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ADVANCE SHEET HEADNOTE
April 27, 2026

2026 CO 25

No. 24SC372, *USAA v. Wenzell* – Insurer's Defenses – Failure-to-Cooperate Defense – Excess Insurers – Exhaustion Clauses.

In this insurance case, the supreme court considers which insurer defenses are covered by section 10-3-1118, C.R.S. (2025). The court concludes that only defenses based in the general cooperation clause, not enumerated conditions precedent, must be raised in compliance with section 10-3-1118's procedural requirements.

The court also considers whether an excess insurer may include an exhaustion clause in its policy to determine when its duty to investigate, adjust, and pay out a claim begins. The court concludes that while these clauses are valid, exhaustion must be defined by a policyholder's undisputed damages, not the payment of benefits by an underlying insurer.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2026 CO 25

Supreme Court Case No. 24SC372
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 23CA1327

Petitioners:

United Services Automobile Association and State Farm Mutual Automobile
Insurance Company,

v.

Respondent:

Anthony Wenzell.

Judgment Affirmed in Part and Reversed in Part

en banc

April 27, 2026

Attorneys for Petitioner United Services Automobile Association:

Spencer Fane LLP

Evan Stephenson

Jeremy Moseley

Denver, Colorado

Attorneys for Petitioner State Farm Mutual Automobile Insurance Company:

Lehotsky Keller Cohn LLP

Katherine C. Yarger

Denver, Colorado

Patterson Ripplinger, P.C.

Franklin D. Patterson

Karl A. Chambers

Greenwood Village, Colorado

Attorneys for Respondent:

Robert J. Anderson, P.C.

Robert J. Anderson

Scott F. Anderson

Timothy G. Buxton

Colorado Springs, Colorado

Patrick Collins Esq. LLC

L. Dan Rector

Colorado Springs, Colorado

Attorneys for Amici Curiae Colorado Defense Lawyers Association and Colorado Civil Justice League:

Wheeler Law, P.C.

Karen H. Wheeler

Jami A. Maul

Jesse O. Brant

Greenwood Village, Colorado

Attorneys for Amicus Curiae Colorado Trial Lawyers Association:

Western Slope Law

Nelson A. Waneka

Glenwood Springs, Colorado

Attorneys for Amici Curiae National Association of Mutual Insurance Companies and American Property Casualty Insurance Association:

Womble Bond Dickinson (US) LLP

Kendra N. Beckwith

Holly C. White

Elizabeth Michaels

Denver, Colorado

Attorneys for Amicus Curiae Rocky Mountain Association of Public Insurance Adjusters:

Burg Simpson Eldredge Hersh & Jardine, P.C.

D. Dean Batchelder

Patrick M. Sweet

Englewood, Colorado

Attorneys for Amicus Curiae United Policyholders:

Levin Sitcoff PC

Gideon S. Irving

Denver, Colorado

JUSTICE HOOD delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ, JUSTICE BOATRIGHT, JUSTICE GABRIEL, JUSTICE SAMOUR,** and **JUSTICE BLANCO** joined.
JUSTICE BERKENKOTTER dissented.

JUSTICE HOOD delivered the Opinion of the Court.

¶1 In this insurance law case, we are confronted with two distinct issues.

¶2 First, we are asked to construe the breadth of a new statute, section 10-3-1118, C.R.S. (2025) (“section 1118”), which proceduralizes how insurers may assert a common-law failure-to-cooperate defense. We reverse the conclusion below that the term “failure-to-cooperate defense,” as used in section 1118, encompasses all insurer defenses based on any of a policyholder’s contractual duties. Instead, we hold that the procedural requirements in section 1118 apply only when the insurer’s defense arises from a policy’s general cooperation clause.

¶3 Second, we are asked to determine when an excess underinsured-motorist (“UIM”) insurer is required to begin its investigation and adjust a claim if the policy first requires the policyholder to exhaust all underlying insurance before claiming benefits. Because all UIM insurers – primary or excess – have a duty to pay their policyholders’ undisputed claims for covered benefits, we affirm the division’s conclusion and hold that if an excess UIM insurer includes an exhaustion clause in its policy, that clause is satisfied when a policyholder demonstrates undisputed damages that exceed the maximum limits of all the underlying policies.

I. Facts and Procedural History

¶4 In 2017, Anthony Wenzell was rear-ended while driving. Unfortunately, it wasn't his first accident. He had been involved in a more serious crash in 2014 and required back surgery as part of his recovery.

¶5 After the 2017 accident, Wenzell filed claims under three insurance policies: the tortfeasor's liability policy, Wenzell's policy with State Farm Mutual Automobile Insurance Company ("State Farm"), and a policy with United Services Automobile Association ("USAA") taken out by Wenzell's brother that covered family members. The State Farm policy and the USAA policy both included UIM insurance covering Wenzell, but the USAA policy also contained an excess "other insurance" clause. Wenzell claimed that all policies would be triggered because his damages would exceed the limits of the tortfeasor's liability policy and his own policy.

¶6 After receiving Wenzell's claims, USAA and State Farm asked him on several occasions to release his medical records so they could apportion his damages between those attributable to the 2017 accident and those attributable to his prior injuries.¹ According to the insurers, Wenzell failed to comply with these

¹ The insurers argue they are entitled to a release under the terms of their policies. State Farm's policy provided, in part, that "[a] *person* making claim under . . . Uninsured Motor Vehicle Coverage . . . must . . . provide written authorization for *us* to obtain: (a) medical bills; (b) medical records; . . . and (d) any other information *we* deem necessary to substantiate the claim." And USAA's policy provided, in

requests. More precisely, the insurers assert that he either didn't return the tendered medical release forms or offered deficient releases instead.

¶7 In 2021, with his claims unresolved and the statute of limitations about to expire, Wenzell sued USAA and State Farm for breach of contract and for bad-faith delay or denial of insurance benefits.²

¶8 During pretrial litigation, the court considered five motions for summary judgment or partial summary judgment and resolved all of them in the insurers' favor. Those motions centered around two issues. First, the trial court concluded that the insurers' defenses were based on Wenzell's failure to provide a comprehensive medical release, which was a condition precedent to compensation under the insurance policies. Therefore, after finding that there was no genuine issue of material fact regarding Wenzell's failure to do so, the court granted summary judgment in the insurers' favor on that issue without addressing section 1118. Second, the court concluded that Wenzell's bad-faith claim against USAA was improper because Wenzell hadn't exhausted his primary insurance

part, that "[a] person or entity seeking any coverage or payment of any benefits . . . must . . . [a]uthorize *us* to obtain medical reports and other pertinent records."

² An apt observer may note that the statute that is at the center of one aspect of this dispute was enacted between the time of Wenzell's 2017 accident and the initiation of this lawsuit in 2021. However, the statute still applies because the General Assembly explicitly noted that section 1118 applied to "litigation that occurs on or after" the effective date of the act, which was September 14, 2020. Ch. 229, sec 2(2), § 10-3-1118, 2020 Colo. Sess. Laws 1116, 1117.

with State Farm. So, the trial court granted summary judgment in USAA's favor on that basis.³ These decisions resulted in the complete dismissal of Wenzell's claims.

¶9 Wenzell appealed, and a division of the court of appeals reversed the trial court's summary judgment orders in a published opinion. *Wenzell v. United Servs. Auto. Ass'n*, 2024 COA 40, ¶ 72, 552 P.3d 1121, 1133. The division concluded that section 1118's procedural requirements apply to all defenses when an insurer asserts that a policyholder failed to comply with a policy provision, not just those based in the general cooperation clause. *Id.* at ¶¶ 26–28, 552 P.3d at 1126–27.

¶10 The division also decided that the trial court had erred by granting partial summary judgment in USAA's favor based on Wenzell's failure to exhaust his State Farm policy. *Id.* at ¶ 58, 552 P.3d at 1131. Applying the rationale from *Tubbs v. Farmers Insurance Exchange*, 2015 COA 70, ¶ 18, 353 P.3d 924, 927, which was extended by *Ligotti v. Allstate Fire & Casualty Insurance Co.*, 694 F. Supp. 3d

³ The trial court also concluded that Wenzell's bad-faith claim against State Farm was improper because there was no genuine issue of material fact related to State Farm's conduct that would show unreasonable delay or denial of payment. Accordingly, it granted summary judgment in State Farm's favor on that basis. While the division reversed the trial court's ruling granting State Farm's motion for partial summary judgment on Wenzell's bad-faith delay or denial of insurance benefits claim, *Wenzell v. United Servs. Auto. Ass'n*, 2024 COA 40, ¶ 70, 552 P.3d 1121, 1133, State Farm didn't raise this issue in its petition to this court, and we don't disturb the division's conclusion here.

1371, 1378 (D. Colo. 2023), the division reasoned that an insurer may not require an insured to “exhaust” his primary insurance—meaning, the policyholder can’t be required to receive a policy-limits payment from the primary insurer before the excess insurer adjusts his claim. *Wenzell*, ¶¶ 57–59, 552 P.3d at 1131. “[I]f it is determined that Wenzell is entitled to damages beyond the sum of the other driver’s liability insurance and State Farm’s UIM insurance (i.e., beyond \$1.1 million), USAA will be required to pay the excess of Wenzell’s damages up to its policy limit of \$300,000” regardless of how much Wenzell ultimately receives from those other insurers. *Id.* at ¶ 59, 552 P.3d at 1131. In embracing this approach, the division concluded that excess UIM policies that require a policyholder to receive a policy-limits payment from the underlying insurer were void as against public policy. *Id.* at ¶ 57, 552 P.3d at 1131.

¶11 Both insurers petitioned this court for certiorari review, and we granted both petitions.⁴

⁴ We granted certiorari to review the following issues:

1. Whether the restrictions from section 10-3-1118, C.R.S. (2024), which solely govern “a failure-to-cooperate defense” arising from an insured’s failure to provide “the information the [first-party] insurer seeks,” section 10-3-1118(1)(a), may extend to other, dissimilar defenses arising from neither (i) the insurance contract’s cooperation provision nor (ii) an insurer’s request for information directly from the insured.

II. Analysis

¶12 We begin by identifying the standard of review and familiar principles of statutory interpretation. We then apply those principles to section 1118 to assess the breadth of its procedural requirements. Lastly, we evaluate what “exhaustion” means in an excess UIM context and how a policyholder satisfies an exhaustion clause, and then we apply that rule to these facts.

A. Standard of Review and Principles of Statutory Construction

¶13 We interpret the insurance code de novo. *Apodaca v. Allstate Ins. Co.*, 255 P.3d 1099, 1103 (Colo. 2011). We also review de novo the meaning of insurance contracts and whether insurance policy provisions are contrary to public policy. *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1045, 1049 (Colo. 2011).

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2. Whether the court of appeals’ nullification of all exhaustion provisions in excess underinsured-motorist policies conflicts with this court’s principle that underlying insurance “must first be exhausted” before excess insurance responds. *Pub. Serv. Co. of Colorado v. Wallis & Cos.*, 986 P.2d 924, 941 (Colo. 1999).
 3. Whether the court of appeals erred in conflating the specific contract duty to “provide written authorization for [petitioner] to obtain: (a) medical bills; (b) medical records; (c) wage, salary, and employment information; and (d) any other information we deem necessary to substantiate the claim,” with the general duty to cooperate.

Because Issues 1 and 3 overlap, this opinion addresses two analytical questions but is responsive to all three issues presented.

¶14 When interpreting statutes, our primary task is to give effect to the intent of the General Assembly. *Skillett v. Allstate Fire & Cas. Ins. Co.*, 2022 CO 12, ¶ 9, 505 P.3d 664, 666. We begin with the statute’s plain language. *Id.* If it’s unambiguous, we look no further. *Id.* However, if the statute is ambiguous—meaning susceptible to multiple reasonable interpretations—we may turn to extrinsic aids like legislative history or common-law analogues. § 2-4-203, C.R.S. (2025).

¶15 And because the General Assembly “is presumed to be aware of existing” common-law precedent, *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004), when the General Assembly tills a new statutory field and uses a common-law term, the “old soil” comes with it, *United States v. Hansen*, 599 U.S. 762, 778 (2023). We won’t assume legislation abrogates the common law unless the legislature clearly expresses its intent to do so. *Beach v. Beach*, 74 P.3d 1, 4 (Colo. 2003).

B. The Scope of Section 1118’s Procedural Requirements

¶16 The insurers responded to Wenzell’s complaint by asserting that his claims were barred because his failure to provide sufficient medical releases constituted a failure to satisfy a condition precedent in his insurance contracts. Wenzell countered that the insurers’ reliance on the medical release requirement was really just a camouflaged failure-to-cooperate defense, and because the insurers hadn’t

complied with section 1118 before asserting that defense, he contends they were precluded from relying on the unsigned medical releases to deny coverage.

¶17 To assess whether section 1118 governs both the affirmative defense of failure-to-cooperate—based on the general cooperation clause—as well as other common-law defenses based on the failure to satisfy contractual conditions precedent—like Wenzell’s failure to provide the requested medical releases—we must first determine the breadth of the common-law failure-to-cooperate defense and whether the enactment of section 1118 abrogated the common-law rule.

1. Does the Common-Law Failure-to-Cooperate Defense Include the Common-Law Failure-to-Satisfy-Conditions-Precedent Defense?

¶18 Under the common law of insurance, policyholders have a duty to cooperate with their insurer to support the investigation, adjustment of claims, and any litigation undertaken by the insurer to compensate the policyholder. *State Farm Mut. Auto. Ins. Co. v. Brekke*, 105 P.3d 177, 189 (Colo. 2004). The scope of the duty is usually defined by the insurer in the policy. *Id.* And in litigation between a policyholder and the insurer, the latter may defend its refusal to pay benefits by asserting that the policyholder’s failure to comply with the cooperation clause in the policy prevented the insurer from properly investigating the claim. *See Soicher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 46, ¶ 19, 351 P.3d 559, 564.

¶19 In discussing this common-law defense, we have distinguished between general “duties of cooperation” as opposed to the conditions precedent for performance under the contract, which are “an additional list of duties . . . designed to assure that [the insurer] had all the information about the nature of the U[I]M claim.” *Brekke*, 105 P.3d at 189. Divisions of the court of appeals have followed suit. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Goddard*, 2021 COA 15, ¶¶ 44–46, 484 P.3d 765, 775 (quoting the insurance policy’s cooperation clause in full to demonstrate that cooperation is defined by the terms of the contract and is distinct from other enumerated duties in the contract); *Soicher*, ¶¶ 25–27, 351 P.3d at 565 (distinguishing the policyholder’s duty of good faith from their duty to cooperate under the terms of the contract).

¶20 In sum, there is a distinction between a policyholder’s common-law duty to cooperate and a policyholder’s duty to satisfy the conditions precedent in the contract. *See Ahmadi v. Allstate Ins. Co.*, 22 P.3d 576, 579 (Colo. App. 2001). This distinction also affects how these duties are pled. For instance, unlike in a breach-of-contract defense related to a condition precedent, to succeed on a failure-to-cooperate defense, the insurer must show that the policyholder’s failure to cooperate “materially and substantially disadvantaged the insurer.” *Soicher*, ¶ 19, 351 P.3d at 564; *see also* 1 Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies & Insureds* § 3:2, Westlaw (6th ed. database updated May

2025) (addressing an insured’s duty to cooperate). This requires the insurer to prove actual prejudice from the insured’s failure to cooperate, a showing not required to succeed on a failure-to-satisfy-condition-precedent defense.

¶21 This distinction regarding conditions precedent has some intuitive force. Policyholders are on notice of the enumerated conditions precedent in their policies requiring them to engage in specific conduct—like the duty to provide a comprehensive medical release—without additional notice from the insurer. But a generic duty to cooperate could include a range of unspecified conduct that a policyholder might not realize the insurer expects them to perform.

¶22 Because advocates for policyholders believed that policy-defined general cooperation clauses could lead to gamesmanship in litigation by insurers, the General Assembly passed H.B. 20-1290, which would become section 1118. *See* Hearing on H.B. 1290 before the H. Judiciary Comm., 72d Gen. Assemb., 2d Reg. Sess. (Mar. 10, 2020) (Chairman, Representative Mike Weissman, stating, “So in the law as we have it now, are there no guardrails on when or how this defense may be raised?”); *see also* Ch. 229, sec. 1, § 10-3-1118, 2020 Colo. Sess. Laws 1116, 1116-17.

2. Did the Passage of Section 1118 Abrogate the Common-Law Failure-to-Cooperate Defense?

¶23 Section 1118 imposes mandatory procedures that an insurer must follow before it may advance a failure-to-cooperate defense. § 10-3-1118(1). Under the

statute, to assert a failure-to-cooperate defense, an insurer must give the policyholder written notice of his or her failure to cooperate within sixty days of the alleged failure, and the notice must provide the policyholder with sixty days to cure. § 10-3-1118(1)(e)(I)-(II). Specifically, an insurer must inform the policyholder that it is seeking information that is unavailable without the help of the insured and may only seek information that a reasonable person would determine is needed to adjust the claim or to prevent fraud. § 10-3-1118(1)(b), (d).

¶24 Although the statute refers to an insurer's "failure-to-cooperate defense," § 10-3-1118(1), and the policyholder's underlying "duty to cooperate," § 10-3-1118(3), it doesn't define the word "cooperate."

¶25 Therefore, we turn to the dictionary. *Cowen v. People*, 2018 CO 96, ¶ 14, 431 P.3d 215, 218 (endorsing common-use dictionaries as a useful source to give meaning to undefined statutory terms). One common understanding of "cooperate" is "to act or work with another" or to "act together or in compliance." *Cooperate*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/cooperate> [<https://perma.cc/2ESQ-JZSA>]. But in insurance contracts, it's common for the policy to assign a narrower meaning to "cooperate" under the terms of the contract. *See Brekke*, 105 P.3d at 189. Section 1118's use of "cooperate" is equally susceptible to at least two meanings: (1) a colloquial meaning consistent with the foregoing dictionary definition or (2) a technical meaning that limits

“cooperation” to the definition in the insurance policy (or by courts interpreting that policy). Therefore, the statutory text is ambiguous. The statutory term “cooperate” could refer to a policyholder’s general duty to cooperate, or it could also include compliance with any specifically enumerated conditions precedent. Because these are distinguishable concepts at common law, we turn to the legislative history for guidance.

¶26 We presume the General Assembly is aware of our precedent. *Vigil*, 103 P.3d at 327. Often, we do so without the legislature explicitly demonstrating such awareness. Not so here. When the bill that became section 1118 was in committee, the members who voted on the bill debated the meaning of cooperation with reference to the common-law background. Even so, whether the committee intended to modify common-law strictures is unclear. Representative Alec Garnett suggested that the bill was intended to provide a standard meaning for cooperation. He found it problematic that “[w]hat constitutes . . . noncooperation is largely undefined and is subject to the discretion of individual insurance companies. For example, failure to cooperate can include . . . failing to sign a specific form, or refusing to turn over private or irrelevant information.” Hearing on H.B. 1290 before the H. Judiciary Comm., 72d Gen. Assemb., 2d Reg. Sess. (Mar. 10, 2020) (statement of Rep. Garnett). He suggested that a uniform definition would “provide clarity because of the near limitless assertions . . . an

insurance company can make and then use to accuse policyholders of failing to cooperate.” *Id.* In isolation, his statement may suggest that he intended to abrogate the common-law approach.

¶27 But it’s unclear whether a majority of the committee shared Representative Garnett’s desire. Representative Adrienne Benavidez, for example, implied that the terms of an insurance contract would continue to control what constitutes cooperation in a particular instance. *Id.* (statement of Rep. Benavidez). She noted that if a policy defined cooperate, “that’s defining – if you’re telling one of your insured, you need to cooperate by submitting this and I’m asking you to do this because your policy says you have to do this, that’s pretty clear.” *Id.* Her statement suggests that she was comfortable allowing policies to define cooperation rather than imposing a legislative definition.

¶28 Without a clear expression of the General Assembly’s specific intent to modify the common-law duty to cooperate, we conclude that section 1118 didn’t abrogate the common law. *Beach*, 74 P.3d at 4. Thus, the failure-to-cooperate defense remains distinct from condition-precedent defenses, and only the former is subject to section 1118’s procedure.⁵

⁵ Our holding today should not be understood as an invitation to insurers to try to circumvent section 1118 by establishing novel or unduly onerous conditions precedent. Today’s opinion leaves open the possibility that an insurer could still be subject to a statutory bad-faith claim if it uses conditions precedent in bad faith.

¶29 In the case before us, USAA and State Farm asserted that Wenzell had failed to provide a suitable medical release, which if true, is a breach of the enumerated conditions precedent in the policies, not the policies' general cooperation clauses. Accordingly, section 1118's requirements don't apply, and we reverse the division's conclusion on this issue.

¶30 Having resolved the statutory issue, we turn to the interpretation of USAA's exhaustion clause.

C. Exhaustion Provisions in the Excess UIM Insurer Context

¶31 In Colorado, all drivers on public roadways must maintain liability coverage that complies with statutory minimums. § 10-4-620, C.R.S. (2025). Insurers are also required to offer UIM coverage as part of a liability policy, although this coverage may be declined by policyholders. § 10-4-609(1)(a)(I)-(II), C.R.S. (2025). In addition, a policyholder may have more than one UIM policy, and insurers are permitted to include provisions that clarify which insurer's coverage will apply first if a policyholder has multiple policies that might cover the same loss. *Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 660 (Colo. 2011). Here, the USAA policy stipulated that any coverage for "[a] vehicle [Wenzell's brother] do[es] not own . . . will be excess over any collectible insurance," making the USAA policy excess over State Farm's primary UIM coverage of Wenzell.

¶32 Because it was an excess insurer on this claim, USAA argued that it wasn't obligated to pay UIM benefits until State Farm (Wenzell's primary insurer) paid Wenzell the policy-limits amount. Because Wenzell hadn't collected up to the limits of his primary coverage with State Farm, USAA maintained that its coverage wasn't triggered.

¶33 The division rejected USAA's argument because it concluded that if an insurer, through an exhaustion clause in the policy, conditions excess coverage on the primary insurer making a coverage-limits payment, then the clause is unenforceable under Colorado law and public policy. *Wenzell*, ¶ 57, 552 P.3d at 1131. Instead, the division determined that an excess UIM policy is triggered when the policyholder claims damages exceeding the maximum policy limits of all the underlying policies. *Id.* at ¶¶ 58-59, 552 P.3d at 1131. We agree with the division, but we clarify that Colorado law permits the enforcement of exhaustion clauses in the excess UIM context only if exhaustion is based on a policyholder's undisputed damages rather than payment by the primary insurer.

1. What Constitutes Exhaustion of an Underlying UIM Policy

¶34 We begin by assuming, without deciding, that the USAA policy provision stating that the policy is "excess over any collectible insurance" is an exhaustion clause. We have never defined what it means for underlying insurance to be "exhausted" in the context of excess UIM coverage. While the concept has been

raised in prior decisions, those cases didn't concern UIM coverage, which is subject to additional statutory regulation, *e.g.*, § 10-4-609, and didn't require us to define the term. *See Apodaca*, 255 P.3d at 1103; *Pub. Serv. Co. of Colo. v. Wallis & Cos.*, 986 P.2d 924, 941 (Colo. 1999).

¶35 Other jurisdictions *have* analyzed similar exhaustion clauses, and two general paths emerge: the policyholder exhausts underlying insurance when (1) it is determined that his damages will exceed the underlying limits—the undisputed-damages approach, *e.g.*, *Waste Mgmt. of Minn., Inc. v. Transcon. Ins. Co.*, 502 F.3d 769, 774 (8th Cir. 2007); or (2) the primary insurer has tendered payment up to its limits—the payment-limit approach, *e.g.*, *Citigroup Inc. v. Fed. Ins. Co.*, 649 F.3d 367, 373 (5th Cir. 2011). USAA proposes we adopt the payment-limit approach.

¶36 But at least one federal court applying Colorado law in an excess UIM coverage context adopted the undisputed-damages approach. *Ligotti*, 694 F. Supp. 3d at 1378 (“[The primary insurer’s] payment does not offset [the excess insurer’s] liability; [the excess insurer] is responsible for damages exceeding the limit of the [primary] [p]olicy no matter what amount [the primary insurer] pays.”). The *Ligotti* court reasoned that if a primary UIM carrier may not use an exhaustion clause to avoid covering damages beyond the tortfeasor’s liability limit, then by the same logic, an excess UIM carrier may not use its exhaustion clause to avoid

covering damages beyond the primary UIM carrier's limit. *Id.* This logic is indicative of the undisputed-damages approach because the primary determinant of coverage is the policyholder's damages, not the primary insurer's payment. While we aren't bound by a federal court's reasoning, we embrace that approach as consistent with Colorado law and policy for several reasons.

¶37 *First*, although Colorado seeks "to provide insurers and insureds the freedom to contract," *Bailey*, 255 P.3d at 1046, that freedom isn't limitless. We will invalidate a clause in an insurance contract if its enforcement would "dilute, condition, or limit statutorily mandated coverage." *Meyer v. State Farm Mut. Auto. Ins. Co.*, 689 P.2d 585, 589 (Colo. 1984), *superseded on other grounds by statute*, § 10-4-418(2)(b), C.R.S. (2025), *as recognized in*, *Schlessinger v. Schlessinger ex rel. Schlessinger*, 796 P.2d 1385, 1389 (Colo. 1990). Adopting the payment-limit approach, as USAA proposes, would limit coverage by conditioning an excess insurer's payment on the primary insurer's adjustment and payment of the claim. Under our decision in *Meyer*, that type of conditioned coverage is contrary to Colorado law. *Meyer*, 689 P.2d at 589; *see also* *Jordan v. Safeco Ins. Co. of Am., Inc.*, 2013 COA 47, ¶ 29, 348 P.3d 443, 449; *cf. Ligotti*, 694 F. Supp. 3d at 1378 (rejecting insurers' attempts to condition coverage on a policy-limits payment to an insurer at a lower level of coverage).

¶38 *Second*, the undisputed-damages approach harmonizes the entire statutory UIM scheme by ensuring that primary and excess UIM insurers are equally prevented from using setoffs tied to payments from underlying coverage to artificially reduce their own coverage. Section 10-4-609(1)(c) provides that insurers shall not reduce coverage by a setoff from “other uninsured or underinsured motor vehicle insurance,” which implies that the statute applies to excess UIM coverage that fits into that category. *See Ligotti*, 694 F. Supp. 3d at 1377-78. As the *Ligotti* court explained, this means that while an excess insurer doesn’t have to cover damages below the limits of the underlying policies, it also may not limit its liability by reference to payments made by underlying policies. *Id.*

¶39 *Lastly*, we are not persuaded that the undisputed-damages approach will lead to phony, inflated pleadings intended to satisfy exhaustion and trigger excess policies that would otherwise go untouched. Under Colorado’s statutory bad-faith regime, an insurer is only subject to statutory liability if it delays payment of *undisputed* damages covered by the insurance contract. *See State Farm Mut. Auto. Ins. Co. v. Fisher*, 2018 CO 39, ¶¶ 21-22, 418 P.3d 501, 505. Policyholders must still demonstrate that their *undisputed* damages exceed the limits of all underlying policies to trigger an excess policy. Only a refusal or delay in paying such undisputed damages under a policy can give rise to a bad-faith claim against an

excess insurer. And should policyholders give their insurers the run-around to keep the informational dispute alive, the insurers retain their own tools – namely, the failure-to-cooperate defense we discussed in Part II.B.1 above.

2. Application

¶40 Here, if Wenzell presents undisputed evidence that his damages would necessarily exceed all underlying policy limits – the tortfeasor’s coverage and his primary UIM coverage with State Farm – then he will have exhausted “collectible” insurance, and USAA acts in bad faith if it doesn’t investigate, adjust, and pay out undisputed portions of Wenzell’s claim that exceed those limits.

¶41 But the parties continue to dispute factual issues regarding Wenzell’s medical release and the scope of his claimed damages. Wenzell claims that he has at least \$2.7 million in medical costs traceable to the 2017 accident, but without a proper medical release and the opportunity to provide their own assessment of Wenzell’s medical records, the insurers dispute whether these costs arise from the 2017 accident or from complications related to the 2014 accident. As long as that dispute persists, there are material issues of fact regarding whether USAA’s coverage has been triggered. Therefore, USAA is not entitled to partial summary judgment based on the contract’s exhaustion provision. *See Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 19, 347 P.3d 606, 611 (noting that a movant is only entitled to summary judgment if there is no genuine dispute as to any material fact). USAA

has no obligation to investigate, adjust, or pay out Wenzell's claim until he presents undisputed evidence that his damages would necessarily exceed all underlying policy limits.

III. Conclusion

¶42 We reverse the judgment of the court of appeals in part, affirm in part, and remand the case to the division with directions to return it to the trial court.

¶43 Specifically, we reverse the division's conclusions with respect to section 1118. On remand, consistent with this opinion, we direct the trial court to grant State Farm's and USAA's cross-motions for summary judgment based on Wenzell's failure to comply with the policies' enumerated conditions precedent. And because failure to comply with a condition precedent bars a policyholder from recovering under an insurance policy, *Jensen v. Am. Fam. Mut. Ins. Co.*, 683 P.2d 1212, 1214 (Colo. App. 1984), Wenzell's remaining claims for bad-faith delay or denial of insurance benefits must likewise be dismissed.

¶44 We also reverse the division's judgment that exhaustion clauses violate section 10-4-609(1)(c). Colorado law permits the enforcement of exhaustion clauses in the excess UIM coverage context but only when exhaustion is based on a policyholder's undisputed damages.

¶45 Lastly, we affirm the division's judgment that USAA has an independent duty to evaluate Wenzell's claim. However, USAA's duty to investigate, adjust,

and pay out Wenzell's claim wouldn't arise until Wenzell could demonstrate that his undisputed damages exceed the limits of all underlying policies.

JUSTICE BERKENKOTTER dissented.

JUSTICE BERKENKOTTER, dissenting.

¶46 I agree with the majority regarding the plain and ordinary meaning of section 10-4-609(1)(c), C.R.S. (2025). I write separately because I don't agree with its interpretation of section 10-3-1118, C.R.S. (2025) ("section 1118"), the failure-to-cooperate statute.¹ Section 1118 was intended to prevent an insurer from unfairly wielding failure-to-cooperate defenses against its insured in first-party insurance litigation. One way the statute accomplishes this is by requiring an insurer to notify its insured *during the claims investigation process* if the insurer believes that the insured hasn't provided information a reasonable person would conclude was necessary to adjust the insured's claim. Importantly, section 1118 prevents the dismissal of an insured's claims based on alleged noncooperation if the defense is raised for the first time *after* litigation is filed.

¶47 Just as important, the statute provides an insured with the opportunity to cure an alleged deficiency. If the insured cures the deficiency, the insurer receives the information it needs to adjust the claim; if not, the insurer may assert a failure-to-cooperate defense (if it is sued by its insured). What's more, by injecting a reasonable person standard into the analysis, section 1118 prevents courts from

¹ While section 1118 refers to the "failure-to-cooperate defense," much of the case law refers to the "noncooperation defense." *See, e.g., Soicher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 46, ¶ 37, 351 P.3d 559, 567. I use the terms interchangeably.

dismissing claims based on minor or vague assertions that an insured failed to cooperate.

¶48 How an insurer chooses to frame an alleged act of noncooperation—as arising from a general versus a specific duty to cooperate—once litigation has been filed months or years later is irrelevant to the inquiry section 1118 requires. Because it is undisputed that the insurers here did not provide Anthony Wenzell with notice and an opportunity to cure, and because I agree with the majority’s analysis regarding the plain and ordinary meaning of section 10-4-609(1)(c), I would affirm the judgment of the court of appeals.

¶49 The majority’s analysis with respect to section 1118 falls short for two reasons. First, it ignores the plain, unambiguous language of the statute, which does not distinguish between general and specific duties to cooperate. Second, a review of the statute’s legislative history (assuming for the sake of argument that there’s a reason to examine it) makes clear that the General Assembly intended the phrase failure-to-cooperate to apply broadly to prevent an insurer from unfairly using the defense against its insureds in first-party insurance litigation. Alleged gamesmanship by insurers concerning requests for blanket medical release authorizations—the type of noncooperation at issue here—was specifically mentioned by proponents of section 1118 no fewer than ten times during the

hearing in the House. Hearing on H.B. 1290 before the H. Judiciary Comm., 72d Gen. Assemb., 2d Reg. Sess. (Mar. 10, 2020) (statement of Mark Levy).

¶50 The majority's analysis turns the legislature's intent on its head. The absurd consequence of its opinion is that how an insurer chooses to label an insured's allegedly noncooperative conduct *after* the insurer is sued gives the insurer the power to determine whether section 1118 applies. That makes no sense. Section 1118 is intended to decrease potential gamesmanship, not increase it. It does this with respect to both insurers and insureds by recognizing insurers' legitimate interest in obtaining information reasonably necessary to adjust claims, while providing insureds specific notice and an opportunity to cure during the claims investigation process. By requiring notice about what specific information is still needed while a claim is being investigated, section 1118 demands that insurers put their cards on the table. If they are missing relevant information, the statute gives them a way to get it.

¶51 Section 1118 also limits potential gamesmanship by insureds. It does this by allowing insurers to allege noncooperation as an affirmative defense if they follow the requirements of section 1118 and the insured still fails to cooperate. It also makes explicit that insurers will not be liable for a bad faith breach of contract claim solely because they give their insured the minimum amount of time to cure provided by the statute.

I. Additional Background

¶52 Both State Farm Mutual Automobile Insurance Company's ("State Farm") and United Services Automobile Association's ("USAA") policies contained general cooperation clauses.² State Farm's policy provides that "[Wenzell] must cooperate with *us* and, when asked, assist *us* in . . . securing and giving evidence." (Emphasis in original.) Similarly, USAA's policy states that "[a] person . . . seeking any coverage or . . . payment of any benefits . . . must . . . [c]ooperate with us in the investigation . . . of any claim or suit."

¶53 Other provisions in both policies require insureds to provide additional, more specifically identified information. State Farm's policy requires its insureds to "provide written authorization for [State Farm] to obtain: (a) medical bills[, and] (b) medical records." USAA's policy requires its insureds to "[a]uthorize [USAA] to obtain medical reports and other pertinent records."

¶54 State Farm asked Wenzell to produce a list of medical providers and sign State Farm's medical records release authorization five times between September 2019 and July 2021. Its release authorization sought expansive access to Wenzell's medical records. As presented, it would have allowed State Farm to obtain any

² Both State Farm and USAA raise similar, but not identical arguments regarding section 1118's interpretation, legislative history, and intent. Where they overlap, I refer to them collectively as "insurers."

medical, psychological, psychiatric, or dental record, thus granting State Farm access to highly personal, privileged medical information. Such information could include notes from marital counseling sessions and records concerning treatment for sexual dysfunction and substance abuse (if they existed).

¶55 USAA's medical records authorization request, like State Farm's, would have provided USAA sweeping access to a wide range of Wenzell's medical records, including any medical, psychological, psychiatric, dental, surgical, or other records that might exist. As with State Farm's medical records request, these requests could include potential documentation of drug use and mental health conditions. Neither these records nor the records concerning his prior accident were, in Wenzell's view, relevant to the injuries he alleged he had sustained in the 2017 accident.

¶56 Over time, Wenzell produced some, but not all, of the information that the insurers requested. It is undisputed that neither insurer provided him with notice of and an opportunity to cure any perceived failure-to-cooperate. Once Wenzell filed suit, however, both insurers moved for summary judgment, arguing that they were relieved from providing coverage because Wenzell had failed to cooperate with the terms of his insurance policies. The claimed deficiency: Wenzell failed to provide blanket medical record release authorizations.

¶57 With the stage set, I turn next to the law concerning failure-to-cooperate defenses.

II. Analysis

A. A Brief History of Failure-to-Cooperate Defenses Prior to the Passage of Section 1118

¶58 This court has long recognized that an insurance policy may bind the insured to a duty to cooperate. *Farmers Auto. Inter-Insurance Exch. v. Konugres*, 202 P.2d 959, 962 (Colo. 1949). When an insurer asserts a failure-to-cooperate defense, the insurer effectively argues that the insured has failed to comply with one or more provisions of the insured's policy. *Soicher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 46, ¶ 25, 351 P.3d 559, 565 (citing *State Farm Mut. Auto. Ins. Co. v. Secrist*, 33 P.3d 1272, 1275 (Colo. App. 2001)). If the alleged noncooperation violates a specific policy provision in a way that "materially and substantially disadvantaged the insurer," the insurer may deny the insured's claim of coverage. *Id.* at ¶ 19, 351 P.3d at 564.

¶59 Many Colorado attorneys and courts have taken a broad, not entirely consistent approach to describing and analyzing failure-to-cooperate defenses. Examples of these varied approaches are not hard to find in Colorado case law, including both published and unpublished cases involving medical records and medical releases. *See, e.g., Soicher*, ¶¶ 17-30, 351 P.3d at 564-66 (describing multiple approaches to characterizing the failure-to-cooperate defense). In *State*

Farm Mutual Automobile Insurance Co. v. Goddard, 2021 COA 15, ¶ 45, 484 P.3d 765, 776, for instance, a division of the court of appeals held that an insured's duty to cooperate arose from both a general cooperation clause and another specific provision. The court's analysis blended together the breach of the specific contractual clause and of the general cooperation clause. *Id.* at ¶ 46.

¶60 The Tenth Circuit, applying Colorado law, took a different approach. It held that a failure to disclose future medical costs was noncooperation in part because compliance with a general cooperation clause constituted a condition precedent. *Cribari v. Allstate Fire & Cas. Ins. Co.*, 861 F. App'x 693, 705 (10th Cir. 2021) (unpublished opinion). It also concluded that noncooperation could only occur where a party had *also* breached an explicit condition in the contract. *Cribari*, 861 F. App'x at 704.

¶61 A federal district court applying Colorado law took a similar approach in determining that an insured had breached his duty to cooperate by not providing necessary information. *Polland v. State Farm Mut. Auto. Ins. Co.*, No. 19-cv-01416-KLM, 2020 WL 6799934, at *2 (D. Colo. Nov. 19, 2020). The court reasoned that the insured had breached his duty to cooperate because he was unambiguously bound by *both* a cooperation clause and an explicit provision in his insurance contract. *Id.* at *5.

¶62 In short, as proponents of the failure-to-cooperate statute noted, no one, not even the courts, knew exactly what “noncooperation” was. To alleviate this uncertainty, the General Assembly enacted section 1118. *Wenzell v. United Servs. Auto. Ass’n*, 2024 COA 40, ¶ 28, 552 P.3d 1121, 1126–27. The statute, which went into effect on September 14, 2020, applies to post-enactment litigation, like this case. See Ch. 229, secs. 1–2, § 10-3-1118, 2020 Colo. Sess. Laws 1116–17. It establishes specific ground rules for insurers asserting noncooperation as a defense. It requires that insurers provide insureds with written notice and an opportunity to cure before pleading and attempting to prove a failure-to-cooperate defense, according to the following requirements:

- (a) The insurer has submitted a written request to the insured or the insured’s representative . . . ;
- (b) The information is not available to the insurer without the assistance of the insured;
- (c) The written request provides the insured sixty days to respond;
- (d) The written request is for information a reasonable person would determine the insurer needs to adjust the claim filed by the insured or to prevent fraud; and
- (e) The insurer gives the insured an opportunity to cure

§ 10-3-1118(1).

¶63 Against this backdrop, I turn to the insurers’ arguments and the majority’s opinion.

B. State Farm and the Majority Ignore the Plain Meaning of Section 1118

¶64 State Farm argues that the phrase “failure-to-cooperate” has a specific meaning within the insurance industry.³ It refers, State Farm asserts, only to those defenses arising from a breach of a general cooperation clause in an insurance policy. In State Farm’s telling, Colorado law has long recognized a distinction between a *general* duty to cooperate based on a cooperation clause in an insurance policy and a *specific* duty to cooperate based on a more detailed provision in the same policy. Notably, an insurer may seek the dismissal of an insured’s claims against it based on alleged noncooperation regardless of which type of clause is breached.

¶65 State Farm’s argument rests wholly on the premise that a failure-to-cooperate defense has a specific meaning in the insurance industry that Colorado courts have consistently recognized. Based on this premise, State Farm contends that section 1118(1)’s requirements do not apply here because it did not cite Wenzell’s *general* duty to cooperate in its answer. Rather, it asserted an affirmative defense based on Wenzell’s failure to comply with a condition

³ Interestingly, USAA did not argue that the failure-to-cooperate defense has a well-recognized meaning in the insurance industry.

precedent, here, his *specific* duty to provide blanket medical authorizations. Thus, it concludes, the division’s opinion must be reversed.

¶66 The majority follows a somewhat different path to get to the same destination, though it too takes a wrong turn right out of the gate. *See* Maj. op.

¶ 19. Its misstep? Accepting State Farm’s arguments that Colorado law has long recognized the specific meaning the insurance industry attributes to the phrase failure-to-cooperate and that attorneys and courts have always clearly distinguished between general and specific duties to cooperate. From there, the majority announces that section 1118 is ambiguous because it can’t tell if the plain meaning of failure-to-cooperate or the insurance industry meaning applies. *Id.* at

¶ 25. Turning to legislative history, the majority ultimately and incorrectly concludes that the statute only applies to general duties to cooperate. *Id.* at ¶ 27.

¶67 There are two major problems with the majority’s reasoning in this regard. First and most notably, the plain language of section 1118 refers only to “a failure-to-cooperate defense.” § 10-3-1118. The statute, which does not define “cooperation,” does not explicitly limit its application to breaches of general cooperation clauses. *See* § 10-3-1118(1). Additionally, it does not distinguish between a duty to generally cooperate under an insurance contract and those duties to cooperate that arise under specific contractual provisions of the same policy. *See id.* There is thus no reason, based on the words used in the statute, to

conclude that it is adopting the nuanced, industry-specific distinction that the insurers claim exists. Disambiguation is not needed here.

¶68 Moreover, because “[w]e do not add words to the statute or subtract words from it,” *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007), we presume that the legislature deliberately chose its language, *People v. Guenther*, 740 P.2d 971, 976 (Colo. 1987). Had the legislature intended to distinguish between specific and general duties or limit the statute’s procedural protections to defenses arising from only certain contractual clauses, it would have said so in the text.

¶69 Second, a statute’s enactment creates a presumption that it “to the extent possible . . . [is] written in plain, *nontechnical* language.” § 2-2-801, C.R.S. (2025) (emphasis added). We presume that the words in a statute use a “common and everyday meaning.” *Id.* This presumption may be overcome where a word has “acquired a technical or particular meaning.” § 2-4-101, C.R.S. (2025). The majority overlooks these rules of statutory interpretation.

¶70 As discussed previously, the way that attorneys and courts in Colorado use the phrase failure-to-cooperate is not particularly consistent. The many ways in which failure-to-cooperate defenses have been described undermines any claim that the phrase failure-to-cooperate had a “technical or particular meaning.” *Id.* Even so, the majority ignores our interpretative rules and in so doing creates, rather than avoids, an absurd result. *See Archuleta v. Roane*, 2024 CO 74, ¶ 9,

560 P.3d 399, 402 (“We should avoid interpretations that would lead to an absurd result.”).

¶71 Assuming, for a moment, that section 1118 is limited only to those failure-to-cooperate defenses that are based on an alleged breach of a general cooperation clause—what then? Insurers would be incentivized to create an ever-more-granular list of specific duties of cooperation to maximize their ability to assert a failure-to-cooperate defense without having to comply with section 1118. This would allow insurers to totally circumvent the statute’s notice and cure requirements. Insurers would also be able to use the majority’s opinion to cast the statute’s reasonable person limit aside. In short, under the majority’s reasoning, section 1118 will be rendered meaningless. Insureds will suffer the same uncertainties and dismissed claims that section 1118 was passed to alleviate.

¶72 To be sure, the insurers asked Wenzell to sign blanket medical release authorizations on multiple occasions. But neither insurer formally notified Wenzell in writing that he had sixty days to comply with specific reasonable requests for information or gave Wenzell a statutorily compliant opportunity to cure any particularized alleged failure. If the insurers had complied with section 1118 and notified Wenzell of the information they still reasonably needed to adjust his claim (perhaps information concerning the injuries he sustained in the 2014 accident and the treatment he received for those injuries), perhaps he

would have cured and the insurers would have received the information they needed. And if he hadn't, the insurers then could have fairly asserted that Wenzell failed to produce that information and sought to dismiss his claims. Instead, the parties seemed to be largely talking past one another, with no one ever stating what was reasonably needed to adjust Wenzell's claim.

C. The Majority Ignores the Legislative History of Section 1118

¶73 Even assuming, for the sake of argument, that section 1118 is ambiguous, its legislative history reveals that the General Assembly intended the phrase failure-to-cooperate to apply broadly to protect insureds from having their claims unfairly dismissed by insurers. During the March 10, 2020, hearing before the House Judiciary Committee, the bill's sponsor, Representative Alec Garnett, spelled out what the bill aimed to address: concerns that insurers were unfairly using failure-to-cooperate defenses to get first-party insurance claims dismissed. Hearing on H.B. 1290, *supra*, (opening statement of Rep. Garnett). The bill was necessary, he said "to set conditions under which insurance companies can claim a failure to cooperate defense, and therefore, avoid payment of the covered benefits." *Id.* The bill's goal wasn't to eliminate the defense, but was needed because "[w]hat constitutes . . . noncooperation is largely undefined and is subject to the discretion of individual insurance companies." *Id.*

¶74 Critically, insurers were latching onto a broad range of even small acts of noncooperation to try to deny coverage. As Representative Garnett explained:

Courts have struggled to provide clarity because of the near limitless assertions . . . an insurance company can make and then use to accuse policyholders of failing to cooperate. To make matters worse, failure to cooperate is a complete defense, meaning that even the smallest allegation can void an entire claim.

Id.

¶75 To illustrate his point, Representative Garnett cited specific examples of how failure-to-cooperate defenses were being unfairly deployed by insurers. His examples illustrate the kinds of failure-to-cooperate claims the bill aimed to address: the failure to respond to a letter, the failure to submit information on the correct form, the failure to sign a specific form, and, particularly pertinent here, the refusal to turn over private or irrelevant information. *Id.* Proponents of the bill cited additional examples, mentioning disputes concerning *blanket medical release authorizations* more than ten times. *See, e.g., id.* (statement of Mark Levy). In sum, there is no question that the bill was intended to protect insureds from losing coverage over disputes concerning the very type of noncooperation at issue here.

¶76 Testimony by proponents also repeatedly emphasized the importance of giving insureds the opportunity to cure:

So why we think the bill is necessary is because there needs to be some consistent standard before you take somebody's entire benefit away. I mean, that's the real damage here. And that it's being used as a club,

that after you file the lawsuit, for the first time ever, you're given notice of this alleged failure to cooperate.

Id.

¶77 Representative Garnett noted that the purpose of the bill was to “make sure that our policyholders aren’t being caught up in a bunch of different ways to get their claims kicked out.” *Id.* (closing statement of Rep. Garnett). The Committee’s Chairman, Representative Mike Weissman, echoed that understanding: The bill intended to reach beyond litigation to address issues of failure to cure. *Id.* (statement of Rep. Weissman).

¶78 Representative Garnett’s statements regarding the bill’s purpose and the proponents’ testimony as to the problems the bill meant to address support a plain language reading of section 1118. There was no mention of an insurance industry definition of failure-to-cooperate defenses. *See generally* § 10-3-1118(1) (providing no specific definition for “cooperation”). What was mentioned – repeatedly – was insurers’ alleged gamesmanship in the use of failure-to-cooperate defenses, the inconsistent judicial definition of failure-to-cooperate defenses, and how those circumstances adversely impacted insureds. *See, e.g.,* Hearing on H.B. 1290, *supra* (closing statement of Rep. Garnett).

¶79 There is no reasonable reading of the legislative history of section 1118 that suggests the legislature intended to carve out an exception for an insurance industry standard. Instead, section 1118’s history reflects that the bill is about

fairness and creating a more level playing field. *Id.* (opening statement of Rep. Garnett and final statement of Rep. Adrienne Benavidez). The statute means what it says: If an insurer claims that the insured has failed to provide information that a reasonable person would conclude was necessary to adjust the insured's claim, the insurer must provide the insured notice and an opportunity cure. § 10-3-1118(1). That notice and opportunity must be provided while the claim is being investigated. It is undisputed that did not happen here.

III. Conclusion

¶80 Section 1118 is about fairness and leveling the playing field. Both the plain language of the statute and its legislative history reflect that the statute is intended to prevent an insurer from unfairly wielding noncooperation as a defense without first giving an insured notice and an opportunity to cure their claimed deficiency while the claim is being investigated. Regardless of how an insurer chooses to frame the insured's noncooperation in litigation years later, section 1118's requirements still apply. Because it is undisputed that the insurers here did not provide Wenzell with notice and an opportunity to cure and because I agree with the majority regarding the plain and ordinary meaning of section 10-4-609(1)(c), I would affirm the judgment of the court of appeals.