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# Where Has All the Coverage Gone? Trends in Claims Made Policies, Cost Erosive Policies, Sub-Limits of Liability and Group Aggregate Limits


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***Where Has All the Coverage Gone? Trends in Claims Made Policies, Cost Erosive Policies, Sub-Limits of Liability and Group Aggregate Limits***

## I. Overview Of The Causes Of Increased Narrowing Of Coverages

### A. SAM Claims Generally: History Of Increasing Claims And Judgment/Settlement Value

1. In 2007, the Archdiocese of Los Angeles paid $660 million[1], and certain clergy in San Diego paid a total of $198.1 million,[2] to settle child sexual abuse claims.

2. In 2018, Michigan State University paid $500 million to settle claims brought by victims of sports doctor Larry Nassar.[3]

3. In May 2018, the Torrance Unified School District paid $31 million to settlement molestation claims brought by 25 students against a wrestling coach.[4]

4. In 2019, the University of Southern California paid $215 million to settle claims brought by victims of gynecologist George Tyndall.[5]

5. Local news reporting indicates that between 2016 and 2021, Redlands Unified alone had paid some $41 million in settlements to students on account of alleged sexual abuse, harassment and molestation.[6]

### B. An Increase In High Value Property Losses

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[1] https://www.nbcnews.com/id/wbna19762878

[2] https://www.nytimes.com/2007/09/08/us/08church.html

[3]https://www.npr.org/sections/thetwo-way/2018/05/16/611624047/michigan-state-university-reaches-500-million-settlement-with-nassar-abuse-victi

[4] https://losangeles.cbslocal.com/2018/05/09/torrance-unified-31m-settlement-sex-abuse-victims-wrestling-coach/

[5]https://www.wsj.com/articles/university-of-southern-california-to-pay-215-million-in-gynecologist-sex-abuse-case-1539965772

[6]https://www.redlandsdailyfacts.com/2021/09/23/redlands-unified-pays-11-million-to-settle-another-sex-abuse-lawsuit/

The combination of drought, global warming, and the expansion of fire "season" to encompass nearly the entire year, has led to historic high property loss claims.

1. A northern California pool sustained losses of $82 million in 2018 and $12 million the year before.

2. Heavy losses sustained by a pool in Central California two years in a row.

3. Heavy loss to a pool with locations in the Santa Monica and Malibu areas in 2018.

**C. All Of The Above Is Driving Historic Increases In Premium Costs**

As an example, the premiums of Self Insurance Schools of California II have increased substantially as outlined below.

| Year | 1st Layer Premium | Total Premium | ADA | Premium / ADA | Annual % Inc / Dec |
|---|---|---|---|---|---|
| 2013 | $ 1,271,900.00 | $ 1,556,643.00 | 395,928 | $ 3.9316 | 2.024% |
| 2014 | $ 1,390,500.00 | $ 1,707,532.00 | 412,153 | $ 4.1430 | 5.375% |
| 2015 | $ 1,462,300.00 | $ 1,791,659.00 | 420,014 | $ 4.2657 | 2.963% |
| 2016 | $ 1,357,080.00 | $ 1,686,439.00 | 385,697 | $ 4.3724 | 2.502% |
| 2017 | $ 1,372,560.00 | $ 1,826,598.00 | 390,328 | $ 4.6796 | 7.026% |
| 2018 | $ 1,471,632.00 | $ 1,951,952.00 | 391,760 | $ 4.9825 | 6.472% |
| 2019 | $ 1,693,050.00 | $ 2,306,330.00 | 389,110 | $ 5.9272 | 18.960% |
| 2020 | $ 1,735,000.00 | $ 3,931,589.00 | 389,110 | $ 10.1041 | 70.469% |
| 2021 | $ 1,845,938.00 | $ 4,278,662.00 | 352,952 | $ 12.1225 | 19.977% |
| 2021-22 | $ 2,103,594.00 | $ 4,954,999.00 | 353,252 | $ 14.0268 | 15.709% |
| | | | | **10 Year - Excess Liability Increase:** | **256.768%** |

Special District Risk Management Authority's premiums have likewise increased significantly:

| | Total Contribution | Annual % Inc / Dec | | Total Expenses | Annual % Inc / Dec |
|---|---|---|---|---|---|
| 2011-12 | 12,162,950 | -0.133% | | 6,381,723 | -44.116% |
| 2012-13 | 12,401,107 | 1.958% | | 12,630,107 | 97.911% |
| 2013-14 | 13,243,784 | 6.795% | | 15,496,374 | 22.694% |
| 2014-15 | 13,268,633 | 0.188% | | 15,289,674 | -1.334% |
| 2015-16 | 13,896,299 | 4.730% | | 15,466,553 | 1.157% |
| 2016-17 | 14,754,829 | 6.178% | | 20,154,904 | 30.313% |
| 2017-18 | 16,965,103 | 14.980% | | 19,052,630 | -5.469% |
| 2018-19 | 18,636,269 | 9.851% | | 23,364,605 | 22.632% |
| 2019-20 | 22,043,113 | 18.281% | | 29,408,699 | 25.869% |
| 2020-21 | 28,511,071 | 29.342% | | 26,910,233 | -8.496% |
| | **10-Year Increase** | **134.409%** | | **10-Year Increase** | **321.677%** |

**D. Brief Summary Of Recent Legislative Changes Reviving Claims (California's A.B. 218)**

1. Extends the limitations period for filing a "childhood sexual assault" claim from three (3) years to five (5) years, commencing upon the discovery that a psychological injury or illness manifesting in adulthood was in fact the result of sexual abuse endured as a child. (Cal. Code Civ. Proc. § 340.1(a).)

2. Increases the age limit to file a lawsuit for childhood sexual assault from twenty-six (26) years to forty (40) years. (Cal. Code Civ. Proc. § 340.1(c).) This limit does not apply if the defendant entity knew or had reason to know of misconduct which created a risk of childhood sexual assault, or if the defendant entity failed to take reasonable steps to avoid acts of childhood sexual assault. (*Id.*)

3. Provides a three (3)-year period commencing on January 1, 2020, to revive childhood sexual assault claims that had expired as of that date. (Cal. Code Civ. Proc. § 340.1(r).) Thus, the effect of the statute is to revive, for the three year period, *all* potential claims for childhood sexual abuse without reference to any prior statute of limitations, claim presentation, or discovery requirement pursuant to which the claim(s) may previously have been barred.

4. Gives courts discretion to award treble damages if a "cover up" was involved. (Cal. Code Civ. Proc. § 340.1(b)(1).) The statute defines "cover

up" as "a concerted effort to hide evidence relating to childhood sexual assault." (Cal. Code Civ. Proc. § 340.1(b)(2).) The concealment of such evidence has overlapping relevance with numerous other issues, such as the availability of punitive damages, establishing an employer's negligence, or determining whether an employer's investigation of a complaint was adequate. Cases addressing such overlapping issues may therefore be instructive in predicting what types of conduct courts would consider to amount to a "cover up" under A.B. 218. (See *Doe 2 v. The Citadel* (S.C.Com.Pl. 2014) 2014 WL 8727884 [example of cover up of child sexual abuse].)

(a) Note that the permissibility of insurance coverage for statutory treble damages is considered on a per-statute basis. (See, e.g., *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 34 [insurer obligated to provide liability coverage for statutory treble damages imposed by Cal. Bus. & Prof. Code § 17043 because the primary purpose for multiplied damages under that statute was "to provide additional compensation to the victim rather than punish the offender"]; *Evanston Insurance Co. v. Versa Cardio, LLC* (Mar. 21, 2018) No. CV 17-180 PSG (SPX), 2018 WL 4860176, at *8 [noting that Eleventh Circuit had previously determined that whether the treble damages available under the Telephone Consumer Protection Act constituted a non-covered penalty was "an open question of law that should be resolved in favor of" the insured."].)

(b) Treble damages on account of a "cover up" to "hide evidence relating to childhood sexual assault" may be considered as arising from a willful act for which insurance coverage is precluded pursuant to Insurance Code § 533. (See, e.g., *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 742 [Cal. Ins. Code § 533 precludes coverage for willful acts]; *J.C. Penney Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1025 [an act is considered "willful" for purposes of Cal. Ins. Code § 533 when "the harm is inherent" in the act itself.]; *J.C. Penney Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1026 [observing that molestation is inherently harmful such that the intent to harm is implicit in the act].)

**E. S.B. 447 – "Civil Actions: Decedent's Cause Of Action"**

1. Permits claims for pain, suffering and disfigurement to be brought by a decedent's personal representative or successors in interest. (C.C.P. § 337.34(b).

2. The provision currently applies to cases granted preference before January 1, 2022, and to all cases filed after January 1, 2022 and before January 1,

2025. As written, the measure is scheduled to "sunset" on all cases filed after December 31, 2024.

3. The statute brings California law into line with that of 45 other states which permit the recovery of pain and suffering in "survival" actions.

4. However, even prior to the statute's effective date, California's wrongful death verdicts averaged $2,212,936, as reported by one Plaintiff's firm, exceeding the national average of $1,450,000—notwithstanding that California's average would not include pain and suffering, while the "national average" would be heavily weighted by states permitting such recovery.

## F. Insurer's Responses To Increasing Frequency And Costs Of SAM And Other High Value Claims

Viewed broadly, the insurance industry's response to the increasing prevalence of SAM claims, and high verdict recoveries more generally, falls broadly into four categories: the withdrawal of coverage for SAM Claims, the addition of exclusionary language to policies, the reduction of limits through the imposition of sub-limits and/or group-aggregate limits of liability, and a shift towards claims-made or claims-made-and-reported policies with respect to coverage for such claims.

1. Exclusions (and their Limitations)

Liability coverage exclusions for claims arising from insured's sexual behavior (e.g., "sexual molestation" and "sexual misconduct" exclusions) have been implemented in standard policies. However, complaints generally allege a variety of conduct—"grooming" and other related conduct—which may be inappropriate but which is non-sexual in nature, or which, standing alone, may amount to "sexual harassment" for which coverage is available. Thus, sexual molestation and misconduct exclusions are often ineffective in disclaiming coverage, even in cases involving intentional sexual assault, because the allegations stated in the complaint have the effect of stating potential claims for other, non-intentional and/or non-excluded conduct, such as harassment. (See, e.g., *Gonzalez v. Fire Insurance Exchange* (6th Dist. 2015) 234 Cal.App.4th 1220 [Insurer was obligated to defend claims arising out of a sexual attack, despite the policy's exclusions for "sexual molestation," "criminal acts," and "expected or intended" injury, because the insured faced potential liability for negligent acts that were not "inseparably intertwined" with the underlying sexual assault.]; *Cranford Ins. Co., Inc. v. Allwest Ins. Co.* (N.D.Cal. 1986) 645 F.Supp. 1440 [Where an insured psychiatrist had sex with a former patient, and the insured also committed malpractice by abandoning the patient, coverage was available under a professional malpractice policy that excluded coverage for sexual intimacy.]; *Horace Mann Ins. Co. v. Barbara*

*B.* (1993) 4 Cal.4th 1076, 1084-85 [Insurer had a duty to defend teacher in a minor student's lawsuit alleging sexual and other misconduct when "the gravamen of the so-called 'parasexual' actions . . . was its commission *in front of other students*", and insurer "had not shown that any of those public acts were inherently harmful or amounted to sexual molestation."] [emphasis in original].)

(a) Nevertheless, under California law, where non-sexual acts are "inseparably" or "inextricably" "intertwined" with sexual activity excluded from coverage, those non-sexual acts are also excluded. (See, e.g., *Jane D. v. Ordinary Mutual* (1995) 32 Cal.App.4th 643, 653 ["In reviewing the allegations of the complaint, we find the allegations of nonsexual conduct—obtaining information about plaintiff during counseling and using this information and misusing counseling techniques to create transference and to control and induce plaintiff's behavior—were 'inseparably intertwined' with the sexual misconduct.... Accordingly, there is no coverage[.]"]; *Marie Y. v. General Star Indemnity Co.* (2003) 110 Cal.App.4th 928, 958 [insurer had no obligation to settle claims based on conduct which was "inextricably intertwined" with non-covered conduct]; *Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 809-810 [sexual molestation exclusion precluded coverage for insured karate instructor who allegedly repeatedly raped and stalked minor student as purported "non-sexual allegations" all involved conduct that was "directed towards the goal of sexual intimacy"]; *Farmer v. Allstate Ins. Co.* (C.D.Cal. 2004) 311 F.Supp.2d 884 [sexual molestation exclusion barred coverage for insured husband's alleged molestation and insured's wife alleged negligence in failing to prevent said molestation].)

(b) Whether acts of non-sexual conduct are potentially separable and thus non-excluded, or "inextricably intertwined" with claims for intentional sexual misconduct, is a judgment call which requires a detailed fact-based analysis, and California courts will "look beneath the surface of the pleadings to the substance of the allegations to determine whether the alleged sexual and non-sexual misconduct are separable." (*State Farm Fire & Cas. Co., supra,* 59 Cal.App.4th 648, 664.) In this respect, as exemplified by the analysis in *Horace Mann Ins. Co. v. Barbara B.*, *supra*, 4 Cal. 4th 1076, 1083-84, "[i]t bears emphasis that this case reaches us in somewhat of a factual vacuum. We must not lose sight of the record before us. The record is devoid of evidence which establishes the chronology or sequence of events comprising the alleged misconduct or that these actions were integral to the molestation. For instance, the record is devoid of evidence demonstrating that Lee's acts of public embarrassment of Barbara occurred in such close temporal and spatial proximity to the molestation as to *compel* the conclusion that they are inseparable

from it for purposes of determining whether Horace Mann owed a duty to defend Lee."

Further addressing the evaluation of the relationship between non-sexual conduct which may be excludable as "inextricably intertwined" with intentional sexual conduct, the court in *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, addressed whether coverage existed for a claim alleging the intentional sexual harassment of an employee by her employer. (*Id.* at 1599-1601.) In its analysis, the *Coit Drapery* court characterized the California Supreme Court's decision in *Barbara B.* as "recogniz[ing] that . . . claimed negligent conduct could lie outside the scope of the duty to defend, if the alleged instances of negligent conduct 'occurred in such close temporal and spatial proximity to the molestation as to *compel* the conclusion that they are inseparable from it for purposes of determining whether [the insurer] owed a duty to defend". (*Id.* at 1607.) Summarizing this analysis, the *Coit Drapery* court thus stated that "[w]hile rather unclear, we take the language "temporal and spatial proximity to the molestation" [in the *Barbara B.* decision] to mean that certain alleged conduct can be 'inseparable' from intentional wrongful conduct and, therefore, not subject to any duty to defend, *even where such conduct might have triggered such a duty when standing alone*." (*Coit Drapery Cleaners, Inc., supra,* 14 Cal.App.4th at 1608 [emphasis added].)

(c) In any event, though the question of whether conduct is "inextricably intertwined" focuses on the "temporal and spatial" relationship between the non-intentional conduct and the alleged intentional misconduct, non-sexual acts may be found to be "inseparably" or "inextricably" "intertwined" with the sexual acts even if they occurred well after the sexual acts where there is a clear and direct connection between the intentional sexual misconduct and the non-sexual misconduct . (See, e.g., *State Farm Fire & Cas. Co. v. Century Indem. Co.* (1997) 59 Cal.App.4th 648, 664 [Negligence claim arising from perpetrator's failure to report his own sexual misconduct was "related directly and solely to the molestation itself" and was therefore "merge[d]" with the molestation claim for purposes of determining insurer's duty to defend.].)

Bottom line, as a result of the increasing number of SAM claims and their resulting judgments and settlements, one would expect to see increasing reliance on policy exclusions, and perhaps, increasingly aggressive exclusions.

## II. Sub-Limits Of Liability

**A. What Are Sub-Limits?**

A sub-limit of liability is exactly what it sounds like – a specified *lower* amount of liability available to the insured or covered party for specific claims or causes of action.

1. Relevant Language

   For instance, a policy or Memorandum of Coverage might provide a "$1,000,000" Limit of Liability "per Occurrence", but then state further limitations, such as:

   "$250,000 For any suit for discrimination or retaliation under the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*); the Rehabilitation Act (29 U.S.C. § 701, *et seq.*), or any similar State or Federal law. . ."

2. Considerations Raised By Sub-Limits Of Liability - Potential Gap Between Primary And Excess Coverage

   It is quite common for excess policies to contain language stating that where underlying insurance contains a sub-limit of liability, the coverage provided by way of the excess policy does not "drop down" to provide coverage immediately upon the exhaustion of the sub-limit.

   This has the effect of leaving the insured or JPA member responsible for the gap in coverage between the amount provided by way of the primary sub-limit of liability and the attachment point of excess coverage.

## III. Group Aggregate Limits Of Liability

Similar to an "Aggregate Limit" which states the maximum amount an insurer or risk pool will pay on account of all claims *against a particular insured or member*, a "Group Aggregate Limit" is a Limit of Liability which is applicable to *all* specified claims asserted against *any and all insureds* or members of the risk pool.

Thus, the effect of a "Group Aggregate Limit" is to cap the insurer's or risk pool's exposure across the entire pool.

Put another way, under a Group Aggregate Limit, the amount of coverage available to any individual insured or member may be affected by the claims, settlements and judgments made against other insureds or members of the risk pool.

**A. Examples**

1. For instance, in a case where there is a group aggregate limit of $10,000,000 for SAM claims in a given pool, if a given SAM claim results in a $2,000,000 settlement or judgment against Member A, the result is that *all other members* of the pool, including Member A, now have only $8,000,000

available for any and all other SAM claims which may be asserted during that policy term.

2. If the claim against Member A results in a $10,000,000 judgment, then the limit will be exhausted *for <u>all</u> members, for <u>any and all</u> other SAM claims during the policy term.*

**B. Other Significant Considerations Raised By Aggregate And Group Aggregate Limits**

1. SAM Claims Frequently Give Rise To The Potential For Multiple "Occurrences"

(a) Basic Background On The Number Of "Occurrences"

In California, the number of "occurrences" under an insurance policy is determined by the underlying "cause" or "causes" of the injury rather than number of resulting injuries. (*See, e.g., Plaisted & Cos.*, *supra,* 61 Cal.App.4th 1132, 1161 [overruled in non-relevant part by *State v. Cont'l Ins. Co.* (2012) 55 Cal. 4th 186, 201]; *State Farm Fire & Casualty Co. v. Elizabeth N.* (1992) 9 Cal.App.4th 1232, 1236.)

Furthermore, the number of "occurrences" which may ultimately be found, and thus the limits of liability which may be available to a defendant, is a question of indemnity, and is therefore a matter of what is *proved* at trial, rather than what is alleged in the complaint. (*See, Aerojet-General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 57 [stating of the insurer's obligation, that its indemnity "duty entails the payment of money [citation], which is expressly limited [citation], in order to resolve liability [citation]. … It arises only after liability is established and as a result thereof."]; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 45-46).) Thus, as stated by the Ninth Circuit in *Journal Publishing Co. v. General Ins. Co.* (9th Cir. 1954) 210 F.2d 202 (applying Oregon law), "the obligation to defend is determined by what is alleged, while the obligation to pay for liability for bodily injury may be such for injury if actually sustained. In other words, if the injury in fact sustained and is otherwise within the terms of the policy, the obligation is to pay independently of what may be alleged" in the complaint. (*Id.* at 207.)

As a consequence, where claims arise in connection with multiple instances of alleged misconduct and injuries, the number of potential "occurrences" is not always readily determinable. (*See, e.g., State Farm Fire & Casualty Co. v. Elizabeth N.* (1992) 9 Cal.App.4th 1232 and *National Union Fire Ins. Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434.)

**C. Shifting Risk**

Again, the goal is *to shift the risk of exposure* to high value claims *from the insurer* to the insureds, risk pools, and their members.

**D. What Duties Do Insurers Or Risk Pools Owe To Multiple Insureds Or Members?**

1. Under California law

(a) In cases involving multiple insureds, the insurer's duty of good faith and fair dealing extends to all of its insureds. (*Strauss v. Farmers Ins. Exchange* (1994) 26 Cal.App.4th 1017, 1021.)

(b) This duty includes an obligation to make a reasonable effort to settle a claim within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. (*Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 14-15.) California law requires that before an insurer can be found to have breached the duty of good faith and fair dealing with regard to a settlement offer, the settlement offer must have been "reasonable" *and* the insurer must have also "unreasonably refused" it. (*Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 725.) An insurer does not "unreasonably refuse" a settlement offer when that refusal is merely the result of "an honest mistake, bad judgement or negligence." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726, quoting *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 346.) An insurer's bad faith "implies unfair dealing rather than mistaken judgment or poor prognostication." (*Critz v. Farmers Ins. Group* (1964) 230 Cal.App.2d 788, 796.) Furthermore, an insurer also owes countervailing "duties to other policyholders and to stockholders not to honor meritless claims" and to avoid the needless dissipation of funds by paying more than it reasonably should. (*Thompson v. Cannon* (1990) 224 Cal.App.3d 1413, 1417; *see also Fleming v. Safeco Ins. Co.* (1984) 160 Cal.App.3d 31, 40.)

(c) Thus, an insurer cannot "pick and choose between its two insureds in its payment of benefits, particularly where no detriment is demonstrated by providing equal treatment to both insureds." (*Shell Oil Co. v. Nat'l Union Fire Ins. Co.* (1996) 44 Cal.App.4th 1633, 1645.)

Nor may insurers favor one insured over another by accepting a policy limits offer which releases some but not all insureds which could expose the insurer to a bad faith claim by the insureds that were not released. (*Shell Oil*, *supra*, 44 Cal.App.4th at 1646-47; *Rankin v. Curtis* (1986) 183 Cal.App.3d 939, 945-46 [despite a

dispute over coverage for a potential additional insured, an insurer breached the covenant of good faith and fair dealing by not informing the additional insured of a lawsuit filed against the named insured and providing independent counsel to represent her interests]; *Strauss, supra,* 26 Cal.App.4th at 1021-22 ["acceptance of an offer that left two of its insureds bereft of coverage would have breached Farmers' implied covenant of good faith and fair dealing."].)

(d) An exception exists in cases where an insurer can pay its full policy limits on behalf of one insured while continuing to defend the other insureds, provided that the payment has the legal effect of benefiting all insureds by reducing their exposure to the plaintiff, such as by way of an offset or credit on account of such sums against any eventual judgment. (*Nationwide Ins. Co. v. Hunley* (9th Cir. 1990) 915 F.2d 557, 559-560.)

(e) Consequently, under California law, an insurer faced with claims from multiple insureds under a single coverage amount that is insufficient to satisfy all claims usually has two options:

(i) Negotiate a fair allocation with its insureds; or alternatively

(ii) File an interpleader action. (*Schwartz v. State Farm Fire and Cas. Co.* (2001) 88 Cal.App.4th ["The insurer's duty not to favor the interests of one insured over the other necessarily applies to require an excess insurer to consider the interests of *all* of its insureds . . . in the limited policy proceeds, whether or not that interest has matured to the point of requiring payment. To conclude otherwise would require insureds to engage in a race to exhaust the available primary insurance, with no right to information from the excess insurer about the amount or status of the competing claim, and with no control over actions of the primary insurer."]; see also *Lehto v. Allstate Ins. Co.*, (1994) 31 Cal.App.4th 60 [insurer not liable for bad faith for interpleading policy limits when faced with valid, competing claims exceeding those limits].)

However, an interpleader provides no assistance where the question is not only one of resolving an existing set of claims, but rather includes the potential for and uncertainty regarding the assertion of additional, unrelated future claims.

2. Under New York law

(a) Similar to California courts, New York's high court has held that an insurer's duty of good faith runs to all its insureds, and that the insurer may not prefer one insured over another. To do so would expose it to a bad faith claim. (*Smoral v. Hanover Insurance Co.*, (1971) 322 N.Y.S.2d 12, 14 [reasoning that just as an insurer breaches its duty of good faith and fair dealing by preferring its own interests over those of the insured, "the same considerations would apply with equal force where the company preferred one of its insureds over another"]; *Lynton v. Metcalf* (Civ. Ct. 1971) 327 N.Y.S.2d 823, 825 [citing *Smoral* in holding that a taxicab's insurer was required to extend coverage to a passenger as an additional insured even though the insurer had already settled with the plaintiff].)

(b) Nevertheless, New York law is less developed than California law in addressing the specifics of what an insurer should do to discharge its duty toward multiple insureds under a single coverage amount. As a result, we would expect that New York Courts would likely endorse the negotiation and interpleader approach approved by California as a method which appropriately resolves both the insurer's obligations while protecting the interests of each individual insured to a fair apportionment of policy benefits by the Court.

3. Jurisdictions other than New York and California have adopted a "first-come, first-served" approach.

(a) An insurer facing claims by multiple insureds that exceed the aggregate limit may expend their limits to resolve the claims of some, but not all, insureds without being obligated to protect the interests of the other insureds. (See, e.g., *Underwriters Guarantee Ins. Co. v. Nationwide Mut. Fire Ins. Co.,* (Fla. Dist. Ct. App. 1991) 578 So.2d 34, 35; *Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co*., (Mo. Ct. App. 1997) 959 S.W.2d 864, 870 ["an insurer should not be precluded from accepting a reasonable settlement offer for fewer than all insureds"]; *U.S. Fire Ins. Co. v. Worcester Ins. Co.*, (2005) 62 Mass. App. Ct. 799 [821 N.E.2d 91, 94]; see also *Travelers Indem. Co. v. Citgo Petroleum Corp.*, (5th Cir. 1999) 166 F.3d 761, 766 ["*Smoral* has not been followed outside of New York and the California Courts of Appeals. Every other court to consider the issue has rejected its application."].)

(b) In the Florida case of *Underwriters Guarantee Ins. Co. v. Nationwide Mut. Fire Ins. Co.,* (Fla. Dist. Ct. App. 1991) 578 So.2d 34, a driver struck and killed a bicyclist while driving a car owned by Nationwide's named insured. Following the accident, the bicyclist's UM/UIM carrier paid the bicyclist's estate and then brought a subrogation action against the driver and the owner of the

car. Nationwide, on behalf of its insured driver and owner, settled the matter by paying its policy limits in exchange for a full release of the owner, and then brought a declaratory relief action seeking a determination that it had no further duty to defend the driver based on a policy provision purporting to relieve it of its duty to defend "any suit" once it has paid its policy limits. The Court of Appeal affirmed the declaratory judgment in Nationwide's favor, distinguishing *Smoral*, *supra*, 322 N.Y.S.2d 12, on the grounds that it involved a bad faith action, whereas in the instant case, there was "no allegation that the settlement was reached other than in good faith."

(c) In the Missouri case of *Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co*. (Mo. Ct. App. 1997) 959 S.W.2d 864, the insurer, Millers Mutual, agreed to defend both its named insured Dunn and additional insured Shell against a negligence action. In January, 1995, the plaintiffs issued a policy limits demand to settle as to Dunn, but explicitly refusing any settlement involving Shell. Millers notified Shell of the underlying plaintiffs' demand and refusal to consider any settlement with Shell. In February, 1995, Dunn made a demand on Millers to settle the case as to Dunn. Millers responded by conveying a settlement offer to the underlying plaintiffs on behalf of both Dunn and Shell, which the plaintiffs rejected because of Shell's inclusion. Millers ultimately settled the suit *as to Dunn* in return for its policy limits, and Millers and Shell stipulated that the settlement was reasonable under the circumstances. Millers then terminated its defense of Shell and brought a declaratory relief action to confirm that position. Millers prevailed in the trial court. On appeal, Shell argued that Miller did not satisfy its duty to defend it when it paid its policy limits on behalf of Dunn, contending that there must be a *complete* settlement on behalf of all insureds in order to terminate the insurer's duty to defend, lest the right to a "full defense" under the policy would become "a near nullity." The appellate court disagreed, reasoning that Shell had received the benefit of the policy on account of its right to offset the amounts paid by Millers against any judgment ultimately rendered against it. Affirming the judgment against Shell, the court stated that "[a]n insurer should not be precluded from accepting a reasonable settlement offer for fewer than all insureds" and again distinguished *Smoral*, *supra*, on grounds that it had involved a claim of "bad faith" which was not present in Miller's handling of the litigation before it.

(d) In the Massachusetts state court case of *U.S. Fire Ins. Co. v. Worcester Ins. Co.*, (2005) 62 Mass. App. Ct. 799, an excess insurer brought suit against a primary insurer, seeking to recover costs it incurred defending the insured after the primary insurer had

exhausted its policy limits to settle five claims and partially settle a sixth claim. The excess insurer argued on appeal that the prior settlements were not made in good faith, and therefore the primary insurer was not discharged from its duty to defend. The appellate court ruled in favor of the primary insurer, finding that there was nothing on the record to suggest that the primary insurer had "squandered" its limit so as to warrant the relief sought by the excess insurer.

**E. Issues Re: Potential But Un-Asserted Claims**

The principles outlined above concerning an insurer's duty to multiple insureds are generally applied where multiple insureds face liability *in a single action or related actions*. As a result, they are not *directly* applicable where, for instance, an insurer or risk pool must address separate lawsuits or claims involving separate insureds or members.

Likewise, those principles do not and cannot directly address the impact of unknown or inchoate *future* claims and litigation on the handling of *present* claims and litigation.

Nevertheless, they do provide useful guidance for handling claims under a group aggregate limit where the existence of such limits would require the insurer or risk pool to forecast not only current potential liabilities, but as well, the existence and magnitude of unknown future claims.

1. Under California law, an insurer facing an accrued personal injury claim and an un-accrued wrongful death claim was not required to interplead funds, "but instead was privileged to prefer the personal injury claim" so long as it made a good faith preference. (*Aetna Cas. & Sur. Co. v. Superior Court*, (1980) 114 Cal.App.3d 49, 58-59 [explicitly adopting the "clear" law of other states in finding that insurer was not required to interplead funds].) In *Aetna*, the insurer settled a personal injury action on behalf of an insured driver brought by a passenger. (*Id.* at 52.) The passenger subsequently died, and passenger's children filed a subsequent wrongful death action. (*Id.* at 53-54.) The insurer moved for summary judgment seeking a declaration that it had fully discharged its obligations to the insured by settling the personal injury action and therefore owed no duty to defend the wrongful death action. (*Id.* at 51, 53-54.) The trial court denied summary judgment, but the appellate court issued a writ mandate ordering the trial court to grant the motion for summary judgment, finding that the insurer showed "wisdom and prudence" by making a "good faith preference" in settling the personal injury action without waiting to see if plaintiff would die. (*Id.* at 51, 57-58.)

2. Courts outside California have similarly held that an insurer facing both asserted claims and accrued but un-asserted claims is not compelled to

interplead its policy limits but may instead settle the claims as presented. (*Castoreno v. Western Indemnity Company, Inc.* (1973) 213 Kan. 103.)

(a) This outcome, however, does not represent a distinct rule in jurisdictions that already recognize an insurer's right to settle on behalf of fewer than all insureds and then to terminate its defense of the other insureds if the settlement amounts were reasonable.

3. Various jurisdictions have endorsed a "first come, first served" approach. (See, e.g., *Underwriters Guarantee Ins. Co. v. Nationwide Mut. Fire Ins. Co.,* (Fla. Dist. Ct. App. 1991) 578 So.2d 34, 35; *Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co*., (Mo. Ct. App. 1997) 959 S.W.2d 864, 870; *U.S. Fire Ins. Co. v. Worcester Ins. Co.*, (2005) 62 Mass. App. Ct. 799 [821 N.E.2d 91, 94]; see also *Travelers Indem. Co. v. Citgo Petroleum Corp.*, (5th Cir. 1999) 166 F.3d 761, 766 ["*Smoral* has not been followed outside of New York and the California Courts of Appeals. Every other court to consider the issue has rejected its application."].)

Thus, from an insurer's or risk pool's perspective, a "first-come, first-served" approach to claims under a group aggregate limit is a likely and logical approach—effectively, resolving claims and judgments *as the final settlement or judgment* is presented (rather than as the litigation or claim itself is necessarily presented).

**F. What Happens When the Money Runs Out?**

1. Statutes

(a) Government Code § 6508.1 states, as relevant, that:

> If the [resulting entity] is not one or more of the parties to the agreement but is a public entity, commission, or board constituted pursuant to the agreement, the debts, liabilities, and obligations of the parties to the agreement, *unless the agreement specifies otherwise.* (Emphasis added).

(b) Government Code § 895.2 states, as relevant, that:

> Whenever any public entities enter into an agreement, they are jointly and severally liable upon any liability which is imposed by any law other than this chapter upon any one of the entities or upon any entity created by the agreement for injury caused by a negligent or wrongful act or omission occurring in the performance of such agreement.
>
> . . .
>
> What is meant by "occurring in the performance of such agreement"? There's limited case law addressing this issue.

(i) In *Tucker Land Co. v. State of California* (2001) 94 Cal.App.4th 1191, where suit was brought against a JPA for its conduct in connection with a land purchase, the court described that section as "impos[ing] joint and several liability on the constituent members [of the agency] for *torts* committed by the JPA." (*Id.* at 1198.) It further observed that comments on the section by the Law Revision Commission "explain that this section imposes liability on each of the parties to a JPA to an injured party for any tort that may occur in the performance of the agreement for which any one of the entities, or the entity created by the agreement is otherwise liable under the law." (*Id.*)

The decision in *Tucker Land Co.* thus reconciled the language of Gov't Code §§ 895.2 and 6508.1 to conclude that Section 6508.1 does not impose automatic joint and several liability on constituent entities in non-tort cases, but rather "unambiguously provides that the obligations of the agency will be the obligations of the constituent entities unless they otherwise agree", though Section 895 *et seq*. "make[s] clear that the Legislature intended that member entities of a JPA be liable for the torts of the JPA." (*Id.,* at 1198-1199.)

(ii) Subsequently, the Court in *D.K. ex rel G.M. v. Solano County Office of Education* (E.D.Cal. 2009) 667 F.Supp.2d 1184, observed of the statute that: "whenever any public entities enter into an agreement, they were jointly and severally liable upon any liability which is imposed upon any one of the entities." (*Id.,* at 1192.) Thus, the District Court had no difficulty concluding that both the Solano County Office of Education ("SCOE") and the Benicia Unified School District could be liable to Plaintiff for claims arising out of Plaintiff's special education program which the SCOE had contracted with the District to provide. (*Id.,* at 1192 [quoting *Ross v. Campbell Union Sch. Dist.* (1977) 70 Cal.App.3d 113, 118].)

(iii) Government Code § 895.4

Provides as relevant that the constituent entities of JPA may "provide for contribution or indemnification by any or all of the public entities that are parties to the agreement upon any liability arising out of the performance of the agreement."

(iv) Government Code § 895.6

Provides as relevant that where the JPA Agreement does not address constituent entities' respective liability for the debts of the JPA, any such debts or liabilities shall be shared pro rata among the members.

Thus, as stated in *Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136 Cal.App.4th 1207, 1212-1213, "[w]henever any *public entities* enter into an agreement, *they* are jointly and severally liable upon any liability which is imposed by any law other than this chapter upon any one of the entities or upon any entity created by the agreement for injury caused by a negligent or wrongful act or omission occurring in the performance of such agreement." (Emphasis in original).

Moreover, "[u]nless *the public entities that are parties to an agreement* otherwise provide in the agreement, if a public entity is held liable upon any judgment for damages caused by a negligent or wrongful act or omission occurring in the performance of the agreement and pays in excess of its pro rata share in satisfaction of such judgment, such public entity is entitled to contribution from each of the other public entities that are parties to the agreement. (*Id.*, at 1213.)

2. Agency Agreements

In many instances, the question of the exact parameters of the statutory liability imposed by Government Code § 895.2 may be resolved under the terms of the relevant Joint Powers Agreement.

Specifically, consistent with both Government Code § 6805.1 and § 895.2, a JPA Agreement may specify that the members shall not be liable for the debts and liabilities of the Agency itself (as permitted under § 6805.1), but then provide for a proportionate assessment of the Agency's members in the event of a shortfall in Agency funds (thus effectively apportioning liability among the members in a manner equivalent to the result of joint and several liability under § 895.2).

(a) What Is Meant By "Occurring In The Performance Of Such Agreement" As Used In Gov't Code § 895.2?

Unfortunately, as to the critical question of the precise meaning of the phrase "occurring in the performance of such agreement" as used in Government Code § 895.2 is not well developed.

Nevertheless, cases that have suggested that the entity must be engaged in some conduct (or lack of conduct) furthering the purposes of the JPA, and/or must have had the legal authority or

ability to act where liability under Government Code § 895.2 is sought to be imposed for inaction.

For instance, in *Paterno v. State of California* (2003) 113 Cal.App.4th 998, 1034, the Court reversed a decision imposing liability on a water district for damages resulting from a levee failure, stating that "We reject Paterno's claim that the State's relationship with the District mandates a joint liability finding. Such liability extends to acts arising 'in the performance of' an agreement between public entities. [Citation.] Nothing in the State's relationship with the District gave the District the ability to change the levee, and the liability we find did not occur during the performance of an agreement *inter sese*."

This conclusion is consistent with that reached in *Solano County Office of Education, supra,* 667 F.Supp.2d 1184, discussed previously, in which the Court found that liability was properly imposed where the SCOE where liability arose out of the parties contractual agreement for the provision of services for disabled students. (*See also, Boxall v. Sequoia Union High School Dist.,* 464 F.Supp. 1104, 1106-1107, 1114 (N.D. Cal. 1979) [similarly finding imposition of liability appropriate where district and agency had contracted for performance of disability services out of which claim arose].)

Consequently, consistent with both Government Code § 6805.1 and § 895.2, a JPA Agreement may specify that the members shall not be liable for the debts and liabilities of the Agency itself (as permitted under § 6805.1), but then provide for a proportionate assessment of the Agency's members in the event of a shortfall in Agency funds (thus effectively apportioning liability among the members in a manner equivalent to the result of joint and several liability under § 895.2).

In short, though the Government Code suggests that JPA members will simply be jointly and severally liable to the extent of judgments or settlements in excess of the group aggregate limit, in the face of uncertainty regarding the specific scope of that liability, look to the governing JPA Agreement, which may itself provide a definitive resolution.

(b) Practical Application

Put simply, the insured and/or members of the affected risk pool bear the cost of any additional claims themselves.

With respect to risk pools, the governing agreement will contain language permitting the pool to impose an "assessment" on members to cover pool shortfalls. And likewise, Government Code § 895 *et seq.* provides that members of a JPA shall be "jointly and severally liable upon any liability which is imposed by law."

That language will be triggered where claims against members exhaust relevant sub-limits or group aggregate limits.

## IV. "Cost Erosive", "Burning Limits" Or "Defense In Limits" Policies

Traditionally, insurance policies and memoranda of coverage provide that the insurer or risk pool "will defend" or "will have the right and duty to defend" the insured/covered party.

As the California Supreme Court has observed with respect to such language, "[t]he insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability." (*Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295-296).

### A. The ISO Has Changed Its Forms To Remove Awards Of Attorneys' Fees From Covered Indemnity Payments

In April 2013, the ISO modified its standard policy form to *exclude* an award of attorneys' fees from coverage under the "supplementary payments" provision. As revised, that form now states that supplementary payment only includes court costs and not attorneys' fees:

> All court costs taxed against the insured in the "suit." However, these payments *do not include attorney's expenses* taxed against the insured.

### B. Cost Erosive Language

A "cost erosive", "burning limits" or "defense-in-limits" policy, therefore, contains language providing that sums incurred by the insurer/risk pool to defend the insured – attorneys' fees, court costs, etc. – are charged against and consequently reduce the limit of liability available to indemnify the insured.

For instance, typical language provides that: "Defense expenses shall be a part of, and not in addition to, the applicable Limit of Liability"; or "Costs incurred to defend the insured shall reduce the limit of liability available to indemnify the insured".

California courts and federal courts applying California law have routinely concluded that such "cost erosive" language is enforceable. (*Helfand v. Nat'l Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 884-885 [where policy's declarations page clearly and conspicuously proclaimed that "THE LIMIT OF LIABILITY

AVAILABLE TO PAY JUDGMENTS OR SETTLEMENTS SHALL BE REDUCED BY AMOUNTS INCURRED FOR LEGAL DEFENSE", such costs properly eroded the available limits of liability]; *McLaughlin v. Nat'l Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1161 [same].)

## V. Claims Made Policies

**A.** "Occurrence"-based policies apply to the insureds' liability for damage that happens during the policy period regardless of when the claim is asserted against the insured – even if the claim is not asserted until years after the policy expires. (*See A.C. Label Co., Inc. v. Transamerica Ins. Co*. (1996) 48 Cal.App.4th 1188, 1192, *Montrose Chemical Corp. of Calif. v. Admiral Ins. Co*. (1995) 10 Cal.4th 645, 669-670).

**B.** "Claims-Made" policies "limit[] coverage to claims made against the insured during the policy period. Coverage does not depend on when the 'actual or alleged negligent act, error or omission' occurs … The event that triggers … [coverage] is transmission of notice of the claim." (*Homestead Ins. Co. v. American Empire Surplus Lines Ins. Co*. (1996) 44 Cal.App.4th 1297, 1304).

1. "Claims-Made" policies were first introduced in the context of professional malpractice and were designed to limit outstanding insurer exposure due to the potential lengthy amount of time between the negligent act (i.e. mistakes in drafting a well) and the resulting damages (e.g. adverse tax consequences to the will beneficiaries). (*Pac. Emps. Ins. Co. v. Superior Ct*. (1990) 221 Cal.App.3d 1348, 1358).

2. By limiting the time of the insurer's exposure on the risk, "Claims-Made" policies are designed to "provid[e] certainty in gauging potential liability which in turn leads to more accurate calculation of reserves and premiums." (*Helfand v. National Union Fire Ins. Co*. (1992) 10 Cal.App.4th 869, 888).

   Consequently, California courts have emphasized that "'Claims made' policies benefit insureds by making coverage cheaper and more widely available." (*Homestead Ins. Co. v. Am. Empire Surplus Lines Ins. Co*., 44 Cal.App.4th 1297, 1304; *see also Helfand, supra,* 10 Cal.App.4th 869, 888; *Pacific Employers Ins. C*o., *supra,* 221 Cal.App.3d 1348, 1358–1359).

### C. What Amounts to A "Claim?"

1. When the term "claim" is undefined by a "Claims-Made" policy, the term is construed by its "common sense" understanding as "a demand for something due or believed to be due." (*Safeco Surplus Lines Co. v. Employer's Reinsurance Corp*. (1992)11 Cal.App.4th 1403, 1407; *see also Supera v. Moreland Sales Corp.* (1938) 28 Cal.App.2d 517, 521 ["In its ordinary sense the term [claim] imports the assertion, demand or challenge of something as a right; the assertion of a liability to the party making it to do some service or pay a sum of money."].)

2. However, the meaning of the term "claim" can be changed by its "context" within a particular policy. (*See, e.g., Gyler v. Mission Ins. Co*. (1973) 10 Cal.3d 216 [where insuring agreement provided indemnity "against any Claim or claims for breach of professional duty as Lawyers *which may be made* against them during the period set forth in the Certificate…" term "claim" encompassed negligent acts made during the policy period which did not materialize into a "cause of action" until after the expiration of the policy period]; *see also Root v. Am. Equity Specialty Ins. Co*. (2005) 130 Cal.App.4th 926, 934 ["given the ambiguity in the word 'claim,' the word must be given an interpretation which favors the insured on both sides of the policy period divide, lest the insured be trapped by competing, but mutually exclusive, reporting triggers of 'a basis to believe' versus 'service of a suit.'"].)

**D. Distinction Between "Claims-Made" And "Claims-Made-And-Reported" Policies**

1. Under a "Claims-Made" policy, the insurer agrees to defend and indemnify the insured against alleged wrongful acts or omissions only if the claim is first made against the insured during the policy period. (*Chamberlin v. Smith* (1977) 72 Cal.App.3d 835, 845).

2. Under a "Claims-Made-And-Reported" policy, the "claim" must both be "first asserted" against the insured and reported in writing to the insurer during the policy period. (*VTN Consolidated, Inc. v. Northbrook Ins. Co., Inc*. (1979) 92 Cal.App.3d 888, 893).

**E. Additional Features Of "Claims-Made" Coverages**

1. To avoid unlimited retroactive coverage for prior acts, "Claims-Made" and "Claims-Made-And-Reported" policies usually require that the act or omission which forms the basis for the "claim" occurred on or after a specified "retroactive date." The "retroactive date" requirement is enforceable so long as it set forth in "conspicuous, clear and plain" policy language. (*Merrill & Seeley, Inc. v. Admiral Ins. Co*. (1990) 225 Cal.App.3d 624, 630).

2. Application Of The "Notice-Prejudice" Rule

   (a) The "notice-prejudice" rule – generally applicable to "occurrence" based liability policies – indicates that a liability insurer cannot deny coverage for an insured's breach of the policy's "notice" provisions unless the insurer can prove the breached caused it to suffer "substantial prejudice" (i.e. made the insurer spend more in defense or indemnity). (*See, e.g., Venoco, Inc. v. Gulf Underwriters Ins. Co*. (2009) 175 Cal.App.4th 750, 760; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 763).

(b) The "notice-prejudice" rule also applies to "Claims-Made" policies since the policy's "notice" requirements do not affect the risks assumed by the liability insurer. (*See Xebec Dev. Partners, Ltd. v. Nat'l Union Fire Ins. Co*., 12 Cal.App.4th 501 (1993), [disapproved of on non-relevant grounds by *Essex Ins. Co. v. Five Star Dye House, Inc*., 38 Cal.4th 1252 (2006)]; *Nw. Title Sec. Co. v. Flack*, 6 Cal.App.3d 134, 141 (1970); *see also Root, supra*, 130 Cal.App.4th 926, 936 [collecting cases]).

(c) However, the "notice-prejudice" rule does not apply to "Claims Made-And-Reported" policies since (1) the reporting period requirements contractually limit the coverage bargained for; and (2) effectively eliminating the reporting period requirements via the "notice-prejudice" rule would give the insured more coverage than they paid for. (*Root, supra*, 130 Cal.App.4th 926, 936; *Pacific Employers Ins. Co. v. Sup.Ct.* (1990) 221 Cal.App.3d 1348, 1358.) At the same time, the reporting period requirements can be "set aside" if the court deems it "equitable" to do so to avoid an unjust "forfeiture" of benefits. (*Root, supra*, 130 Cal.App.4th 926, 946-947).

3. "Self-Consuming" Or "Burning" Limits

(a) Typically, under "Occurrence"-based coverages, the amounts spent by the insurer to defend have no effect on the applicable indemnity limit(s). (*See Hertzka & Knowles v. Salter* (1970) 6 Cal.App.3d 325, 335).

(b) In contrast, many "Claims-Made" policies contain provisions which reduce the policy's indemnity limit "dollar for dollar by defense costs until zero is reached and the duty to indemnify ... [is] then terminated." (*Powerine Oil Co. v. Superior Ct*. (2005) 37 Cal.4th 377, 402 [*citing Aerojet–General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 76, fn. 29]).

(c) Typically, "self-consuming" or "burning" limits provisions are in policies where the insured has some control over settlement under the policy (e.g. professional liability, D&O). While no California cases have appeared to address the issue, when an insurer has issued a policy with a "burning" limits provision the insurer may have additional duties: (1) "to keep the insured informed of the defense costs incurred so that [they] will know what indemnity coverage remains" (2) "to avoid "unreasonable" defense costs that reduce the indemnity limits"; and (3) "to increase efforts for early settlement." (W. Crosky, *et al*. Cal. Practice Guide: Insurance Litigation (TRG August 2021 update) Chp.7A-J, §7:360; *see also Weber v. Indem. Ins. Co. of N. Am.* (D.Haw. 2004) 345 F.Supp.2d 1139, 1147 [while

holding that policy did not "unambiguously" state that it provided "burning limits" coverage, opining in passing that "bad faith" legal threshold for excusing insured's compliance with "cooperation" clause would be lower for "burning limits" policies].)

Thus, in many instances a "claims made" policy not only applies significant time limitations on claim reporting, but also provides less coverage compared to a standard "occurrence"-based policy, where the "claims made" policy incorporates "burning limits" or "cost erosive" defense-in-limits language.