

# WHAT WORKS IN CONSTRUCTION CASES, MDLS AND CLASS ACTIONS

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WHAT WORKS CLE

FEBRUARY 3, 2017

PLAINTIFF'S PERSPECTIVE PRESENTED BY: JUSTIN LUCEY

DEFENDANT'S PERSPECTIVE PRESENTED BY: ED BUCKLEY



# WHAT WE ARE GOING TO DISCUSS

- **Tips for Trying Construction Cases**
- **Tips for Succeeding in Class Actions/Multi-Unit Cases**
- **Tips for Succeeding in Multi-District Litigation**
- **Back To Trial Tips: It Should Have Started 2 Yrs Ago**



# **TRYING YOUR CONSTRUCTION CASE**

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**TIP:**

**PREPARE, PREPARE,  
PREPARE**

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- Things Must Do - One Month Pre-Trial



# ONE MONTH OUT

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**GET THE BASICS DONE AT THE BEGINNING  
OF THE PRE-TRIAL CRUSH**

**TIP:**

**LOVED ONES, OTHER  
CLIENTS, AND HAVING A  
LIFE = KISS IT ALL  
GOODBYE**

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## TIP:

# GET TO DRAFTING (OR, HOPEFULLY, UPDATING)

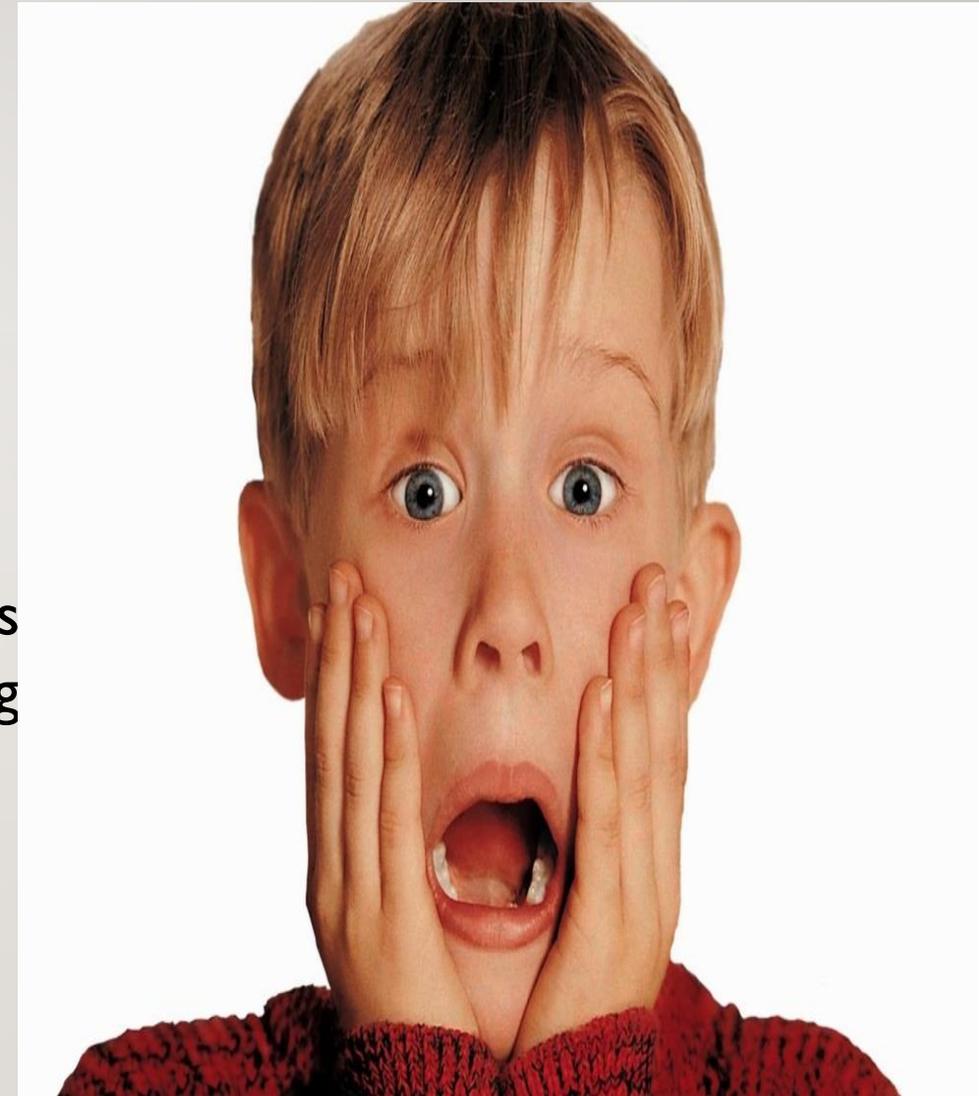
- 
- Trial Brief = Edit What Already Started/Updated
  - Succinct Undisputed Statement of Facts
  - Brief Oppositions to Anticipated, Last Minute Motions
  - Jury Charges = 90/10 Rule: Dial In On Key Points
  - Verdict Form = Consider Special Rogs, But Keep General Verdict Form on Standby



**TIP:**

## **ANTICIPATE TRIAL TESTIMONY (AND SURPRISE WITNESSES)**

- 
- List Probable & Potential Witnesses = Get Options Together & Opposing Witness Forecast (Including Length)
  - Notice Any Final Depos
  - Check Global (Depo) Exhibit List: Code Yes, No, Maybe
  - Check For Depo Originals
  - Inventory Your Summaries & Short Lists

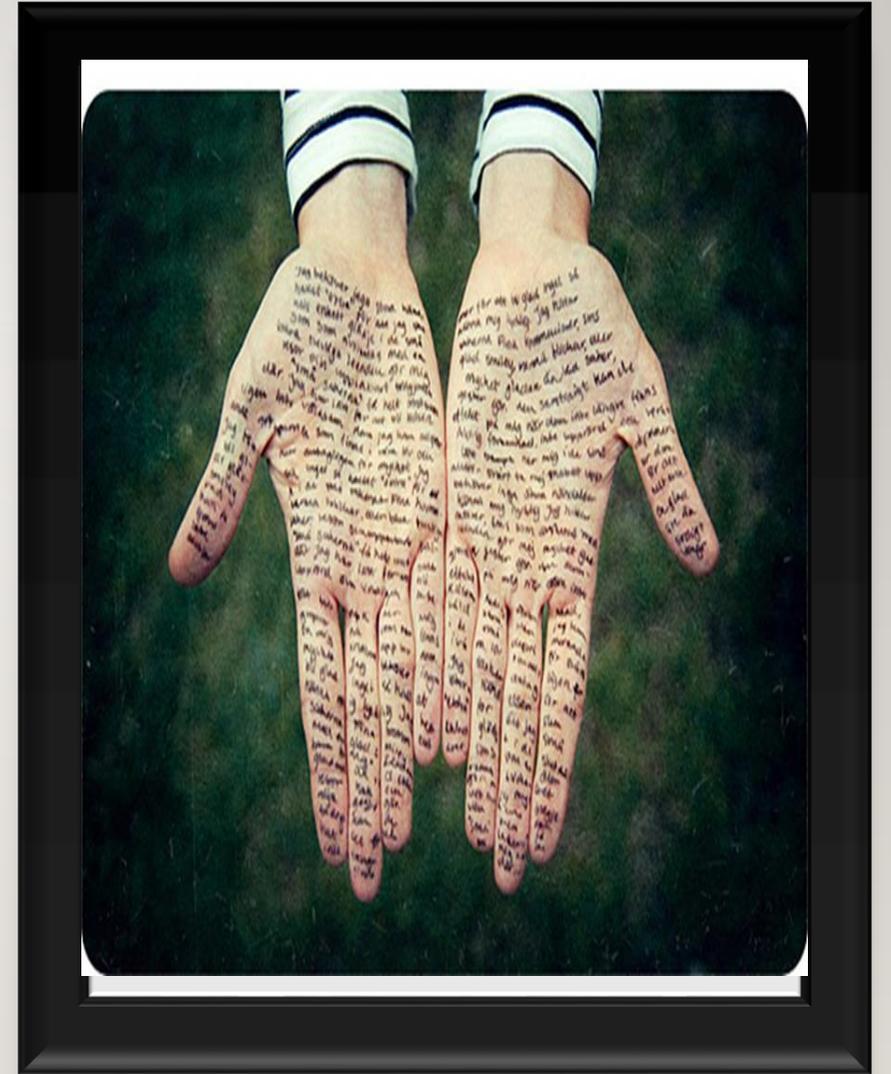


**TIP:**

## **DEVELOP TRIAL HELP AIDS AND EXPAND SUPPORT TEAM**

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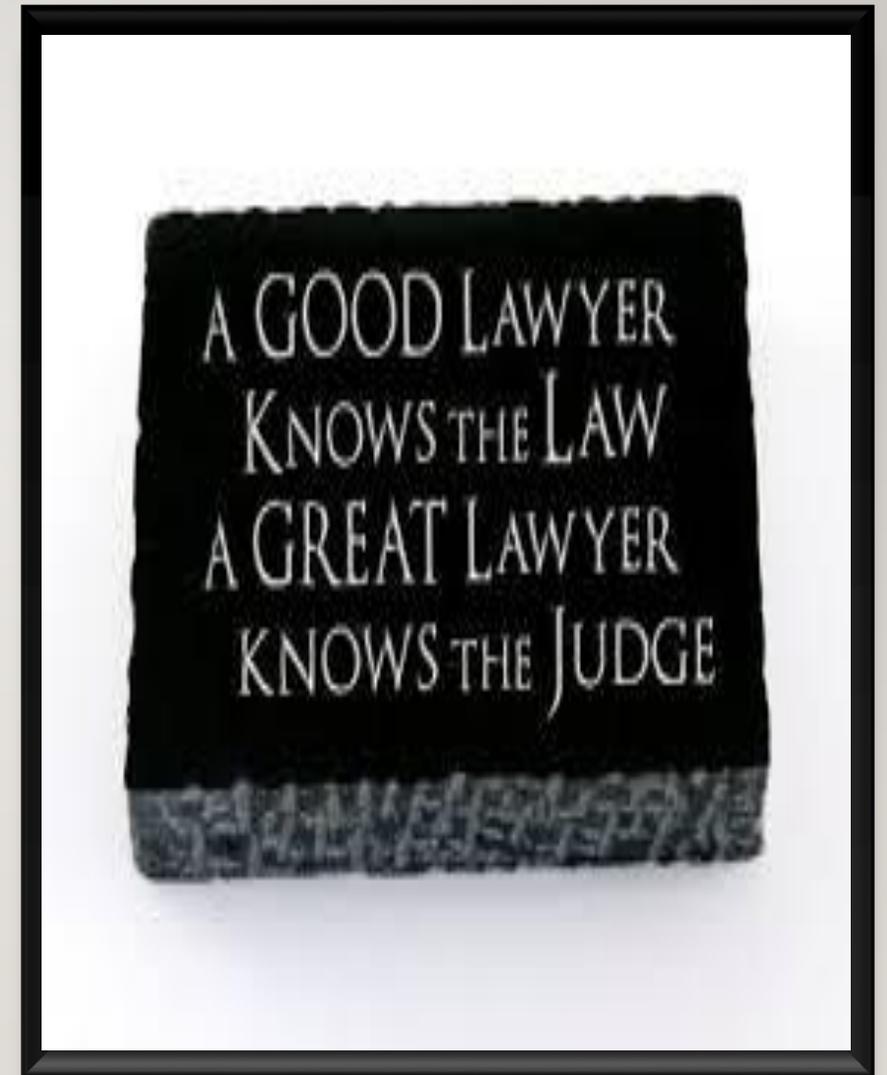
- Update Cheat Sheet & Chronology
- Broaden Your Trial Team
- List Possible Pre-Trial Motions & Voir Dire
- Think of Demonstratives & Toys



**TIP:**

**AUDIT TRIAL JUDGE IN  
ANOTHER ACTION**

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# THREE WEEKS OUT

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**GET IT ON THE BOOKS**



## **TIP:**

# **MAKE EXHIBITS AND DISCOVERY CONSIDERATIONS A PRIORITY**

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- Suggest Exhibit Conference 10 Days Out So Time For Court Rulings on Evidence (40/60 Shot)
- Amend Your Discovery Responses & Check Their Discovery Responses for Possible Cross/Publication
- Order Placards for Electronic Failure



**TIP:**

**PREPARE DIRECT/CROSS  
EXAMS AND CLIENT  
ATTENDANCE**

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- Outline Key Witness Direct Examinations
- Annotate Opposing Depos Anticipating Cross
- Complete Key Testimony Review/Extraction
- Attendance & Protocol Letters to Clients



# TWO WEEKS OUT

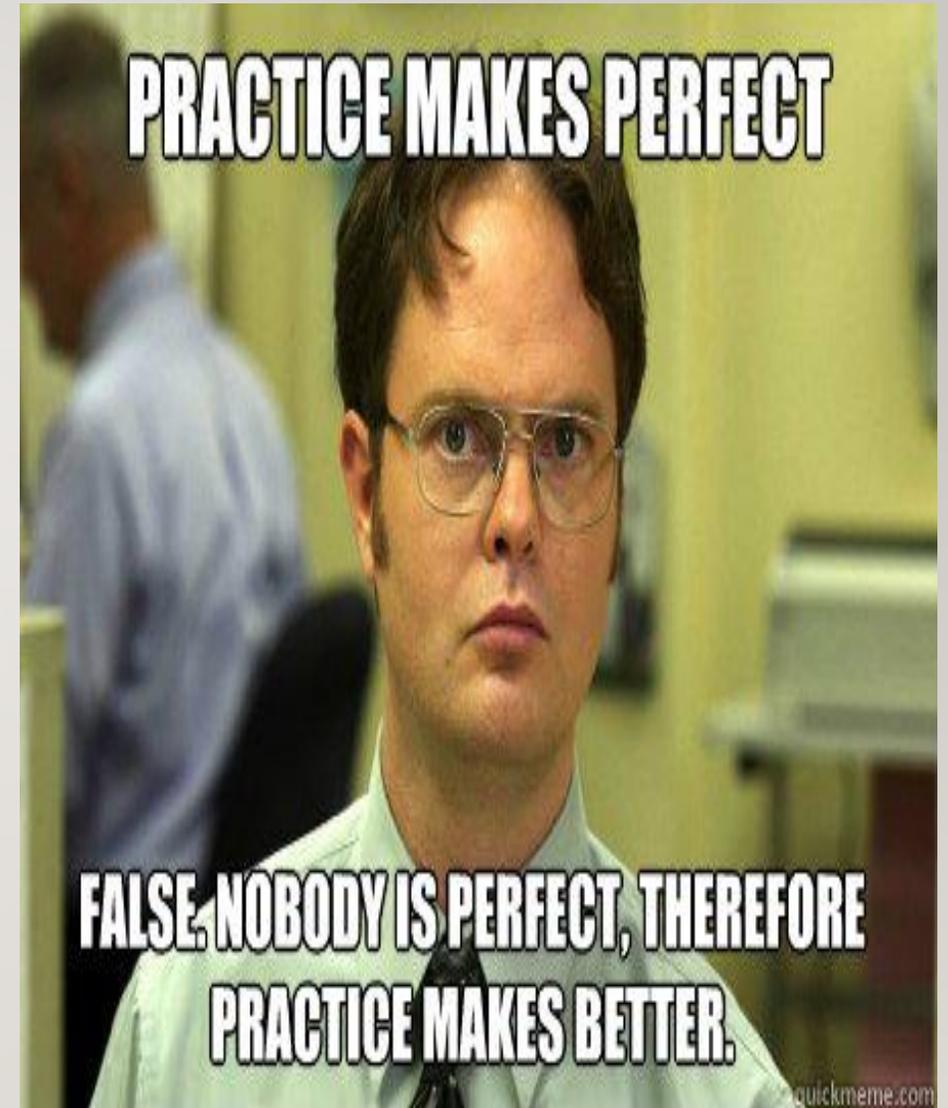
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**KEEP IT MOVING**

**TIP:**

**PRACTICE & REFINE**

- 
- Expert & Client Dry-Runs (Ensure No Scheduling Conflict)
  - Prepare Preparation of Cross (Two Days Per Witness)
  - Outline Opening
  - Revisit Trial Themes
  - Update Disclosures
  - Refine Exhibit List



# ONE WEEK OUT

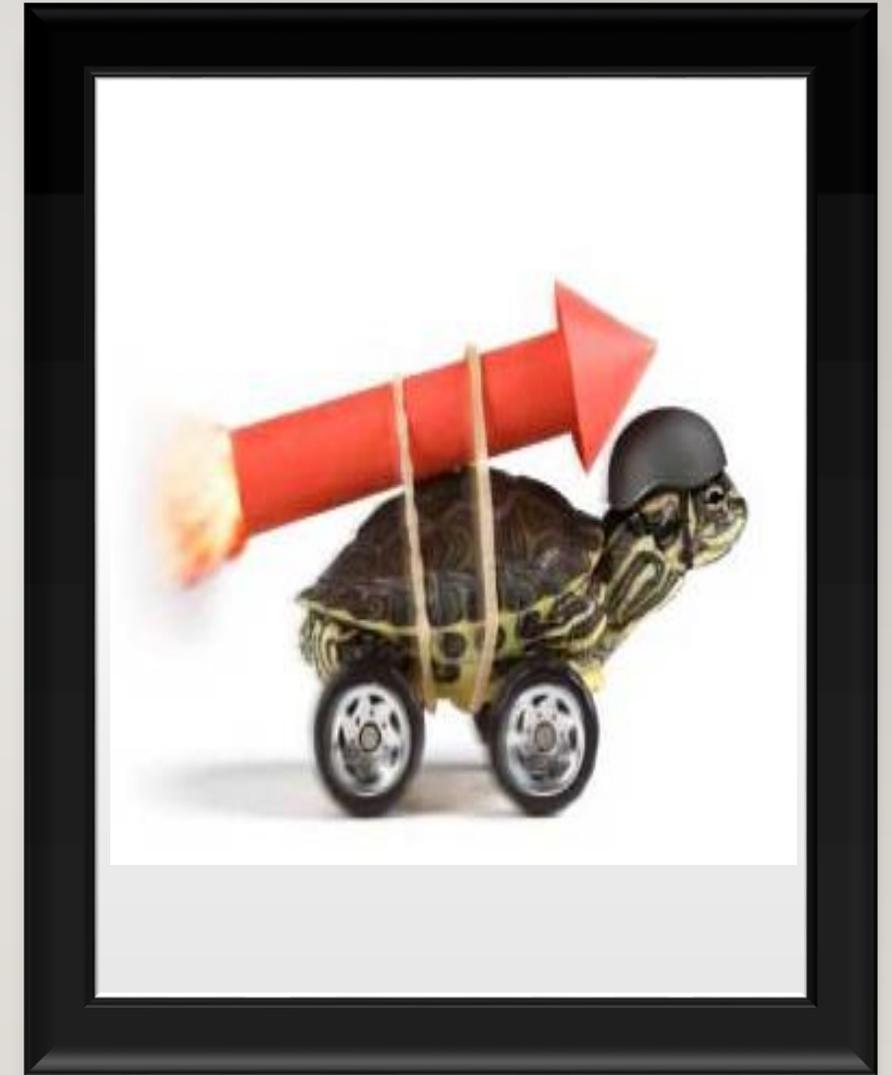
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**NOW IS NOT THE TIME TO PANIC**

**TIP:**

**FINALIZE ANYTHING NOT  
FINALIZED**

- 
- Witness Order & Prep
  - Demonstratives & Courtroom Technology
  - Trial Briefs, Pre-Trial Motions, Voir Dire, Jury Charges
  - Cross & Direct Examinations
  - Opening & Closing
  - Trial Themes



**TIP:**

## **MANDATE COURTROOM ATTENDANCE AND VET POTENTIAL JURORS**

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- Reminder E-mail to Clients
- Pull, Review, and Circulate Jury List
- Summarize Juror Information for Use in Voir Dire
- Revisit to Kill a Mockingbird



# **TIP:**

## **FIGHT FOR SURVIVAL**

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- Make An Exhibit Conference Happen
- Complete Your Trial Notebook (Including List of Objections)
- Deal With the Paperwork Onslaught



# YOUR TRIAL TOOLS

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- Single Opening Note Card/Separate Outline (2 Locations)
- Left Hand:
  - Cheat Sheet,
  - Chronology,
  - Working Exhibit List & Official Exhibit List
  - Group of Key Documents
- Exhibit & Transcript Paralegals in Audience/Runner on Standby
- War Room



# TRIAL

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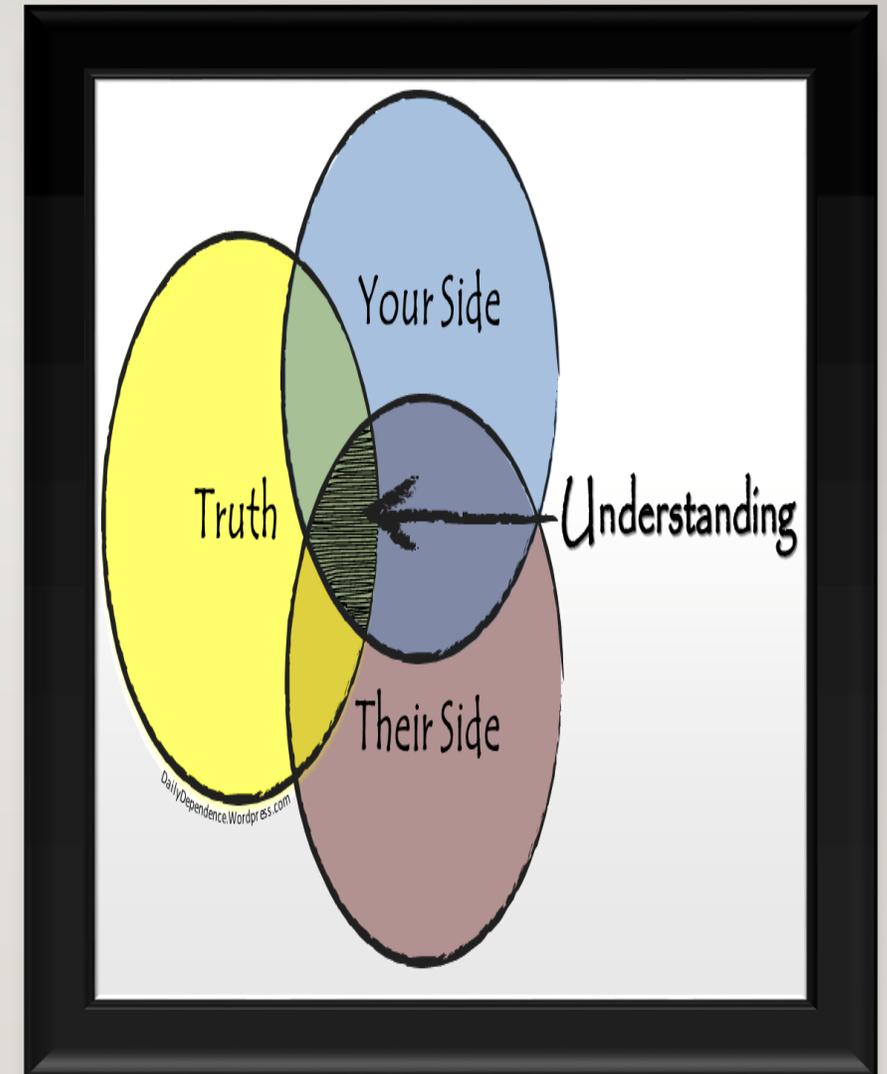
**TIME TO DO YOUR JOB**

## TIP:

# UNDERSTAND WHATS PRINCIPALLY AT DISPUTE

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- Scope of Repair & Cost for Repair
- Uncovered v. Covered Damages
- Statute of Limitations
- Finger Pointing (Product v. Design v. Installation Defect or a Combination)
- Potential for Punitive Damages



**TIP:**

**DO NOT SHARE EXHIBITS**

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- Save Yourself and Everyone Else From Headache
- A Clean Record is Key
- Chaos = Does Not Work In Trial OR On Appeal



**TIP:**

**TAKE CONTROL OF YOUR  
CASE**

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- Take Charge While Also Being Respectful
- Own the Courtroom – Confidence is Key
- Eye Contact With The Jury is Critical
- Remain Calm When Surprises Happen



**TIP:**

**ALTERNATE COUNSEL,  
WITNESS TYPES,  
SUBJECT MATTER &  
LENGTH**

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- Give Yourself a Break
- Keep Opposing Counsel on Its Toes
- Avoid Monotony

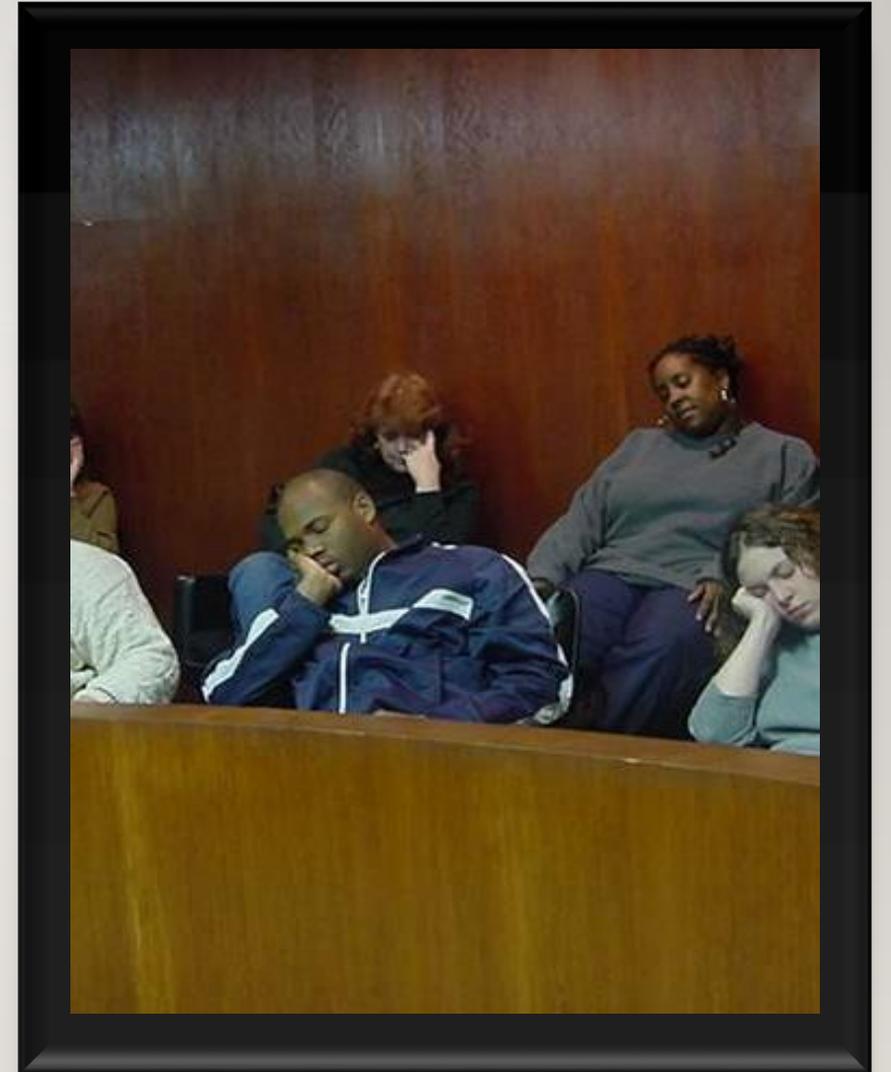


## **TIP:**

# **MAKE IT EASIER ON, AND INTERESTING TO, THE JUDGE AND JURY**

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- User-Friendly Exhibits & Exhibit Lists
- Know Judges Preferences & Do What is Preferred
- Take Advantage Technology & Demonstratives
- Move Your Case & Don't Waste Time
- Keep It Interesting



# TIP:

## PACKAGE YOUR EXPERTS PROPERLY AND BE THE TOURGUIDE

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- Be Thorough, But Interesting, In Preparing Your Tender
- Write Out Tender Weeks Ahead and Refine
- Have Pointers That Work With Technology
- Use Well Thought Out Explanations/Analogies
- Use Props To Make It Interesting

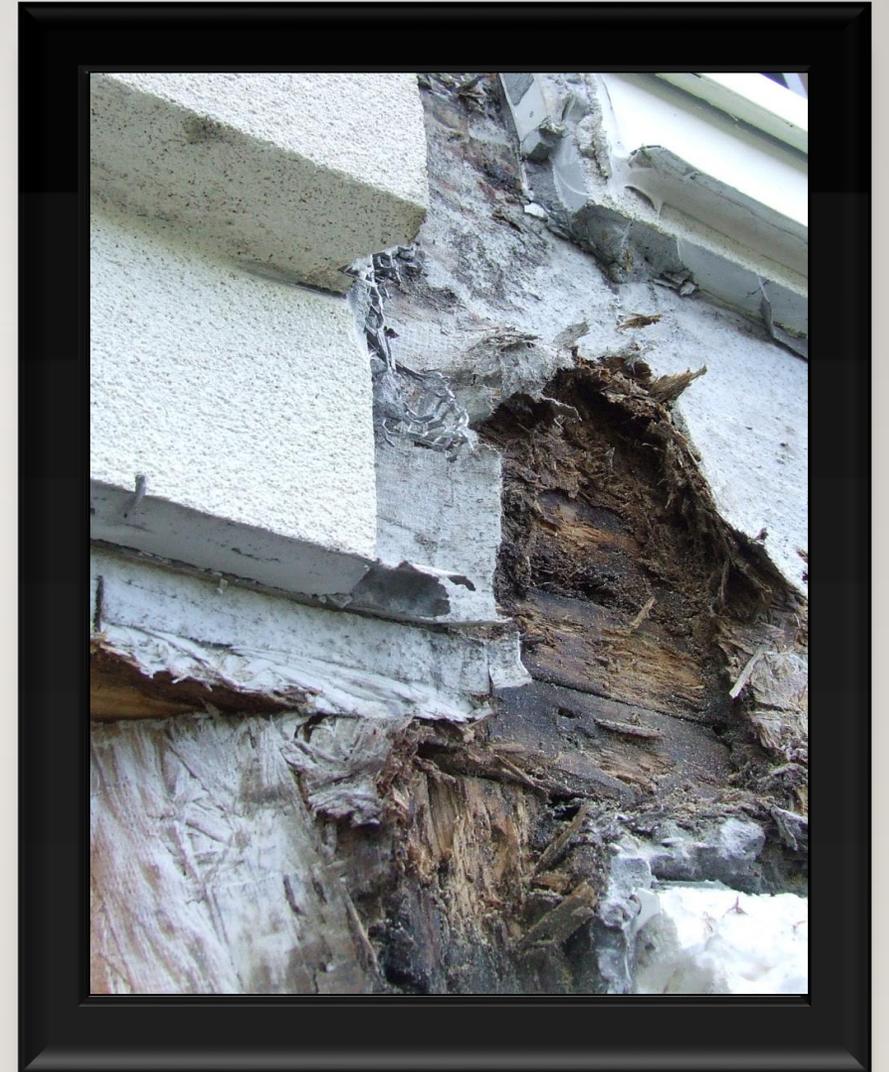


**TIP:**

**FOCUS ON INSURANCE &  
CONSEQUENTIAL  
DAMAGES**

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- Load The Transcript With Consequentials !



**TIP:**  
**LET IT ROLL!**

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**TIP:**

**ANTICIPATE THE END  
RESULT**

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- Know Which Parties Are Judgment Proof
- Understand Insurance Picture Working With
- Ensure Your Client Is Ready for Any Result – Including Appeals



**TIP:**

**PRESERVE YOUR CASE  
FOR APPEAL**

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- Objections = Make Them When Warranted
- Directed Verdict = Renew At Close of All Evidence
- JNOV/New Trial = End of Trial or Request 10 Days
- Rule 59(e) = Within 10 Days of Ruling/Non-Ruling



**Directed Verdict**  
(Plaintiff Do You Really Want It  
Without a Clear Concession?)

**Trying The Insurance Case  
Within**

**Photos Are King**  
(How Are You Getting Them In?)

**Stipulating to the Admissibility  
of Repair Estimates  
or Summaries**

**OTHER  
THOUGHTS  
AND  
TRIAL TIPS**

**Problems With  
Power Points and Labels**

**Expert Fees as Damages**

**Trying The Allocation Case  
Within**

**Use a Multi-Media  
Presentation Expert**

# **INTERLUDE:**

# **TIPS FOR CLASS ACTIONS AND MDLS**

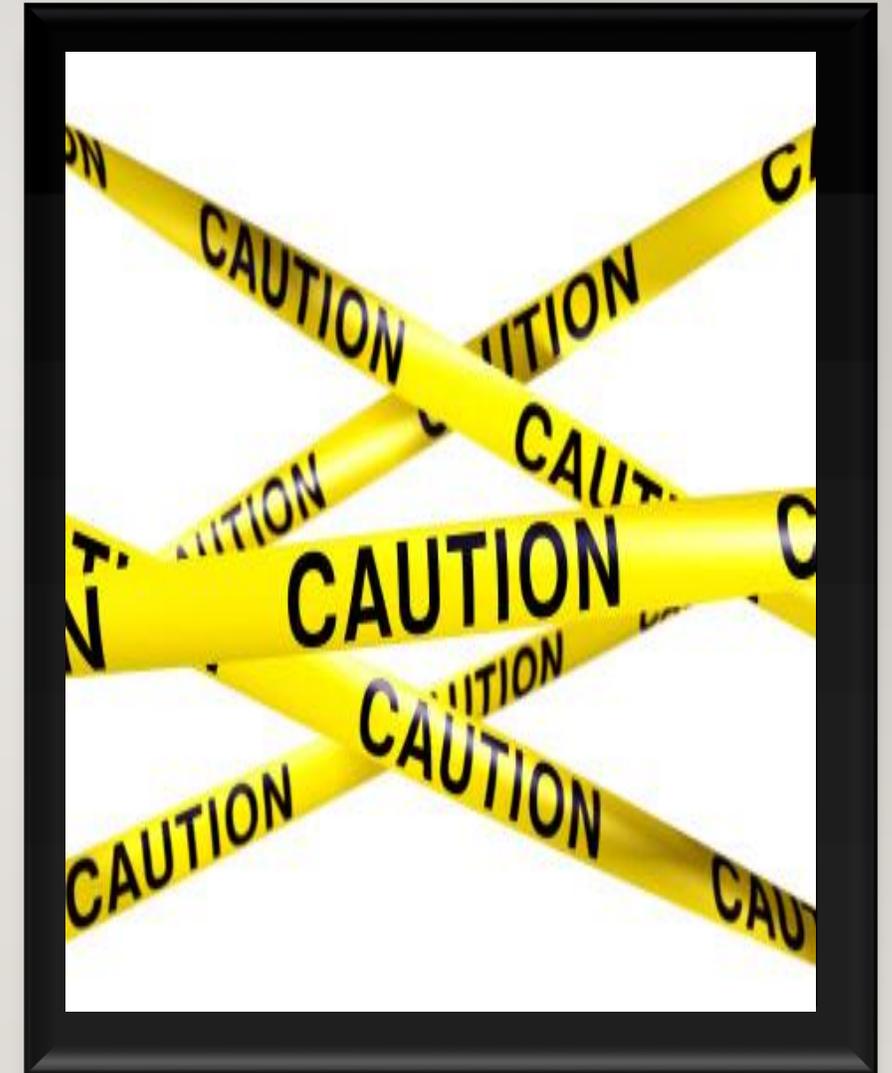
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## **TIP:**

# **BEWARE – TREACHEROUS TERRITORY AHEAD**

- 
- Know What You Are Getting Into is Complicated
  - Consider State v. Federal Rules
  - Consider Latest Class Precedent
  - Consider Impact of Consolidation/Transfer



## CLASS ACTIONS

- Rule 23(a) Factors (Numerosity, Commonality, Typicality, Adequate Representation and Ascertainability)
- Rule 23(b)(3) Factors (Predominance & Superiority)
- State Law Variances = Predominance Problems
- National Classes Almost Impossible to Certify
- State Classes (and MDLs Consisting of State Classes) Still Have a Chance

## MDLS

- For “civil actions involving one or more common questions of fact pending in different districts.” 28 U.S.C. § 1407
- Consolidated Pre-Trial Proceedings (Including Class Certification)
- Remanded to Each State for Trial
- Helps Account for State Law Differences
- But If One Fails, Likely Others Also Fail Because of Consolidated Pre-Trial Proceedings

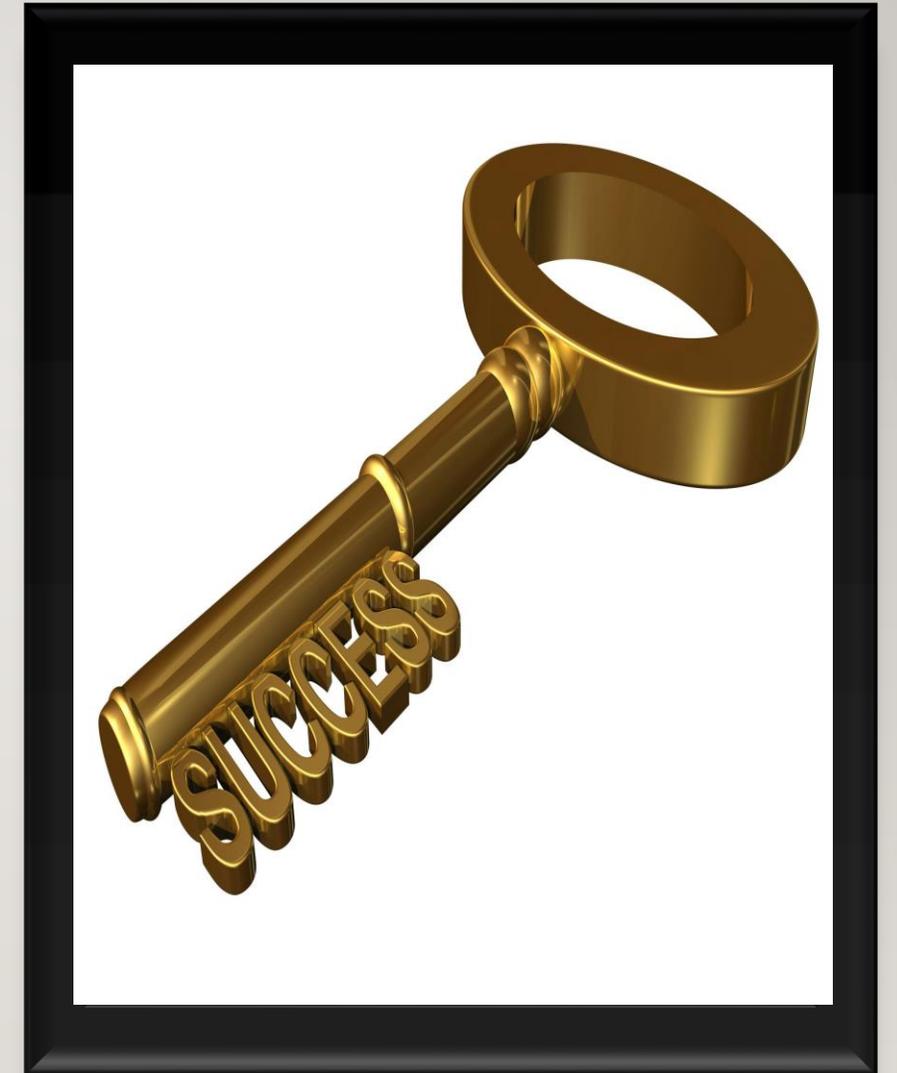
**OTHER OPTION -  
PROCEED AS SINGLE STATE CLASS ACTION AND/OR  
SECURE COUNSEL IN OTHER STATES TO  
BUILD A NETWORK AND FRONT**

**TIP:**

**CAREFULLY DEFINING  
THE CLASS IS KEY**

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- Who Needs to Be Included v. Excluded
- Include Applicable Time Frames
- Manifested Defects Required
- Consider Subclasses



**TIP:**

**Common Sense Common  
Issues**

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**K.I.S.S.**



**TIP:**

**ADJUST STRATEGY  
BASED ON CLASS TYPE**

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- Products Liability v. Homeowner Class
- Issue Class v. Other Class
- Declaratory Judgment Class v. Other Class





## TIP: TRYING YOUR HOMEOWNER CLASS

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- Already Tried Through Engineers & Repair Contractor !
- Put Assignments (if used) Into Evidence
- Unless Assignments Stipulated - Board Member Authentication Prudent
- Consider Dropping Unique Out-of-Pocket Repair Costs
- Jury = Needs to Hear From Class Rep/Board Member AND Homeowner With Empathetic Story
- Have 6 Homeowners Ready - But Also Be Ready to Cut a Few to Save Time
- Property Manager - Can Use For Broad Testimony
- Any of The Foregoing Can Give Loss of Use Exemplar Calculation With Foundation

**BACK TO TRIAL TIPS:**

**PREP SHOULD HAVE  
STARTED FROM DAY ONE**

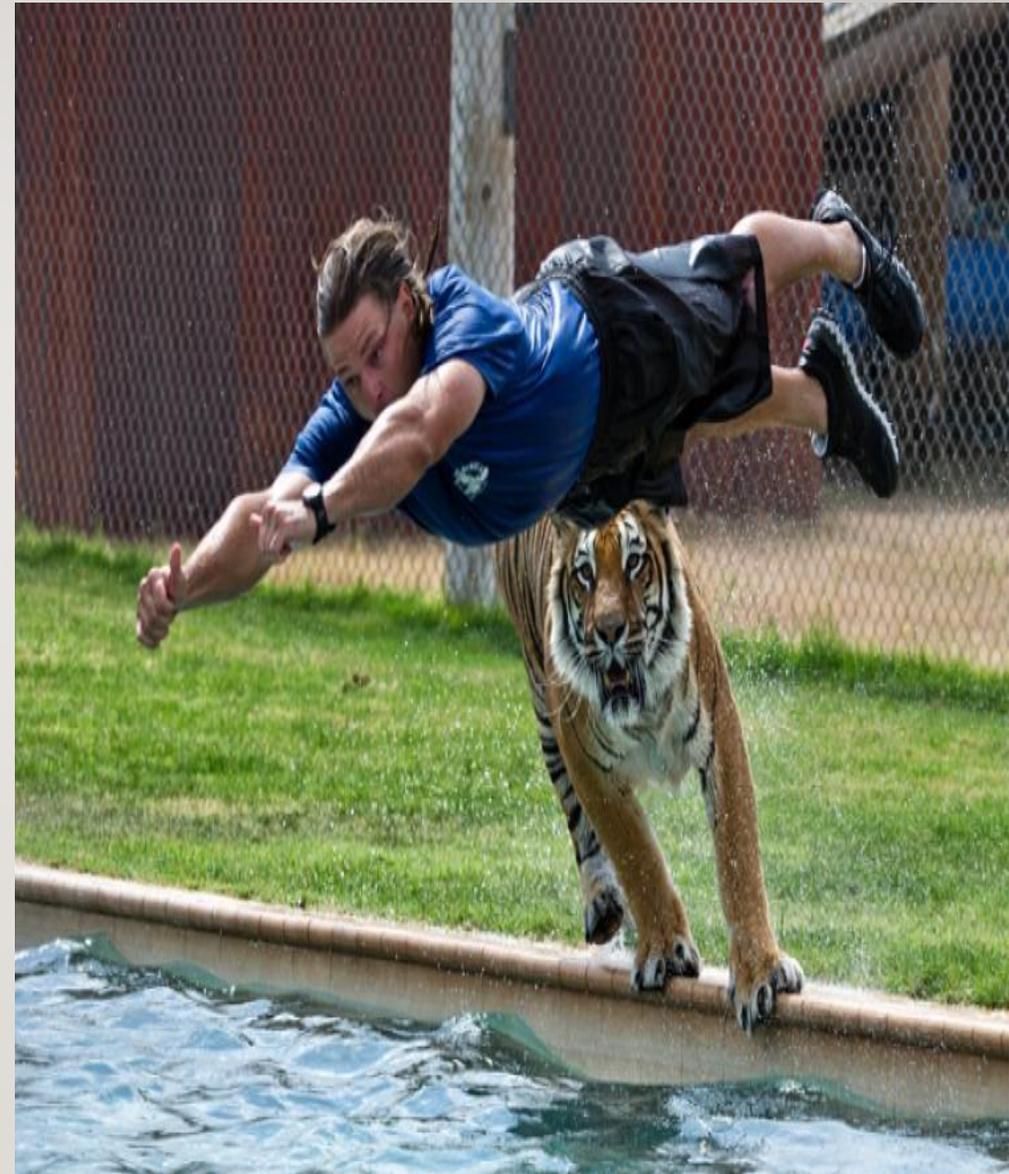
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**A GOOD SYSTEM BETTER ACHIEVES  
GOOD RESULTS**

**TIP:**

## **DON'T CATCH THE TIGER BY THE TAIL**

- 
- If This Is Your First Complex Trial and You Haven't Settled Yet - Associate Someone Who Has Tried One
  - Obtain a Well Defined Scope of Responsibilities/Fee Split
  - Fee Sharing May Not Be Attractive, But Half of the Pie is Better Than No Pie & Bad Result for Clients



## TIP:

# FILE CLASS ACTION TO TOLL SOL UNTIL ASSIGNMENTS ARE ORGANIZED

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- Better Protects You and The Client
- Allows Time to Develop Best Strategy Moving Forward
- Particularly Important in Cases Involving Multi-Family Developments

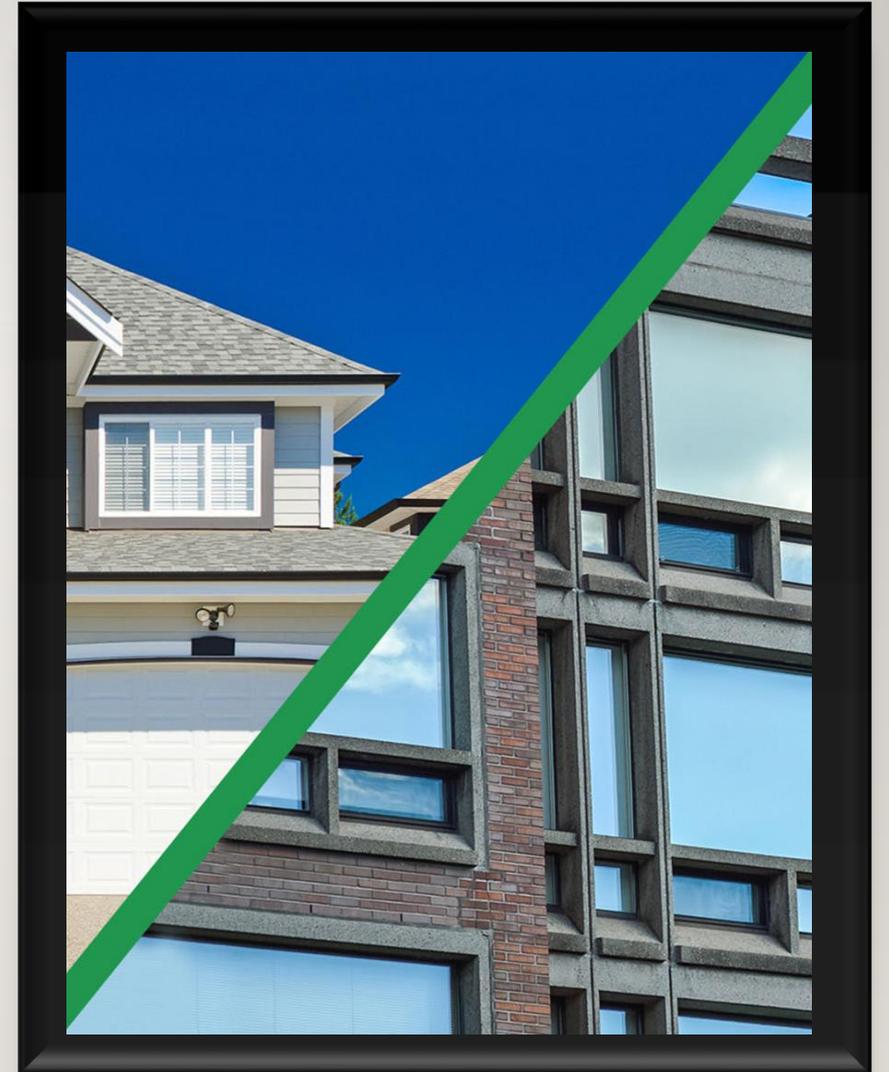


## TIP:

# COMBINE OWNER/ ASSOCIATION CLAIMS IN ONE ACTION

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- The More Involved = The More Damaged
- Unified Front = Better Case Protection
- Get A Consent and Conflict Waiver
- Know Who Owns What For Assignment Purposes

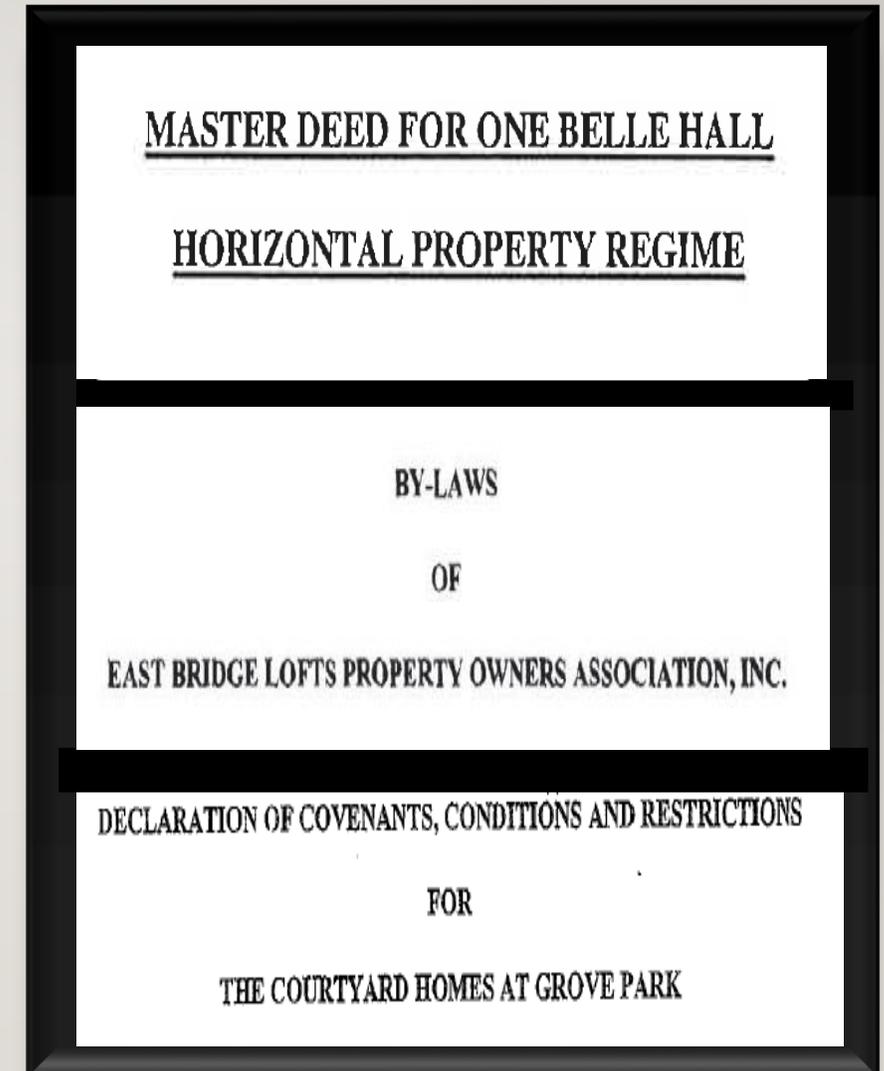


**TIP:**

**THROUGHLY VET  
GOVERNING DOCUMENTS,  
COMPLAINTS & ANSWERS**

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- Arbitration Provisions
- Anti-Suit Provisions
- Insured v. Uninsured Causes of Actions
- Successor Liability & Corporate Considerations
- Statute of Limitations/Repose & Economic Loss Rule



# ARBITRATION CONSIDERATIONS

DOES THE FAA OR  
SCUAA APPLY?

WHAT CONSTITUTES  
THE “ARBITRATION  
PROVISION”

DOES IT LEAD TO AN  
“UNBIASED  
DECISION BY A  
NEUTRAL ARBITER?”

ALSO CONSIDER WHETHER ARBITRATION WAIVED AND  
WHETHER ARBITER LIMITED IN AWARDING DAMAGES

# IMPORTANT ARBITRATION-RELATED STATUTES

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- **9 U.S.C. § 2** (Written arbitration agreements may be invalid, revocable and unenforceable based upon “such grounds as exist at law or in equity for the revocation of any contract”).
- **S.C. Code § 15-48-10(a)** (A party may seek revocation of a contract under “such grounds as exist at law or in equity” including fraud, duress and unconscionability. )
- **S.C. Code § 36-2-302(1)** (Court may refuse to enforce any unconscionable clause in a contract or to limit its application to avoid an unconscionable result.)

# IMPORTANT ARBITRATION CASES - PLAINTIFFS

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- *Oxford Health Plans, LLC v. Sutter*, 556 U.S. \_\_\_\_, 133 S.Ct. 2064 (2013)
- *Green Tree Fin. Corp v. Bazzle*, 539 U.S. 444 (2003)
- *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287 (2010)
- *Smith v. D.R. Horton*, 417 S.C. 42, 790 S.E.2d 1 (2016)
- *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14 (2007)
- *Munoz v. Green Tree Fin. Corp*, 343 S.C. 531 (2001)
- *Buice v. WMA Serchs., Inc.* 380 S.C. 149 (Ct. App. 2008)
- *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388 (Ct. App. 1998)

# IMPORTANT ARBITRATION CASES - DEFENDANTS

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- *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)
- *Prima Paint v. Flood & Conklin Mnfg. Co.*, 388 U.S. 365 (1967)
- *Brown v. Green Tree Svcs.*, 585 F. Supp. 2d 770 (D.S.C. 2008)
- *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky), Inc.*, 312 S.C. 559 (1993)
- *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1 (2016)
- *Carlson v. SC State Plastering, LLC*, 404 S.C. 250 (Ct. App. 2013)
- *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67 (Ct. App. 2013)
- *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620 (Ct. App. 2008)

# ANTI-SUIT CONSIDERATIONS

**CLASS ACTION  
WAIVERS**

**JURY TRIAL  
WAIVERS**

**TIMING  
RESTRICTIONS**

**WARRANTY &  
DAMAGE  
DISCLAIMERS**

**NOT ALWAYS  
APPLICABLE TO  
ALL PARTIES**

**SEVERAL AGAINST  
SOUTH CAROLINA  
LAW**

**INDIVIDUAL AND  
CUMULATIVE  
CONSCIONABILITY  
CONSIDERATIONS**

# PLEADING CONSIDERATIONS

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## DEFENDANTS

- **Statute of Limitations**
- **Economic Loss Rule**
- **Anti-Suit Provisions**
- **Anti-Joint and Several Liability**
- **Insufficient Class**

## PLAINTIFFS

- **Estoppel/Discovery < 3 Years Ago**
- **Negligence/“Other Property Damage”**
- **Anti-Suit Provision Unconscionability**
- **Amalgamation/Similar Theories**
- **Clear Class Definition w/ All Rule 23 Requirements Referenced**

# TIP:

## RETAIN THE RIGHT EXPERTS FOR THE JOB

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- Investigate Early & Comprehensively
- Test (With *Daubert* in Mind)
- Document the Defects & Establish the Standards
- Build the Damages
- Experience Matters in the “Battle of Experts”
- Join and Vet Expert Work!



**TIP:**

**PUSH THE CASE**

- 
- Amend Complaints ASAP With Additional Parties
  - Immediately Seek Discovery & Follow Up Often
  - Seek Discovery and Consent Scheduling Orders
  - Get Depositions on The Books
  - Evaluate (& Re-Evaluate) Damages and Defenses

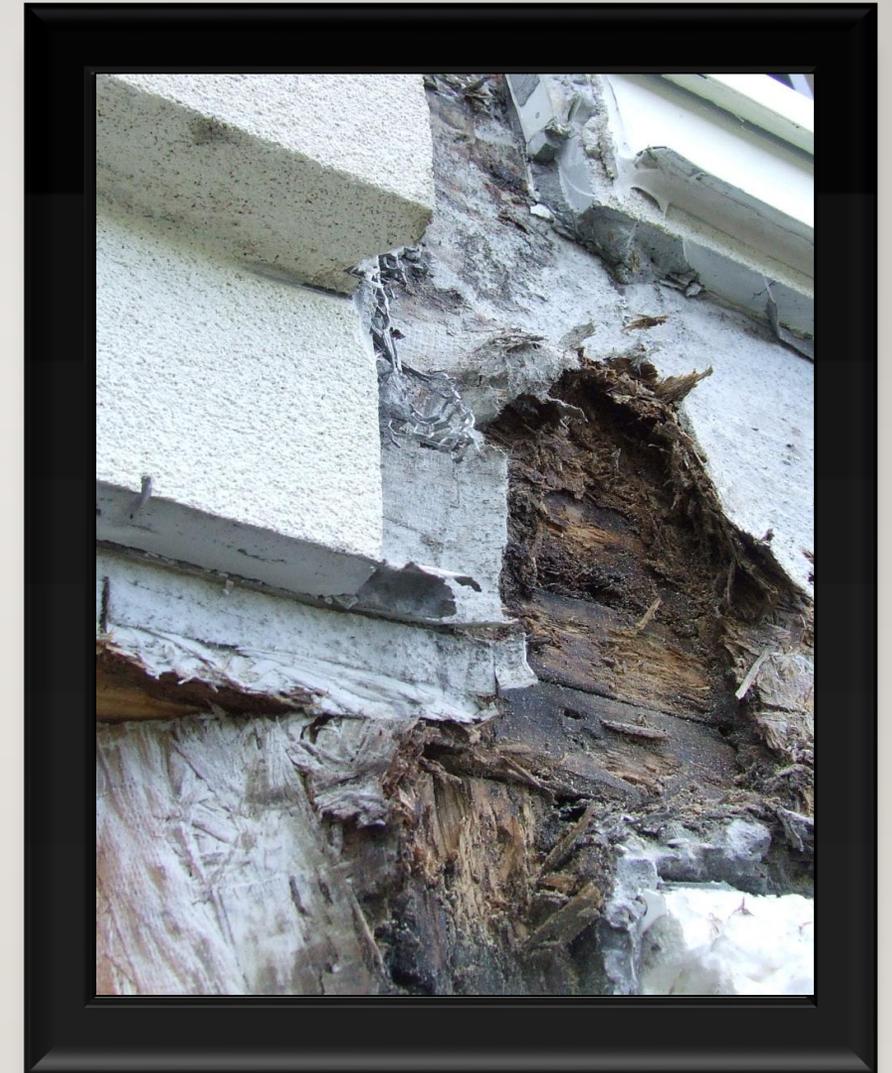


**TIP:**

## **FOCUS ON INSURANCE & CONSEQUENTIAL DAMAGES**

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- Subpoena Directly From Agencies And Providers
- Create Comprehensive Insurance Chart For All Parties
- Re-Notice All Carriers, All Years
- Identify And Pull Exclusions
- Tender Early Tyger River Letters
- Help Pro Se Defendants With Insurance Claims
- Continually Document Consequential Damages



**INSURANCE**



**CRITICAL FACTOR**

ALL AVAILABLE PRIMARY +  
EXCESS COVERAGE

UNCOVERED V. COVERED  
DAMAGES

SUBSTANTIAL  
COMPLETION  
V. C.O. DATE

WRAP POLICY v. NON-  
WRAP POLICIES

POLICY PERIODS AND  
CONTINUED  
OCCURENCES

TIME ON RISK

THINGS  
TO  
KNOW

EFFECTIVE TYGER RIVER  
LETTERS

INSURERS ON NOTICE  
(Primary = Claim)  
(Excess = Exhaustion)

PROBLEMATIC PROVISIONS  
(And How To Avoid Them  
When Possible)

ELECTION OF THE RIGHT  
REMEDY

# PROBLEMATIC POLICY PROVISIONS

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- **“Your Work” Exclusions and The 2294 Endorsement**
- **“Prior Work” Exclusion**
- **“Pre-Existing Damages” Exclusion**
- **“EIFS” and “Mold” Exclusions**
- **“Multi-Unit” Exclusions**
- **“Other Insurance” Provisions**
- **“Self Insured Retentions” and Other Preconditions**

# OTHER GOOD POLICY PROVISIONS

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- **Extended Completed Operations**
- **Additional Insureds**
- **Separation of Insureds**
- **Responsible for Judgment Interest**
- **Ever Read Paragraph I(c) in 1999-2004 ISO Coverage Forms?**

# OTHER IMPORTANT INSURANCE CONSIDERATIONS

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# INSURED CONTRACTS AND ADDITIONAL INSUREDS

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- What is An Insured Contract?
- Why is That Important?
  
- How Do I Know If I Have An Additional Insured?
- Why is That Important?

# POLICY AMBIGUITIES AND THE REASONABLE EXPECTATION DOCTRINE

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- *Whitlock v. Stewart Title Guaranty Co.*, 732 S.E.2d 626, 399 S.C. 610 (2012) (when faced with an ambiguity, the Court MUST construe in favor of insured regardless of any inequity)
- *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399 (2014) (“[T]he reasonable expectations of parties entering an insurance contract will be honored within the confines of our interpretive rules and fairness principles.”)

# ILLUSORY COVERAGE

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- *Western World Ins. Co. v. Empire Fire & Marine Ins. Co.*, No. 7:06-cv-217, 2006 WL 3337427 (D.S.C. Nov. 16, 2006) (exclusion excluding the very risk insured is ambiguous and will be construed against insurer)
- *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 730 S.E.2d 862 (2012) (“The literal interpretation of policy language will be rejected where its application would lead to unreasonable results and the definitions as written would be so narrow as to make coverage merely illusory.”)
- *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1994) (“[T]he internal inconsistency created by [an exclusion] which purports to bar coverage for claims arising out of the very operation sought to be insured renders [the policy] ambiguous in favor of coverage.”)

# INSUFFICIENT RESERVATION OF RIGHTS LETTERS AND ESTOPPEL

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- *Harleysville Group Ins. V. Heritage Comms., Inc.*, Op. No. 27698 (S.C. Sup. Ct. Jan. 11, 2017) (finding reservation of rights letters were not sufficiently specific to put the insureds on notice of insurer's specific defenses).
- *Southern Land & Golf Co. v. Harleysville Mut. Ins. Co.*, 2006 WL 2443340 (D.S.C. Aug. 22, 2006) quoting *Preferred Risk Mut. Ins. Co. v. Thomas*, 372 F.2d 227(4th Cir. 1967) (“[W]hile generally, estoppel cannot extend or create coverage under South Carolina law, [t]his rule is subject to one exception: the scope of risk under an insurance policy may be extended by estoppel if the insurer has misled the insured into believing the particular risk is within the coverage.”).

# BAD FAITH

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- *Cock-N-Bull Steak House, Inc. v. General Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727(1996) (bad faith is established by (1) the existence of an insurance contract; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action; (4) which caused damage to the insured)
- *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 473 S.E.2d 52 (1996) (where an insured demonstrates bad faith, she can recover consequential damages)
- *Mixson, Inc. v. American Loyalty Ins. Co.*, 349 S.C. 394, 562 S.E.2d 659 (Ct. App. 2002) (“[T]he covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed.”)

# VERTICAL V. HORIZONTAL EXHAUSTION

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- Loss Exceeds Primary Policy Limits = Triggers Coverage Under Excess Policies
- Horizontal Exhaustion = Requires Exhaustion of ALL Underlying Primary Policies to Trigger ANY Excess Coverage
- Vertical Exhaustion = Requires Exhaustion of THE Underlying Primary Policy to Trigger Excess Coverage Following THIS Policy

## VERTICAL EXHAUSTION APPEARS TO BE THE CASE IN SC

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The portion of the total loss which exceeds the policy limit would either fall back onto the policyholder or be covered by an excess insurance policy.

This result is equitable and in line with the policyholder's objectively reasonable expectations...

*Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Ins. Co.*,  
395 S.C. 40, 65 n. 15, 717 S.E.2d 589, 602 n. 15 (2011)