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August 11, 2025

**Via Email and U.S. Mail**

Michael J. Rusing, Esq.  
Rusing Lopez & Lizardi  
6363 N. Swan Road, Suite 151  
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Re: *Crosby v. Cochise County*

Dear Mr. Rusing:

This firm represents the Arizona Counties Insurance Pool (“ACIP”) in connection with your letter to ACIP dated July 11, 2025, regarding Cochise County’s request for coverage relating to a Notice of Claim received from counsel for Terry Thomas Crosby (“Claimant”), a County Supervisor. This letter provides ACIP’s initial coverage determination relating to the Notice of Claim.

Claimant asserts a claim for indemnification against the County for his attorney’s fees allegedly incurred, and to be incurred, in defense of certain criminal charges that ACIP understands were filed against Claimant by the State of Arizona on or about November 27, 2023. ACIP further understands that Claimant was charged with, *inter alia*, knowingly interfering with an election officer’s duty (A.R.S. § 16-1004), a class 5 felony, and criminal conspiracy (A.R.S. § 13-1003). Your July 11 letter asserts that Claimant is entitled to coverage for his attorneys’ fees simply because he “is a named insured under the policy for actions during the course and scope of his position as supervisor,” and because “the criminal action was initiated against him during the applicable period of coverage.” Your letter does not, however, identify any coverage language under ACIP’s Memorandum of Coverage (“MOC”) that would provide coverage for Claimant’s criminal defense fees, nor does it address the MOC’s applicable exclusions to coverage and general conditions.

As will be demonstrated below, ACIP’s applicable MOC with the County does **not** provide coverage for Claimant’s claim for indemnification of criminal defense attorney’s fees against the County, and coverage is hereby disclaimed and denied.

The MOC provides five types of coverage: (1) Comprehensive General Liability, (2) Automobile Liability, (3) Errors and Omissions Liability, (4) Employee Benefits Liability, and (5) Employment Practices Liability. As explained below, *none* of these coverages applies to Claimant's claim for indemnification for his criminal defense attorney's fees against the County.

### 1. **Comprehensive General Liability Coverage.**

The Comprehensive General Liability Coverage agreement provides that:

**ACIP** agrees, subject to the terms and conditions of this **MOC**, to pay on **MEMBER'S** behalf those sums which **MEMBER** becomes legally obligated to pay as **DAMAGES** for **BODILY INJURY, PERSONAL INJURY, PROPERTY DAMAGE**, or liability arising out of **LAW ENFORCEMENT ACTIVITIES** which arise out of an **OCCURRENCE** during the **MOC PERIOD OF COVERAGE**.

"Occurrence" is defined as "an **ACCIDENT** or a continuous or repeated exposure to substantially the same general fortuitous, unexpected, and unintended conditions that result in **BODILY INJURY, PERSONAL INJURY** and/or **PROPERTY DAMAGE** during the **PERIOD OF COVERAGE**." And "'**BODILY INJURY**' means **PHYSICAL INJURY**, sickness or disease sustained by a person at any time. **BODILY INJURY** also includes death, shock, mental anguish or mental injury by that person at any time; however, only when it results as a consequence of the **PHYSICAL INJURY**."<sup>1</sup>

In addition, **PERSONAL INJURY** means injury arising out of one or more of the following:

Wrongful Entry; Wrongful Eviction; Malicious Prosecution;  
Piracy; Infringement or Misappropriation of any Intellectual  
Property Rights (including: Copyrights; Patents; Trademarks;

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<sup>1</sup> The type of potential damages implicated by the Notice of Claim do not include Bodily Injury or Property Damage, but may well instead be categorized as "economic loss" under Arizona law. *See Carstens v. City of Phoenix*, 206 Ariz. 123, 128 (Ct. App. 2003). "Liability insurance policies typically afford coverage for property damage and bodily injury" only, such that coverage in connection with any recovery of economic losses would be precluded. Allan D. Windt, *Insurance Claims & Disputes*, § 11.01, at 173 (West 2000).

Service marks; and Advertising, Broadcasting, and Publishing Ideas); Invasion of Rights of Privacy; Libel; Slander; Defamation of Character; Disparagement of Property; Erroneous Service of Civil Papers; False Arrest, False Imprisonment; and Detention.

And **PROPERTY DAMAGE** is defined as “direct damage to or destruction or loss of tangible property, including all resulting loss of use or property, excluding, however, damage to the **NAMED MEMBER’S COVERED PROPERTY.**”

In his Notice of Claim, Claimant does not allege any claim for bodily injury, personal injury, property damage, or liability arising out of law enforcement activities, as those terms are defined in the MOC. Thus, the Comprehensive General Liability Coverage does not apply to the Notice of Claim.

**2. Automobile Liability Coverage.**

This coverage is likewise clearly inapplicable as Claimant does not allege any claim arising from an automobile accident or damage to an automobile.

**3. Errors and Omissions Coverage.**

The Errors and Omissions Coverage agreement provides that:

**ACIP** agrees, subject to the terms and conditions of this **MOC**, to pay on **MEMBER’S** behalf all sums which **MEMBER** shall become legally obligated to pay as **DAMAGES** because of any **CLAIM** or **SUIT** which is **FIRST MADE** against **MEMBER** during the **MOC PERIOD OF COVERAGE** and arising out of any **WRONGFUL ACT** by a member.

“Wrongful Act” is defined as:

[A]ny actual or alleged breach of duty, negligent error, and mistreatment, misleading statement or misleading omission including any **EMPLOYMENT PRACTICE VIOLATION**, Discrimination, and Violation of Civil Rights by the **MEMBER. WRONGFUL ACTS** do not include Discrimination or Violation of Civil Rights arising out of **LAW ENFORCEMENT ACTIVITIES** or any acts relating

to or arising from a request for inspection or disclosure of public records.

“Claim” means, with regard to Errors and Omissions Coverage:

[A] demand received by a **MEMBER** for **DAMAGES** alleging a **WRONGFUL ACT** by a **MEMBER** and for only those **CLAIMS** that are filed during the coverage period with an **OCCURRENCE** on or after the Retroactive Date contained in the Declarations of this **MOC**. *No CLAIM exists where the only DAMAGES sought or demanded are costs of suit and/or attorney's fees.*<sup>2</sup>

In addition, **SUIT** is defined as “a civil proceeding in which **DAMAGES** are sought to which this coverage applies.” And, significantly, “**SUIT** does not mean any criminal proceeding against any **MEMBER** or any open meeting law proceeding.”<sup>3</sup> Moreover, “Damages” are defined as “monetary compensation sought or fees, costs, charges and expenses incurred as a result of a **CLAIM** or **SUIT**.”

This coverage does not apply to Claimant’s claim against the County for several reasons. *First*, the MOC’s definition of **CLAIM** specifically excludes those claims “where the only **DAMAGES** sought or demanded are costs of suit and/or attorney’s fees.” Here, the only damages sought by Claimant are “costs of suit and/or attorney’s fees.

*Second*, the MOC’s exclusions specifically applicable to the Errors and Omissions Coverage exclude coverage of claims “[a]rising out of any dishonest, fraudulent, criminal, malicious, deliberate or intended **WRONGFUL ACT** committed by a **MEMBER** or at **NAMED MEMBER**’s direction.” Because Claimant’s attorney’s fees claimed against the County *arise* solely out of alleged criminal, deliberate, or intended acts, this exclusion also applies to bar coverage of Claimant’s Notice of Claim.

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<sup>2</sup> Emphasis added.

<sup>3</sup> Although the Notice of Claim purports to assert a new claim against the County, it is clear that Claimant—a County Supervisor—is seeking coverage for his criminal defense fees related to criminal proceedings. But Claimant—as a County Supervisor—cannot indirectly obtain coverage for his criminal defense fees (through a Notice of Claim against the County) that he could not otherwise obtain directly through the MOC.

In addition, the MOC's exclusions specifically applicable to the Errors and Omissions Coverage exclude coverage "[r]esulting from a **WRONGFUL ACT** intended or expected from the standpoint of any **MEMBER** to cause injury or **DAMAGES**. This exclusion applies even if the injury or **DAMAGES** claimed are of a different kind or degree than that intended or expected." Once again, because Claimant's attorney's fees result from alleged intended and/or expected acts, this exclusion also applies to bar coverage of Claimant's Notice of Claim.

Moreover, the MOC's exclusions specifically applicable to the Errors and Omissions Coverage exclude coverage for any **CLAIM** or **SUIT** "[b]rought by an elected or appointed official of a **NAMED MEMBER** against another official of the same **NAMED MEMBER**, or the **NAMED MEMBER** itself, arising out of a dispute or interpretation involving the relative governmental authority of the elected or appointed officials of the **NAMED MEMBER**." Because Claimant's Notice of Claim purports to assert a claim against the "Named Member" (i.e., the County) potentially "arising out of a dispute or interpretation involving the relative governmental authority of the elected or appointed officials of the **NAMED MEMBER**," ACIP reserves the right to deny and disclaim coverage under this exclusion as well.

For these reasons, the MOC's Errors and Omissions Coverage does not apply to Claimants' claims.

#### **4. Employee Benefits Liability Coverage**

Under the Employee Benefits Coverage, "ACIP agrees . . . to pay on **MEMBER'S** behalf those sums which **MEMBER** is legally obligated to pay as **DAMAGES** by reason of a **NEGLIGENT ACT, ERROR OR OMISSION** in the **ADMINISTRATION** of an **EMPLOYEE BENEFITS PROGRAM** for the **NAMED MEMBER**."

This coverage clearly does not apply as Claimant does not allege a claim arising out of the County's administration of an employee benefits program. Consequently, the Employee Benefits Coverage likewise does not apply to the Notice of Claim.

#### **5. Employment Practices Liability Coverage**

Under the Employment Practices Liability Coverage, "ACIP agrees, subject to the terms and conditions of this MOC, to pay on **MEMBER'S** behalf those sums for which the **MEMBER** is legally obligated to pay as **DAMAGES** by reason of a **WRONGFUL ACT** arising out of any **EMPLOYMENT PRACTICES VIOLATION** as defined in this MOC."

And “**EMPLOYMENT PRACTICES VIOLATION**” means:

- a. Refusal to employ;
- b. Termination of employment;
- c. Practices, policies, acts of omissions such as Coercion, Demotion, Failure to Promote, Evaluation, Reassignment, Discipline, Humiliation, Harassment (other than **SEXUAL HARRASSMENT**), including Violation of Civil Rights or Discrimination by the **MEMBER**, which are employment related;
- d. Any act relating to the selection, supervision or dismissal of any **MEMBER**.

Once again, this coverage clearly does not apply to Claimant’s Notice of Claim as Claimant does not allege an “Employment Practices Violation.”

For all the foregoing reasons, ACIP has determined that coverage is not available to the County under *any* of the coverages contained in the MOC. Moreover, coverage is expressly excluded by other conditions and exclusions contained in the MOC, all of which are hereby expressly reserved in their entirety.

For example, the MOC’s General Exclusion No. 3 excludes coverage for “[a]ny **SUIT, CLAIM**, loss, or damage resulting from any civil or criminal penalties imposed or provided for pursuant to any federal, state, or local law, statute, ordinance, or regulation, however characterized.” In addition, General Exclusion No. 4 excludes coverage for “[a]ny investigatory, disciplinary, or criminal proceeding against a **MEMBER**.” Because Claimant—a County Supervisor—seeks indemnification and coverage for his attorney’s fees resulting directly from a “criminal proceeding” against him, General Exclusion No. 4 applies to preclude coverage.

Further, the MOC’s General Exclusion No. 26 precludes coverage of claims “[f]or which the only monetary **DAMAGES** sought are costs of **SUIT** and/or attorney's fees.” Here, once again, Claimant’s only damages demanded against the County in the Notice of Claim “are costs of **SUIT** and/or attorney’s fees.” Thus, General Exclusion No. 26 also applies and excludes coverage of Claimant’s Notice of Claim.

Moreover, General Exclusion No. 36 provides that “[t]his **MOC** does not cover any **CLAIM, SUIT, DAMAGES**, or liability arising out of or relating to an election.” Because the criminal proceedings against Claimant *arise out of or relate to an election*, this exclusion also applies to exclude coverage for the Notice of Claim.

ACIP also reserves the right to deny and disclaim coverage under General Exclusion No. 23, which excludes coverage for “**BODILY INJURY, PERSONAL INJURY or PROPERTY DAMAGE** resulting from an act or omission outside the course and scope of employment or any act performed with **MALICE** or criminal intent,” and states that “[t]his exclusion applies regardless of whether any **MEMBER** is actually charged with, or convicted of, a crime.” The MOC defines “Malice” as “the intent or desire to commit a **WRONGFUL ACT**, or to cause pain, injury, harm, or distress to another, or to commit an act with knowledge that the act would violate the rights of or injure another person or organization,” and provides that “Knowledge” shall conclusively be deemed to exist whenever the Member actually knows or reasonably should know that the act may violate the rights of or injure another person or organization.”

Additionally, ACIP reserves the right to deny and disclaim coverage under General Exclusion No. 7, which excludes coverage for “**BODILY INJURY or PROPERTY DAMAGE or PERSONAL INJURY expected or intended from the standpoint of any MEMBER or NAMED MEMBER.**”

ACIP also reserves the right to deny and disclaim coverage pursuant to the MOC’s General Conditions. For example, General Condition No. 10 provides as follows:

**Duties After Event, CLAIM or SUIT.**

a. **MEMBER, NAMED MEMBER** must see to it that **ACIP** is notified as soon as practicable of facts that may reasonably result in a **CLAIM** or **SUIT**. To the extent possible, notice should include:

- 1) How, when and where the event, **CLAIM** or **SUIT** took place;
- 2) The names, addresses and telephone numbers of any injured persons and/or witnesses;
- 3) The nature and location of any injury and/or damage arising out of the event, **CLAIM** or **SUIT**.

b. If a **CLAIM** is made, or **SUIT** is brought against any **MEMBER**, then the **NAMED MEMBER** and any involved **MEMBER** must:

- 1) Immediately send **ACIP** copies of any **CLAIMS**, demands, notices, correspondence, summonses, or legal papers received or obtained in connection with the **CLAIM** or **SUIT**.
- 2) See that **ACIP's** Executive Director receives written notice of the **CLAIM** or **SUIT** as soon as practicable.
- 3) Authorize **ACIP** to obtain any and all records, including, but not limited to, personnel records, minutes of meetings, memorandum, correspondence, notes, financial records, Email, **ELECTRONIC DATA**, and other information requested.
- 4) Cooperate with **ACIP** in the investigation, and/or defense of the **CLAIM** or **SUIT**, including but not limited to, attendance at legal proceedings, hearings and trials, strategy and/or planning meetings, if requested by **ACIP**.
- 5) Assist **ACIP**, upon its request, in the enforcement of any right against any person or organization, which may be liable to **NAMED MEMBER** because of injury and/or damage to which this **MOC** may also apply.

c. **MEMBER, NAMED MEMBER** shall not, except at **NAMED MEMBER's** own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for **FIRST AID**, or in any way bind, obligate or represent to anyone that **NAMED MEMBER** has such authority on behalf of **ACIP**, without **ACIP's** consent.

d. **MEMBER, NAMED MEMBER's** failure to comply with the foregoing duties shall constitute a material breach deemed prejudicial to **ACIP**, thereby entitling **ACIP** to refuse any coverage for the **CLAIM** or **SUIT**, or any duties arising therefrom.

As noted above, **ACIP** understands that the criminal charges against Claimant were first filed in **November 2023**. **ACIP**, however, received no notice of Claimant's purported claim for coverage of his criminal defense fees until its receipt of your letter dated **July 11, 2025**. Although the Notice of Claim purports to assert a new claim against the County, it is clear that Claimant—a County Supervisor—is seeking coverage for his criminal defense fees related to criminal proceedings instituted **over 18 months ago**. But Claimant—as a County Supervisor—cannot indirectly obtain coverage for his criminal defense fees (through a Notice of Claim) that he could not otherwise obtain directly

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through the MOC. Accordingly, ACIP reserves the right to assert that the requirements of General Condition No. 10 also apply to bar coverage of Claimant's claim.

Finally, the MOC may not provide coverage for Claimant's claim because the claim does not involve a "fortuity," which is a fundamental requirement of liability insurance. *See* A.I. Widiss, *Insurance Law* §5.3(a), at 475 (1988) ("[A] fundamental principle of insurance law is that insurance contracts should not provide coverage when a loss is not fortuitous."); *Smith v. Hughes Aircraft Co.*, 783 F. Supp. 1222, 1234 (D. Ariz. 1991) ("Clearly, the parties intended, and public policy requires, some element of fortuity in their indemnification contracts."). Accordingly, ACIP reserves the right to disclaim and deny coverage of Claimant's claim to the fullest extent that it does not involve accidental and fortuitous circumstances.

In light of the foregoing, the claim asserted by Claimant against the County is not covered under ACIP's MOC, and no defense or indemnity is owed or will be provided by ACIP. In issuing this written coverage determination, ACIP hereby reserves all rights, defenses, conditions, limitations, exclusions, and remedies available to it under the MOC and applicable law, including any and all other bases for this determination. The foregoing is not intended to limit or modify, in any respect, ACIP's rights, defenses, and/or remedies in connection with the Notice of Claim, or otherwise.

Of course, if you believe that you have additional facts or information that may bear upon ACIP's coverage determination, or if there are any changed circumstances in the future that you believe may implicate coverage for any reason whatsoever, please promptly provide me—in writing—with any such facts, information, and/or circumstances for consideration. ACIP also requests that the County keep it informed of any developments in this matter, and provide ACIP with a copy of the Complaint, if and when one is filed against the County.

Please feel free to contact me if you have any questions regarding this initial coverage determination.

Very truly yours,

WELKER & PAUOLE PLC

By

  
Christopher S. Welker