

A Question of Coverage: Key Components of Insurance Disputes

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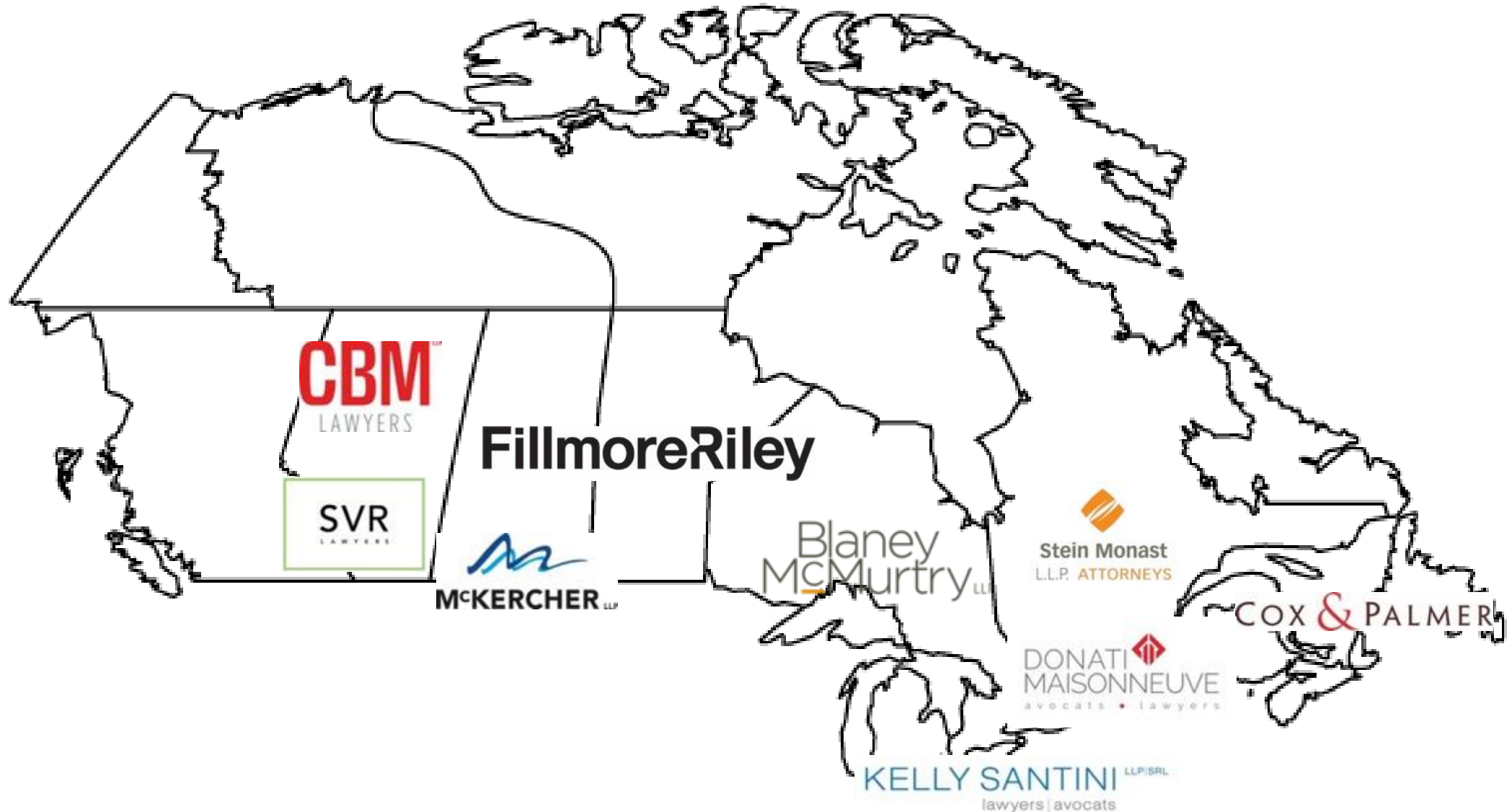
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National Coverage





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A Question of Coverage



Coverage Investigation

1. Duty to Defend
2. Waiver & Estoppel
3. Reservation of Rights Letters vs Non-Waiver Agreements

A Case Study: Mr. Campbell

- The Insured, Mr. Campbell, took his girlfriend's father's dirt bike from a shed on his property and went for a ride to the local gravel pit. The dirt bike was registered to Mr. Campbell's employer.
- A short distance away from the gravel pit, on a municipal highway, Mr. Campbell turned abruptly in front of an ATV operated by Mr. Rodger, leading to a collision.
- The dirt bike was unlicensed, and Mr. Campbell did not have permission to drive the dirt bike. Mr. Campbell also did not have a motorcycle license.
- Mr. Rodger struck his head on a mailbox and suffered severe injuries in the collision.
- Mr. Rodger commenced a lawsuit against Mr. Campbell for bodily injury damages.



What is the duty to defend?

- The insurer's obligation to provide a legal defence in the name and on behalf of the insured party, at the cost of the insurer, against a civil action brought against the insured.

Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada, 2010 SCC 33, para. 19:

- *An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim.*
- *It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify.*
- *What is required is the **mere possibility** that a claim falls within the insurance policy.*



Case Study Continued: Duty to Defend

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- Mr. Campbell had possible insurance coverage under two policies: a standard automobile insurance policy on his own motor vehicle and a home and general liability insurance policy with another insurer.
 - Mr. Campbell's auto insurer denied coverage.
 - The home insurance policy provided coverage for liability arising from use or operation of "any self-propelled land vehicle" which the insured does not own provided that the vehicle is not "required to be registered under any government authority" and is primarily designed for use off public roads and provided the vehicle is being used with the owner's consent.
 - Mr. Campbell home and general liability insurer assigned defence counsel to Mr. Campbell on the basis that the facts alleged in the civil claim of Mr. Rodger, if true, would have possibly led to coverage under the home insurance policy for liability arising from the use or operation of a self-propelled land vehicle.

CASE STUDY CONTINUED: Coverage Denial

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- Mr. Rodger's bodily injury litigation proceeded to discoveries.
 - During the Discovery process, Mr. Rodger's lawyer asked Mr. Campbell's insurer-appointed defence counsel whether there were any coverage issues with the claim.
 - At this stage, Mr. Campbell's home insurer retained separate coverage counsel and determined that there was likely no coverage under the policy.
 - Mr. Campbell's home insurer brought a Court application seeking a determination that there was no coverage available under his home insurance policy.
 - Mr. Campbell opposed this Court Application on the basis of the legal doctrines of waiver and estoppel.

WAIVER & ESTOPPEL

Two related legal concepts that can prevent an insurer from denying coverage or enforcing a policy term.

Insurers should be aware of these legal doctrines when investigating claims for possible coverage issues.

WAIVER

- Waiver is the voluntary and intentional decision, on the part of the insurer, not to hold the insured to a particular contractual or policy obligation.
- Provincial insurance legislation generally requires that the insurer give notice in writing that the insured's compliance with a policy requirement is waived.

E.g. Ontario *Insurance Act*, Section 131:

131 (1) The obligation of an insured to comply with a requirement under a contract is excused to the extent that, (a) the insurer has given notice in writing that the insured's compliance with the requirement is excused in whole or in part, subject to the terms specified in the notice, if any.

ESTOPPEL

- An insurer can be prevented from denying coverage where an insurer has represented that coverage is available and the insured has relied on this representation to their detriment.
- Promissory Estoppel:
 - There must be a promise or assurance from the insurer to the insured;
 - The insured must have relied on that promise; and
 - The insured must have changed their position in reliance on the insurer's representation.



*The
Commonwealth
Mutual
Insurance Group
v Campbell,*
2019 ONCA 668,
paras 13-14:

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- 13 Ultimately, the lawyer appointed for Mr. Campbell acted for him for 10 months before [the insurer] gave Mr. Campbell any reason to believe his liability was not covered and he would not be defended. In these circumstances, the application judge was entitled to conclude that the litigation was well-advanced, and to infer that allowing [the insurer] to now assert that there is no coverage and therefore no duty to defend Mr. Campbell would be detrimental to him.
 - 14 There was also supplementary direct evidence of prejudice. As Mr. Campbell attested, he assumed that his interests were being taken care of during this 10-month period. He did nothing to secure his own counsel to second-guess the decisions being made by the lawyer [the insurer] retained...
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- The Ontario Court of Appeal did not allow the insurer to deny coverage due to the doctrine of estoppel.
 - What did the Court say could have allowed the insurer to deny coverage?
 - Issuing a Reservation of Rights Letter or having Mr. Campbell execute a Non-Waiver Agreement

Reservation of Rights Vs. Non-Waiver Agreement

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- Documents used by insurers to pre-empt arguments of waiver and estoppel.
 - Reservation of Rights Letter: Formal letter from an insurer unilaterally informing the insured that the insurer is investigating a claim but is reserving the right to deny coverage later if the investigation reveals that the claim is not covered under the policy.
 - Non-Waiver Agreement: The insurer and insured mutually acknowledge and agree to the insurer's reservation of rights and the insurer's ability to deny coverage if a breach of condition is found.
 - Courts have held that in order to be effective, such documents must clearly set out the rights which are reserved to the insurer.

Reservation of Rights Vs. Non-Waiver Agreement

2 benefits of a non-waiver agreement:

1. Because the Insured is required to sign a non-waiver agreement, the document provides strong evidence that the insured knew that it should not interpret the insurer's actions as confirming coverage.
2. Since a non-waiver agreement is a bilateral contract, a non-waiver agreement can impose additional rights and obligations on the insurer and the insured.
 - E.g. non-waiver agreements often authorize the insurer to defend a third-party action brought against the insured, to settle this claim, and to later recover from the insured both the cost of defending the claim and the settlement amount if coverage is denied.

Bad faith – what is it?

- “Bad faith” refers to a breach of the insurers’ duty of good faith and fair dealing with the insured.
- General principles:
 - An insurer owes a duty of good faith in the manner in which it investigates and assesses a claim and in deciding whether to pay it.
 - A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy.
 - This duty, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim.
 - Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.



Bad faith litigation

- Allegations of bad faith are appearing with more regularity in coverage claims.
 - Included as boiler-plate.
- Often, these allegations are not actually pursued.
 - Insured usually cares most about getting their indemnity.
 - Majority of coverage cases resolve.
- Manitoba – not a lot of case law.



Linde v. Max Insurance Company, 2023
MBKB 74; 2025 MBCA 13

- Fact scenario that could easily arise on any of your files (which is why it is worth discussing).
- Claim concerns a residential fire loss that occurred in December 2019.
- Insured, Nicole Linde ("**Linde**"), made a claim under her homeowner's policy.



Linde v. Max Insurance Company, 2023 MBKB 74; 2025 MBCA 13



- Shortly after the fire, the insurer determined that the ACV of the house was \$125,000.
- In February 2020, the insurer determined that the cost to repair the house was \$248,000, pursuant to an estimate from a contractor.
 - Insurer agreed to pay up to this amount.
- Linde grew dissatisfied with how her claim was being handled.
 - Incomplete, slow, inaccurate, determination on repair vs. replace, repair valuation.
- By August 2020, 8 months after the loss, Linde still had not repaired or replaced the home.
 - Insurer paid her the ACV amount of the house (\$125,000) plus what they viewed as valuation for contents.
 - Linde continued to demand replacement of her house and contested the valuation of her contents.

***Linde v.
Max
Insurance
Company,
2023 MBKB
74; 2025
MBCA 13***

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- Linde sued the insurer, alleging a breach of the policy and also claimed that the insurer engaged in bad faith in handling her claim.
 - Laundry list of allegations in support of bad faith, mainly about how the file was handled:
 - The initial meeting post-fire was too brief.
 - Linde was not informed of the repair quotes on a timely basis;
 - The insurer did not consider rebuilding Linde's home;
 - The insurer only hired one expert to provide a repair estimate;
 - The insurer did not pay out the mortgage on the property at the earliest possible date;
 - The insurer did not pack out her personal contents to a storage facility;
 - Linde was not provided with any photographs of her damaged contents;
 - The insurer's original content list was, in Linde's view, incomplete, which required extensive revisions.
 - Tone of adjuster's letter re: content submission.

***Linde v.
Max
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- Linde also made allegations about the personal conduct of the adjuster:
 - Alleged that, at their initial meeting, that the adjuster inappropriately said that she should consider taking a “big fat cheque”.
 - Alleged that, during a later meeting, the adjuster called her “a greedy bitch” and that, “she just wanted to build a new house”.
 - The trial judge did not accept Linde’s evidence that these statements were actually made.

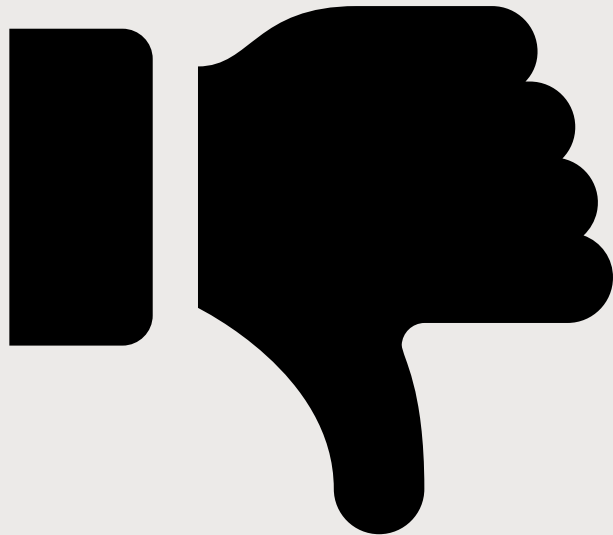
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- In assessing the evidence, the Court found that bad faith had not been proven.
 - Test is whether handling was “overwhelmingly inadequate”.
 - Not present here.
 - Claim was delayed, but not unreasonable.
 - Paid part of claim within 8 months and remained willing.
 - Insurer properly determined that the home could be repaired rather than replaced, based on expert evidence.
 - Just because Linde didn’t like it does not = bad faith.
 - Under Policy, the lesser of repair or replacement was payable, if the home was indeed repaired or replaced.
 - Court took no issue with the insurer hiring only one expert to determine repair cost, given that this expert was incredibly experienced and there was no evidence their assessment was deficient.

***Linde v.
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- With respect to the handling of the contents claim:
 - Failure to pack....not bad faith.
 - Initial incomplete content listing...not bad faith.
 - Statement of concern in adjuster's letter...not bad faith.
 - Court also found that there was no evidence that the insurer's motivation was anything other than doing what it was required to do under the policy.

***Linde v. Max Insurance
Company, 2023 MBKB
74; 2025 MBCA 13***



- One criticism:
 - the insurer ought to have paid the mortgage out on the property on a more timely basis – because coverage had been confirmed early.
 - Had the \$125,000 ACV payment been made earlier, it would have paid the mortgage off earlier and Linde would have paid less in interest.
 - Court ultimately ordered the insurer to compensate Linde for this...but not bad faith.

Linde v. Max Insurance Company, 2023 MBKB 74; 2025 MBCA 13

- Matter was appealed to Manitoba Court of Appeal (2025 MBCA 13)
 - Appeal on bad faith determination dismissed;
 - Court found that it was open to the judge to make the findings he made.
 - *“None of the conduct proven against the insurer rises to the threshold required to establish bad faith”.*



A note on adjusters'/examiners' communications



- Internal communications are disclosable.
- “What you say can be used against you”
 - May suggest improper motive.
 - Issue arose in Manitoba case of *Martens v. Manitoba Public Insurance Corporation*, 2020 MBQB 158.
 - Found bad faith partly due to internal emails.
 - Words used suggested that insurer wanted to cut off benefits no matter what.
 - Looking for “wiggle room”.
 - Needed to come up with a “plausible plan” to retire the file.
 - Awarded damages for bad faith in the amount of \$348,000.
 - Overturned on appeal, but fueled years of litigation and made the news.

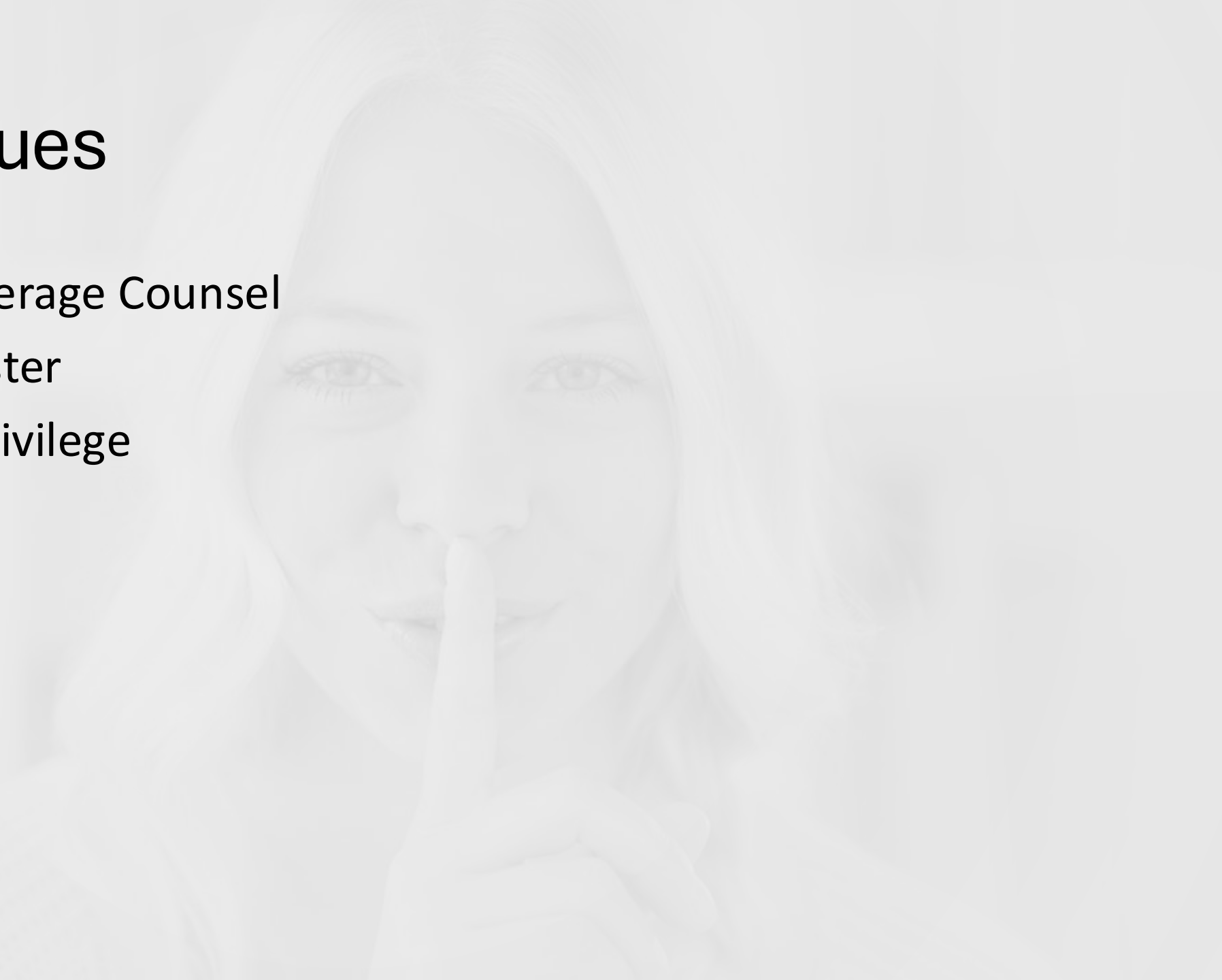
Takeaways

- For claim management to amount to bad faith, it must be *overwhelmingly inadequate*.
 - High threshold.
 - Delay, on its own, is not enough.
 - Making decisions that an insured does not agree with, is not enough.
 - Being wrong on a claim, also, does not automatically amount to bad faith.
- Internal communications may be used to support allegations of bad faith.
 - Assume they will be disclosed.
 - Be mindful of your internal communications.



Privilege Issues

- Defence and Coverage Counsel
- Counsel vs. Adjuster
- Compromising Privilege



Defence and Coverage Counsel



Counsel vs. Adjuster

- Sometimes lines between counsel and adjuster become blurred
- Consider what documents are covered by solicitor-client privilege
- Evidence of reasonable decision-making
- Benefits of early legal input



Compromising Privilege

LITIGATION PRIVILEGE OUT THE DOOR FOR
COVERAGE CLAIMS

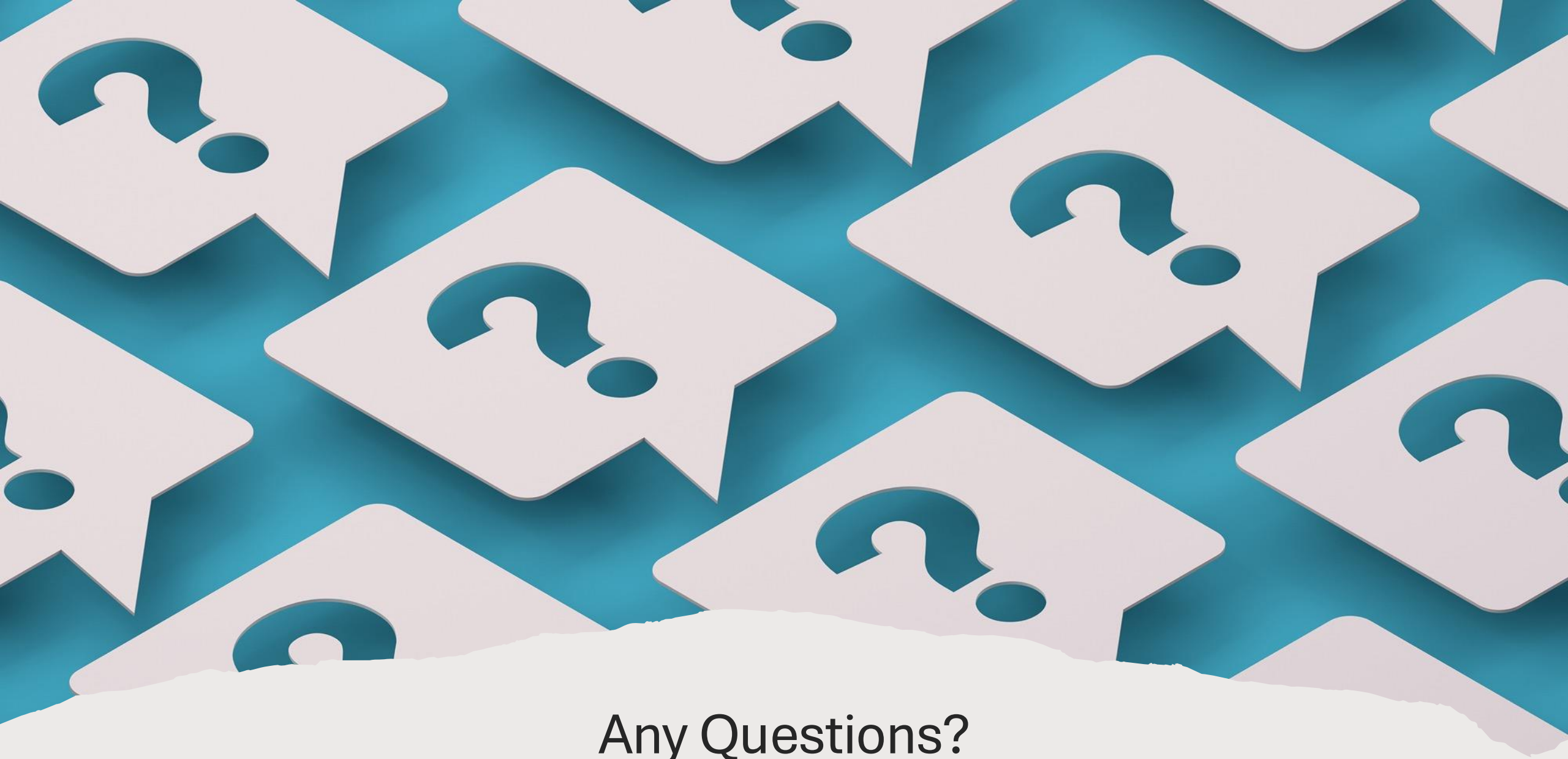


WITHOUT PREJUDICE COMMUNICATIONS
AND SETTLEMENT OFFERS



SOLICITOR-CLIENT PRIVILEGE REMAINS
BUT CAN BE WAIVED





Any Questions?



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Today's Panel