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RWI PRACTICE INSIGHTS SERIES

Extreme Prejudice: Establishing Insurer Prejudice for Purposes of Insured Covenant Non-Compliance in Representation and Warranty Insurance (RWI) Policies

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Introduction

The insured covenant provisions of an insurance policy set forth a series of on-going covenants and obligations binding on the insured with respect to the coverage under the policy.[1] In some insurance policies, coverage under the policy is explicitly conditioned on the insured's compliance with such covenants and obligations, provided that the insurer has suffered actual prejudice as a result of non-compliance. In some U.S. states, case law or statute imposes an insurer prejudice requirement for forfeiture of coverage to result from non-compliance, even if the policy in question does not set forth such a requirement.

In a modern RWI policy, all or almost all of an insured's on-going covenants and obligations are made subject to an explicit insurer prejudice requirement before there will be a forfeiture or limitation of coverage due to non-compliance. The purpose of such a provision is typically to prohibit the insurer from denying or limiting coverage to an insured based on an insured's non-compliance **unless and only to the extent** that the insurer has been actually prejudiced by the non-compliance, with the burden of proof on the insurer. Such an insurer prejudice provision is favorable to the insured.

This article addresses the question of what measure of evidence might demonstrate insurer prejudice sufficient to permit an RWI carrier to deny or limit coverage based on an insured's non-compliance with policy covenants and obligations.

Examples of an Insured's On-Going Covenants and Obligations and of an Insurer Prejudice Provision

Examples of an insured's on-going covenants and obligations

7.2 **Notification**

With respect to a Breach, the Insured shall deliver a Claim Notice to the Insurer, signed by an executive officer of the Insured, as soon as practicable after a Specified Person has Actual Knowledge of such Breach, taking into account Insured's obligation in Clause 7.3.

7.3 **Claim Notice contents**

(i) The Claim Notice shall describe the facts and circumstances relating to the claim (including, where appropriate, specific references to the relevant Insured Obligations) in sufficient detail to allow the Insurer to assess the claim to the extent the Insured has knowledge of such facts and circumstances.

(ii) A Claim Notice shall not be invalid for failing to provide all necessary facts and circumstances and other information relating to the claim so as to enable the Insurer to assess the claim.

7.4 **Late notification**

With respect to any Breach, the Insurer shall not be liable for the underlying Loss nor shall the Retention be eroded unless the Claim Notice with respect to such Breach has been delivered to the Insurer:

(i) prior to the relevant Expiration Date for the applicable Breach; or

(ii) no later than 20 Business Days after the relevant Expiration Date to which the Claim Notice relates if a Specified Person first has Actual Knowledge of the Breach set out in the Claim Notice in the 20 Business Day period prior to such relevant Expiration Date.

7.7 **Cooperation Clause**

The Insurer, at its sole expense, shall be entitled to participate fully in the defense, negotiation and settlement of any Loss (with respect to a Third Party Demand, to the extent permitted by the terms of the Acquisition Agreement) such that the Insured Group shall (without limitation):

(i) to the extent reasonably permitted by the circumstances, not incur any Defense Costs without prior consultation with and the prior written consent of the Insurer, which consent shall not be unreasonably withheld, delayed or

conditioned (provided, however, that the Insured Group may incur Defense Costs without the Insurer's prior written consent up to USD$_____);

(ii) not settle, compromise or discharge any Third Party Demand without prior consultation with and the prior written consent of the Insurer, which consent shall not be unreasonably withheld, delayed or conditioned, but, for clarity, such consent shall only be required if the amount of such settlement together with any Loss paid plus Losses alleged in any pending claims, would exceed the Retention in effect at such time;

(iii) to the extent reasonably practicable, use its reasonable and good faith efforts (subject to existing confidentiality agreements) to provide the Insurer with copies of all correspondence and documentation available in connection with the claim under this Policy and to the extent possible afford the Insurer sufficient time in which to review and comment on such documentation;

(iv) subject to existing confidentiality agreements, use its reasonable and good faith efforts to grant the Insurer access to documentation and information of the Insured Group relevant to the Loss as reasonably requested by the Insurer and grant the Insurer upon reasonable prior notice access to the Insured Group's representatives for interviews and witness statements during normal business hours and in reasonable locations;

(v) use its reasonable and good faith efforts to keep the Insurer reasonably informed of proposed meetings with the Seller or any other relevant third party in connection with any Loss and allow the Insurer to attend such meetings where able to do so, and, subject to existing confidentiality agreements, where the Insurer so requests in writing, provide a detailed written description to the Insurer of the outcome of meetings and discussions at which the Insurer was not present;

(vi) use its reasonable and good faith efforts to conduct all negotiations and proceedings in respect of any Third Party Demand with advisers consented to by the Insurer in writing (such consent not to be unreasonably withheld, delayed or conditioned) and take such action as the Insurer may reasonably request to contest, avoid, resist, compromise or otherwise defend a Third Party Demand; and

(vii) subject to existing confidentiality agreements, use its reasonable and good faith efforts to provide the Insurer with such other information and assistance in connection with any (a) Loss, (b) Third Party Demand or (c) subrogation action per Clause 9 as the Insurer may reasonably request.

8.1 **Mitigation and preservation of rights**

To the extent required by applicable law, the Insured shall, and shall cause the other members of the Insured Group to, take all commercially reasonable steps to mitigate any Loss after any Specified Person has Actual Knowledge of any matter that would reasonably be expected to give rise to any Loss; provided that the Insured Group shall not be obligated to seek any recovery from the Seller; provided, further, that the failure of the Insured to so mitigate, or cause the other members of the Insured Group to mitigate, shall only reduce the rights of the Insured Group to recover for Loss under this Policy to the extent of the Loss that would have been avoided by such mitigation and the burden of proving such amount shall be on the Insurer. The Insured shall, and shall cause the other members of the Insured Group to, take all commercially reasonable steps to preserve all rights against any other person in respect of any Loss and to preserve the Insurer's subrogation rights with respect thereto to the extent such subrogation rights exist hereunder. If the Insurer believes that the Insured should take any additional actions in order to comply with its obligations pursuant to this paragraph, the Insurer shall request such actions promptly in writing.

8.2 **Maintenance of records**

Until the later of 60 Business Days after (i) the expiration of the Policy Period or (ii) the final resolution of all claims or disputes relating to this Policy, the Insured Group shall, to the extent within their control and in accordance with their respective record retention policies, maintain all of their respective documentation and information relating to the due diligence and consummation of the transaction provided for in the Acquisition Agreement; provided that the Insured Group may destroy documents in the ordinary course of their businesses consistent with past practices and their respective record retention policies so long as such destruction is not done with the intent to harm the Insurer.

10.10 **Other Insurance**

The Insured shall or, to the extent practicable, shall cause its affiliates to maintain and/or purchase insurance coverage for the acquired business in a commercially reasonable manner. The coverage provided under this Policy shall be excess of any other valid and collectible insurance coverage or any other valid and collectible insurance policy with respect to any Loss resulting from the underlying facts and circumstances of any (i) Breach or matter that would reasonably be expected to give rise to a Breach, (ii) Third Party Demand and/or (iii) Loss. The Named Insured shall discuss with the Insurer, at the Insurer’s reasonable

request, whether any bond, indemnity or other insurance policy is applicable or available with respect to the matters described in any Claim Notice. Notwithstanding any other provision in this Policy, any dispute as to the applicability of, or delay in obtaining coverage under, any such bond, indemnity or other insurance policy shall not be a basis for delay or refusal of payment hereunder, and the Insured Group shall not be obligated to first pursue claims against any other bond, indemnity or other insurance policy prior to being eligible for any payment under this Policy. If there is a dispute as to whether the coverage under this Policy shall be excess of other coverage or if other coverage shall be excess of the coverage under this Policy, the Insured Group may recover under this Policy, and the Insurer, to the extent allowed under applicable law, shall be subrogated to the Insured Group's rights under the applicable other coverages.

Example of an Insurer Prejudice Provision

8.3 **Failure to comply**

Any failure of an Insured to comply with Clauses 7.2 (except as provided in Clause 7.4), 7.3, 7.7, 8.1, 8.2 or 10.10 shall not relieve the Insurer of its obligations under this Policy; however, the Insurer shall be entitled to reduce the amount of Loss payable under this Policy to reflect the extent (but only the extent) to which the Insurer's position has been actually prejudiced by such failure, with the Insurer having the burden of proving such actual prejudice and such amount.

Anatomy and Meaning of the Insurer Prejudice Provision

"Any failure of an Insured to comply with Clauses 7.2 (except as provided in Clause 7.4), 7.3, 7.7, 8.1, 8.2 or 10.10 shall not relieve the Insurer of its obligations under this Policy;"

The foregoing portion of the insurer prejudice provision effectively prescribes that the insured's covenants and obligations in the RWI policy are independent of the insurer's obligation to insure loss under the policy. Thus, non-compliance by an insured with one or more of such covenants and obligations will not result in a forfeiture or limitation of any insured's coverage under the policy, except and only to the extent provided in the remaining portion of the insurer prejudice provision, as discussed below.[2]

"however, the Insurer shall be entitled to reduce the amount of Loss payable under this Policy to reflect the extent (but only the extent) to which the Insurer's position has been actually prejudiced by such failure,"

The foregoing portion of the insurer prejudice provision sets forth a limited exception to the independent covenant portion of the provision. Thus, to the extent that the failure by an insured to comply with one or more of its on-going covenants and obligations under the RWI policy results in actual prejudice to the insurer, then the insurer can reduce the amount of loss it is obligated to cover under the policy.

"with the Insurer having the burden of proving such actual prejudice and such amount."

As will be discussed below in the section headed "Applicable Delaware Law in the Absence of an Insurer Prejudice Provision", the issue of whether the insurer or the insured has the burden of proving insurer prejudice can be of exceptional significance. Moreover, the burden on the insurer of proving the amount of loss affected by such prejudice may be of even greater significance in constraining the limiting effect of the insurer prejudice provision.

In some cases, applicable law may shift the burden of proof from the insurer to the insured based on the gravity of the insured's non-compliance. The RWI policy's insurer prejudice provision overrides such applicable law by prescribing that the insurer always has the burden of proving the fact and extent of insurer prejudice.

Applicable Delaware Law in the Absence of an Insurer Prejudice Provision

Given that many RWI policies are governed by Delaware law to match up with the governing law of the relevant acquisition agreement, this article will focus on Delaware law.[3] Since this article assumes that the RWI policy in question contains an explicit insurer prejudice provision like the example set forth above, this section will provide only a brief overview of applicable Delaware law in the absence of such a provision.

An important aspect of evaluating applicable Delaware law is recognizing that it is purely an evaluation by analogy analysis, generally to automotive and liability insurance policies, as there simply are no Delaware cases or statutes specific to RWI policies.[4]

The seminal case in Delaware regarding insurer prejudice is *State Farm* v. *Johnson*, a Delaware Supreme Court case decided in 1974. The case involved an issue of untimely notice given by an insured under an automobile liability insurance policy, in which the Court established a two-part test applicable to untimely notice: (i) Has the insured complied with the policy's notice provision, with the burden of proof on the insured?; and (ii) If the insured has failed to comply, has the insurer suffered prejudice as a result of the insured's non-compliance, with the burden of proof on the insurer?

A critical underpinning of the holding in *Johnson* was the Supreme Court's finding that the insurance policy in question was a contract of adhesion, which meant that the policy's terms and conditions were "'not talked out or bargained for as in the case of

contracts generally,'" and therefore that the policy "'should be read to accord with the reasonable expectations of the [insured] so far as the language will permit.'"[5] "[W]e hold that when an insured fails in his burden of proving compliance with the notice condition, before any forfeiture [of coverage] can result, the insurer has the burden of showing that it has thereby been prejudiced."[6]

There have been a series of Delaware cases extending or distinguishing *Johnson* in various contexts:

- *Brandywine One Hundred Corp.* v. *Hartford Fire Insurance*, U.S.D.C. Delaware, 1975--insurer prejudice not required in the case of insured non-compliance with a one-year notice of suit covenant.[7]
- *Falcon Steel* v. *Maryland Casualty*, DE Superior Court, 1976—explanation of measure of insurer prejudice required, discussed below in "Proof of Insurer Prejudice".[8]
- *Hall* v. *Allstate*, DE Superior Court, 1985—insurer prejudice required in the case of insured non-compliance with a prior-consent-to-settlement covenant.[9]
- *National Union Fire Insurance Co. of Pittsburgh* v. *Rhone-Poulenc Basic Chemicals*, DE Superior Court, 1992—insurer prejudice not required if insurance policy not an adhesion contract.[10]
- *du Pont* v. *Admiral Insurance Co.*, DE Superior Court, 1995—insured non-compliance with notice, cooperation/assistance and prior-consent-to-settlement covenants alleged by insurer; Court stated that Delaware courts have not required insurer prejudice for cooperation/assistance non-compliance, although at least one commentator has noted that prejudice may be relevant to the materiality of the non-compliance.[11]
- *Sutch* v. *State Farm*, DE Supreme Court, 1995—explanation of measure of insurer prejudice required, discussed below in "Proof of Insurer Prejudice".[12]
- *Jones* v. *State Farm*, DE Supreme Court, 1997—demonstration of actual prejudice required, reversing lower court's finding of prejudice as a matter of law, discussed below in "Proof of Insurer Prejudice".[13]
- *Homsey Architects* v. *Harry David Zutz Insurance*, DE Superior Court, 2000—insurer prejudice not required for an untimely notice under a claims-made policy, distinguishing *Johnson* as involving an occurrence policy.[14]
- *Allstate* v. *Fie*, DE Superior Court, 2006—shifting of burden of proof regarding insurer prejudice to insured in case of insured non-compliance with prior-consent-to-settlement covenant.[15]
- *Sun-Times Media Group* v. *Royal & Sunalliance Insurance Co. of Canada, DE Superior Court, 2007*—insurer prejudice required in case of insured non-compliance with a prior-consent-to-settlement covenant.[16]

- *Wilhelm v. Nationwide*, DE Superior Court, 2011—explanation of measure of insurer prejudice required, discussed below in "Proof of Insurer Prejudice".[17]
- *Medical Depot v. RSUI Indemnity*, DE Superior Court, 2016—insurer prejudice required for a claims-made policy with continuing coverage, distinguishing *Homsey*.[18]
- *Northrop Grumman Innovation Systems v. Zurich American Insurance*, DE Superior Court, 2021—explanation of measure of insurer prejudice required, questioning *Wilhelm*.[19]

In addition to the foregoing cases, a number of cases in Delaware, decided at the motion for summary judgment stage, have addressed the question of whether or not insurer prejudice is an issue of fact or an issue of law and, in that regard, whether insurer prejudice can ever be presumed to exist at the motion for summary judgment level (such as in the case of an extended unexcused delay by an insured in giving a claim notice).

Except as discussed in the next section below, whether any of the Delaware cases dealing with insurer prejudice would be considered binding or even analogous precedent with respect to an RWI policy that does not contain an insurer prejudice provision is questionable for a number of reasons, including:

- None of the cases involved an RWI policy.
- Whether an RWI policy would be considered a claims-made policy.[20]
- Whether an RWI policy would be considered a contract of adhesion.[21]
- Whether an RWI policy would be considered different on some other basis from the policies involved in the cases.
- Whether the presence of a duty to defend in the policies involved in some of the cases is a distinguishing factor from an RWI policy, which disclaims any insurer duty to defend.

Proof of Insurer Prejudice

Regardless of whether or not an RWI policy contains an insurer prejudice provision, the Delaware cases dealing with the measure of proof of insurer prejudice required should be considered persuasive analogous precedent for analyzing RWI policies.

The most important element of establishing insurer prejudice is that actual prejudice is required for RWI coverage to be forfeited or limited, not merely prejudice in theory. *See Jones* v. *State Farm*, DE Supreme Court, 1997.[22] The seminal case in Delaware regarding proof of insurer prejudice is *Falcon Steel* v. *Maryland Casualty*, DE Superior Court, 1976.[23]

The *Falcon Steel* Court's holding that insurer prejudice had not been proved was with respect to a comprehensive general liability (CGL) insurance policy. In support of that holding, the Court's various findings resonate in terms of what an RWI carrier should be required to demonstrate to satisfy its burden of proof regarding insurer prejudice and the amount of loss affected thereby, including:

- "[Insurer's expert witnesses'] testimony as to the effect of delayed notice was for the most part mere speculation …, since they lacked sufficient specific factual information upon which to base a sound opinion."[24]
- "The test is not what the insurer might have done, but rather what results it is probable would have been produced if the insurer had been given the opportunity to function upon receipt of timely notice. Prejudice must be determined based upon loss of substance and not merely loss of opportunity for the insurer to follow its established procedures."[25]
- "The question of whether or not the delay in notification has caused prejudice to [the insurer] must be based on evidence and reasonable inferences and cannot be left to mere speculation."[26]
- "It is clear that the Delaware Supreme Court in Johnson rejected the concept that mere passage of time creates the kind of prejudice which bars recovery against an insurer. It is obvious that every diligent insurer upon prompt receipt of notice would take steps to preserve and perpetuate evidence and that it could be surmised that this might not be done as effectively at a later time. If this is all that Johnson stands for, it would not have been necessary for the Court to give the full consideration to the subject of prejudice which it did."[27]
- "In order to carry [its] burden [of proof], an insurer must show that evidence which it is reasonably probable could have been developed by prompt investigation has not or cannot be developed by later investigation or that in some other respect it is reasonably probable that a resolution of the claim could have been reached if prompt notice had been given which cannot be reached after the late notice."[28]

A number of Delaware cases after *Falcon Steel* have considered the issue of proof of insurer prejudice. In *Sutch* v. *State Farm*, DE Supreme Court, 1995, the Court reversed a determination by the Delaware Superior Court that the insurer had been prejudiced by the insured's failure to give timely notice of the claim. In reaching that decision, the Court found that the insurer "had notice and the opportunity to intervene [in the underlying case] to protect its interests" and had failed to do so, and therefore had "failed to demonstrate any prejudice …."[29]

In *Wilhelm* v. *Nationwide*, DE Superior Court, 2011, the Court found that the insurer had "suffered prejudice as a result of [the insureds'] delay in two way [*sic*] primary ways: (1) it was unable to investigate Mr. Wilhelm's pre-accident condition because certain older medical records are no longer available, and (2) it was unable to have an expert examine Mr. Wilhelm at a time close to the 1998 accident so that it could asses [*sic*] what injuries were attributable to that accident as opposed to other accidents and the lapse of time in general."[30] The Court in *Wilhelm* went on to hold that "those facts, along with the 'inordinate lapse of time' between the accident and notification, demonstrate that [the insurer] is in a less favorable position in defending this suit as a result of [the insureds'] delayed notice. [The insurer] has suffered prejudice as a matter of law, and thus, is not obligated to provide coverage pursuant to its policy."[31]

The *Wilhelm* case seems to be an outlier from the *Falcon Steel* line of cases in relying on aspects of theoretical prejudice rather than of actual prejudice, in giving weight to the inordinate lapse of time in the insureds' giving notice in determining prejudice, and in finding prejudice as a matter of law on summary judgment. In a 2021 case, *Northrop Grumman Innovation Systems* v. *Zurich American Insurance*, a different Delaware Superior Court judge seemed to call into question the viability of the holding in *Wilhelm*, noting that the *Wilhelm* Court's determination of prejudice as a matter of law in those circumstances was "not too far from skipping a prejudice analysis altogether."[32]

The combination of an issuer prejudice provision of the type described above and the *Falcon Steel* line of cases regarding proof of insurer prejudice creates a very high hurdle for an RWI carrier seeking to deny or limit coverage based on an insured's policy covenant or obligation non-compliance.[33] An insurer's burden of proving actual prejudice and the amount of loss affected thereby would be particularly challenging in the case of a settlement entered into without the prior consent of the insurer or in the case of a first party loss, such as a purchase price overpayment loss based on a financial statement representation and warranty breach. In those types of cases, the burden on the insurer of having to prove what would have happened differently had the insured complied with the policy covenant and the amount of loss that would have thereby been avoided may simply prevent the insurer from denying or limiting coverage based solely on the policy covenant or obligation non-compliance, particularly if the insurer's attempt to do so ends up being decided by a AAA arbitration panel, as provided for in most RWI policies.

That said, there are practical considerations an insured should take into account with respect to RWI covenant compliance, including:

- Even a AAA arbitration panel may be inclined to give an RWI insurer the benefit of the doubt in the case of an inordinate delay in covenant or obligation compliance or in the case of willful or intentional non-compliance.[34]
- Non-compliance by an insured with an RWI policy's covenants or obligations may present a roadblock, or at least a speed bump, in terms of getting the insurer to act promptly and reasonably with respect to a pay-out pursuant to the policy.
- Non-compliance may also exacerbate other concerns an RWI insurer may have about a claim under the policy regarding the breach, the loss, or the proximate relationship between the loss and the breach being asserted by the insured.

Conclusion; Practice Tips

Conclusion

A well-crafted insured-favorable insurer prejudice provision in an RWI policy may constrain the RWI carrier's ability to deny or limit coverage well beyond what applicable law allows in the absence of such a provision. Taken together with the obstacles upon the RWI carrier in proving actual prejudice imposed by the *Falcon Steel* line of cases, the hurdle on the carrier may simply be too high to overcome. However, practical considerations may weigh in favor of covenant compliance notwithstanding such a provision and the *Falcon Steel* line of cases.

Practice tips for attorneys for insureds

- In the RWI policy arrangement and negotiation phase, make sure that the policy contains an insured-favorable insurer prejudice provision applicable to all of the insured's on-going covenants and obligations under the policy (other than the covenant to give a claim notice prior to the expiration of the policy period for such notices), and try to avoid any carve-outs and limitations on the insurer's obligation to prove actual prejudice and the amount of loss affected thereby; relying on applicable state law in the absence of such a provision is dicey, at best.
- If the RWI policy does not contain an insurer prejudice provision, review applicable governing law for the policy to determine whether or not insurer prejudice is required and which party has the burden of proof, keeping in mind ways in which applicable law may not be analogous.
- Try to avoid willful or intentional non-compliance by insured with its RWI policy covenants and obligations.
- Be cognizant of any practical considerations favoring compliance by the insured.

- If the RWI carrier asserts insured non-compliance, request that the carrier identify specifically how it has been actually prejudiced by such non-compliance and the amount of loss that would have otherwise been avoided.
- Be prepared to put the RWI carrier to the test of proving such actual prejudice and such amount.

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[1] Insurance policies, including RWI policies, typically contain an insured's covenants and obligations in order for coverage to be put into place, often structured as conditions to the coverage commencing or remaining in place (such as payment of the premium). The on-going covenants and obligations referred to in this article are an insured's covenants and obligations arising with respect to the making and pursuit of claims by the insured under the policy.

[2] The parenthetical in the foregoing portion of the insurer prejudice provision—"(except as provided in Clause 7.4)"—effectively carves out claim notices not given on a timely basis in accordance with Clause 7.4 from the effects of the insurer prejudice provision in Clause 8.3. An insurer may also try to carve out from the purview of Clause 8.3: (i) settlements, compromises or discharges of Third Party Demands to which it has not provided its prior consultation or consent as required by Clause 7.2; and/or (ii) willful and/or intentional non-compliance with any of an insured's on-going covenants and obligations under the RWI policy.

[3] For a 50-state survey of the notice prejudice rule as of December 2016 prepared by Tressler LLP, see the publication "Late Notice and the Prejudice Requirement", available at the Tressler LLP website; for a discussion of U.S. law regarding the giving of claim notices generally, see 3 New Appleman on Insurance Law Library Edition §16.03[1][2024], including §16.03[1][d][iii] regarding what constitutes insurer prejudice.

[4] Because almost all U.S. RWI policies provide for AAA arbitration of disputes, customarily at the choice of the insured, there is a dearth of U.S. case law generally regarding RWI policies.

[5] State Farm Mut. Auto. Ins. Co. v. Johnson, 320 A.2d 345, 347 (Del. 1974)(citing and quoting Cooper v. Government Employees Insurance Co., a New Jersey Supreme Court case).

[6] Id. (footnote omitted).

[7] Brandywine One Hundred Corp. v. Hartford Fire Ins. Co., 405 F. Supp. 147 (D. Del. 1975).

[8] Falcon Steel Co., Inc. v. Maryland Cas. Co., 366 A.2d 512 (Del. Super. 1976).

[9] Hall v. Allstate Ins. Co., 1985 WL 1137299 (Del. Super., Jan. 11, 1985).

[10] National Union Fire Ins. Co. of Pittsburgh, PA v. Rhone-Poulenc Basic Chemicals Co., 1992 WL 22690 (Del. Super., Jan. 16, 1992).

[11] E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., 1995 WL 654010 (Del. Super., Oct. 27, 1995).

[12] Sutch v. State Farm Mut. Auto. Ins. Co., 672 A.2d 17 (Del. 1995).

[13] Jones v. State Farm Fire and Cas. Ins. Co., 703 A.2d 644(Table) (Del. 1997).

[14] Homsey Architects, Inc. v. Harry David Zutz Ins., Inc., 2000 WL 973285 (Del. Super., May 25, 2000).

[15] Allstate Ins. Co. v. Fie, 2006 WL 1520088 (Del. Super., Mar. 9, 2006).

[16] Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada, 2007 WL 1811265 (Del. Super., June 20, 2007), abrogated on other grounds by First Solar, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa, 274 A.3d 1006 (Del. 2022).

[17] Wilhelm v. Nationwide General Ins. Co., 2011 WL 4448061 (Del. Super., May 11, 2011).

[18] Medical Depot, Inc. v. RSUI Indemnity Co., 2016 WL 5539879 (Del. Super., Sep. 29, 2016).

[19] Northrop Grumman Innov. Sys., Inc. v. Zurich American Ins. Co., 2021 WL 347015 (Del. Super., Feb. 2, 2021).

[20] RWI policies are generally thought to be claims-made policies, rather than occurrence policies. However, RWI policies differ in significant ways from typical claims-made liability insurance policies, including by providing coverage for a multi-year claims period rather than a one-year claims period followed by a series of additional one-year claims periods with the same carrier or different carriers.

[21] The question of whether or not an RWI policy would be considered a contract of adhesion will be addressed in a later article in this RWI Practice Insights Series. The question centers around whether or not the terms and conditions of the RWI policy were negotiated by the insured, either in the course of arranging the policy or in the case of a policy based on a previously negotiated form between the insurer and the insured (or, in

some cases, by counsel to the insured for its clients), including whether the insurer or the insured prepared the first draft of the policy. For an example of a Delaware case in which a court found that the insured had been involved in the negotiation of the terms and conditions of a liability insurance policy, and therefore that the policy was not a contract of adhesion requiring insurer prejudice for potential forfeiture of coverage, see National Union Fire Ins. Co. of Pittsburgh, PA v. Rhone-Poulenc Basic Chemicals Co., 1992 WL 22690 (Del. Super., Jan. 16, 1992).

[22] Jones v. State Farm Fire and Cas. Ins. Co., 703 A.2d 644(Table) (Del. 1997).

[23] Falcon Steel Co., Inc. v. Maryland Cas. Co., 366 A.2d 512 (Del. Super. 1976).

[24] Id. at 516.

[25] Id. at 517 (citations omitted).

[26] Id. at 518 (citations omitted).

[27] Id. at 518.

[28] Id. at 518 (citations omitted). Some courts outside Delaware have also focused on the amount of insurer actual prejudice required, such as "substantial prejudice" or "appreciable prejudice."

[29] Sutch v. State Farm Mut. Ins. Co., 672 A.2d 17, 22 (Del. 1995).

*[30] Wilhelm v. Nationwide General Ins. Co., 2011 WL 4448061, at *5 (Del. Super., May 11, 2011) (footnote omitted).*

*[31] Id. at *5.*

*[32] Northrop Grumman Innov. Sys., Inc. v. Zurich American Ins. Co., 2021 WL 347015, at *15 (Del. Super., Feb. 2, 2021)(footnote omitted).*

[33] Among other things, how an insurer can uncover sufficient information regarding actual prejudice to it and the amount of loss affected thereby from a recalcitrant insured is a particularly daunting burden of proof for the insurer.

[34] Whether there is any substantive difference between "willful" and "intentional" for this purpose is uncertain. Definitions of "willful" often include "intentional" as a synonym or an element of the definition. However, some resources describe a difference for the term "willful" in requiring an element of "maliciousness" or the like. See, e.g., the definition of "willful" in Black's Law Dictionary (12th ed. 2024).