

Title Insurance Litigation Committee¹



RESERVING RIGHTS OF TITLE INSURERS IN THIRD PARTY ACTIONS: WHEN AND HOW TO DO IT AND THE ETHICAL IMPLICATIONS FOR RETAINED COUNSEL

By: [James A. Bradford](#) and [Steven R. Parker](#)²

A reservation of rights is a unilateral notice by an insurer to the insured that the insurer is accepting the defense of a tendered claim but is reserving its rights to deny coverage at a later time on specified grounds. Because courts liberally construe policy provisions in favor of the insured, and insurers risk contract liability (and even tort liability in many jurisdictions) if they fail to defend, a title insurer may safely reject a tender of defense only if it is abundantly clear that there is no coverage for any portion of the complaint. If a third party action against an insured alleges any matter that arguably comes within the coverage provisions, if the insurer’s initial investigation reveals facts that might bring the complaint within the scope of coverage, or if it is simply not clear whether the policy potentially covers some claim, the insurer, through the mechanism of a reservation of rights letter, can defend the insured while preserving its defenses to coverage and its right to seek reimbursement for defense costs if the facts later establish an exclusion from coverage.

I. DUTY TO DEFEND

An insurer’s duty to defend is broader than its duty to indemnify.³ The duty to defend is measured at the outset of the litigation and arises only when the allegations in the complaint filed by the third party against the insured “give rise to a potentially covered claim.”⁴ Some courts hold that an insurer owes its insured a duty to defend only against “adverse claims raising the pos-

Continued on page 9

In This Issue:

Reserving Rights Of Title Insurers In Third Party Actions: When And How To Do It And The Ethical Implications For Retained Counsel	1
Chair’s Comments	3
Examination Under Oath As Investigative Tool	4
Notes On Recent Class Action Claims Under RESPA	6
Editor’s Note	8
2010-2011 TIPS Calendar	13

¹ Before citing any case or legislative enactment mentioned or discussed in this Newsletter, be sure that the decision has not been overruled or modified, or that the statute has not been amended, subsequent to the time these summaries were prepared.

² [James Bradford](#) and [Steven Parker](#) are attorneys at [Balch & Bingham LLP](#) in Birmingham, Alabama. They can be reached at (205) 251-8100 or jbradfor@balch.com and sparker@balch.com, respectively.

³ *Chicago Title Ins. Co. v. F.D.I.C.*, 172 F.3d 601 (8th Cir. 1999).

⁴ *Somerset South*, 873 F. Supp. at 357; see *United Bank v. Chicago Title Ins. Co.*, 168 F. 3d 37 (1st Cir. 1999) (applying Maine law).

Title Insurance Litigation Committee Newsletter Winter 2010

Chair

Homer Duvall III

6158 Bayou Grande Boulevard NE
St. Petersburg, FL 33703
(727) 455-0513
hduvalliii@hotmail.com

Chair-Elect

Jennifer Pugh Stephens

Fidelity National Title
601 Riverside Ave Bldg 5 Fl 4
Jacksonville, FL 32204-2957
(904) 854-8936
jennifer.stephens@fnf.com

Last Retiring Chair

Jerel Johnston Hill

Law Office of Jerel J Hill
1420 B Stonehollow Dr
Kingwood, TX 77339-2494
(281) 358-3560
Fax: (281) 358-0030
jerel@jjhlawoffice.com

Membership Coordinator

Marc S. Lipinski

Donnelly Lipinski & Harris LLC
29 S LaSalle St 1210
Chicago, IL 60603-1520
(312) 564-5200
Fax: (312) 564-5230
mlipinski@dlhlawoffices.com

Newsletter Editor

Roberto O. Soto

Williams Kastner & Gibbs PLLC
601 Union St Ste 4100
Seattle, WA 98101-2380
(206) 233-2941
Fax: (206) 628-6611
rsoto@wkg.com

Website Coordinator

Jesse S. Hernandez

Anderson McPharlin & Connors LLP
444 S Flower St Ste 3100
Los Angeles, CA 90071-2932
(213) 688-0080
Fax: (213) 622-7594
jsh@amclaw.com

Law Student Vice-Chair

Salim Elias Awad

610 Johnson Hill Rd Apt A
Collinsville, IL 62234-6028
salim26@msn.com

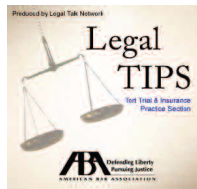
Vice-Chairs

Elwood F. Cahill Jr.

Sher Garner Cahill Richter Klein
909 Poydras St Ste 2800 Fl 28
New Orleans, LA 70112-4046
(504) 299-2103
Fax: (504) 299-2303
ecahill@shergarner.com

William Jacob Long IV

217 Dexter Ave
Birmingham, AL 35213-3721
(205) 251-3000
Fax: (205) 244-5730
jlong@burr.com



We're proud to tell you about a special legal podcast series called **Legal TIPS**

In February, the Government Law and Animal Law Committees began producing a series of internet podcast radio talk shows that air weekly on Legal Talk Network. Join the thousands already tuning in at [Legal TIPS on LTN](#).

Podcasts with global reach concerning...

CREATIVE APPROACHES TO OLD PROBLEMS

THOUGHT-PROVOKING DISCUSSIONS

CUTTING EDGE ISSUES

LEGAL TIPS

©2008 American Bar Association, Tort Trial & Insurance Section, 321 North Clark Street, Chicago, Illinois 60610; (312) 988-5607. All rights reserved.

The opinions herein are the authors' and do not necessarily represent the views or policies of the ABA, TIPS or the Title Insurance Law Committee. Articles should not be reproduced without written permission from the Tort Trial & Insurance Section.

Editorial Policy: This Newsletter publishes information of interest to members of the Title Insurance Law Committee of the Tort Trial & Insurance Section of the American Bar Association — including reports, personal opinions, practice news, developing law and practice tips by the membership, as well as contributions of interest by nonmembers. Neither the ABA, the Section, the Committee, nor the Editors endorse the content or accuracy of any specific legal, personal, or other opinion, proposal or authority.

Copies may be requested by contacting the ABA at the address and telephone number listed above.

CHAIR'S COMMENT

By: [Homer Duvall, III](#)¹



There are three tongue-in-cheek “blessings” which are purported to be curses of increasing severity:

May you live in interesting times.

May you come to the attention of those in authority.

May you find what you are looking for.

If these are actual blessings then someone certainly must have blessed the title insurance industry. Although I have worked in or for the title insurance industry for more than 40 years—and my father before me, and his father before him—I have never seen (nor heard of) any times more interesting than these for those in the title insurance industry. Faced with increasing claims, declining revenues in a faltering real estate market, fraud and theft, the title insurance industry has produced some absolutely fascinating factual scenarios for title insurance litigators. These same factors have required title insurers to find interesting means of reducing costs and increasing revenues. Moreover, title insurers and their agents have come under increasing scrutiny from those in authority, including HUD, state insurance regulators, state legislatures and the U.S. Congress.

But what of the third “blessing”? What could the title insurance industry be looking for—and what lies in store when the search yields its result? One thing title insurers are looking for are title insurance claim litigators—competent attorneys to deal with the interesting times and the attentions of those in authority. Yet, while the ABA Title Insurance Litigation Committee has grown to more than 225 members, we have actually lost membership among the in-house claims attorneys for the title insurers. In part, this is due to the “interesting times” and the “attentions of those in authority.” Increased claims, decreased revenues, increased regulatory enforcement and threats of federal regulation have forced title insurers to implement cost savings, which sometimes manifest in the insurers dropping payments of ABA or committee dues or declining to pay travel expenses to ABA meetings or CLE seminars.

However, the title insurers’ in-house attorneys are among the most knowledgeable and experienced. Consequently these attorneys have much to offer our Committee, and we have always benefited from their involvement. Because our non-in-house Committee members work regularly with the claims attorneys for the title insurers, I ask each of our members to inquire of the in-house claims attorneys how the ABA Title Insurance Litigation Committee can be more accessible and more of a benefit to the title insurance claims attorneys. Encourage the involvement of in-house claims attorneys in our Committee meetings and seminars. Send in-house claims attorneys a copy of this newsletter. Invite them to the Committee’s seminars and meetings. Let’s all work to bring value to what we do so that we can regain the talent and experience of the title insurers’ claims counsel as valued members of the Title Insurance Litigation Committee.

In 2010:

May your times be somewhat less interesting but more fruitful.

May those in authority make better use of their time finding solutions to current crises.

Finally, may you find what you need—whether you were looking for it or not. 

¹ [Homer Duvall](#) is a partner Major claims counsel at Fidelity National Title Group in Tampa, Florida. Mr. Duvall can be reached at (727) 455-0513 or hduvalliii@hotmail.com. Mr. Duvall is currently serving as the Title Insurance Litigation Committee Chair.



Examination Under Oath As Investigative Tool

By: Lore Hilburg, Esq.¹

PURPOSE OF THE EXAMINATION UNDER OATH (“EUO”)

To obtain information and evaluate the obligations of the insurer, *i.e.*, to determine coverage and/or the amount of damages.

To discourage exaggerated or improper claims and protect the insurer from fraud.

To expedite the evaluation and settlement of valid claims.

To prevent bad faith – bad faith can be the result of a failure to investigate as much as failure to make the right coverage decision. *See, Eigner v. Worthington*, 57 Cal. App. 4th 188 (1997).

To prevent the need to hire *Cumis* counsel when the insured is accused of wrongful conduct but there is a strong probability that the insured did not commit said conduct. If it becomes evident that the insured was not truthful in the EUO, the claim can later be denied on that basis. *Navy Fed. Credit Union v. Cumis Ins. Soc’y, Inc.*, 162 Cal. App. 3d 358 (1984).

THE RIGHT TO TAKE THE EUO

There has been language entitling the insurer to take an EUO in all ALTA policies and guarantees since 1987. The language is usually located in the paragraph of the Conditions entitled, “Proof of Loss”. Even in policies issued before 1987, it can be argued that there is sufficient language that entitles the insurer to take an EUO. Moreover, insurance regulations and case law requiring the insurer to conduct a thorough investigation support the right to take an EUO. *See, Eigner, supra*.

WHO, WHAT, WHERE, WHEN AND HOW

WHO Must Submit to the EUO?

The named insured.

If the insured is a corporation, the person in the corporation most knowledgeable about the transaction, but also any shareholders, directors or officers that may have information. It may also be necessary to take the EUO of employees. Not even the RTC is exempt. *First National Ins. Co. of Am v. FDIC*, 977 F. Supp. 1051 (1997).

Non-insureds.

Because of the strong emphasis placed by the courts on the duty of an insurer to properly investigate a claim, the insurer may also take the EUO of any possible witnesses. *Frommoethelydo v. Fire Insurance Exchange*, 42 Cal. 3d 208 (1986); *Hughes v. Blue Cross*, 215 Cal. App. 3d 832 (1989); *e.g.* the mortgage broker who arranged the loan secured by the insured trust deed; the purported victims of the forgery; the realtor.

“In general, I use the EUO as an opportunity not only to educate the insurer, but also to educate the insured about what her expectations should be. It also helps the insured feel confident that the insurer has heard her side and will give serious consideration to her claim.”

WHAT is an EUO?

It is an interview taken under oath in front of a court reporter. It is easier to explain what an EUO is not. It is not a deposition.

Differences Between an EUO and a Deposition

The questions asked at an EUO are often open-ended, general and seek narrative responses. The questioner is not trying to cross-examine the insured or the witness, but is looking to obtain their stories. I encourage the witness to talk as much as possible so as to explain their positions and provide the reasons for taking the actions that they did.

The EUO is far less formal than a deposition and, therefore, more relaxed. To the extent possible, the atmosphere is kept non-adversarial. This encourages the witness/insured to be open and freer with information.

The questions asked at an EUO need not lead to admissible evidence as in a deposition. Therefore, the range of questions that can be asked can often be much broader than at a deposition. It is an opportunity to get into the background of the insured/witness and find out about other transactions that may not be directly relevant but may help to understand why the insured took certain positions.

¹ Lore Hilburg practices law at the Law Office of Lore Hilburg in Los Angeles, California. Ms. Hilburg may be reached at (323) 737-4444 or Lore@HilburgLaw.com.

Unlike a deposition, where the attorney may object to questions on the grounds of relevance, privacy, *etc.*, those objections would not and should not stand at an EUO. My strategy in responding to those objections where the attorney has advised his client not to answer is to explain that the insurer's duty to investigate is very broad and that if the insured prevents that full investigation, then policy benefits are waived.

Certain privileges do not exist at an EUO and are considered waived by reason of making the claim. For example, because the knowledge of an insured's attorney is imputed to the insured, there may not be an attorney-client privilege. *Stallberg v. Western Title Insurance Co.*, Cal. App. 3d 1223 (1991). There is also support for the position that there is no privilege against self-incrimination. *Hickman v. London Assurance Corp.*, 184 C 524 (1920).

Other Advantages that an EUO has over a Deposition

An EUO is taken earlier in the process so it is closer in time to the relevant events. Thus, the memory of those events is usually fresher. Because of the timing, if other leads are provided, there is a better chance of being able to track down the leads. Witnesses or potential sources of recovery are still in the area and documents are still intact.

Because all ALTA policies and guarantees now provide for arbitration of any dispute where the policy limits are under \$1,000,000.00, there may not be a right to take a deposition. The rules of arbitration do not allow a deposition by right; permission must be sought from the arbitrator. Although it is unlikely that such a request would be denied, it is safer to have already taken the EUO.

The insurer may be entitled to take a deposition of the same person(s) of whom it took the EUO during subsequent litigation or an arbitration. By the time the deposition is taken, a lot more information may be known so that additional questions may be asked. The EUO often provides the leads for that additional information.

Until a demand for the EUO has been met by the insured, arbitration and/or litigation is premature. *Globe Indemnity v. Superior Court*, 6 Cal. App. 4th 725 (1992).

WHEN to take the EUO?

There are two competing factors. The first is the need to obtain information as quickly as possible from the best

source possible, which is usually the insured. There is also a need to pin the insured's story down as soon as possible. In addition, California Insurance Code Section 790.03(h)(3) and Insurance Regulation 2693.5(e) impose a duty upon the insurer to begin the necessary investigation within 15 days of the "notice of claim".

On the other hand, the insurer wants to have as much information as possible about the transaction so that the right questions are asked. I prefer to obtain all of the insured's documents as well as documents from any other source, *i.e.*, the lender, the escrow, the real estate agent, the seller, the buyer, the creditor, the governmental agency, *etc.*, before taking the EUO. That way, I can question the insured about the documents. However, often the insured will not provide the documents ahead of the EUO, or the identity of the other witnesses is not known until after the EUO is taken. If that is true, then the insurer should reserve its right during the EUO to continue taking the EUO once the remaining documents are obtained and reviewed.

The insured should be told as soon as possible of the insurer's demand for the EUO. Usually, I send out the initial letter asking for information and documents and reserve the right to take the EUO, if the review of the documents or other investigation deems it necessary.

When making the demand for the EUO, I always advise the insured/witness that they are entitled to be represented by their own counsel, but remind them that the policy does not provide coverage for those attorney's fees and costs and that said fees and costs will not be reimbursed by the insurer.

The courts in *Globe* and *Hickman* have reiterated that an EUO can be demanded even after an informal interview or a recorded statement.

WHERE to take the EUO?

I let the insured decide the location. Usually, it is taken at their attorney's office, but sometimes it is taken at their own office, when they are not represented, or even at their home. This makes the insured more comfortable and their attorney feel more in control. I offer to take it on weekends, if necessary, to accommodate an insured's work schedule.

HOW to take an EUO?

How Long Does it Take? This question is often asked by the insured/witness. It rarely takes less than 3 hours even for the simplest EUO. In complicated cases with multiple parties, the EUO can stretch over several days, particularly where there are a lot of documents.

Where there are multiple insureds, *i.e.*, husband and wife, officers of the corporation, *etc.*, the insurer is entitled to take their EUOs separately so that one cannot hear what the other says. *State Farm Fire and Casualty Company v. Tan*, 691 F. Supp. 1271 (SD CA 1988). However, as a strategy, I sometimes let the husband and wife or related parties sit in with each other. They often get the opportunity to talk to each other anyway. See also, Section III (2) (a), *supra*.

REFUSAL TO SUBMIT TO AN EUO

If the insured refuses to submit to an EUO, the insurer is protected from paying policy benefits and

may not have to provide a coverage decision. *Globe, supra*, which also cites *Hickman, supra*. The court cases have confirmed that an EUO can be taken in front of a court reporter *Globe, supra*.

CONCLUSION

In general, I use the EUO as an opportunity not only to educate the insurer, but also to educate the insured about what her expectations should be. It also helps the insured feel confident that the insurer has heard her side and will give serious consideration to her claim. ⚖️



NOTES ON RECENT CLASS ACTION CLAIMS UNDER RESPA

By: [Shawn Rediger](#)¹

This article examines two recent decisions involving class action lawsuits brought under the Real Estate Settlement Procedures Act of 1974² (“RESPA”) in which the plaintiffs alleged they were overcharged for lender’s title insurance policies purchased in connection with refinance transactions.

THE 4TH CIRCUIT LOOKS TO STATE LAW AND ADMINISTRATIVE REMEDIES

In *Arthur v. Ticor Title Insurance Co.*, the plaintiffs brought a class action lawsuit on behalf of “thousands” of consumers, including a claim for restitution (or “money had and received”), who sought a refund of alleged overcharged premiums for lender’s policies.³ The plaintiffs alleged that the state-approved rate schedule entitled homeowners to a 40 percent discount for lender’s policies on refinance transactions.⁴ Plaintiffs asserted that Ticor’s agents failed to apply this discount.⁵ The plaintiffs further claimed that they were charged for lender’s extended coverage policies

that provided additional insurance not required by their lenders.⁶ The plaintiffs also asserted violations of RESPA, negligent misrepresentation and civil conspiracy. The trial court dismissed all of the claims and never reached the class certification issues.⁷

The Fourth Circuit Court of Appeals affirmed the trial court’s dismissal of the restitution claim, because the plaintiffs had not exhausted their administrative remedies under the Maryland insurance code.⁸ Maryland, like many states, requires title insurers to obtain approval for their rate schedule from the state, and to comply with those rates when selling title insurance to the public.⁹ The Court of Appeals found that the Maryland insurance code authorizes the state insurance commissioner to order restitution for alleged overcharges of insurance premiums.¹⁰ The court further found that administrative remedies are presumed to be primary remedies under Maryland law and that the presumption is rebutted only where a claim is “wholly independent” of the statute that provides the remedy.¹¹ The court explained that a claim to recover title insurance premiums in excess of the filed rate cannot be

¹ Shawn Rediger is an attorney at [Williams Kastner](#) in Seattle, Washington. Ms. Rediger can be reached at (206) 628-2788 or SRediger@williamskastner.com.

² 12 U.S.C. § 2607.

³ *Id.* at 157.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ 569 F.3d 154, 161 (4th Cir. 2009).

⁹ *Id.* at 156.

¹⁰ *Id.* at 161.

¹¹ *Id.*

“independent” of the insurance code because such a claim cannot, by definition, exist without the statutorily-required filed rates that the premiums allegedly exceed.¹²

The court also rejected the plaintiffs’ assertion that their claim for restitution was independent of the insurance code because a money had and received cause of action existed at common law. The court stressed the importance of the Insurance Commissioner’s expertise in resolving the claim:

The Commissioner would be in a better position than a federal court to determine, for example, whether plaintiffs are correctly interpreting the rate structure that Tigor filed with the Commissioner [and if] Tigor violated the Insurance Code’s prohibition on “willfully” charging excessive rates . . . Second, the Commissioner’s expertise also will be important in determining the proper remedy for any violation by Tigor . . . It therefore makes sense for the Insurance Commissioner to exercise his expertise in the first instance in determining whether full restitution to plaintiffs is warranted. Furthermore, the Insurance Code grants the Commissioner the authority to impose a wide variety of other remedial measures, such as cease and desist orders, revocation of certificates of authority to sell insurance, and monetary penalties . . . The Maryland legislature surely intended for the Commissioner to exercise his expertise in choosing among these remedies for a violation of the Code.¹³

The Court of Appeals also affirmed the dismissal of plaintiffs’ RESPA claim since the plaintiffs were charged for settlement services that were actually performed.¹⁴ The court concluded that “[RESPA] Section 8(b) does not prohibit charging ‘too much’ for services actually performed; instead they have held that an allegation that services were not performed is necessary for liability to attach under Section 8(b).”¹⁵ Because Tigor and its agents performed services in consideration for the fees that they collected, the court concluded that the plaintiffs’ theory of liability conflicted with RESPA’s

statutory text and the Fourth Circuit’s previous recognition that RESPA is not a price control statute.¹⁶ Plaintiffs argued that the amount charged for title insurance should be divided into valid and invalid parts based on state law. The court disagreed, relying on a similar decision in the Eleventh Circuit.¹⁷

THE 5TH CIRCUIT LOOKS AT CLASS ACTION ON RESPA AND STATE CLAIMS

In *Mims v. Stewart Title Guaranty Company*, the Fifth Circuit considered whether plaintiffs can certify a class under Section 8(b) of RESPA based on a claim that a service provider’s fee bears no relationship to the service provided.¹⁸ Like *Arthur*, *Mims* involved mandatory discounts on premiums for title insurance policies purchased from the same insurer when borrowers refinanced their home mortgages. Plaintiffs alleged that Stewart Title Guaranty Company consistently failed to provide them with the required discount and that Stewart and its agents split the illegal and unearned charges for the policies.¹⁹ Stewart brought a motion to dismiss that was denied. The district court then certified the class.²⁰ Stewart appealed, arguing that the district court erred in certifying a class because (1) plaintiffs lacked standing, (2) class issues did not predominate with respect to plaintiffs’ RESPA claims and (3) the certified class was overbroad with respect to plaintiffs’ state law claims.

The Fifth Circuit Court of Appeals found that plaintiffs had standing but declined to address the question of whether plaintiffs had stated a claim under RESPA because the question of class certification “does not permit a general inquiry into the merits of plaintiffs’ claims.”²¹ The court then considered whether a class action was the superior method by which to try the RESPA claims.²² Plaintiffs argued that by failing to provide the discount, Stewart had charged them an “excess amount” which represented a “charge for which no services were actually provided” under RESPA.²³ The district court had agreed with the plaintiffs, finding that “Stewart’s split with the title agents

¹² *Id.*

¹³ *Id.* at 161-162.

¹⁴ *Id.* at 157-159.

¹⁵ *Id.* at 159-160.

¹⁶ *Boulevard v. Crossland Mortgage Corp.*, 291 F.3d 261, 265 (4th Cir. 2002).

¹⁷ *Hazewood v. Foundation Financial Group, LLC*, 551 F.3d 1223, 1224-25 (11th Cir. 1008).

¹⁸ 2009 WL 4642631 (5th Cir. December 9, 2009).

¹⁹ *Id.* at *1.

²⁰ *Id.* at *2.

²¹ *Id.*

²² *Id.* at *4.

²³ *Id.* at *4.

Statutory schemes governing insurance premiums differ from state to state. A thorough analysis of a state's insurance provisions may provide insureds and insurers the basis for bringing arguments and defenses similar to those in *Arthur and Mims* regarding RESPA claims, administrative remedies and class certification issues.

may not have been for services actually performed, and hence, in violation of section 8(b), if the title agent's compensation was not reasonable in relation to the services they [sic] performed."²⁴ The Court of Appeals, however, did not address the issue, but instead concluded that the class action model was not superior because "the district court's liability model for violations of RESPA § 8(b) requires an inquiry into the facts of each individual class member's title insurance transaction."²⁵

The Court of Appeals also considered the question of whether the district court abused its discretion in

granting class certification on plaintiffs' state law claims for money had and received, unjust enrichment and implied contract. The Court of Appeals found that the district court did not abuse its discretion in certifying a class on the state law claims. Because of the finding that plaintiffs were barred from bringing class claims on their RESPA cause of action, however, the Court of Appeals remanded to the trial court to determine if it still had jurisdiction over the remaining state law claims.²⁶

CONCLUSION

Statutory schemes governing insurance premiums differ from state to state. A thorough analysis of a state's insurance provisions may provide insureds and insurers the basis for bringing arguments and defenses similar to those in *Arthur and Mims* regarding RESPA claims, administrative remedies and class certification issues. ⚖️

²⁴ *Id.* at *4-5.
²⁵ *Id.* at *6.
²⁶ *Id.* at *8.



EDITOR'S NOTE

By: [Roberto O. Soto](#)¹

The Title Insurance Litigation Committee will be holding its Spring 2010 Meeting on March 4-6 at the Renaissance Mayflower Hotel in Washington, D.C. We have negotiated a special rate of \$229 per night, but spaces are limited, so please reserve your room soon. The reservation numbers are (800) 468-3571 and (202) 347-3000. Please reference the "Title Insurance Litigation Committee of ABA". The seminar fee will be \$150 and payable to Homer Duvall. All inquiries can be directed to me.

The program for Thursday, March 4 is an informal dinner at a location to be determined. The CLE program takes place on Friday, March 5 at the hotel. We have a great lineup of speakers, including a panel of in-house claims counsel who will give us their insights on the state of the title insurance industry. Friday night we will hold our traditional dinner for networking and socializing. Our business meeting will be held on Saturday morning. If you have never been to one of the committee's meetings, I encourage you to come to Washington. In addition to the informative CLE and the great networking opportunity, the setting could not be any better. Washington, D.C. is a great place to visit, even in March.

Our next meeting will be held during the ABA Annual Meeting in San Francisco, California from August 5-10, 2010. The committee will also be sponsoring a CLE at the ABA meeting. We will send out an email with more information when the dates are confirmed.

Finally, if you have an article idea for a future newsletter, please contact me. Publishing articles is a great way to get your name out to colleagues and potential referral sources. I hope to see you in Washington. ⚖️

¹ Roberto Soto is an attorney at [Williams Kastner](#) in Seattle, Washington. Mr. Soto can be reached at (206) 233-2941 or RSoto@williamskastner.com. Mr. Soto is currently serving as the Title Insurance Litigation Committee Newsletter Editor.

RESERVING RIGHTS...

Continued from page 1

sibility of coverage.”⁵ Thus, if the claims asserted against the insured are not potentially (or “possibly”) covered under the policy, the insurer has no duty to defend. Most courts acknowledge and attempt to apply this “complaint allegation rule” in cases involving a title insurer’s duty to defend.⁶ Other courts have not limited the duty to defend to the allegations of the complaint, but have expanded the duty to encompass additional facts known to the insured or learned by it during its investigation or even during the course of litigation.⁷

Frequently, the third-party complaint filed against the insured contains numerous counts, some of which are arguably within the coverage of the title policy, while others clearly are not. The general rule in insurance cases is that the insurer must defend the whole case until it becomes apparent that no recovery is possible under any theory.⁸ Nevertheless, given the contractual limitations on defenses set forth in the standard title policy forms, an Eighth Circuit ruling, *Enron v. Lawyers Title Ins. Corp.*⁹, provides authority for the proposition that both defense responsibilities and associated costs may be allocated among covered and non-covered claims.

The *Enron* rationale may provide a basis for obtaining an apportionment of both defense responsibilities and costs at the outset of a claim, unless the applicable jurisdiction strongly embraces the “in for one, in for all” rule regarding the duty of defense by an insurer. The insurer should, therefore, review the complaint to determine the extent to which non-covered matters are contained in separate counts and causes of action and the extent to which the underlying allegations relate to separate counts or are common to both covered and

non-covered grounds. This analysis should assist in determining the practicality of any proposed allocation. On this basis, perhaps, an arrangement can be made with the insured and its personal counsel that will allow joint representation of the insured with an agreement as to the splitting of defense costs between counts that are clearly not covered and those that may be covered. The agreement should not preclude the insurer from seeking declaratory relief as to its duties for matters that are subject to the reservation of rights.

II. RESERVATION OF RIGHTS

Notice of an insurer’s reservation of rights must be in writing, must clearly and fairly inform the insured of the insurer’s position, and must be submitted in a timely fashion. An insurer may reserve its rights only by sending written notice to its insured; the insured’s actual knowledge of the policy contents is irrelevant.¹⁰ Proper notice can be given to a representative of the insured¹¹, though not to the attorney hired by the insurer to represent the insured.¹² Notice sent to one partner is sufficient to establish notice to other partners.¹³ The burden is on the insurer to prove that a reservation of rights letter was, in fact, sent to the insured.¹⁴

The reservation of rights letter must fairly inform the insured of the insurer’s position. The test is whether the letter would inform a person of average intelligence that the insurer is claiming policy defenses to the underlying litigation.¹⁵ Some courts have held that a generalized reservation of rights is adequate.¹⁶ The better practice is to provide a more detailed discussion of policy provisions and why no coverage exists for certain claims.¹⁷

Once proper notice is given, the insurer’s participation in, and investigation and defense of a claim will not operate to waive or estop the insurer from raising any

⁵ See e.g., *Morgan v. Chicago Title Ins. Co.*, 65 Fed. Appx. 184 (9th Cir. 2003) (applying Hawaii law).

⁶ See e.g., *Morgan v. Chicago Title Ins. Co.*, supra; *Pioneer Nat. Title Ins. Co. v. Fourth Commerce Properties Corp.*, 487 So. 2d 1051 (Fla. 1986); *Cheverly Terrace Partnership v. Tigor Title Ins. Co.*, 642 A.2d 285 (Md. Ct. App. 1994); *Gebrayel v. Transamerica Title Ins. Co.*, 888 P.2d 83 (Or. Ct. App. 1995); *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E. 2d 916 (S.C. Ct. App. 1994); *Daca, Inc. v. Commonwealth Land Title Ins. Co.*, 822 S.W. 2d 360 (Tex. Civ. App. 1992).

⁷ *Ginger v. American Title Ins. Co.*, 185 N.W. 2d 54 (Mich. Ct. App. 1970).

⁸ See e.g., *Advance Watch Co. v. Kemper Nat. Ins. Co.*, 878 F. Supp. 1034 (E.D. Mich. 1995).

⁹ 940 F.2d 307 (8th Cir. 1991); see *Buss v. Superior Court*, 65 Cal. Rptr. 2d 366 (Cal. Ct. App. 1997) (Kennard J. dissenting) (noting that title insurers state their defense obligation in terms of particular causes of action).

¹⁰ *Knox-Tenn Rental Co. v. Home Ins. Co.*, 2 F.3d 678 (6th Cir. 1993) (applying Tennessee law); *Alliance Ins. Co. v. Colella*, 995 F.2d 944 (9th Cir. 1993) (applying California law).

¹¹ *Equity Gen. Ins. Co. v. C & A Realty Co.*, 715 P.2d 768 (Ariz. 1985).

¹² *Knox-Tenn Rental Co. v. Home Ins. Co.*, supra.

¹³ *State Farm Fire & Cas. Co. v. Jioras*, 29 Cal. Rptr. 2d 840 (Cal. Ct. App. 1994).

¹⁴ *Alliance Ins. Co. v. Colella*, supra.

¹⁵ *Equity Gen. Ins. Co. v. C & A Realty Co.*, 715 P.2d 768 (Ariz. Ct. App. 1985); *United Nat. Ins. Co. v. Waterfront N.Y. Realty Corp.*, 948 Supp. 263 (S.D.N.Y. 1996) (letter must give fair notice of insured’s intention to assert coverage defenses).

¹⁶ See, e.g., *State Farm Fire & Cas. Co. v. Jioras*, supra; *California Union Ins. Co. v. Poppy Ridge Partners*, 274 Cal. Rptr. 191 (Cal. Ct. App. 1990).

¹⁷ See *Manzanita Park, Inc. v. Insurance Company of North America*, 789 F.2d 1196 (5th Cir. 1986) (applying Texas law); *Ideal Mutual Ins. Co. v. Myers*, 857 F.2d 549 (9th Cir. 1988) (applying Arizona law).

coverage defense described in the notice.¹⁸ Failing this, if the insurer assumes the defense of an action against its insured without reserving its rights, and with either actual or presumed knowledge of facts that would have allowed it to deny coverage, it may be estopped from subsequently raising a coverage defense.¹⁹

The 2006 ALTA policy forms state that the title insurer shall provide for the defense of an insured “without unreasonable delay.” In the absence of statute or other governing law, whether a reservation of rights letter is timely is a question of fact to be determined in each case.²⁰

III. SUGGESTED RESERVATION LETTER

Because a reservation of rights letter should fairly inform the insured of the insurer’s position and must clearly and unambiguously reserve rights under the particular policy provisions or exclusions, the letter should accomplish the following, as tailored to the circumstances of the particular claim:²¹

Acknowledge receipt of the written request or tender by the insured.

Describe the claim and discuss any relevant investigation to demonstrate to the insured that the insurer understands the nature of the claim and has investigated and reviewed the relevant and available information.

Identify the particular title policy under which claim has been made.

Refer to, or preferably quote, each policy provision that forms the basis for a potential coverage defense and explain those provisions that, when applied to the facts of the claim, may result in a denial of coverage.

State that the reservation of rights letter is not a denial of coverage or any abridgment of the insured’s rights under the policy terms.

State that any action taken by the insurer in connection with the claim is not an admission of liability or coverage under the policy and should not be deemed a waiver of any right to disclaim liability or coverage under the policy, and that the insurer specifically reserves all rights and defenses it has under the policy.

Reserve the insurer’s rights to modify or amend its coverage position and to assert defenses based on any of the policy provisions, whether or not specifically mentioned in the letter. This may be effective only as to defenses predicated on matters learned after the insurer sends the reservation of rights letter.

Identify the lawyer or law firm retained to defend the insured.

In California, give the notice required under Cal. Civ. Code § 2860.

Request any additional information needed from the insured.

Consider sending the notice by certified mail.²²

IV. INSURED’S REFUSAL OF AN INSURER’S TENDER OF DEFENSE

Because it is accomplished by unilateral notice, the reservation of rights differs from a non-waiver agreement, which is a bilateral written agreement in which the insured consents to the insurer’s investigation and participation in the litigation without waiving its defenses to coverage.²³ In some jurisdictions, an insured may refuse an insurer’s tender of defense under a reservation of rights.²⁴ Other courts hold that the insurer has the right to appoint counsel, and that the insured cannot claim breach of contract for so doing.²⁵ California has both statutory and case law on the subject.²⁶

Some courts hold that when an insured fails to object to the reservation of rights letter, it is deemed to have impliedly consented to the insurer’s terms.²⁷ Other

¹⁸ *Premier Homes, Inc. v. Lawyers Title Ins. Corp.*, 76 F. Supp. 2d 110 (D. Mass 1999) (applying Massachusetts law).

¹⁹ *First United Bank of Bellevue v. First American Title Ins. Co.*, 496 N.W.2d 474 (Neb. 1993).

²⁰ *Compare* N.Y. Ins. Law § 3420(d); Fla. Stat. § 627.426(2); Va. Code § 38.2-2226 with *Ideal Mut. Ins. Co. v. Myers*, 789 F.2d 1196 (5th Cir. 1986) (under Texas law, reservation two months after suit filed held timely) and *Fire Ins. Exchange v. Fox*, 423 N.W. 2d 325 (Mich. Ct. App. 1986) (four months after suit held timely).

²¹ See generally, Robert N. Kelly & Mark A. Goodin, *Notice, Investigation, and Reservation of Rights*, The Brief, Summer 1994 at 20.

²² See *Alliance Insurance Co.*, 995 F. 2d 944 (unsigned copy of letter insufficient to prove delivery to insured).

²³ *American Home Assurance Co. v. Glenn Estess & Assoc.*, 763 F.2d 1237 (11th Cir. 1985) (applying Alabama law); *Motorists Mut. Ins. Co. v. Trainor*, 294 N.E. 2d 874 (Ohio 1973).

²⁴ *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 120 (5th Cir. 1983); see *U.S. Underwriters, Ins. Co. v. TNP Trucking, Inc.*, 44 F. Supp. 2d 489 (E.D.N.Y. 1999) (applying New York law) (while insured may refuse the limited defense, there are practical, i.e., financial, reasons why it may decide not to incur the cost of retaining its own counsel of its own choice).

²⁵ See *American Home Assurance Co. v. Glenn Estess & Assoc.*, 763 F.2d 1237 (once insurer follows established practice of giving notice of its reservation of rights, it does not breach insurance contract and is not obligated to reimburse insured when the insured refuses to accept the defense offered).

²⁶ *Native Sun Inv. Group v. Ticor Title Ins. Co.*, 235 Cal. Rptr. 34 (Cal. Ct. App. 1987); Cal. Civ. Code § 2860.

²⁷ *Jacore Systems, Inc. v. Central Mut. Ins. Co.*, 390 S.E. 2d 876 (Ga. Ct. App. 1990) (suggesting that insurer should file a declaratory judgment to avoid waiver and estoppel).

courts, however, have held that an insured's silence will be construed only as implied consent if the reservation of rights letter advises the insured of its right to reject the tendered defense and obtain its own counsel.²⁸

V. DEALING WITH CONFLICTS OF INTEREST: THE INSURER'S AND RETAINED COUNSEL'S RELATION WITH THE INSURED

The insurer's reservation of rights creates a situation in which an actual or potential conflict of interest may exist between it and the insured. Depending on the jurisdiction, the reservation of rights may obligate the insurer to provide independent counsel to the insured, or, assuming that the insurer is allowed to select defense counsel, impose strict ethical requirements on the appointed counsel.

A. Relation of Insurer to Insured

As the Fifth Circuit has noted an "insurer's duty to defend the insured may conflict with the insurer's right to raise defenses against the insured."²⁹ Although the question whether the insured is entitled to have "independent" counsel paid by the insurer was not specifically addressed, the court recognized that when a reservation of rights is made, the insured may "properly refuse the tender of defense and pursue his own defense."³⁰ In those cases when the insured elects to pursue his own defense, the insurer would be bound to pay the damages which resulted from covered conduct, and which were reasonable and prudent, up to policy limits.³¹ Thus, there is no breach of the duty to defend, and the insurer does not lose its ability to deny coverage.

The question whether a title insurer must pay for the services of independent counsel selected by the insured touches the issues and policies discussed in *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*,³² and its progeny. In *Cumis*, a liability insurer agreed to defend the insured in third-party litigation under a reservation of rights as to certain issues relating to coverage. The California court determined that a

"The insurer's reservation of rights creates a situation in which an actual or potential conflict of interest may exist between it and the insured. Depending on the jurisdiction, the reservation of rights may obligate the insurer to provide independent counsel to the insured, or, assuming that the insurer is allowed to select defense counsel, impose strict ethical requirements on the appointed counsel."

conflict of interest was created as a result of the reservation of rights, and held that the insured was entitled to have its insurer pay reasonable expenses of hiring independent counsel. Thus, the insurer was not allowed to require its insured to relinquish control of the litigation. Three years after the *Cumis* ruling, the California legislature enacted Section 2860 of the California *Civil Code*, which requires an insurer, in certain situations, to offer to pay for independent counsel; notably in situations where the insurer agrees to provide the insured with a defense subject to a reservation of rights which creates a conflict of interest.³³ However, the *Cumis* rule, as modified by statute, does not automatically authorize the insured to hire independent counsel at the expense of the insurer when there has been a reservation of rights.

In *Native Sun Investment Group v. Ticor Title Ins. Co.*,³⁴ the California Court of Appeals affirmed the lower court's ruling that there was no conflict requiring the insurer to pay the fees of counsel other than the defense counsel it had retained for its insured, notwithstanding the reservation of rights. This holding seems to give proper effect to the limiting language in the title policy that the insurer "shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action" and "shall not be liable for and will not pay the fees of any other

²⁸ *E.g., Merchants Indem. Corp. v Eggleston*, 179 A.2d 505 (N.J. 1962).

²⁹ *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 120 n.6 (5th Cir. 1983).

³⁰ *Id.* at 120.

³¹ *Id.* at 121.

³² 162 Cal. App. 3d 358 (Cal. Ct. App. 1984).

³³ Cal. Civ. Code § 2860. (a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section. (b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

³⁴ 235 Cal. Rptr. 34 (Cal. Ct. App. 1987).

counsel.”³⁵ Some jurisdictions embrace a strict notion of the *Cumis* rule.³⁶ Other courts have held that a reservation of rights does not deprive the insurer of its ability to appoint counsel for the insured.³⁷

B. Relation of Defense Counsel to Insured

The relation between defense counsel appointed by an insurer, and the insured for whom services are being provided, has been summarized as follows:

When a carrier establishes a professional relationship between itself, a defense lawyer, and an insured, rules of professional responsibility come into play. As the ABA Committee on Professional Ethics recently observed:

The Model Rules of Professional Conduct offer virtually no guidance as to whether a lawyer retained and paid by an insurer to defend its insured represents the insured, the insurer, or both. The Model Rules assume a client lawyer relationship established in accordance with state law, and prescribe the ethical obligations of the lawyer that flow from that relationship.

It is a defense lawyer’s responsibility to see that these ethical obligations are met.³⁸

These professional responsibility issues exist in all insurance defense work undertaken by an attorney, but are of particular significance in cases in which the insurer has reserved its right to deny coverage to the insured, while at the same time providing defense counsel of its own choosing to represent the insured. Retained counsel must therefore be aware of and comply with the case law of the particular jurisdiction as well as the applicable rules of professional responsibility and bar ethics opinions.³⁹

VI. CONCLUSION

The reservation of rights notice is the generally accepted method by which a title insurer may undertake its duty to defend its insured in third party action while preserving any underlying coverage question for later resolution. At the same time, the decision to reserve rights has ramifications not only with respect to the insurer-insured relation, measured by the contract and the applicable insurance law, but also with respect to the standards of conduct imposed on retained counsel for the insured. ⚖️

³⁵ 2006 ALTA Owner’s and Loan Policies, Conditions and Stipulations ¶ 5.

³⁶ See e.g., *Moeller v. American Guar. & Liab. Ins. Co.*, 707 So. 2d 1062 (Miss. 1996).

³⁷ *Twin City Fire Ins. Co. v. Ben-Arnold Sunbelt Beverage Co.*, 433 F. 3d 365 (4th Cir. 2005) (applying South Carolina law); *L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298 (Ala. 1987); *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133 (Wash. 1986).

³⁸ Pryor & Silver, *Defense Lawyer’s Professional Responsibilities: Part I – Excess Exposure Cases*, 78 TEX. L. REV. 599, 663-64 (2000).

³⁹ See, e.g., *U.S. Underwriters Ins. Co. v. TNP Trucking Inc.*, *supra*; *L&S Roofing*, 521 So. 2d at 1303; *Givens v. Mullikin*, 75 S.W. 3d 383 (Tenn. 2002); *Farmers Ins. Co. of Arizona v. Vagnozzi*, 675 P.2d 703 (Ariz. 1983).

**VISIT US ON
THE WEB AT:**

<http://www.abanet.org/tips/title/home.html>

2010-2011 TIPS CALENDAR

April

- 8-9 2010 Emerging Issues in Motor Vehicle Product Liability Litigation** Arizona Biltmore Resort & Spa
Phoenix, AZ
Contact: Donald Quarles – 312/988-5708
- 9-10 19th Annual Toxic Torts Spring CLE Meeting** Arizona Biltmore Resort & Spa
Phoenix, AZ
Contact: Debra D. Dotson – 312/988-5597
- 17-21 TIPS/ABOTA National Trial Academy** Grand Sierra Resort & Spa
Reno, NV
Contact: Donald Quarles – 312/988-5708

May

- 6-7 FSLC Spring Meeting** Loews New Orleans Hotel
New Orleans, LA
Contact: Donald Quarles – 312/988-5708
- 12-16 TIPS Spring Leadership Meeting** Ritz-Carlton Hotel
San Juan, PR
Contact: Felisha A. Stewart – 312/988-5672

August

- 5-10 ABA Annual Meeting** TBD
San Francisco, CA
Contact: Felisha A. Stewart – 312/988-5672
Speaker Contact: Donald Quarles - 312/988-5708

2011

February

- 9-15 ABA Midyear Meeting** TBD
Atlanta, GA
Contact: Felisha A. Stewart – 312/988-5672

August

- 5-10 ABA Annual Meeting** TBD
Toronto, Canada
Contact: Felisha A. Stewart – 312/988-5672
Speaker Contact: Donald Quarles - 312/988-5708