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ALLOCATION OF LOSS IN INSURANCE LITIGATION:

EFFECTIVE SCOPE OF COVERAGE STRATEGIES FOR POLICYHOLDERS & INSURERS

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PART IV: ALLOCATION AMONG INSURERS

- “Other Insurance” clauses
- Multi-year insurance contracts and stub policies
- Number of occurrences & nature of underlying claims
- Applicable limits
- Apportionment of defense costs
- Allocation issues in D&O policies

Allocation Among Insurers

Other Insurance Clause

Equitable contribution claims and the Other Insurance clause

Typical Language: "*It is agreed that any loss covered hereunder that is also covered in whole or in part under any other excess policy issued to the insured prior to the inception date hereof the limit of liability hereon shall be reduced by the amounts due to the insured on account of such loss under such prior policies*."

Allocation Among Insurers

Multi-Year Insurance Contracts and Stub Policies

- Multi-year insurance contracts
  - Are separate limits available to pay claims under a three year policy?
  - Typical language: "[*Insurer's] liability shall be limited to the amount stated in the Policy declarations with respect to all ultimate net loss because of personal injury or property damage which occurs during each annual period or part thereof commencing from the Policy's date*."
- Stub policies
  - Issued to cover less than a full annual period
  - Full year policy cancelled during the policy period
  - Full year policy extended for less than a full annual period

Allocation Among Insurers

Number of Occurrences

- The number of occurrences and the nature of the underlying claims determine the amount of coverage available for particular claims and may impact the allocation between primary and excess insurers.
- Typical Occurrence Definition: "*Accidents, including continuous or repeated exposure to the same or similar conditions, that result in bodily injury during the policy period*."
- Allocation of claim dollars between the primary versus the excess layer carriers

Allocation Among Insurers

Applicable Limits

To the extent an insurer is obligated to pay for a covered claim, how do the limits of liability of the policy apply?

Nature of the underlying claim may impact allocation of claim dollars between primary and excess insurers

Significance of applying single vs. multiple per occurrence limits

Allocation Among Insurers

Apportionment of Defense Costs

Primary Insurer's Duty to Defend

- As a general rule, if allocation is done on a pro-rata basis, defense costs are allocated among co-insurers on a pro-rata basis in proportion to policy limits.
- Some courts, however, have held that defense costs are apportioned on an equal basis among all of the insurers owing a duty to defend a common insured.

Allocation Among Insurers
Apportionment of Defense Costs
(cont'd)

Excess Insurer's Duty to Defend

- To what extent must an excess insurer contribute to the defense of claims which have the potential to involve excess indemnity limits?

- Problem typically arises when the primary insurer is notified of a claim involving significant defense costs that appears likely to exhaust the indemnity limits of the primary policy

Allocation Issues in D&O Liability Contracts

Settlement Payments & Judgments

- Allocation between insureds
- Allocation between covered and non-covered claims
- Payment by excess insurer if primary insurer paid less than full limits in settlement