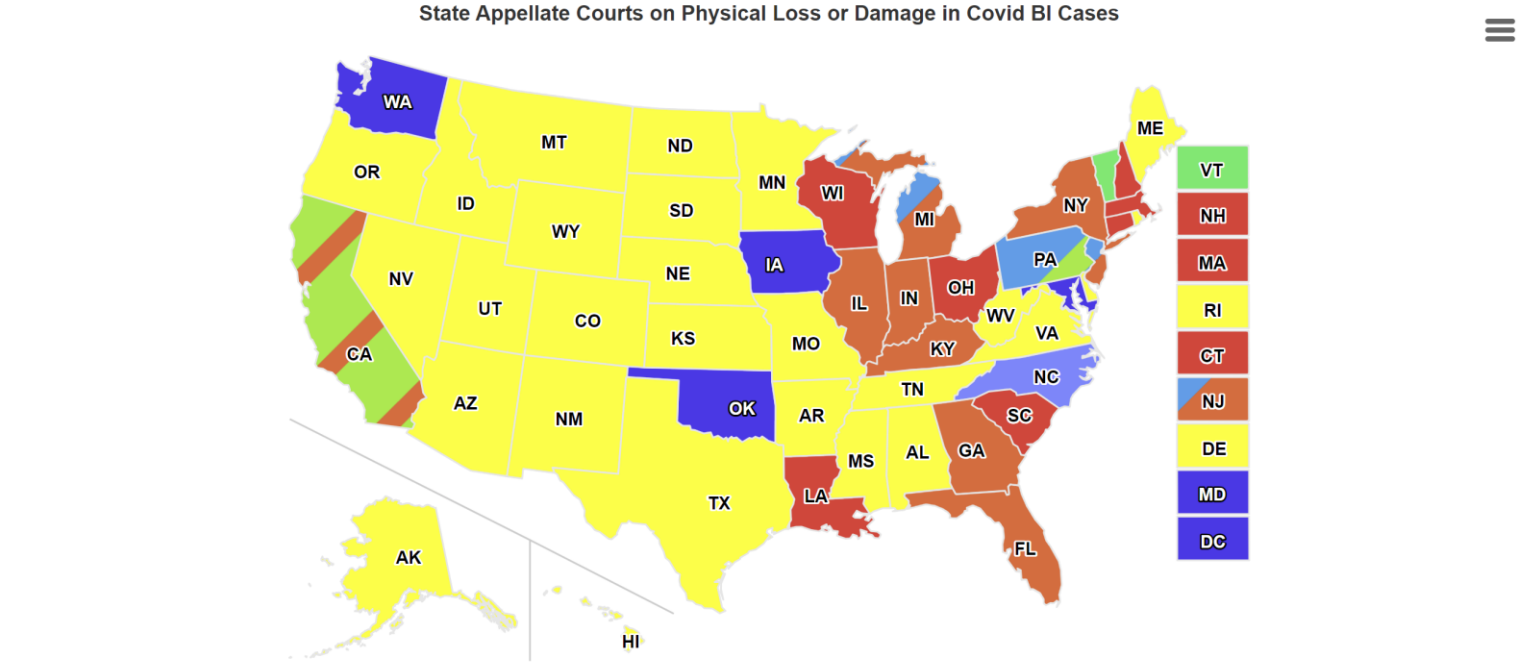
Business Interruption and the COVID-19 Pandemic

	Virus Exclusion	No Virus Exclusion
MTD Granted	597	299
MTD Denied	36	35
Insurer MSJ Granted	51	30
Insurer MSJ Granted in part	12	5
Policyholder MSJ granted in part	5	9
Trial verdict for insurer	1	6
Trial verdict for policyholder	1	0

Business Interruption and the COVID-19 Pandemic



	Intermediate	High Court
No physical loss or damage (PLOD) decisions in the state		
COVID loss can satisfy PLOD; the req'ts are met at this (pleading) stage		
COVID loss can potentially satisfy PLOD but requirements not met		
COVID loss cannot satisfy PLOD		

Covid Coverage Litigation Tracker, UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL, https://cclt.law.upenn.edu/judicial-rulings/ (last visited Sept. 7, 2023)

Washington

***Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 200 Wn.2d 208, 515 P.3d 525 (2022)**

- Physical Loss
- Loss of Use
- The Efficient Proximate Cause Rule
- Anti-Concurrent Causation
- Inverse-EPC Language

Washington

Business Interruption Claims After *Hill & Stout*

- The Physical Loss or Damage Requirement
- Potentially Viable Claims
  - Contaminated Property
  - Extensions of Coverage for Virus & Communicable Disease
- The Impact on Business Interruption Claims related to Covered Physical Damage

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Questions?

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GTTC Insurance Recovery Seminar

September 15, 2023

GORDON TILDEN THOMAS CORDELL

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The Appraisal Process from A to Z
and
Replacement Cost Insurance

Presented by:

Dale Kingman and Matthew Pierce

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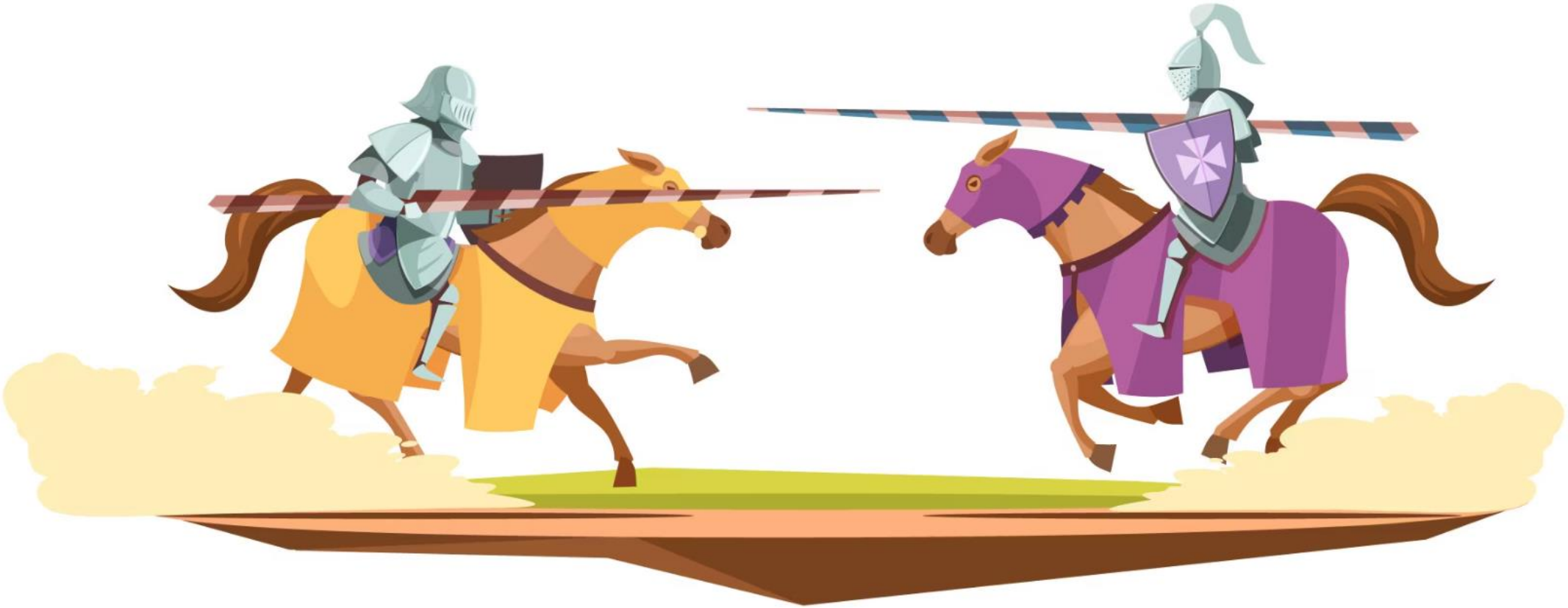
The Appraisal Process



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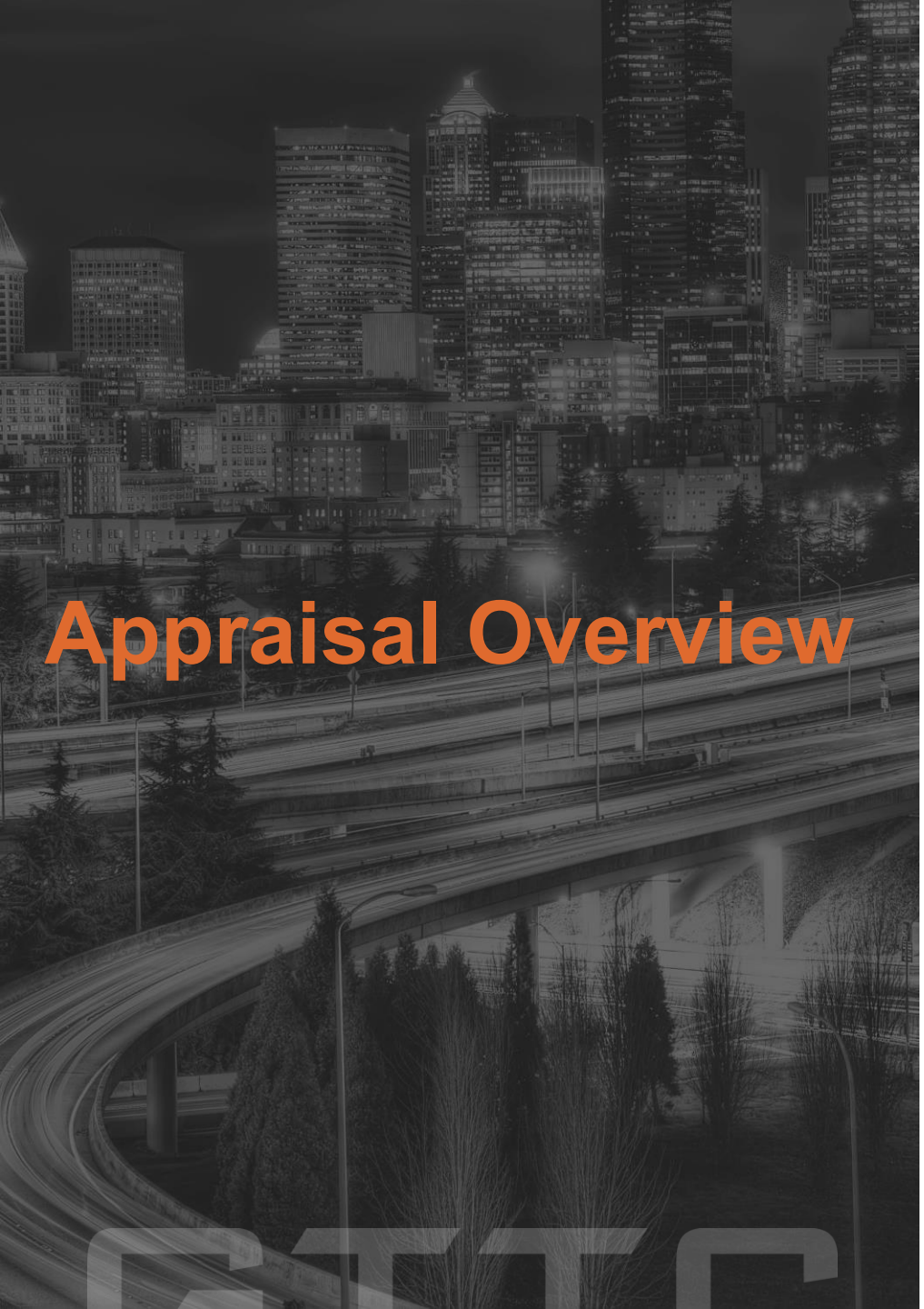
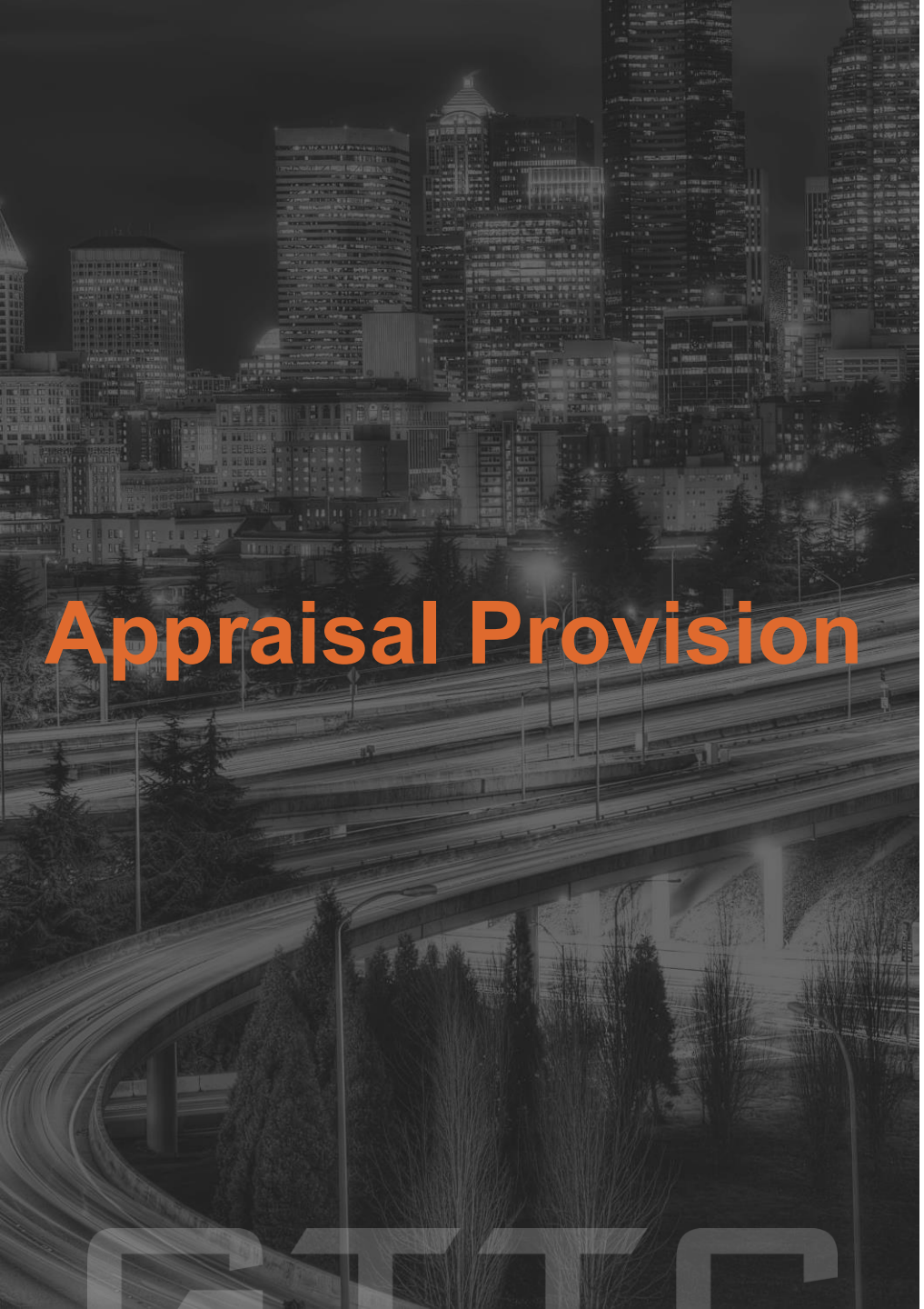


Appraisal Overview

- **What is Appraisal?**
  - Policy Provision in Property Insurance Policy (Loss Settlement section)
  - Resolve disagreement when Insured/Insurer do not agree amount of loss
  - Insurer or Insured can make demand to have Loss determined by Appraisal



Appraisal Provision

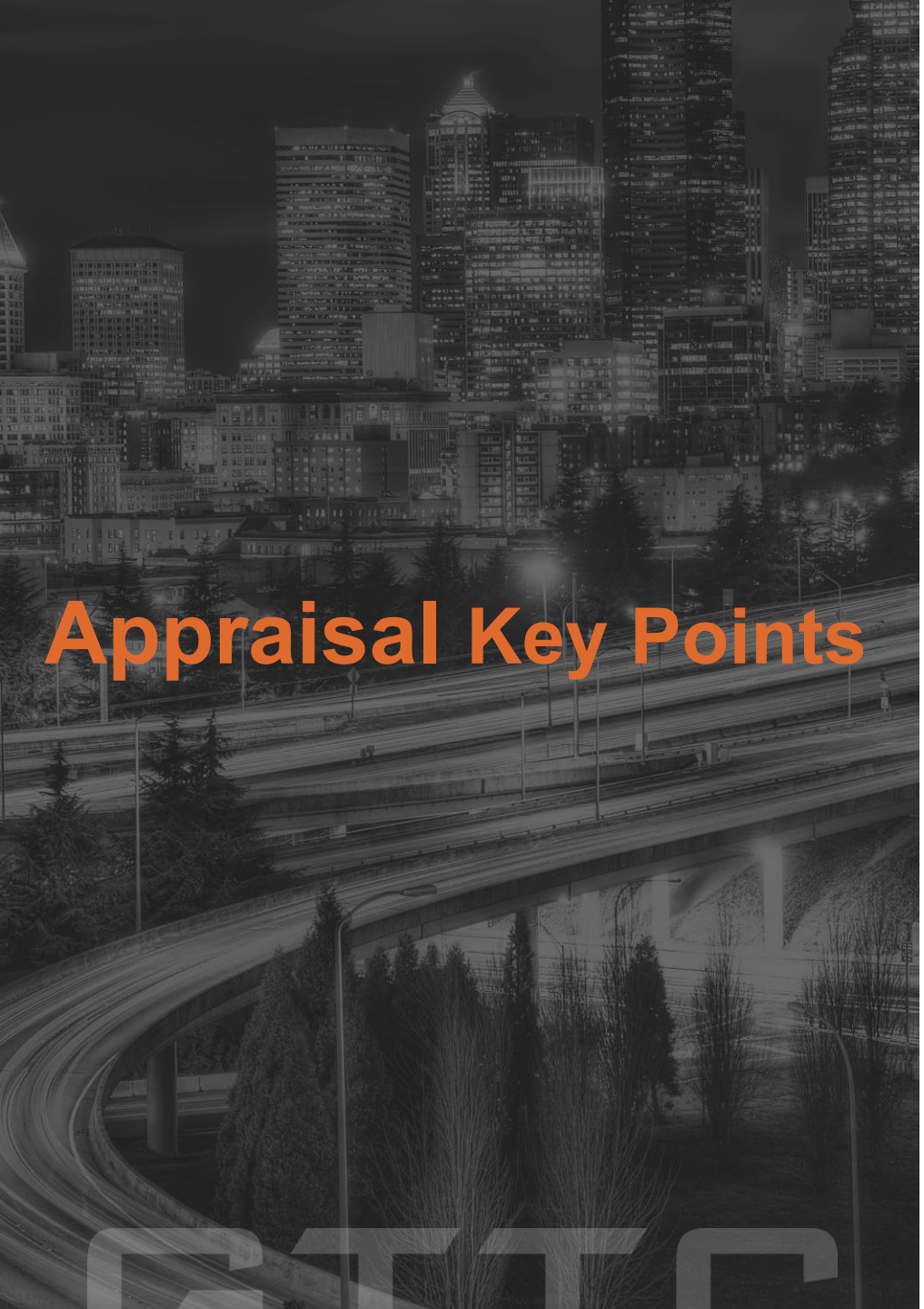
Appraisal

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that the selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

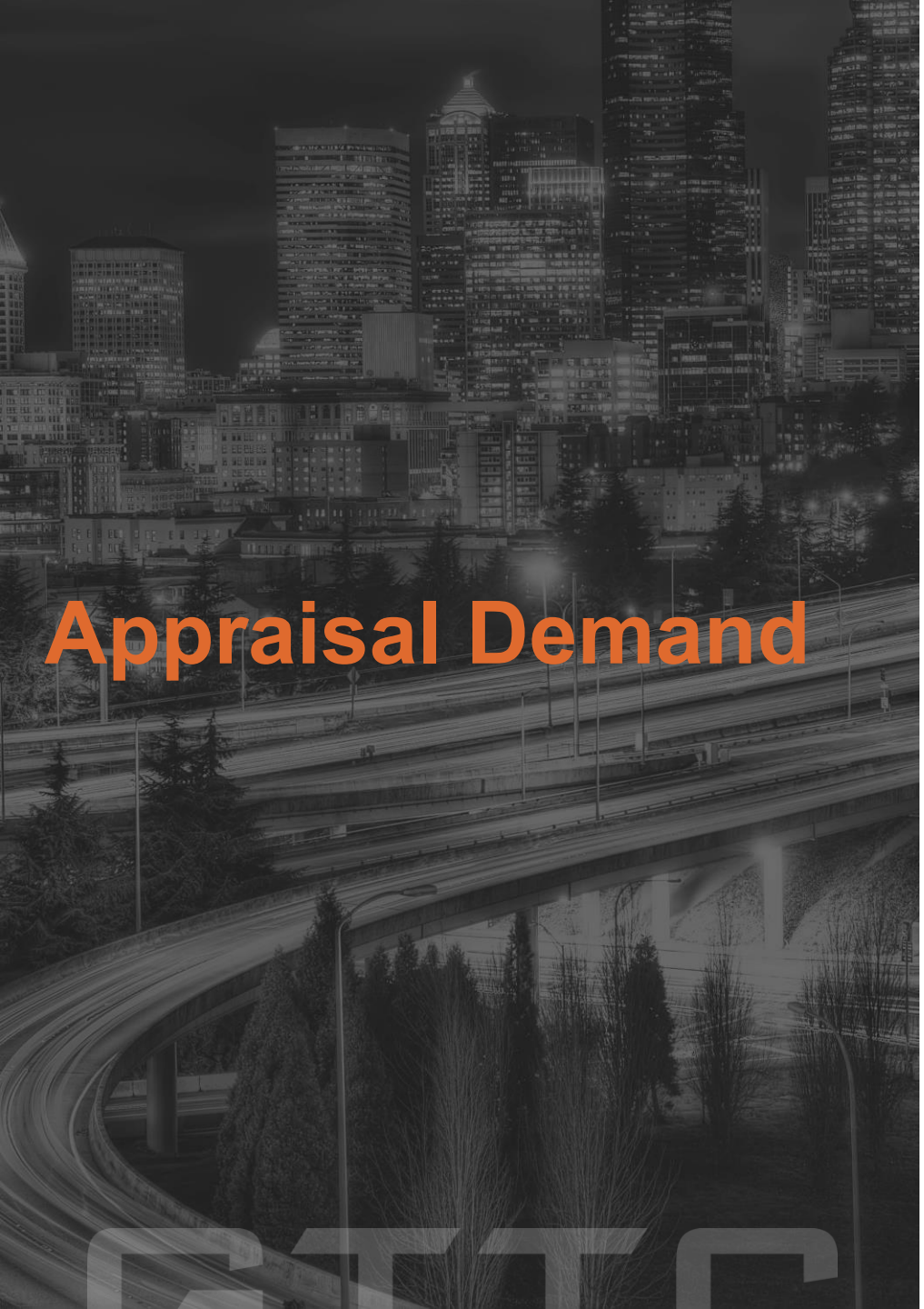
a. Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

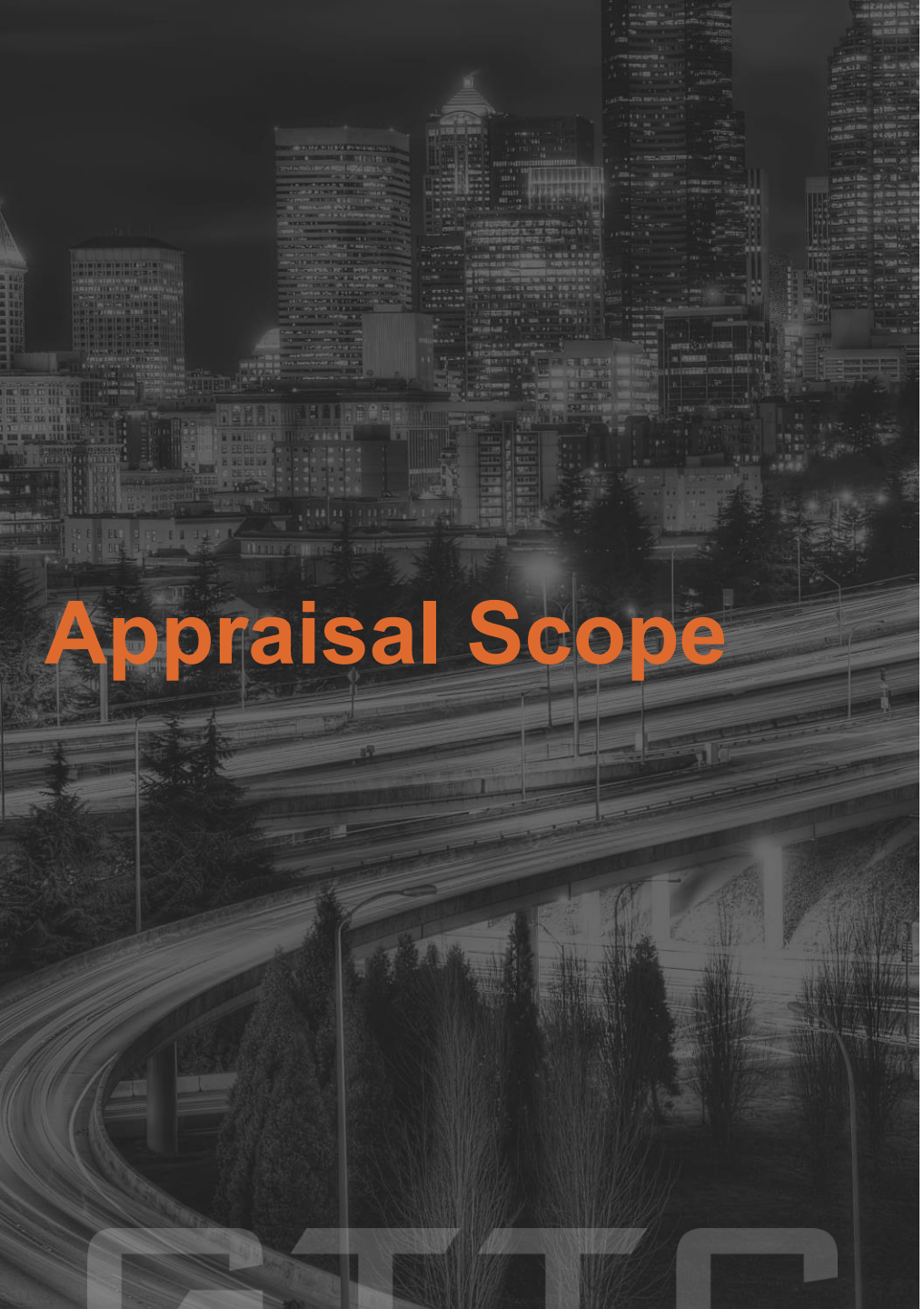


- **Key Points**
  - Coverage issues reserved
    - (can be determined before or after appraisal) (*i.e.*, insurer may still deny claim)
  - Must be a disagreement on ***value of property or amount of loss***
  - Either Insurer or Insured may demand
  - Both select ***impartial*** appraiser
  - Appraisers agree on umpire
  - Appraisers work to agree on amount of Loss
  - Cannot agree? Then Umpire selected
  - Appraisal award must have agreement of at least 2 of 3 (between 2 Appraisers and Umpire)
  - Appraisal award must be in writing



- **Demanding Appraisal**
  - Have completed Proof of Loss and supporting Docs
  - Clear demand is imperative
    - (documents the valuation dispute and sets parameters)
  - In writing
    - (specifically cite appraisal provision)
  - Specify the disagreement on amount of loss
  - Specify what is being appraised
    - (RC, ACV, EE, BI, etc.)
  - Cite relevant policy provisions
  - Identify your appraiser
    - (if you have one)
  - *above applies if you are responding to demand for appraisal
    - (note agreements/disagreements)

- **Selecting Appraisers and Umpire**
  - **Appraiser selection**
    - Disinterested
    - Knowledgeable re: issues being appraised
    - Competent/Experienced
  - **Umpire selection**
    - Disinterested
    - Knowledgeable re: issues being appraised
    - Competent/Experienced
    - Timing?
      - Before or after the two Appraisers meet to see if they agree on loss amount
        - Pros/Cons of having Umpire involved early
  - **Cannot agree on Umpire?**
    - Petition court to name Umpire (and submit names)



- **Scope of Appraisal**
  - What is and is not being appraised (RC, ACV, BI, EE, etc.)
  - In writing
  - Agreement on certain things
  - Details of Appraisal
    - Policy provisions at issue
    - Documents exchanged
    - Witness disclosures
    - Experts?
    - Hearing demand?
    - Location
    - Timing

Appraisal/ Experts

- **Experts**
  - **Should you use experts?**
    - Depends on the items at issue
    - Expert can assist in supporting breadth of property damage and thus extent of amount of loss (e.g., Replacement Cost)
    - Experts can testify if parties agree to a hearing
  - **When should you retain experts?**
    - If you retain early, expert can assist insured and appraiser
    - This could benefit insured when making demand for appraisal

- **Appraisal Hearing**
  - Insurance policy is silent regarding an appraisal hearing
  - If hearing is requested and refused does this provide basis for challenging appraisal award
  - Benefits of a hearing
    - Testimony
    - Presentations/Graphics assist Appraisers and Umpire in understanding Loss
    - Opportunity for questions

- **Appraisal Award/ Correcting Award/ Vacating Award**
  - Conclusive as to amount of loss
  - Can correct award with evident mathematical miscalculation or mistake in descriptions
  - **If** fairness of the appraisal process is questioned through allegations of bias, prejudice, or lack of disinterestedness on the part of either an appraiser or the umpire, **then** factual issues properly reserved for jury determination may arise.
    - *Bainter v. United Pac. Ins. Co.*, 50 Wn. App. 242, 748 P.2d 260 (1988)

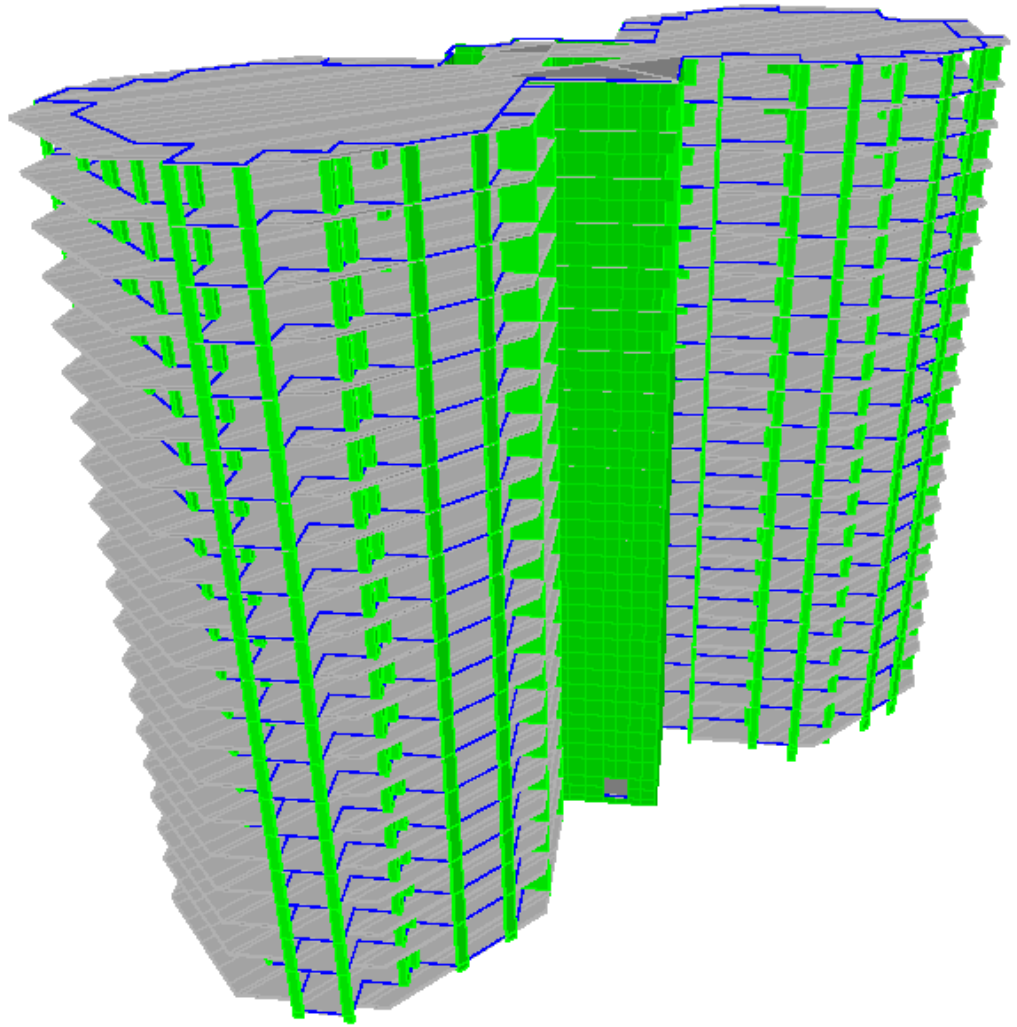
Appraisal
(Example: Effective Use of Expert Exhibits/ Demonstratives at Hearing)

Sandpiper Condominiums (Marco Island, FL)

Hurricane Wilma (10/24/05)

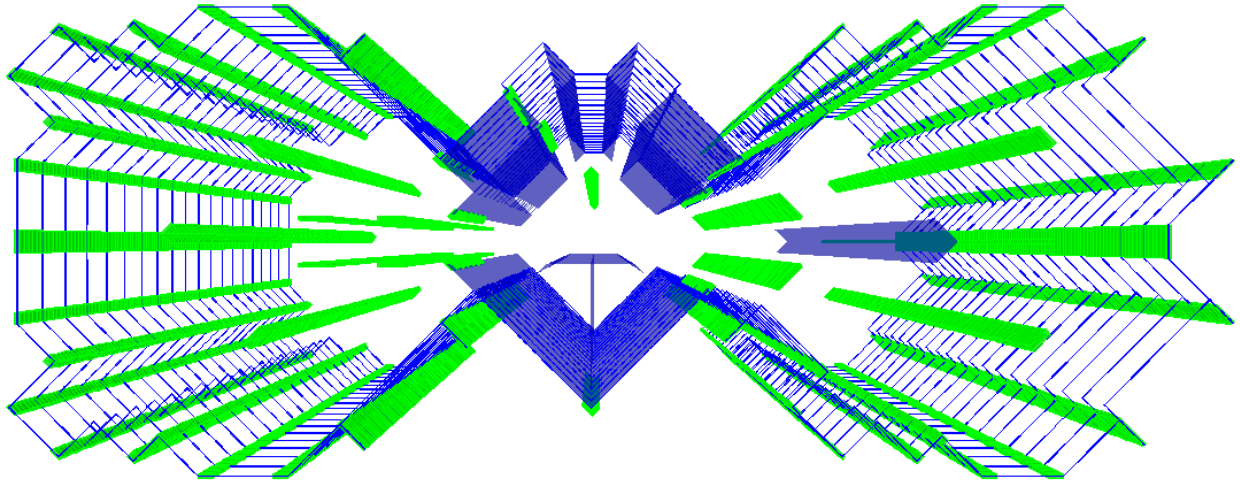
Winds - 125 mph or higher

Computer Model of Sandpiper Condominiums With ETABS 9

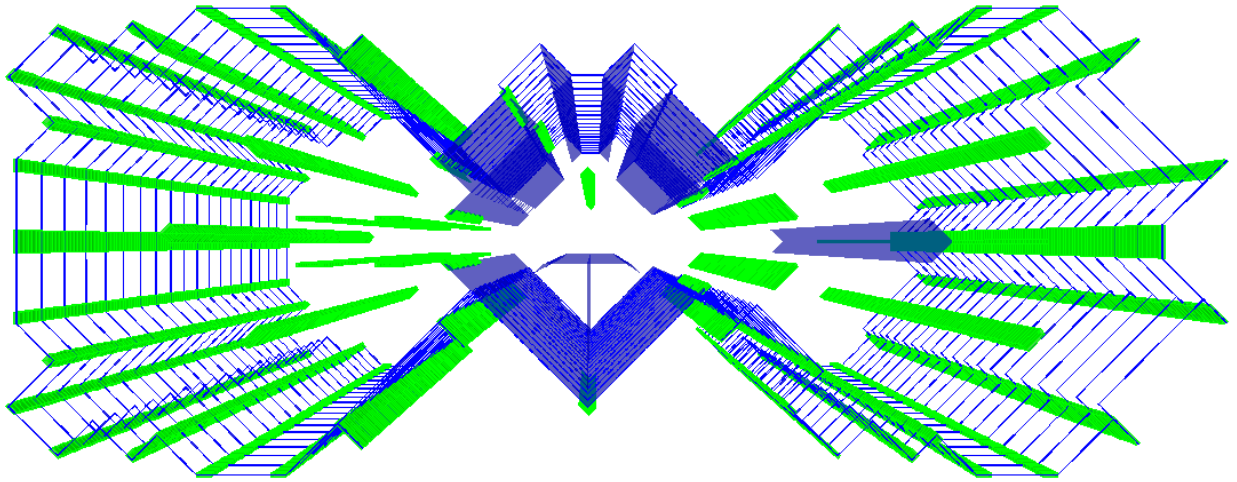


Delamination Mapping

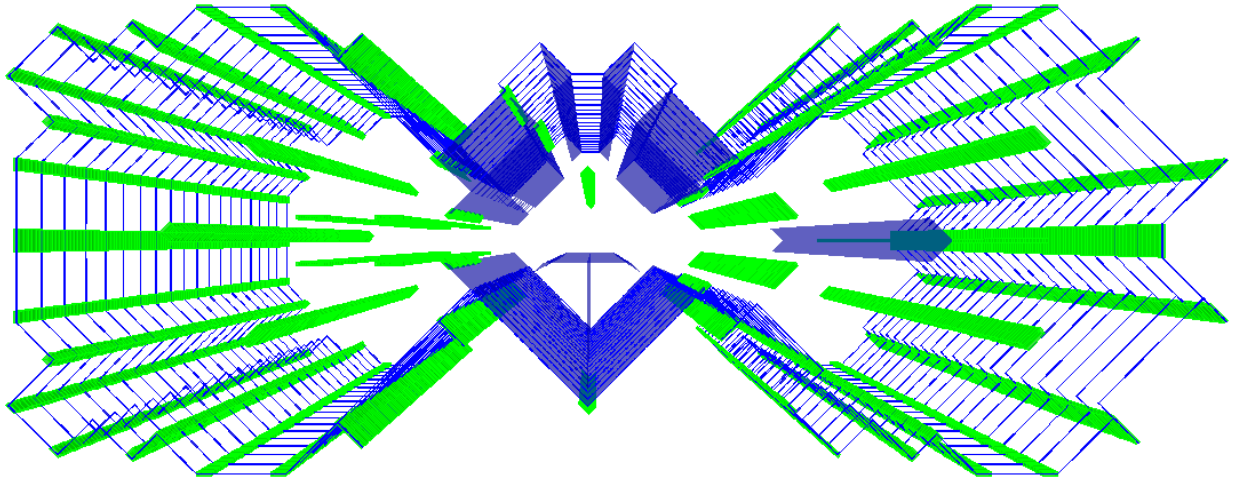
Analysis of Wind Damage
First vibration mode is torsional



Analysis of Wind Damage
Second vibration mode is translational



Analysis of Wind Damage
Third vibration mode is translational/torsional



Replacement Cost Insurance: A Primer

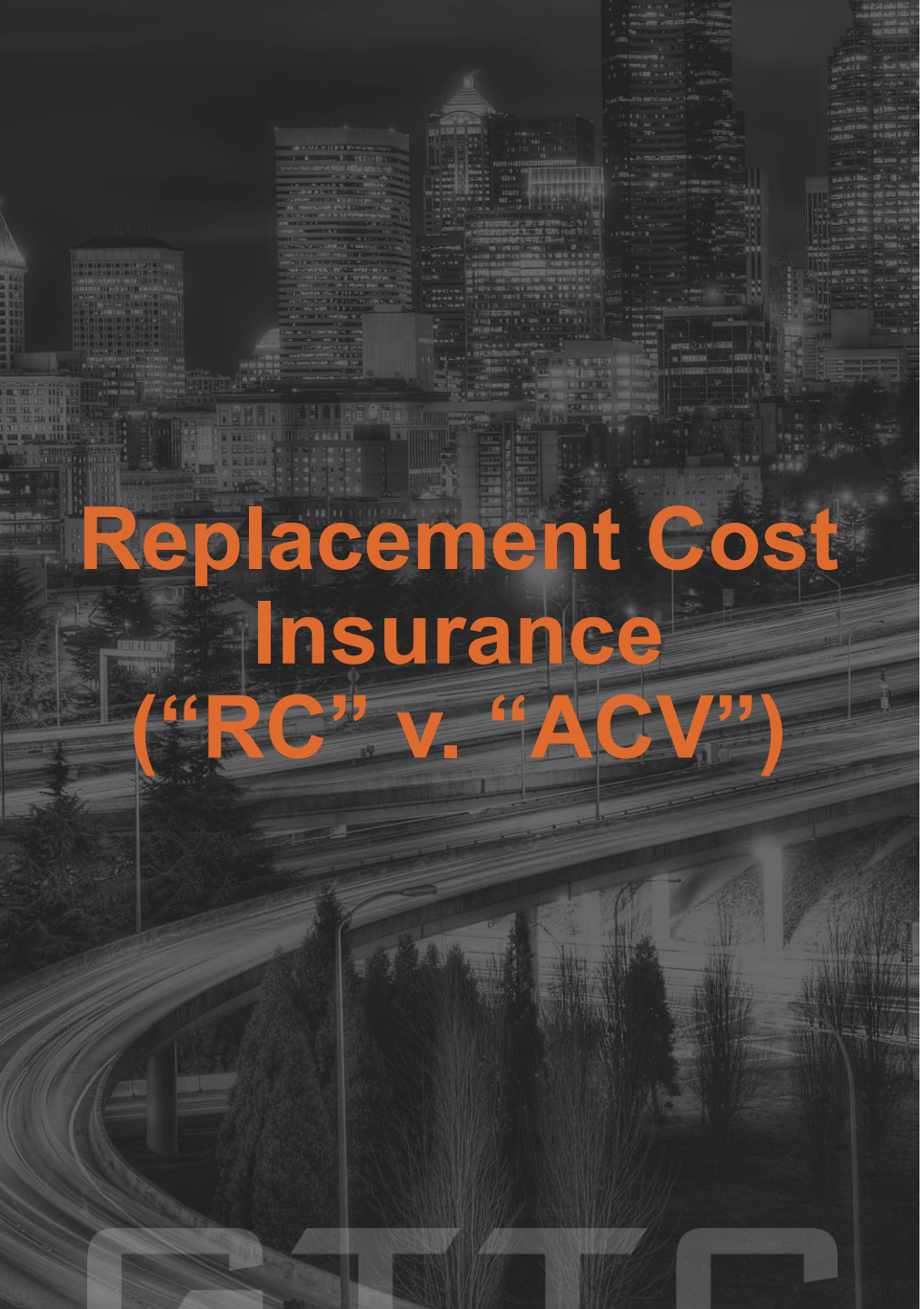
Image by macrovector on Freepik

Replacement Cost Insurance

- **History of Replacement Cost Insurance**
  - **Purpose**: Purpose of property insurance is indemnity
  - **Nature**: Nature of replacement cost insurance is to reimburse insured for depreciation inherent in damaged property
  - **Washington**: Value of damaged property is its "fair market value"
    - Difference in value immediately before the loss and immediately after (*see National Fire Insurance Company v. Solomon*, 96 Wn.2d 763, 638 P.2d 1259 (1982))

Replacement Cost Insurance

- **History of Replacement Cost Insurance**
  - "Over-insurance" is prohibited (RCW 48.27.010)
  - To determine "over-insurance", statute defines "fair value" as replacement cost less depreciation (RCW 48.27.010)
  - Exception: RCW 48.27.020, which allows full cost of repair or replacement, without deduction of depreciation



Replacement Cost Insurance ("RC" v. "ACV")

- **History of Replacement Cost Insurance**
  - **Replacement Cost ("RC")** ("new vs. old" or replacement cost at time of casualty less depreciation)
  - **Actual Cash Value ("ACV")** (fair market value)

Replacement Cost Insurance Provision

- **Typical Replacement Cost Provision**
  - In Policy under “Valuation” or “Settlement of Loss”
  - Example:

In the event of physical loss or damage to covered property by perils insured against, the company will not pay more than the lesser of: the minimum liability applicable to loss or damaged property; the interest of the insured in the lost or damaged property; the cost to repair the lost or damaged property; the actual expenditure incurred in repairing or replacing the damaged property; or the value of property insured determined as follows:

***

For purposes of this valuation section:

The term **replacement cost** used herein means the cost to repair or replace lost or damaged property with property of comparable material and quality on the same or another site, and used for the same purpose, without deduction for depreciation, deterioration, and obsolescence.

The term **actual cash value** as used here means the replacement cost with deduction for depreciation, deterioration, and obsolescence.

All the above to be *computed as of the time and at the place of loss* insured against by this policy.

(Property policy issued by Continental Casualty Company) (1-17).

Replacement Cost Insurance (Valuation Clause)

- **Summary of Common Valuation Clauses**
  - **Valuation/loss clauses have attributes in common:**
    - Recover only RC up to but not exceeding the limits of liability of the policy
    - RC estimate predicated on cost of materials of like kind and quality to be used in the repair or rebuilding of damaged property
    - Time and place of loss
    - Property being replaced must be used for same general purpose as that of damaged or destroyed property
    - Insured entitled to no more than cost to actually repair or rebuild property regardless of limits or the hypothetical “RC” of damaged or destroyed property

Replacement Cost Insurance (Functional "RC")

- **Functional Replacement Cost**
  - **Limitations in policy's valuation or loss settlement provisions**
    - Inhibit ability to replace lost/damaged property with other property with different materials not of like kind and quality, at a different site, but which might be the functional substitute for the destroyed property
  - **Example**: Fish processing company whose remote Alaska shore-based processing facility was destroyed by fire
  - **Typical Functional RC endorsement**

The amount which it would cost to repair or replace the damaged building with *less costly common construction materials and methods which are functionally equivalent to obsolete, antique or custom construction materials and methods* used in the original construction of the building (HO 32 50 05 03).[3]

Replacement Cost Insurance ("ACV")

- **Actual Cash Value ("ACV")**
  - **Calculation of ACV**
    - **Appraisers often use 3 methods to determine fair market value:**
      - Replacement cost less depreciation
      - Income approach
      - Comparable sales approach
    - **Broad Evidence Rule**

Replacement Cost Insurance ("ACV")

- **Actual Cash Value ("ACV")**
  - **Duty to Pac ACV until Replacement Complete**
    - Insured must replace or repair the property before the insurer is required to pay the replacement value. *See Hess v. North Pacific Insurance Company,* 122 Wn.2d 180, 859 P.2d 586 (1993).
    - Insured not entitled to receive RC until property replaced
    - In practice, insurers will calculate both the replacement cost and actual cash value of property.

Replacement Cost Insurance ("ACV")

- **Actual Cash Value ("ACV")**
  - **180-Day limit to claim Replacement Cost**
    - Many valuation and loss settlement provisions require policyholder to replace or repair damaged property within 180 days of casualty
    - 180-day period near impossible to achieve
      - Some insurers deny if property not rebuilt/repaired within 180 days. *See Blanchette v. York Mutual Insurance Co.*, 455 A.2d 426 (Me. 1983)
    - Other cases have interpreted 180-days language to require insured apprise insurer of intention to repair or rebuild.
    - "Intent to rebuild" should satisfy repair/ replacement requirement. See Parker, Replacement Cost Coverage: *A Legal Primer, 34 Wake Forest Law Review*, 295 (1999)

- **Requirements of Replacement Cost Insurance**
  - **Time and Place of Loss**
    - Most policies require property be valued
      - "at time and place or loss" or
      - "as of time of loss or damage"
    - *Snoqualmie Summit Inn, Inc. v. Travelers Property and Casualty Co. of America*, 2007 WL 709297 (W.D. WA 2007);
    - *SR International Business Insurance Co. Ltd. v. World Trade Center Properties*, LLC, 2006 WL 3073220 (S.D. N.Y. 2006) (language "at the time and place of loss" does not allow for increased costs attributable to inflation, construction pressures, or code upgrades)

Replacement Cost Insurance (Requirements)

- **Requirements of Replacement Cost Insurance**
  - **Repair, Rebuild, or Replace with Due Diligence and Dispatch**
    - Older policies often included requirement that an insured had to replace property with “due diligence and dispatch.” (*i.e.*, within a reasonable time)
    - Today, the phrase “due diligence and dispatch” usually used in business interruption provisions
  - **Like Kind and Quality**
    - Most policies include requirement replacement property be of “like kind and quality” or of “materials of like kind”
    - Insurers often argue policyholder’s repair/replacement includes “Betterment”
    - “Like kind and quality” has been interpreted to:
      - Be similar to “equivalent construction”
      - Mean substantial equivalent rather than “literal identity”
    - “Functional Similarity”
      - may not be covered if the property claimed to be functionally similar is in fact, a betterment. *Mount Zion Lutheran Church v. Church Mutual Ins. Co.*, 8 Wn.App.2d 461, 442 P.3d 22 (2019)
  - **Must Property be Replaced on Same Site?**
    - Destroyed property need not be replaced on same site

Replacement Cost Insurance (Acquisition of another Property)

- **Acquisition of Another Property Constitutes Replacement**
  - **Using money from hypothetical cost of replacement to purchase other property**
  - **Restrictions when buying another property**
    - Whether property acquired is similar in use to property destroyed

Replacement Cost Insurance (Special Issues)

- **Special Issues with Replacement Cost Coverage**
  - **Code Compliance: What is covered**
    - With few exceptions, code compliance not covered by replacement cost insurance
  - **Repair Part or Replace the Whole**
    - Only part of property damaged and policyholder argues aesthetic values
    - General rule is replacement cost policy does not cover
  - **Sale of Property after the Loss: Does the Insured Forfeit Replacement Cost?**
    - *Ruter v. Northwestern Fire & Marine Ins. Co.*, 178 A.2d 640 (N.J. 1962) (allowing recovery of replacement cost)
    - *Athena Restaurant, Inc. v. Sheffield Ins. Co.*, 681 F. Supp 561 (N.D. Ill. 1988) (if insured take discount on sale price, it would entitled to replacement cost because no “windfall”)
    - *Paluszek v. Safeco*, 517 N.E.2d 565 (Ill. App. 1987)

- **Replacement Cost Involving Schedule of Values and Blanket Coverage—Problem that Won't go Away**
  - **Policy contains both blanket coverage and attaches a statement of values?**
    - **Courts generally agree "blanket" and "scheduled" are terms or art**
      - **"Blanket" coverage** - insures different types of property are one/more locations
      - **"Valued" or "Scheduled"**
        - separately schedules different types of property – each separately treated item of property in effect covered by separate contract
        - Amount recoverable re: loss affecting such property determined independent of others

- **Replacement Cost Involving Schedule of Values and Blanket Coverage—Problem that Won't go Away**
  - **Policy Language Matters**
    - **Blanket coverage (example)**

The amount of insurance listed on the declarations page is a single amount "listed without qualification or reference to any separately valued items." *Abraxas Group, Inc. v. Guaranty National Ins. Co.*, 648 F. Supp 304 (W.D. Pa. 1986); and

The inclusion of endorsements "used only for blanket coverage." For example, that would be rendered meaningless or useless if the policy were not one providing a blanket limit.

- **Scheduled Policy (example)**

The policy describes the insured premises by reference to a "statement of values"; and

The policy does not reference any overall or combined limit of insurance, but instead each building or risk has its own limit of insurance. *See, e.g., Bahama Bay II Condo. Association Inc. v. United National Ins. Co.*, 374 F. Supp. 3d 1274 (M.D. Fla. 2019)

Replacement Cost Insurance (Schedule of Values and Blanket Coverage)

- **Replacement Cost Involving Schedule of Values and Blanket Coverage—Problem that Won't go Away**
  - **Statement of Values**
    - Key element of scheduled policy
    - Mere inclusion Statement of Values not necessarily mean policy is a scheduled policy
    - Has other uses other than evidencing policy limits
    - inclusion of scheduled limit of liability endorsement (as opposed to mere statement of value) is indication the policy intends to provide scheduled limits. *See, e.g., S. Ins. Co. v. Affiliated FM Ins. Co.*, 830 F.3d 337 (5th Cir. 2016)
  - **Blanket vs. Scheduled - Policy language often determinative**
    - Impact on value assigned as limit of insurance
    - Disputes can arise between insurer and insured
  - **Lessons:**
    - Statement of Values – valuations must be accurate
    - Broker/insured must understand use of statement of values (setting limits vs. setting premium)

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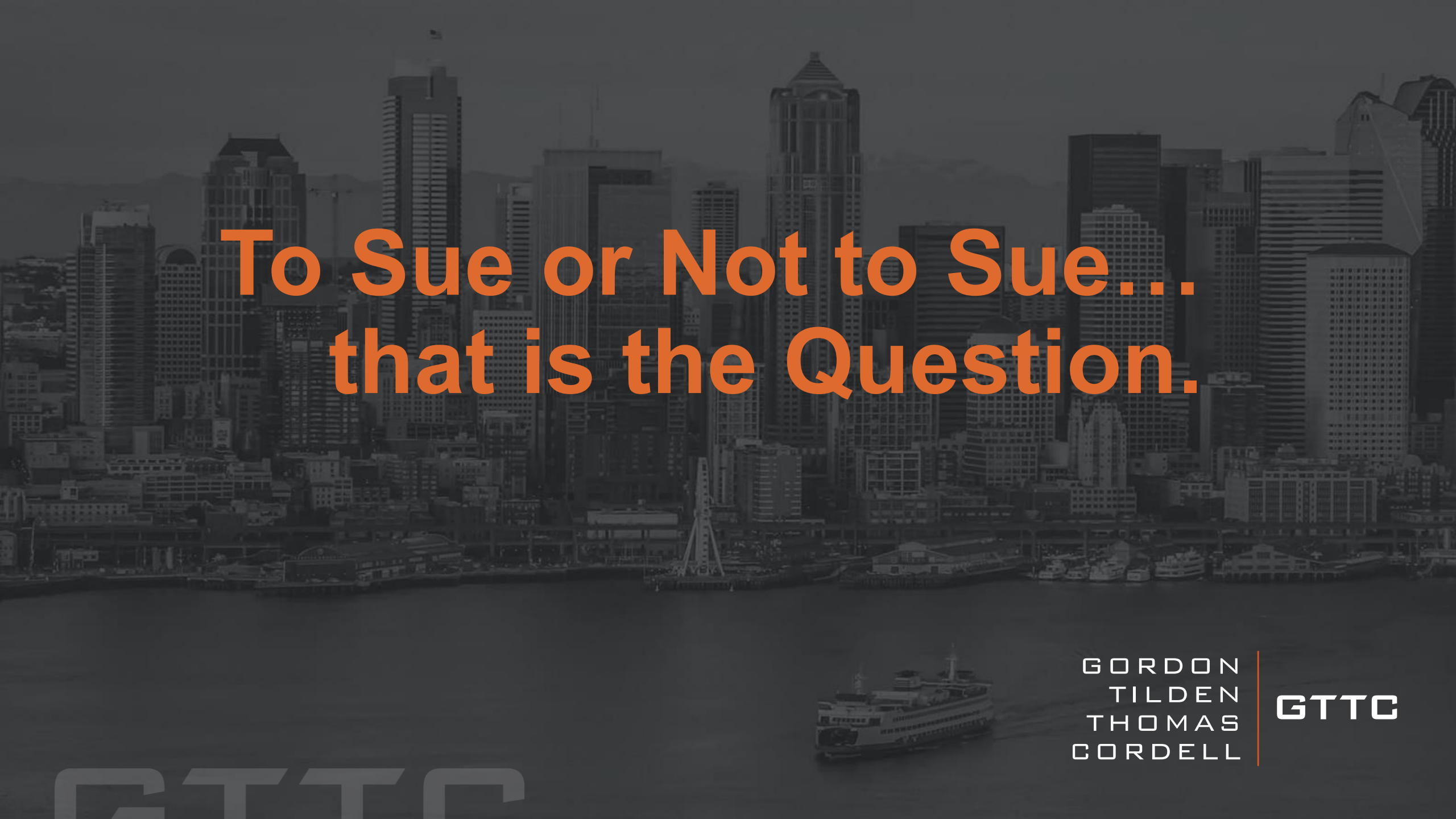
To Sue or Not to Sue...
that is the Question.
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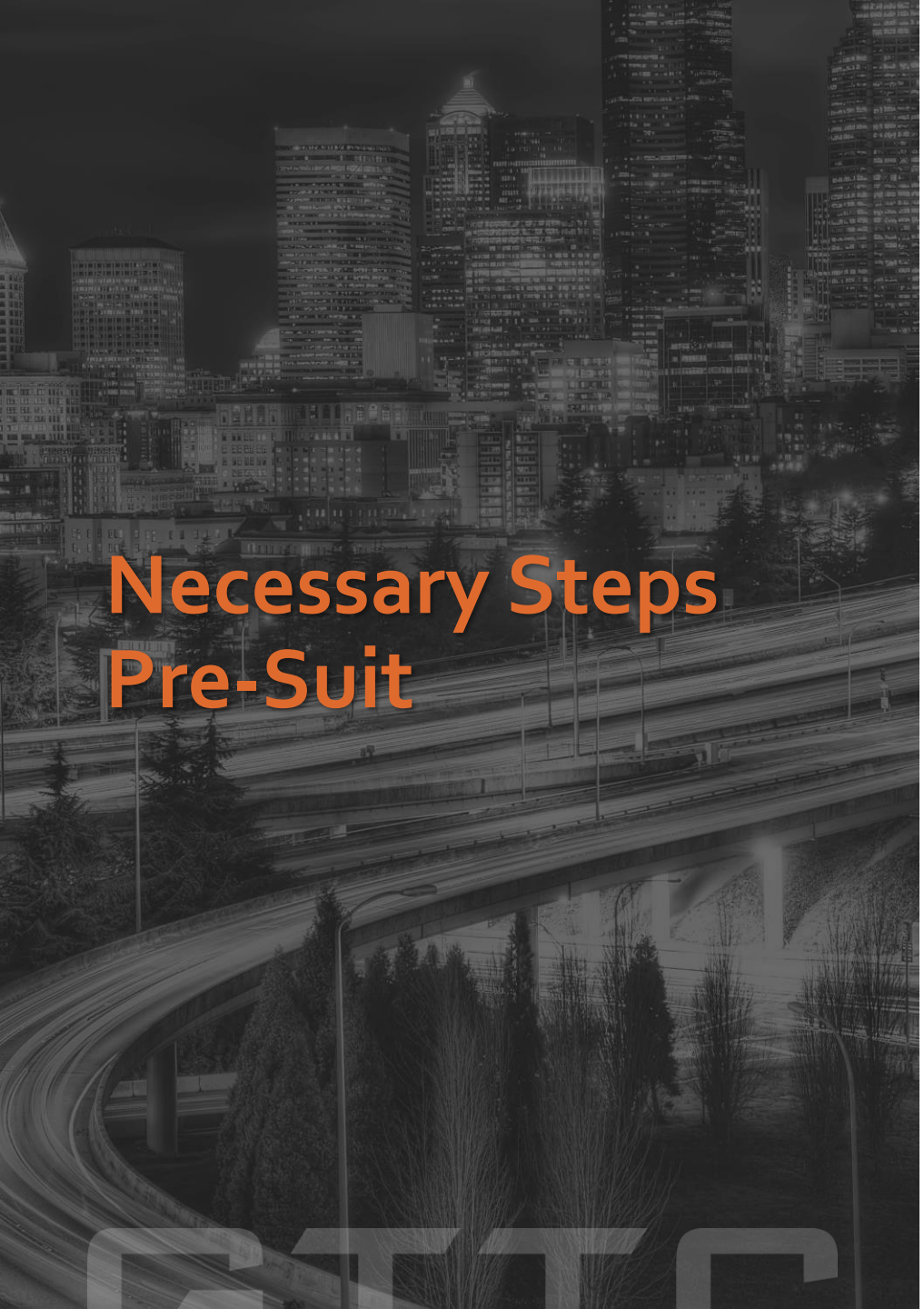
Introduction

Necessary Steps Pre-Suit: Preserving the Insured's Rights

Specific Considerations, by Carrier Communication and Policy Type

Alternatives to Filing Suit

Filing Suit

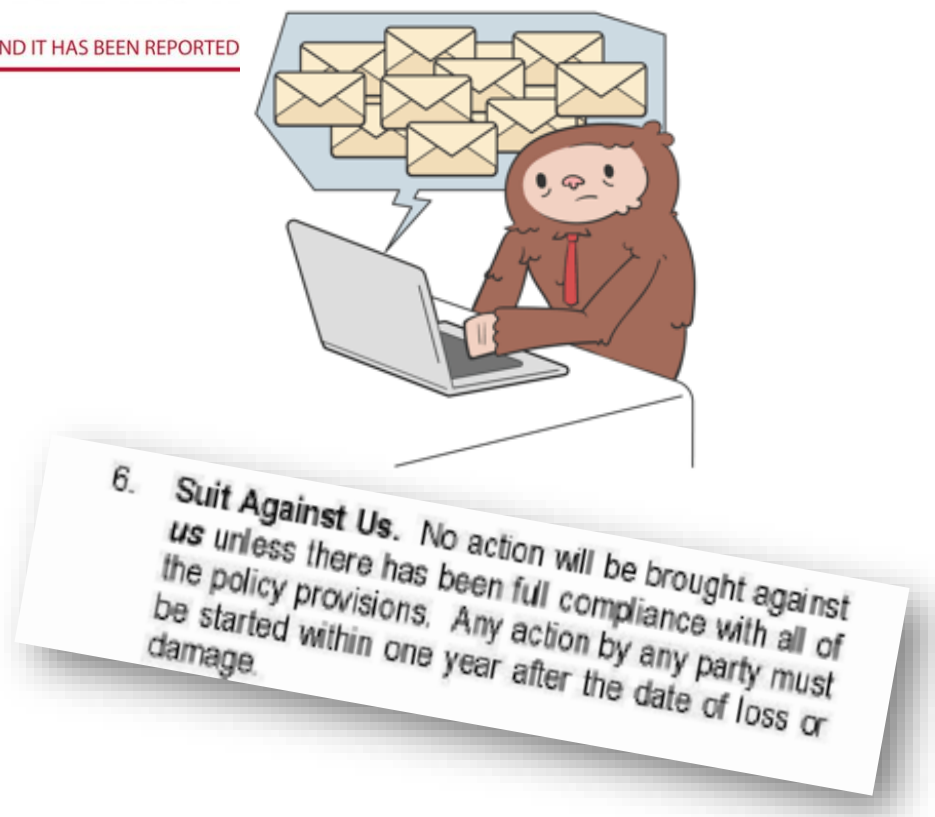


Necessary Steps Pre-Suit

- Notice of Claim
- Document Communications
- IFCA Notice to OIC
- Suit Limitation, Choice of Law, and Similar Clauses

Preserving the Insured's Rights

- Notice of Claim
  - Ideally, know what the policy covers before you submit the claim
  - Tailor documentation and explanation to align with the coverage
- Suit Limitation Clause
  - Look in the "Conditions"
  - Will rarely be called out in the policy or in the denial/ROR
  - May run during adjustment of loss
- Document Communications – All of them
  - Emails are easy to save, but what about phone calls?



Preserving the Insured's Rights (cont'd)

- IFCA Notice
  - On the OIC website
- Comply with Policy Conditions
  - Respond to Requests for Information and Documents
  - Participate in Requested Examinations Under Oath
- Choice of Law

OFFICE of the INSURANCE COMMISSIONER WASHINGTON STATE

INSURANCE FAIR CONDUCT ACT (IFCA) COVER SHEET

Complete and attach this cover sheet to your submission to the Office of the Insurance Commissioner (OIC)

Attn:

Office of the Insurance Commissioner
Insurance Fair Conduct Act Claim Notification
Office Support Unit
P.O. Box 40255
Olympia, WA 98504-0255

Submitted by:

Name:
Law Office:
Address:
Phone:
Email:
Date:

RCW 48.30.015(8)(a) - Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. Notice may be provided by regular mail, registered mail, or certified mail with return receipt requested. Proof of notice by mail may be made in the same manner as prescribed by court rule or statute for proof of service by mail. The insurer and insurance commissioner are deemed to have received notice three business days after the notice is mailed.

Insurance Company:

RCW 48.30.015 (5), (a) through (f)

PDF **RCW 48.18.200**

Limiting actions, jurisdiction.

(1) Except as provided by subsection (3) of this section, no insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement

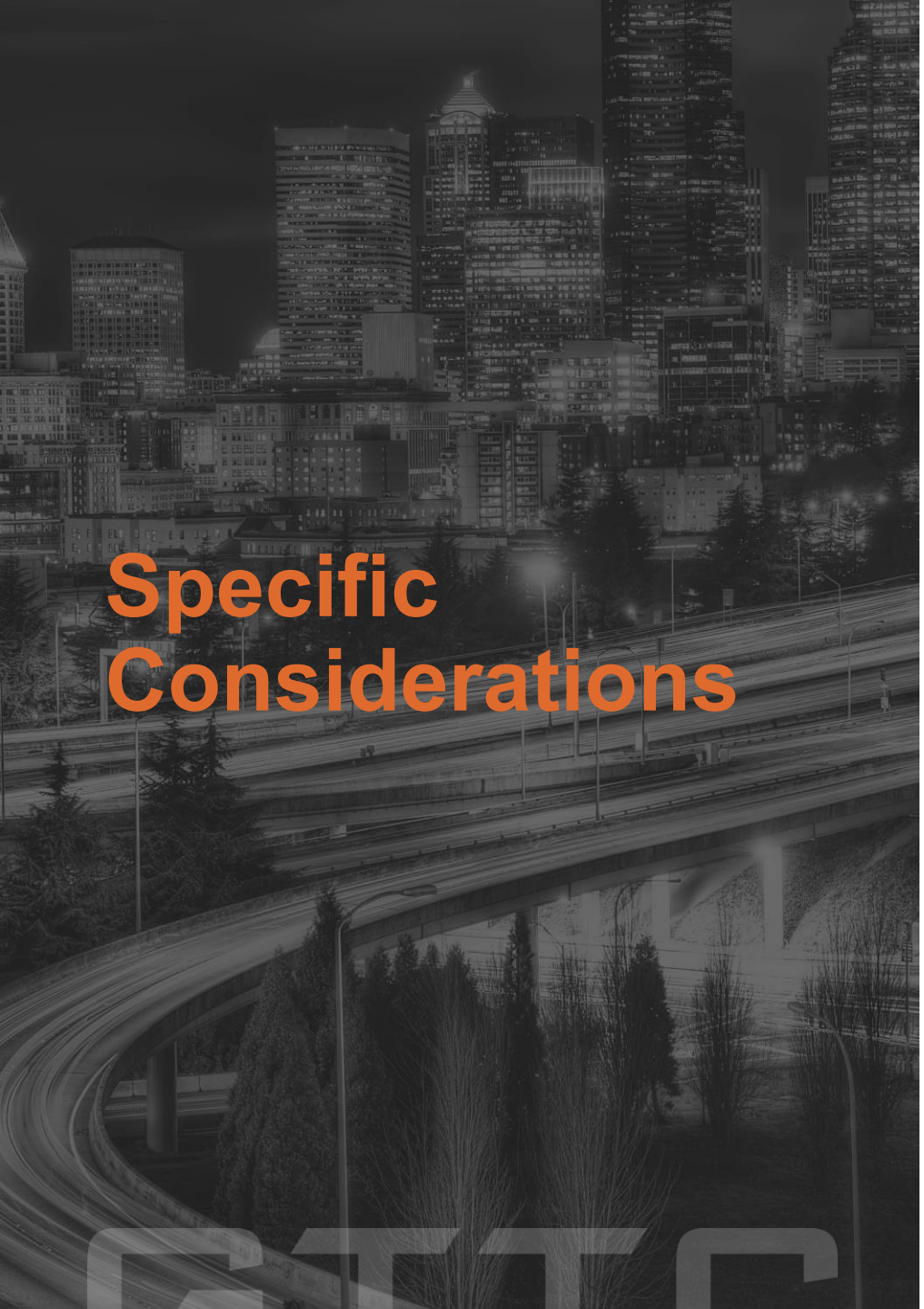
(a) requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country; or

(b) depriving the courts of this state of the jurisdiction of action against the insurer; or

(c) limiting right of action against the insurer to a period of less than one year from the time when the cause of action accrues in connection with all insurances other than property and marine and transportation insurances. In contracts of property insurance, or of marine and transportation insurance, such limitation shall not be to a period of less than one year from the date of the loss.

(2) Any such condition, stipulation, or agreement in violation of this section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.

(3) For purposes of out-of-network payment disputes between a health carrier and health care provider covered under the provisions of chapter 48.49 RCW, the arbitration provisions of chapter 48.49 RCW apply.



Specific Considerations

- How did the carrier respond, if at all?
- What kind of policy?
- What is needed—or available—to support the claim?

Specific Considerations

Carrier Response

- Denial
  - Does it make sense?
  - Does it correctly quote the policy language?
  - What about the endorsements and riders?
  - Does it include the requisite “adverse notification” language? WAC 284-30-770
- Delay/Non-Decision
  - Investigations completed within 30 days?
  - Prompt response to material communications?
- Coverage, but Insufficient Sums
- Reservation of Rights

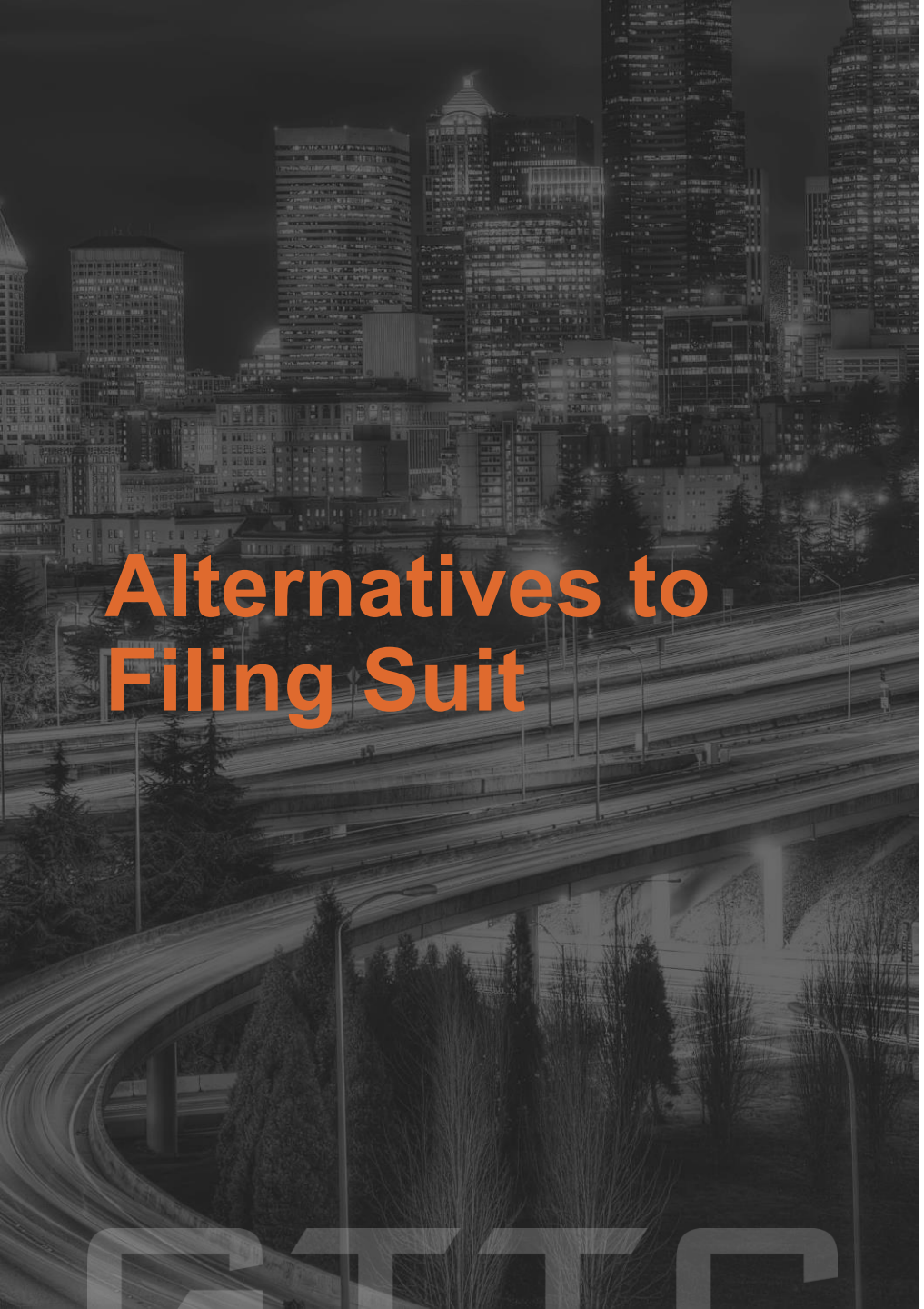
Specific Considerations (cont'd)

Policy Type

- Property
- Casualty
- Specialty
- Manuscript

Proof of Claim

- Casualty: "8-Corners" Rule + extrinsic evidence?
- Property: written description, photographic proof
- D&O: Batches?



Alternatives to Filing Suit

- Demand Letters
- Tolling Agreements
- Role of Brokers
- Role of Defense Counsel

Demand Letters

- Almost always the first communication from the insured after a claim notice
- Usually…
  - Very thorough, factually and in legal authority
  - Threaten imminent litigation within a time certain
- Ultimately, an art not a science

Tolling Agreements

- To prevent suit limitation clauses or statutes of limitation from barring suit
- Useful when an insurer has counsel and is amicable to finding a resolution outside of litigation
- Terms dictated by specific nature of dispute

Role of Brokers

- Know the policy language
  - Types of coverages
  - Occurrence; Claims-Made; Claims-Made-And-Reported
  - Suit limitation clauses
  - Choice of law clauses
  - Special and time-limited policy terms
    - D&O / Professional Liability – tender the defense or opt only for payment of defense costs
    - “Batch” declaration requirements
- Tailor the claim to the coverage, keeping in mind that fraud can void all coverage
- Don’t accept “no,” but know when to engage coverage counsel

Role of Defense Counsel

- The insured is your client
  - No tripartite relationship in Washington. RPC 5.4; *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381 (1986) (reservation of rights, insured controls defense). *But see Transamerica Ins. Grp. v. Chubb & Son, Inc.*, 16 Wn. App. 247 (1976) (no reservation, insurer controls defense).
- Use "personal counsel" to your client's advantage
  - Duty to defend is broad
    - Can't stop paying you
    - Can't shortcut on defense resources
  - Encourage settlements with plaintiffs and claims adjusters
- Defense counsel can benefit, too
  - Fee disputes/ hourly rate disagreement. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Coinstar, Inc.*, 39 F. Supp. 3d 1149 (W.D. Wash. 2014)

Filing Suit

- Have a plan.
- Prepare for contingencies.
- Have a team.

Filing Suit

- Why and When Suing Is the Best or a Necessary Option
- “Race to the [Washington] Courthouse”—RCW 48.18.200(a)
- Potential Legal Theories for Recovery

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“What’s New” – Lightning Round 2023

Significant developments in Washington insurance law over the last year

Presented by: Brendan Winslow-Nason & Katie Wan

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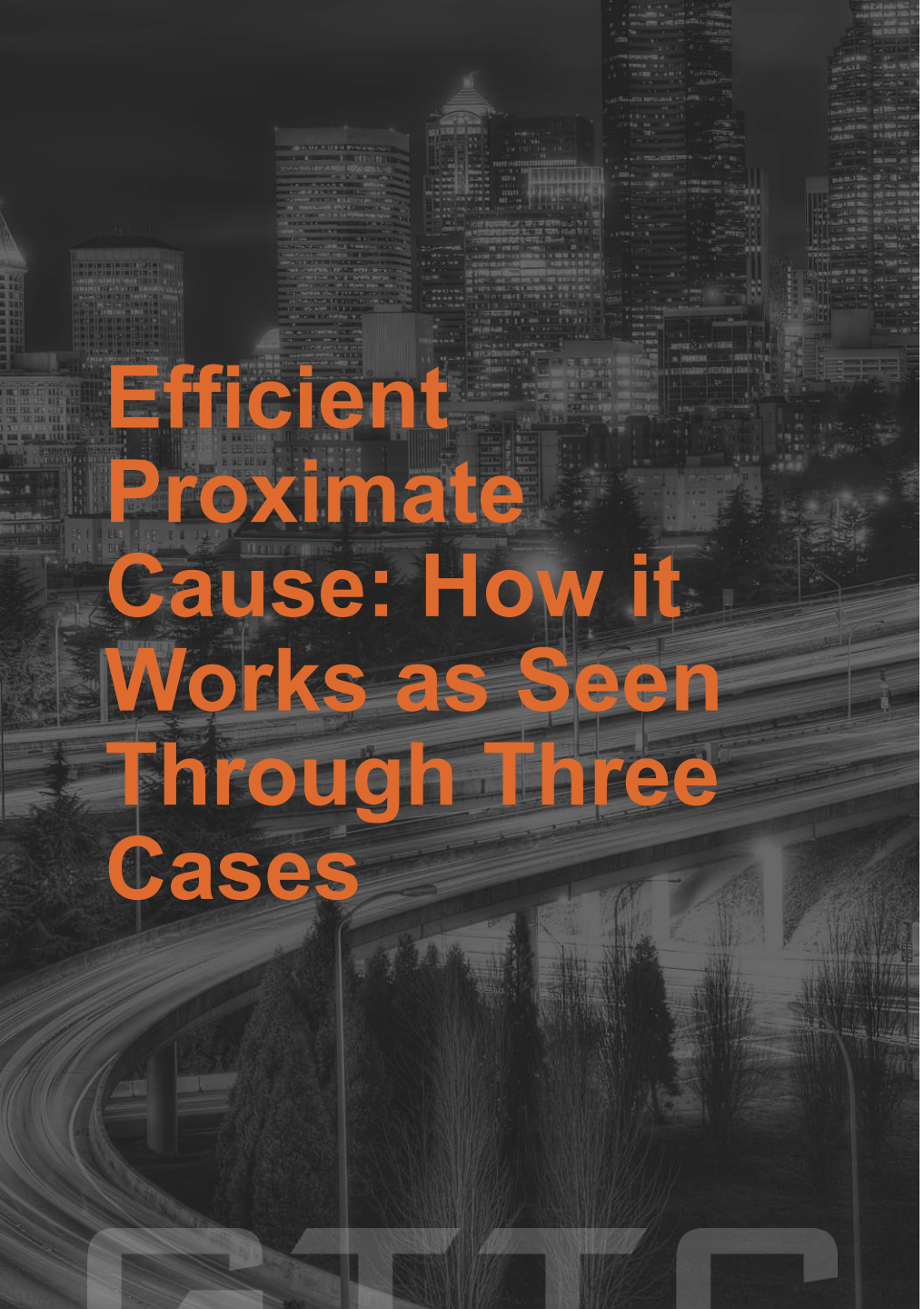
The Bare Minimum

- **Efficient Proximate Cause Rule:** pay close attention to how insuring agreements and exclusions are worded to utilize this rule.
  - *STP, The Gardens,* and *Windcrest* were a mixed bag for efficient proximate cause.
- ***Starr Indem.*:** how to negotiate a reasonable covenant judgment in the D&O context.
- ***Preferred Contractors Ins. Co.*:** claims-made and reported policies without retroactive or prospective coverage are unenforceable as against public policy.
- ***Beasley*:** Non-economic damages available under IFCA.



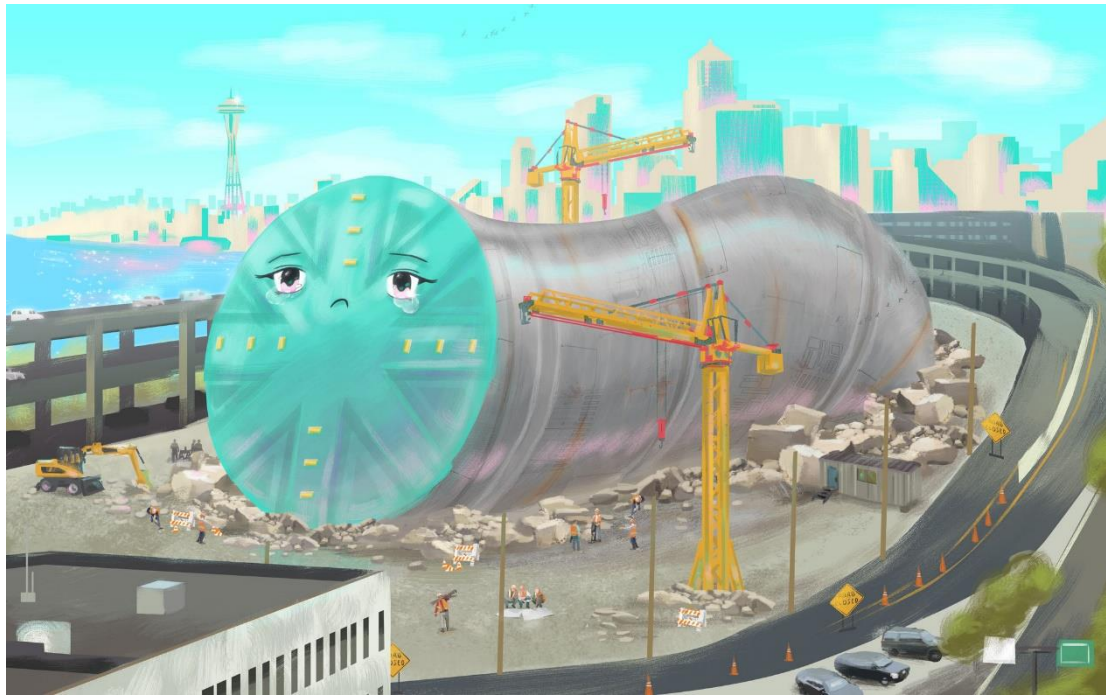
Efficient Proximate Cause: How it Works as Seen Through Three Cases

Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC, 200 Wn.2d 315, 516 P.3d 796 (2022)

- In 2011, Seattle Tunnel Partners "STP" contracted with WSDOT to replace the Alaskan Way Viaduct with a tunnel. The tunnel boring machine ("TBM") became damaged during the project and was inoperable for two years.
- STP and WSDOT tendered insurance claims to builder's risk insurer Great Lakes. Great lakes denied coverage. STP and WSDOT sued. On cross-MSJs, the trial court granted Great Lakes' motions.
- The trial court ruled, as a matter of law, that (1) the "Machinery Breakdown Exclusion" (MBE) in the Policy "excludes coverage for property damage to the TBM caused by any alleged design defects," (2) the Policy does not afford coverage for losses due to project delays, and (3) the loss of use or functionality of the tunnel does not constitute " 'direct physical loss, damage, or destruction' " that is covered by the Policy.
- The Court of Appeals affirmed. The Washington State Supreme Court accepted review.

STP Holdings

- The question before the Court was whether, as a matter of law, the MBE excludes coverage for damage to the TBM caused by the TBM's alleged *design defects*. The MBE read, “[The insurers] will not indemnify the Insured [for] ... [l]oss of or [d]amage in respect any item by its own explosion mechanical or electrical breakdown, failure breakage or derangement.” The Court held that “by its own," in the MBE, means that the exclusion applies to *internal causes* of damage to the TBM.
- The Policy's insuring clause limited coverage to *direct physical losses* and therefore did not provide coverage for nonphysical losses, such as delay costs.



The Gardens Condominium v. Farmers Ins. Exchange, 24 Wn. App. 2d 950, 521 P.3d 957 (2022)

- In 2002, the Gardens discovered water damage to its roof fireboard and sheathing due to lack of ventilation and had it repaired. In 2009, the Gardens discovered the 2002 repair was defective and that the roof continued to be damaged by water vapor and condensation.
- Farmers denied coverage under all-risk policy based on exclusion for damage caused by faulty design or repair. However, this exclusion had a "resulting loss" clause that provided that "if loss or damage by a Covered Cause of loss results, we will pay for that resulting loss or damage." The trial court granted summary judgment to Farmers, ruling that the Gardens' loss was excluded because an excluded loss, the faulty construction, began a sequence of events that resulted in the loss. The trial court refused to find that the resulting loss clause "resurrected" coverage.
- **Holdings:**
  - Resulting loss clauses narrow the applicable exclusion and provide coverage if the loss resulting from the excluded peril is otherwise covered by the policy.
  - Washington does not follow the "inverse proximate cause rule." "[W]hen an excluded peril sets in motion a causal chain that includes covered perils, the efficient proximate cause rule does not mandate exclusion of the loss."
- Cited with affirmation by *Sixty-01 Ass'n of Apt. Owners v. Pub. Serv. Ins. Co.*, No. C22-1373-JCC (W.D. Wash. Aug. 10, 2023).
- Petition for review pending before the Washington State Supreme Court.

Windcrest Owners Ass'n v. Allstate Ins. Co., 24 Wn. App. 2d 866, 524 P.3d 683 (2022)

- Condominium owner's association submitted property insurance claim for damage involving water intrusion. Expert witness submitted report noting decay, degradation, deterioration, etc. resulting in impairment to structure integrity.
- Policy provided coverage for "collapse," but excluded losses arising from faulty construction or inadequate maintenance that initiates a causal chain resulting in a covered loss.
  - The exclusion had an ensuing loss exception, but not for water damage.
- Trial court found no coverage.
- **Holdings:**
  - "Substantial impairment" to structure did not constitute collapse. No evidence that building was uninhabitable.
  - Faulty construction or inadequate maintenance exclusion applied. Water intrusion was not covered by ensuing loss provision.
  - Conclusion: No coverage.

Starr Indem. & Liability Co. v. PC Collections, LLC, 25 Wn. App. 2d 382, 523 P.3d 805 (2023)

- What is a stipulated settlement and covenant judgment?
- What makes a stipulated settlement and covenant judgment reasonable?
- The following unconventional stipulated settlement and covenant judgment is reasonable:
  - In real estate development action, settlement that allowed certain insured directors and officers to retain proceeds of policy was not unreasonable once cash purchase price for options in connection with loans was received fully by plaintiffs; the agreement did not entitle the insureds to keep insurance proceeds.
  - Court held no unjust enrichment from unconventional covenant judgment.

Preferred Contractors Ins. Co. v. Baker and Son Construction, Inc., 200 Wn.2d 128, 514 P.3d 1230 (2022)

- Insured subcontractor purchased liability policies requiring claims to be made and reported within the same policy year to qualify for coverage. No retroactive or prospective coverage.
- Federal district court certified question to Washington Supreme Court. The certified question asked: "When a contractor's liability insurance policy provides only coverage for 'occurrences' and resulting 'claims-made and reported' that take place within the same one-year policy period, and provide no prospective or retroactive coverage, do these requirements together violate Washington public policy and render either the 'occurrence' or 'claims-made and reported' provisions unenforceable?"
- Supreme Court held RCW 18.27.050 and RCW 18.27.140 create a public policy of ensuring contractors are financially responsible for injuries caused to members of the public by their negligence.
- Nonretroactive claims-made and reported policies that provide neither prospective nor retroactive coverage violate public policy and are unenforceable.

Beasley v. GEICO Gen. Ins. Co., 23 Wn. App. 2d 641, 517 P.3d 500 (2022)

- Beasley was injured as a passenger in GEICO's insured's car. Beasley demanded $100k in UIM coverage, GEICO offered $10k. GEICO refused to issue undisputed UIM payment of $10k.
- Beasley sued GEICO alleging violations of IFCA and the CPA. Trial court granted GEICO's motion to exclude noneconomic damages under IFCA.
- Court held that "actual damages" language in IFCA statute includes noneconomic damages.

Cases to Watch

- *Schiff v. Liberty Mut. Fire Ins. Co.*, 24 Wn. App. 2d 513, 520 P.3d 1085 (2022)
  - Court of Appeals held that insurer violates CPA when it fails to conduct an individualized assessment of the reasonableness of a medical provider's bills and instead relies solely on a mechanistic formula.
  - Liberty argued that this ruling conflicts with the OIC's regulations.
  - Oral argument at Washington Supreme Court scheduled for September 26, 2023.
- *The Gardens Condominium v. Farmers Ins. Exchange*, 24 Wn. App. 2d 950, 521 P.3d 957 (2022)
  - Petition for review pending.

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