PLUNKETT COONEY

# Statutory Policy Production Requirement, Fee Exclusion and Deemer Clause Coverage Update

February 16, 2026

## Statutory Policy Production Requirement – Colorado

***Bohanan v. Esurance Prop. & Cas. Ins. Co.***
-- P.3d --, 2026 WL 304180 (Colo. Ct. App. Feb. 5, 2026)

On Aug. 31, 2022, Yeraldy Ugalde Arteaga (Arteaga) and Reesa Bohanan (Bohanan) were involved in a car accident. Later that day, a third party obtained an automobile insurance policy from Esurance Property & Casualty Insurance Company (Esurance) that named Arteaga as an additional insured.

Bohanan retained counsel to bring a personal injury claim against Arteaga. On Sept. 7, 2022, Bohanan's counsel notified the Colorado Division of Insurance, as Esurance's registered agent, that Bohanan was making a claim against Arteaga and requesting any Esurance automobile policy information in connection with Bohanan's claim against Arteaga.

On Oct. 11, 2022, Esurance determined that the car accident occurred before the insurance policy was purchased. On Oct. 13, 2022, Esurance sent a letter to Bohanan's counsel denying coverage for the accident, and Esurance did not include a copy of the policy.

On Aug. 11, 2023, Bohanan sent a letter to Esurance asserting that it had failed to respond to her request for policy information as required by section 10-3-1117(2)(a). On Sept. 29, 2023, Esurance provided a copy of the auto policy for the first time.

On Oct. 6, 2023, Bohanan filed suit against Esurance, alleging that Esurance had improperly withheld a copy of the pertinent policy and sought monetary damages in the statutory amount of $100 per day for the 356 days between the expiration of the statutory 30-day deadline and the day Esurance produced a copy of the policy.

On cross-motions for summary judgment, the trial court concluded that Esurance had failed to comply with the statute requiring it to provide a copy of the policy to Bohanan within 30 days and, therefore, Bohanan was entitled to limited damages for the period between the expiration of 30 days from the initial request and the date that Esurance issued its denial letter. The trial court entered judgment against Esurance in the amount of $600.

Esurance appealed, arguing that the district court improperly determined that Esurance violated section 10-3-1117(2)(a). The appellate court reasoned that, even though the policy had not yet been issued at the time of the accident, the statute unambiguously required Esurance to provide Bohanan with a copy of the policy within 30 days of the request.

As such, the appellate court affirmed the trial court's ruling that Esurance violated section 10-3-1117(2)(a). On calculating damages, the appellate court noted it was "a matter of simple mathematics." Bohanan requested a copy of the insurance policy on Sept. 7, 2022, and 30 days elapsed on Oct. 7. Esurance provided a copy of the policy to Bohanan 356 days later. At $100 per day, per the statute, the mandatory damages award equaled $35,600.

The appellate court affirmed the trial court's finding that Esurance violated section 10-3-1117(2)(a), reversed the damages award, and remanded the matter with instructions that the trial court enter a judgment awarding Bohanan damages in the amount $35,600.

By: Danielle Chidiac

## Fee Exclusion and Deemer Clause – Second Circuit (New York and Michigan Law)

***In Re: Residential Cap., LLC***
Nos. 25-118 (Lead), 25-131(CON), 25-138 (CON), 25-225 (XAP), 2026 WL 278142 (2d Cir. Feb. 3, 2026)

The U.S. Court of Appeals for the Second Circuit affirmed the judgment entered by the U.S. District Court for the Southern District of New York, agreeing with the district court that the seven defendant-insurers were not liable to cover defense costs and settlement payments for claims arising from unlawful mortgage loan fees charged by originating banks because the claims fell within the fees exclusions and deemer clause provisions of the insurers' respective policies.

This coverage dispute arose when the plaintiffs, comprised of two groups of class action plaintiffs, the *Mitchell* and the *Kessler* class actions (the class actions), and ResCap Liquidating Trust (the trust) sought payment from the defendant insurers for defense costs incurred and settlements reached in the class actions. The class actions alleged that the origination and closing fees paid in connection with second mortgages obtained from originating banks were unlawful, and that Residential Funding Company, LLC (RFC), as purchaser of those loans, was derivatively liable under the Home Ownership and Equity Protection Act, 15 U.S.C. § 1641(d)(1). Notably, RFC did not originate the mortgages or receive fees related to the mortgage originations or closings. Instead, the fees were paid to the originating banks.

RFC, formerly known as GMAC-Residential Funding Corporation or Residential Capital Corporation, was an indirect subsidiary of General Motors Corporation (GM). During the relevant times, RFC was an insured under a professional liability policy issued to GM by Certain Underwriting Members at Lloyd's of London (Lloyd's) and a tower of excess policies written by the other defendant insurers. The applicable policies include terms materially identical to the Lloyd's policy (the policy).

While the class actions were pending, RFC filed for Chapter 11 bankruptcy. The bankruptcy court approved settlements reached in those cases and assigned the trust certain rights to seek recovery under the policy. The class action plaintiffs and the trust then brought an adversary complaint in the bankruptcy court against Lloyd's and the excess insurers seeking declaratory judgment and money damages related to the class actions and defense costs incurred for the class actions, as well as punitive damages and consequential damages. After eight years of discovery and pre-trial activities, the parties filed cross-motions for partial summary judgment. The bankruptcy court issued a report and recommendation in which it recommended that RFC's liability was not excluded from coverage by the policy's two exclusions, (i.e., the return of fee exclusion (fee exclusion) and the mortgage fee claim exclusion).

The district court declined to adopt the bankruptcy court's report and recommendation with respect to the fee exclusion, and instead, granted partial summary judgment in favor of the defendant insurers based on the applicability of the fee exclusion, which excludes coverage for any claim "for … fees … payable by or to the Assured." The district court determined that the fee exclusion applied by virtue of the deemer clause, which states, "[a]s used in the Exclusions set forth in Clause III.C. [which includes the fee exclusion], the term Assured includes any person or entity for whose conduct an Assured is legally responsible in rendering or failing to render Professional Services."

The appellate court disagreed with the plaintiffs' argument that the fee exclusion did not apply because RFC's liability did not arise from a claim for "fees." Because the word "fees" was not defined in the policy, the appellate court utilized the dictionary definition to determine that "fees" includes charges for labor and services related to the issuance of mortgages. As such, the appellate court found that the underlying claims against RFC were for "fees" that fell within and were excluded by the fee exclusion.

The appellate court also rejected the plaintiffs' argument that, because the fees were mortgage-related, they were potentially subject only to the mortgage fee claim exclusion and not the fee exclusion. The appellate court noted that the two exclusions vary in scope, such as the mortgage fee claims exclusion, including other items associated with mortgages, and the fee exclusion explicitly excepted certain defense costs associated with a mortgage fee claim. As such, the plaintiffs' argument could not be reconciled with the terms of each of the exclusions.

The appellate court was also unpersuaded by the plaintiffs' argument that the deemer clause did not apply to the originating banks because RFC is not legally responsible for the acts of those banks and

the originating banks did not provide "Professional Services" as defined by the policy. Instead, the appellate court agreed with the reasoning of the trial court, finding that the plain language of the deemer clause, specifically the words "in rendering or failure to render Professional Services," applied only to RFC, not the originating banks. The appellate court, focusing on the word "in," noted that its interpretation is consistent with the policy's definition of professional services, which requires the services to have been performed by a professional liability insured and not by other entities for which the insured may be legally responsible. The appellate court also determined that RFC was "legally responsible" for the originating banks per the deemer clause since RFC was liable for the banks' fee-related misconduct in the class actions under 15 U.S.C. § 1641(d)(1).

Finally, the appellate court rejected the plaintiffs' argument that the word "the" as used in the fee exclusion applied only to fees received by RFC, not by the originating banks. The appellate court noted that, while the originating banks were not assureds under the policy, RFC's derivative liability for the banks' wrongful conduct brought the banks within the meaning of assured by virtue of the deemer clause but only for purposes of the fee exclusion. Accordingly, the appellate court affirmed the district court's judgment.

By: Amy Diviney