

WEBINAR



Review of Nevada's 2023 Legislative Session: New Laws that Might Affect Your Claims

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2023 Legislative
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**Michael Lowry
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Las Vegas
Presented on September 28, 2023


Presenters

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Burning Limits Banned!



- AB 398 prohibits insurance companies from issuing or renewing policies of liability insurance that contain depleting limits provisions.
 - Does not apply to any contract for liability insurance existing on October 1, 2023, but applies to any renewal of such a contract.
 - Applies to an insurer listed in NRS 679A.160, but NRS 679A.160 lists insurers that are not subject to the Nevada Insurance Code, including risk retention groups and captive insurers.
- Caused immediate confusion among insurers

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- Insurance Division published an Emergency Regulation to clarify some of the questions on July 21, 2023 and Guidance to Insurers
- ER defined “policy of liability insurance” as “a type of coverage, as defined in NRS 681A.020.1(b), issued under casualty insurance and offered by an insurer authorized pursuant to NRS 680A.060 and NRS 694C.230 to offer the casualty line of authority for third party liabilities”.
- AB 398 does not apply to 1) risk retention groups for which “liability” is defined to include defense costs under 15 U.S.C. 3901; and 2) captive insurance that does not cover third party liability.
- Added a section: “A policy of liability insurance that is required to be filed for approval with the Division must make defense coverage available at the defense coverage limit selected by the insured, if any. Any defense coverage limit selected, including \$0, must be included on the declaration page. This provision does not apply to policies that do not limit defense costs coverage.

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Insurance Division Guidance for Carriers

- **Applicability:** Law applies to policies of liability insurance issued by authorized insurers, as defined in NRS 679A.030, and non-risk retention group captive insurers, as defined in NRS 694C.060, that provide third-party liability coverage
- **Meaning of “Policy of Liability Insurance”:** Form of casualty insurance, insurance against “legal liability for the death, injury or disability of any human being or for damage to property, including liability resulting from negligence in rendering expert, fiduciary or professional services.”

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Insurance Division Guidance for Carriers

- **Separate Limits for Defense:** Policy must include defense costs outside of limits and defense coverage must be available, but the law does not require unlimited defense costs. For policies other than those that do not limit defense costs coverage, a separate limit for defense costs may be selected by the insured, including a limit of \$0.
- **Deductibles and Self-Insured Retention:** Still permitted.
- **Cyber Liability:** As to the third-party liability coverage, AB 398 requires that legal defense coverage be offered as a separate limit from liability; but it does not preclude first party indemnity and third party liability from sharing the same policy coverage limit. Defense costs may not erode the per occurrence or annual aggregate limit of liability coverage.

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Insurance Division Guidance for Carriers

- Towers: AB398 applies to every layer of liability coverage, but each policy may determine the limits of defense coverage, if any, that will be included in each policy. Individual indemnity limits may not be eroded by defense costs.
- Policy Exclusions: AB398 does not mandate specific coverages that must be included or may be excluded in a policy; it only mandates that the limits for the types of liability that are included in the contract cannot be eroded by costs of defense.
- Endorsements: Endorsements that add additional liability coverage must comply with the requirement that liability limits cannot include defense within those limits.
- No applicability to surety and fidelity bonds, unless the bond includes defense in the surety contract.

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- Insurance Division's Permanent Regulations Proposed
 - August 9, 2023 Proposed Regulation Released
 - August 10, 2023 Workshop and Comments Received
 - August 25, 2023 Revised Proposed Regulation Released
 - September 10, 2023 Notice of Intent to Act on August 9, 2023 Regulation
 - September 12, 2023 Hearing/Meeting on Regulation

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August 9, 2023 Proposed Permanent Regulation, as Revised

- Retains definition of policy of liability insurance from ER but adds “is issued to a policyholder in the State of Nevada”
- It clarifies that the law applies to an issuer who either holds a certificate of authority under NRS 680A.060 or a license pursuant to NRS 694C.230 (instead of “and”)
- Retains exceptions, clarifying that the law does not apply to risk retentions grounds defined in NRS 695E.110
- Expands on the section added by the ER: If a policy limits defense coverage and is required to be filed for approval by the Commissioner: (a) the policy must make defense coverage available at the limit for defense coverage selected by the insured; and (b) the limit selected by the insured, including a limit of \$0, must be included on the declarations page
- Defines “defense coverage” to include costs of defense, legal costs and fees and other expenses for claims

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Comments

- No clarity on what happens when an expressed defense limit in the policy is reached, although it is unlikely that additional defense costs can deplete limits (per comments at workshop). Withdrawal of the defense after limits reached may raise implications under Nevada caselaw on the duty to defend.
- Regulation should become effective October 1, 2023.
- Division’s website provides updated guidance as positions change, can be accessed at: doi.nv.gov, tab “Insurers”, side tab “Property & Casualty”, heading “Important P&C News”, link to guidance is listed in text

Expanded Protections for Sexual Assault



- SB 129
 - Eliminates Nevada’s statute of limitations (formerly 2 years) for civil sexual assault claims. The lawsuit “may be commenced against the alleged perpetrator or person convicted of the sexual assault at any time after the sexual assault occurred.”
 - Changed the burden of proof. “[I]f the alleged injury to the plaintiff is the result of a series of two or more acts constituting sexual assault, the plaintiff is not required to identify which specific act in the series of acts caused the alleged injury.”
 - Applies retroactively, reviving actions previously barred by the SOL.
 - Definition of sexual assault unchanged (NRS 200.366)

Expanded Protections for Sexual Assault



- SB 129

June 2023: High profile suit filed against Bill Cosby by 9 women in Nevada under amended statute. Some of the Plaintiffs testified before the Nevada Legislature and were at the signing of the bill into law.

Expanded Protections for Sexual Assault



- AB163 amended NRS 608.0198 (FMLA) to provide leave for employee victims of sexual assault.
 - Revises current domestic violence victim's leave law to include victims of sexual assault.
 - Goes into effect January 1, 2024.
 - Under certain conditions, if employees or family members are victims of sexual assault, leave must be available for up to 160 hours in one 12 month period.
 - Time used for treatment, counseling, court appearances, safety plans.

Expanded Protections for Sexual Assault



- AB163 amended NRS 608.0198 (FMLA) to provide leave for employee victims of sexual assault.
 - Employers must make reasonable accommodation for victims of sexual assault.
 - Unemployment benefits cannot be denied in certain circumstances.
 - Definition of sexual assault unchanged (NRS 200.366)

Landlord Tenant Changes



- SB381 Prohibits a Landlord from requiring a tenant to pay any fee or charge for repairs, maintenance or other work for which Landlord has a duty to perform to maintain the habitability of a dwelling unit.
 - Includes deductibles or premiums for insurance (affecting habitability).
 - If tenant creates the condition, exceptions apply.
 - Effective July 1, 2023.

Attorney General's Ability to Hire Counsel



- NRS 228.110 states the Attorney General must represent the State in its legal matters “unless the Attorney General and the deputies of the Attorney General are disqualified to act in such matter.”
- SB34 expands that authority, or clarifies what was common practice. NRS 228.110 now authorizes the hiring of outside counsel where the Attorney General “determines that it is impracticable, uneconomical or could constitute a conflict of interest for the Attorney General or a deputy of the Attorney General to serve as the legal adviser in such matter.” Often utilized in areas requiring specialized knowledge.

New Requirements for Physical and Mental Examinations



- How'd we get here?
- What did AB 244 do?
 - Applies to “a person compelled to submit to a mental or physical examination pursuant to a court order, a contractual obligation or any other type of obligation....”
 - Must give at least 21 days’ notice.
 - Examinee has right to “have any observer of choice present throughout the examination, including, without limitation, the person’s attorney, provider of health care or any other person hired by or on behalf of the person.”
 - Have an interpreter if the examinee believes it is necessary.
 - “Take notes or appoint an observer to take notes during the examination”
 - “make an audio, stenographic or video recording of the examination or appoint an observer to make such a recording.”
 - Can sue the examiner, lawyer, anyone, “if notice of the alleged violation is provided to the person who allegedly violated this section not later than 7 days before the action is commenced.”
 - Can obtain attorney’s fees, actual damages or a \$1,500 fine, whichever is greater, injunctive relief, protective relief, and bar the examination from being used for any purpose.

Changes to Certain Types of Claims



- Punitive damages for drunk driving, SB 401.
 - Current law triggers punitive damages if the driver willfully consumed alcohol or another substance knowing that he would then operate the motor vehicle.
 - SB401 eliminates the knowledge requirement. Punitive damages can be recovered if driver 1) willfully consumed alcohol or another substance; and 2) operated a motor vehicle
- Medical malpractice changes: AB 404, effective 10/1/23
 - Noneconomic damages are currently capped at \$350,000. Now increase \$80,000 each year starting 1/1/24 until it reaches a new \$750,000 cap on 1/1/28. It will then increase 2.1% annually starting 1/1/29.
 - Expands the statute of limitations. If date of injury is uncertain, the SOL is currently 1 year after plaintiff discovers or should have discovered the injury. Will now be 2 years.
 - Increases the recoverable contingency fee. No more tiers, the max fee is now 35%.

Changes to Certain Types of Claims



- GPS Tracking, AB 356
 - Existing law did not expressly prohibit a person from installing a tracking device on the motor vehicle of another person. AB356 criminalizes it. Relates to invasion of privacy torts.
- SB370, Nevada's first data protection laws take effect 3/31/24.
 - Applies to "consumer health data."
- SB422, allows operation of autonomous "personal delivery devices" on NSHE property or "directly adjacent" to it "while servicing such an institution."
 - Classified as a pedestrian. Required to have GL policy for no less than \$500,000.

Trial Changes



- SB 222
 - expands jury pool to include "persons who receive public assistance."
 - Fee per juror, per day increased from \$40 to \$65.
- AB 76
 - Recoverable fees per expert witnesses, up to 5, without testifying at trial are increased from \$1,500 to \$15,000, effective 7/1/23.

Questions?



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