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Insurer's Duty to Defend: Pre-Tender Costs, Target Tender Issues, Non-Covered Claims and Parties, Uninsured Periods

Resolving Defense Cost Reimbursement and Allocation Disputes for Policyholders and Insurers

WEDNESDAY, JUNE 14, 2017

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Today's faculty features:

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Resolving Defense Cost Issues

The Right And Duty To Defend, Targeted Tender, Pre-Tender Costs, Reimbursement, & Other Defense Cost Issues

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Scott M. Seaman is a partner at Hinshaw & Culbertson LLP, where he serves as Co-Chair of the firm's National Insurance Services Practice Group. For nearly three decades, Scott has successfully represented companies in trial courts, appellate courts, and arbitrations across the country in a variety of high stakes matters, including cases and cessions involving general liability coverage (primary, umbrella, and excess), professional liability coverage, first-party property coverage, bad faith and extra-contractual matters, fee disputes, and facultative and treaty reinsurance contracts. He has served as national coverage counsel as well as trial and appellate counsel. Scott also provides advice to companies on strategic, portfolio, and emerging issues.

Scott has received numerous awards and recognitions and is listed in Chambers USA, Best Lawyers in America, Leading Lawyers, Illinois Super Lawyers, The International Who's Who of Insurance and Reinsurance Lawyers, America's Most Honored Professionals and is rated AV Pre-eminent (5.0/5.0) by Martindale & Hubbell. He is a fellow of the American College of Coverage and Extra-contractual Counsel and serves on the Law360 Insurance Editorial Advisory Board.

He is a prominent speaker and prolific author. His writings have been cited by the highest courts in Arizona, Illinois, Kentucky, Massachusetts, New Jersey, South Carolina, West Virginia and Wisconsin, and by other state and federal appellate and trial courts across the country. His treatise *Allocation of Losses in Complex Insurance Claims* (5th Ed. Thomson Reuters 2016-17) addresses many of the important issues involved in contemporary insurance and reinsurance disputes.

Primary Insurers Right To Defend

- The focus usually is on a primary insurer's duty to defend. However, primary insurers also generally have the right to defend.
- ISO policy language: "the company shall have the right and duty to defend any suit . . . ."
- The right to defend is an important right:
    - Control the defense (timely access to information, ability to monitor activities effectively, help formulate strategy with defense counsel)
    - Select counsel (ensure that qualified, responsive, counsel with the proper skill set is selected for the particular case)
    - Contain costs (reasonable billing rates, cost-effective counsel, cogent execution of strategy)
    - Favorable case disposition whether trial or settlement (able to impact resolution, seat at the table, not simply presented with a bill to pay)
- Often this right is not fully appreciated until its existence is threatened (e.g., situations in the policyholder is allowed to select independent counsel and the insurer is required to pay counsel).
- The right to defend is not something an insurer should give up lightly.
- Dynamics often change in Curtis/Peppers counsel situation. Insurers paying the bill and often being treated like mushrooms.

The Excess Or Umbrella Insurer's Right To Associate In The Defense

- Many excess policies provide the excess insurer with a right to "associate" in the defense of a lawsuit against the policyholder.
- This allows the excess insurer to become involved in defending the policyholder in lawsuits that could impact the excess insurer's layer of coverage.
- The vast majority of decisions recognize that is a right or option and does not impose a duty to defend or a duty to reimburse defense costs.

Rarely exercised right, but may be used where excess limits are at risk and:

- The primary insurer is not mounting a strong defense;
- The policyholder is defending under an SIR or a captive insurer is defending;
- As a placeholder, pending assumption of the defense by a primary insurer;
- To focus on a particular issue/aspect of the defense; or
- Where the policyholder is impecunious or primary insurer insolvent (e.g., asbestos context to avoid default judgments, assignments, etc.).
- Mixed claims can be "mixed up." A claim potentially covered by a primary policy may not be under an excess/umbrella or vice versa. The same claims may impact or not impact insurers/policies differently.

How Does An Excess Insurer Exercise Its Right To Associate In The Defense

- There is a distinction between reserving the right to associate and exercising the right to associate in the defense.
- By exercising right, the excess insurer may be assuming duties to policyholder/other insurers in addition to protecting its interests.
- The excess insurer cannot prejudice the policyholder. *See, e.g., Home Ins. Co. v. Three I Truck Line, Inc*., 95 F.Supp.2d 901 (N.D. Ill. 2000) (excess insurers associated under ROR, appointed counsel and advised insured's selected counsel he was no longer needed, counsel appointed by the insurer did not handle experts and damages issues properly, $42.5M verdict, insurer estopped from denying coverage based upon late notice).
- Challenges associated with multiple counsel, conflicting positions, or inconsistent defenses. Often there are better options such as cost sharing, interim funding, participation off the record.
- Although issues of defense obligations, mixed claims, and reimbursement generally are discussed in the context of primary insurance, these issues may be of interest to excess insurers as well.

The Primary Insurer's Duty To Defend

- The duty to defend generally is broader than the duty to indemnify.
- Common policy language for many years:

  "the company shall have the right and the duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, *even if the allegations of the suit are groundless, false, or fraudulent* . . . ." Courts often used the italicized language in ruling on the breadth of the duty to defend.
- In most jurisdictions the insured must defend if the claim is "potentially covered" as opposed to "actually covered." This standard normally is directed to facts.
- What if the facts are undisputed, but there is a question of law?
- The "four corners" rule or the "eight corners" rule. It is the same standard, but everything always is bigger in Texas.
- Extrinsic evidence (sometimes operates for the benefit of the policyholder, but in some states an insurer can decline to defend if the facts are undisputed).

Generally The Excess Or Umbrella Insurer Has No Duty To Defend

- Most cases across the country recognize that the excess insurer's duty to defend is strictly contractual.
- Many excess contracts expressly disclaim a duty to defend. Commonly stated in excess policies as: "The company shall not be obligated [or called upon] to assume charge of the defense."
- Such language should not be required. However, there are a minority of jurisdictions that hold that there is a duty to defend unless the excess contract expressly provides to the contrary (*e.g*., CA and WI). *See, e.g., Legacy Vulcan Corp v. Superior Court of Los Angeles County*, 185 Cal. App. 4th 677 (Cal. App. 2010); *Johnson Controls, Inc. v. London Market*, 2010 WL 252094, (Wisc. 2010).

On Occasion, Excess Insurers May Have A Limited Duty To Defend

- A small number of umbrella/excess contracts provide for a duty to defend upon the exhaustion of the underlying insurance. For example, “If the underlying insurance is exhausted by any occurrence, the company shall be obligated to assume charge of the settlement or defense of any claim resulting from the same occurrence.”
- Common for umbrella policies to obligate the insurer to defend lawsuits that are covered under the umbrella policy, but “not covered” under the primary policy.
- “Not covered” applies only to risks not within the scope of the underlying coverage, but within more expansive coverage afforded by the umbrella policy (*e.g.*, advertising liability). Refers to the fact of coverage, not the extent of coverage. Primary exhaustion does not trigger this defense obligation.
- Accordingly there are situations excess insurers, like primary insurers, may have rights to reimbursement of defense costs as well as indemnity.

Reimbursement Of Defense Costs Under An Excess Policy

- Few excess contracts contain a defense obligation.
- Many excess contracts do not obligate the excess insurer to reimburse defense costs.
- Some excess contracts obligate the excess insurer to reimburse defense costs.
- The duty to reimburse defense costs is different from the duty to defend: an insurer can have a duty to reimburse/indemnify an insured for defense costs without assuming a duty to defend.

Distinctions Between Defense Obligation & Reimbursing Costs

- **A**ctions: assigning and paying counsel to defend versus reimbursing defense costs incurred by the policyholder.
- **C**ontrol of defense: insurer (generally controls absent *Cumis/Peppers* situation) versus policyholder.
- **T**iming: insurer pays defense counsel versus policyholder pays and insurer reimburses.
- **S**tandard: defense for potentially covered claims versus costs associated with claims actually covered.

The Consent Requirement

- Many excess and umbrella contracts require the insurer's consent prior to the incurring of defense costs in order for defense costs to be reimbursable. Mutual consent/insurer consent/jointly incurred/prior consent.
- These provisions are for the benefit and protection of the insurer. It allows the insurer to elect to participate in payment of defense costs if it wishes to save indemnity limits.
- Overwhelming majority of courts enforce consent requirements and hold the insured has the absolute right to consent or not consent.

Defense Costs Payable Within Limits Or In Addition To Limits

- When defense costs are payable, often an issue is presented concerning whether defense costs are payable as part of limits (wasting limits) or in addition to limits.
- Varies a great deal in excess contracts and is very policy specific. Sometimes, even insurers participating in the same layer may afford different treatment to defense costs.
- Some courts have held, when the umbrella insurer is required to defend, the costs it incurs in defending are supplemental even when defense costs are included within UNL. *See, e.g., Planet Ins. Co. v. Mead Reinsurance Corp*., 789 F.2d 668 (9th Cir. 1986); *Grunewald & Adams Jewelers, Inc. v. Lloyds of London*, 700 P.2d 288 (Ariz. Ct. App. 1985).
- Historically, primary policies paid defense costs on a supplementary basis. Today many primary policies are wasting limits policies.

Circumstances Involving Mixed Claims

- Many complaints allege claims and damages that are all “potentially” covered (whether or not they are actually covered).
- A “mixed” complaint involves one or more claims or elements of relief that are potentially covered and one or more that are not even potentially covered.
- There are many examples:

  Negligent and intentional acts are alleged

  Some but not all claims are within the scope of an exclusion

  Potentially covered damages and non-covered damages (punitive damages) or relief (equitable relief) are sought

  Some of the parties seeking coverage are insureds, while others (e.g., predecessor or successor) are not

  Some of the injury took place within the policy period/coverage territory and some took place outside

  Multiple plaintiffs or class action complaint in which some allege potentially covered damage or injury and others do not

- May result from initial pleading, from amendments, or from joinder of claims.

Provide A “Complete” Defense Of Mixed Actions

- The vast majority of jurisdictions require general liability insurers to defend the entire action (all claims whether potentially covered or not) when any claim is covered. In other words, the insurer must provide a complete defense. In for a pence, in for a pound (if only it were that cheap)
- Various rationale for the complete defense rule: the broad language in the policy regarding the duty to defend; the absent of reasonable means for allocating defense costs/defense responsibilities between covered and non-covered claims; separate representation by multiple attorneys may not be reasonable and might produce duplicative or inconsistent results to the prejudice of the policyholder; policyholder’s “reasonable expectations,” and failure to include an apportionment provision for mixed claims.
- There is some authority in the few jurisdictions for the proposition that an insurer may provide a “partial defense” and defend only covered claims (MS, AL, WA, and ME). However, insurers should be suspect about defending only covered claims, if that is even feasible.

Potential Consequences For Breach Of The Duty To Defend

- Potential consequences for breach of the duty to defend vary considerably from state to state and depending upon the circumstances.
- Consequences may include:

  Liability for defense costs (*e.g., Burd* NJ) or breach of contract damages Liability for the judgment up to policy limits

  Liability for attorneys fees incurred by the policyholder in securing contract benefits (*e.g., Brandt* CA)

  Estopped from asserting coverage defenses (*e.g.*, IL)

  Loss of ability to enforce policy conditions (*e.g.*, notice, cooperation, etc.)

  Limited ability to challenge settlements (fraud, collusion, unreasonableness)
- In view of the broad scope of the duty to defend and the potential adverse consequences for breach of that duty, insurers often resolve doubts in favor of providing a defense under a reservation of rights, a non-waiver agreement, and/or by filing an action seeking a declaration that it has no duty to defend or indemnify the policyholder in connection with the subject claim.

Underpinnings For Reimbursement/Recoupment

- Primary insurer with a defense obligation (potentially covered standard) or an excess insurer reimbursing defense costs (actually covered standard) may be paying defense costs associated with uncovered claims.
- This part was mostly by way of setting the stage for Linda's discussion of reimbursement.
- Can the insurer recover defense costs associated with claims not even potentially covered in a mixed claims context.
- What must the insurer do?

  Nothing

  Reserve rights

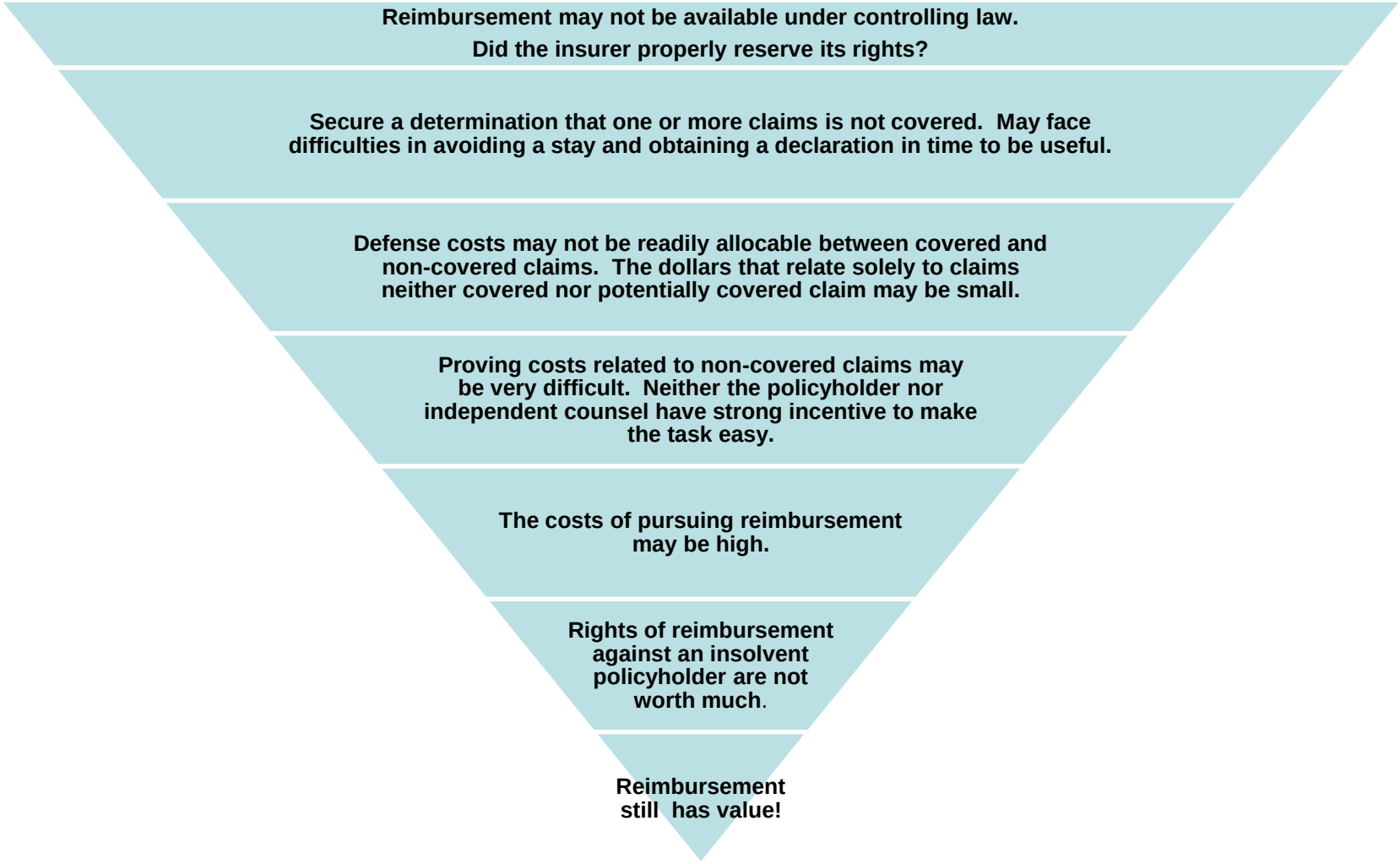
  Show the claim is not covered or potentially covered

  Identify the costs that relate solely to non-covered claims
- Some policies do have endorsements providing for reimbursement

Buss Is An Important Vehicle For Maintaining Some Balance

- Where available, reimbursement provides a tool for insurers to use with unreasonable or overreaching policyholders to seek to inject some reasonableness in the process.
- It does give the policyholder something to lose.
- As part of a broader strategy, the potential of reimbursement can be useful.
- Lack of other meaningful remedies in the “mixed claim” situation.
- Withdrawing from the defense is rarely a viable option.
- From the mixed claim perspective, instituting a coverage action will result in additional costs being incurred without relief from the defense obligation unless no claims are even potentially covered (perhaps by employing undisputed extrinsic evidence).

The Buss Ride Is Not Always Worth The Fare



Strategies For Minimizing And Resolving Buss Fights

- Where controlling defense costs is the critical factor (e.g., defense costs are expected to exceed indemnity exposure, coverage defenses are fairly weak, and/or controlling the defense is the most likely way to exert meaningful control on the claim), retain the right to control the defense and select counsel.
- Where coverage defenses are strong, consider advocating and aggressively pursuing coverage defenses, instituting declaratory judgment actions where warranted.
- Negotiate with the policyholder even where the right to independent counsel exists, to select acceptable defense counsel, to secure reasonable rates, to have the policyholder make meaningful contributions to payment of defense counsel (where independent counsel rates exceed panel counsel rates), to limit activities to defense of the case, to limit multiple layers of counsel (*e.g.*, national coordinating counsel), to put in place effective controls, to obtain agreement that some costs or buckets are excluded or at least segregated to fight about later.

Reserving Your Seat On The Buss

- Although it is a good practice, RORs are generally not required of excess insurers.
- Most lawyers and claims professionals representing primary insurers are diligent in reserving rights and apprising the policyholder of their coverage position.
- Do not want to waive any right, remedy, or defense and often error on the side of being over inclusive.
- The South Carolina Supreme Court's reminder in *Harleysville Group Ins. v. Heritage Communities, Inc.* But in being over inclusive sometimes they make the error of not being specific.
- Also there are some countervailing considerations. First, you do not want to unwittingly create a conflict entitling the policyholder to select independent counsel.
- Second, must be mindful of the impact of the kitchen sink ROR letter on the judge or jury if the case is tried.

A DELIBERATE DECISION NOT TO RESERVE A RIGHT/DEFENSE CAN BE APPROPRIATE

- In many instances, reserving a particular right or defense and setting up a strategy geared at recoupment may not be the best course of action.
- Although adjustments may be required along the way, insurers may consider the following in connection with mixed claims: (1) whether failing to enumerate a particular right, defense, or issue is likely to effectuate a waiver or estoppel; (2) the likelihood of ultimate success with respect to the right, defense, or issue; (3) the monetary and strategic significance of the right, defense, or issue; (4) the risk that asserting the right, defense, or issue will create a conflict and empower the policyholder to select independent counsel; (5) the monetary and other costs associated with losing control of the defense; (6) the likelihood of recouping defense costs and the amount likely to be reimbursed in view of the burden of showing that costs relate solely to uncovered claims; and (7) the costs of pursuing recoupment.
- Often, the loss of control of the defense and the increased costs associated with independent counsel outweigh the preservation of a particular right, defense, or issue. Sometimes, a deliberate decision not to reserve a right or defense even if it means forgoing the right to recoup defense costs may be the proper decision.
- Sometimes an insurer may change course or withdraw a defense.

Selecting Counsel

- Generally, the insurer has a right to select counsel as part of its right to control the defense.
- Where there is no conflict, the insurer selects counsel. (If the policyholder wishes to pay select additional counsel, it must pay for it).
- In states adhering to the one-client rule, the insurer retains the right to select counsel.
- In tripartite states, if the ROR creates a conflict of interest, the policyholder is entitled to independent counsel and the insurer is required to pay.

Right To Independent Counsel

- A minority of tripartite states, hold the issuance of an ROR per se creates a conflict for purposes of entitling policyholder to independent counsel. Most courts hold that there must be an actual conflict.
- Some states have some "bright line" rules. For example, claim of punitive damages or claims seeking damages in excess of policy limits do not constitute conflicts for independent counsel purposes in California or Alaska.
- Most states conduct a case-by-case analysis to determine whether a conflict exists. Some tests: whether the facts to be adjudicated are the same facts upon which coverage depends, whether insurer retained counsel can influence outcome of coverage issue, whether the interests of insurer would be advanced by providing less than vigorous defense.
- Cases going both ways on whether reserving rights to recover defense costs on non-covered claims creates a conflict.
- Model Rule 1.7 on concurrent representation.
- Important to note that, even where independent counsel is required, it is not always the case that the policyholder is allowed to make the selection. (e.g., Michigan case law that the insurer may select in good faith "truly independent" counsel; Florida ("the insurer . . . retains independent counsel which is mutually agreeable to the parties"); RI.)

Imposition Of Sound Billing And Litigation Management Guidelines

- Whether counsel is appointed by the insurer or selected by policyholder, insurers have several available management tools. The most important is talented, committed claims professionals and counsel. Others include:
  - Employing reasonable billing and litigation guidelines
  - Negotiating reasonable rates
  - Conducting audits, where appropriate
  - Asserting right to review bills and promptly review bills, raise questions, and identify issues
  - Requiring timely and detailed reporting with time for meaningful input
  - Consultation verses pre-approval
- Where insurers wish to retain control of the defense, they should insist upon retaining the right to defend from the outset, identify and appoint qualified defense counsel and promptly communicate with the policyholder.
- The need for flexibility and employment of good judgment.

The Right To Independent Counsel Does Not Mean Anything Goes

- When the policyholder has selected independent counsel to represent him or her, the insurer still may exercise its right to require that the counsel selected by the policyholder possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage.
- The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended.
- Independent counsel and the policyholder have a duty to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action.
- The insured may waive its right to select independent counsel by signing a prescribed statement.
- Nothing in this section shall relieve the policyholder of his or her duty to cooperate with the insurer under the terms of the insurance contract.

Cumis Counsel Statute Cal. Civ. Code § 2860

Targeted Or Selective Tender

- Where available, policyholders often seek “all sums” allocation to maximize flexibility/recover.
- There is a line of cases that, under certain circumstances, allows a policyholder to tender its defense to one of its primary insurers, but not another, and thereby nullify the “targeted” insurers rights of equitable contribution (as to both defense and indemnity) against the non-selected insurer.
- Policyholders would like to expand the doctrine to long-tail claims so that they can obtain leverage that they hoped to achieve through obtaining a “joint and several” or “all sums” allocation.
- Even if a policyholder obtains an “all sums” ruling, generally insurers can reallocate any disproportionate share they get saddled with through contribution claims and the net difference between an “all sums” and *pro rata* allocation may be *de mininus*, depending upon such factors as the amount of insolvent insurers within the policyholders’ insurance program.
- Stacking does not automatically flow from an “all sums” ruling.

Application Of Targeted Tender

- If a policyholder can make its selection stick, it provides it with leverage and it can entice other insurers to defend it or settle with it.
- Where the doctrine applies, it does render “other insurance” clauses useless and does saddle the “targeted” insurer with defense and indemnity.
- The policyholder does retain some flexibility because it can “de-select” and keep other coverage available to it on a “stand-by” basis.

Properly Viewed, Targeted Tender Is A Limited Doctrine

- Origin & application: construction context involving a property owner and contractor or a general contractor and subcontractor. Often the construction contract/indemnity agreements between the parties are intended to shift the loss.
- Illinois Supreme Court decision in *Kajima Const. Services, Inc. v. St. Paul Fire and Marine Ins. Co., 858 N.E.2d 234(*Ill*. 2006):*
  - Doctrine limited to concurrent, primary contracts
  - Doctrine does not override the doctrine of horizontal exhaustion
- Long tail claim disputes typically involve consecutive, not concurrent contracts.
- Most of the decisions involving the targeted tender rule are Illinois cases.

Targeted Tender Doctrine Is Largely Confined To Illinois

- But some courts in other jurisdictions have addressed targeted tender. *Mutual of Enumclaw Insurance Co. v. USF Insurance Co.*, 191 P.3d 866 (Wash. 2008) (Acknowledged the targeted tender rule and excused a non-selected carrier from liability for contribution or coverage).
- *Casualty Indem. Exchange Ins. Co. v. Liberty Nat. Fire Ins. Co.*, 902 F. Supp. 1235, 1239 (D. Mont. 1995) (applying Montana law).
- *Cargill, Inc. v. ACE American Insurance Co.*, 766 N.W.2d 58 (Minn. App. 2009), ***aff'd*** *on other grounds*, 784 N.W.2d 341 (Minn. 2010). The policyholder targeted coverage for its defense from one primary insurer and refused to enter into loan receipt agreements allowing the targeted insurer to seek contribution from other non-targeted insurers. The court held that equity requires a court to impose a constructive loan receipt agreement that allows a primary insurer to obtain equitable apportionment of defense costs among all primary insurers with a duty to defend.

A More Direct Resolution

- Some courts in other states effectively reach the same result in the construction claim context without invoking any targeted tender rule by holding that co-insurers' "other insurance" clauses have no impact on their respective rights and obligations when the underlying parties' hold harmless and indemnity agreements address how the risk of loss is to be borne. *See, e.g., Ross v. Prevost*, 200 Cal. App. 2d 570 (1st Dist. 1962) (holding that the indemnification agreement in a construction contract between a property owner and a contractor controlled the coordination of coverage between the property owner's insurer and the contractor's insurer, whose insurance contract included the property owner as an additional insured, reasoning that "to apportion the loss in this case pursuant to the other insurance clauses would effectively negate the indemnity agreement and impose liability on [the property owner's insurer] when [the property owner] bargained with [the contractor] to avoid that very result as part of the consideration for the construction agreement"); *American Indem. Lloyds v. Travelers Property & Cas. Ins. Co.*, 335 F.3d 429 (5th Cir. 2003) (applying Texas law) ("an indemnity agreement between the insureds or a contract with an indemnification clause, such as is commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an 'other insurance' clause in its policy.")

Pre-Tender Defense Costs

- Most courts conclude there is no coverage for pre-tender defense costs. *See, e.g., Travelers Property Cas. Co. v. Hillerich & Bradsby*, 589 F.3d 257 (6th Cir. 2010) (Ky. law); *Buss v. Superior Court*, 16 Cal.4th 35, 65 Cal.Rptr.2d 366, 939 P.2d 766, 773 (1997); *First Bank of Turley v. Fid. & Deposit Ins. Co. of Md.*, 928 P.2d 298, 304 (Okla. 1996); *Towne Realty, Inc. v. Zurich Ins. Co*., 201 Wis.2d 260, 548 N.W.2d 64, 68 (1996); *Scottsdale Ins. Co. v. Am. Empire Surplus Lines Ins. Co.*, 791 F.Supp. 1079, 1084 (D. Md. 1992); *O'Brien Family Trust v. Glen Falls Ins. Co.*, 218 Ga. App. 379, 461 S.E.2d 311, 313 (1995); *Dreaded Inc. v. St. Paul, et al.*, 904 N.E.2d 1267, 1273 (Ind. 2009) (insurer is not obligated to reimburse the policyholder for the defense costs that it incurred prior to its tender of the underlying claim to the insurer); *Faust v. Travelers*, 55 F.3d 471, 472 (9th Cir. 1995) (Cal. law).
- An insurers' duty to defend does not arise until the insured provides notice and requests a defense.
- The voluntary payments provision contained in many CGL policies (e.g., 2001 ISO CGL policy form) provides that no insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without the insurer's consent.
- The duty to defense is also a right to defend and affords the insurer the right to control the defense.

Exhaustion Is More Than Being Tired

- Two major issues concerning exhaustion are commonly presented. The first is whether only exhaustion of the limits of insurance contracts and retentions directly underlying the subject excess insurance contract must be exhausted (vertical exhaustion) or whether all underlying limits and retentions for all periods implicated by a loss must be exhausted (horizontal exhaustion) before an excess insurance contract is obligated to respond.
- There is a strong correlation between a *pro rata* allocation and a requirement of horizontal exhaustion and between an "all sums" allocation and horizontal exhaustion. But decisions such as *Viking Pump* (N.Y. Ct. App.) and *Kajima Const.* (Ill. Sup. Ct.) demonstrate that is not always the case.
- There is general agreement that the attachment point of the excess contract must be reached before an excess contract is required to respond. There often are disputes, however, as to whether the underlying exhaustion required to access an excess contract can be satisfied solely by payment of claims by the underlying insurer(s) or whether some type of "functional" exhaustion will be accepted. These disputes exist with respect to both traditional and long tail claims.
- Look to: the contract language for requirements with respect to exhaustion; principles of excess insurance; the facts; and the law. The conflicting decisions cannot always be reconciled by differences in contract language.

The Notion of “Functional” Exhaustion

- Apart from arguing ambiguity, policyholders often argue that, whether the policyholder pays the difference between the amount actually paid by the underlying insurer and the attachment point of the excess policy, the excess insurer is no worse off by reason of functional exhaustion by settlement and it would be unjust to limit the policyholder’s ability to settle.
- The argument, however, may not comport with the contract language or with the realities of excess insurance. Excess insurers receive only a small premium relative to the large limits of liability provided, making excess insurance available at reasonable costs. The excess insurer does not solely rely upon claims being settled for an amount in excess of the attachment point of the policy, it relies upon the claims implicating the excess contract after being subjected to the claims adjustment process of the underlying insurers such that the underlying insurers have reviewed and analyzed the claim, determined that there is coverage, and determined that the settlement is reasonable such as to pay the settlement amount.

Cases Rejecting Functional Exhaustion

Several decisions have not permitted "functional" exhaustion and have held that exhaustion of the underlying limit must be by the actual payment of the amount by the underlying insurer. *See, e.g., Comerica, Inc. v. Zurich Am. Ins. Co.*, 489 F.Supp.2d 1019 (E.D. Mich. 2007) (rejecting functional exhaustion by insured's payment of the difference between the amount paid by primary insurer and policy limit and holding actual payment of losses by the underlying insurer is required); *Qualcomm, Inc. v. Certain Underwriters at Lloyds*, 161 Cap. App. 4th 184. 73 Cal. Rptr. 3d 770 (Cal. App. 2008) (finding language of excess contract, when read in context of function of excess contract, requires actual payment by underlying insurer of no less than the underlying limits); *Great Am. Ins. Co. v. Bally Total Fitness Holding Corp.*, 2012 WL 2542191 (N.D. Ill. June 22, 2010) (where, as here, policy language clearly defines exhaustion, courts tend to enforce the policy as written); *Citigroup Inc. v. Federal Ins. Co.*, 649 F.3d 367 (5th Cir. 2011) (underlying insurer must make actual payment of underlying limits to constitute exhaustion); *Federal Ins. Co. v. The Estate of Irving Gould*, 2011 WL 4552381 (S.D.N.Y. Sept. 28, 2011)(policies require actual payment and noting if the insured "were able to trigger the Excess Policies simply by virtue of their aggregated losses, they might be tempted to structure inflated settlements with their adversaries… that would have the same effect as requiring the Excess Insurers to drop down…"); *United States Fire Ins. Co. v. Lay*, 577 F.2d 421 (7th Cir. 1978) (applying Indiana law) ("sham" settlement for less than primary limits did not trigger excess insurer's obligation); *JP Morgan Chase & Co. v. Indiana Harbor Ins. Co.*, 2011 WL 2320087 (N.Y. Sup. Ct. May 26, 2011).

Cases Accepting Functional Exhaustion

Zeig v. Massachusetts Bonding & Ins. Co., 23 F.2d 665 (2d Cir. 1928) (old decision involved a burglary loss under a first-party insurance contact determining that the policy was ambiguous and recognizing that a different result would attain where warranted by the contract language); *Reliance Ins. Co., v. Transamerica Ins. Co.*, 826 So.2d 998, 999 (Fla. Dist. Ct. App. 2001) (primary insurer paid $15,000 less than limits); *Pereira v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2006 WL 1982789 (S.D.N.Y. July 12, 2006); *Rummel v. Lexington Ins. Co.*, 123 N.M. 752, 945 P.2d 970 (N.M. 1997); *Drake v. Ryan*, 514 N.W.2d 785, 789 (Minn. 1994) (policyholder settled with underlying insurers for less than the full limits of their professional liability insurance policies and agreed to "fill in the gap" by absorbing the difference between what the insurers agreed to pay and their actual policy limits); *Maximus Inc. v. Twin City Fire Insurance Co.,* 2012 U.S. Dist. LEXIS 32970 (E.D. Va. 2012); *Trinity Homes LLC v. Ohio Casualty Ins. Co.*, 629 F.3d 653 (7th Cir. 2010)

Apportionment Dominates The Contemporary Coverage World

- Allocation of defense and indemnity under "all sums" and various pro rata schemes and reallocation through contribution claims and "other insurance" clauses.
- Taking into account all of the allocation variables such as: number of occurrences, multi-year policies, stub and extension periods, retentions, settlement credits, proper exhaustion, coordination of lines of coverage, and multiple insurance programs implicated by corporate successorship, on-site verses off-site costs, characterization of costs as defense or indemnity (e.g., RI/FS), application of occurrence and aggregate limits, etc.
- Allocating between covered and non-covered claims is a relatively small part of the mix.
- There are many issues to fight about as well as incentives to negotiate a resolution. Usually, there are only a handful of issues that drive a resolution of even complex coverage disputes.
- The issue of "unavailability of coverage."

Insurer's Duty to Defend: Resolving Cost Issues

Allocation of Costs

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Sherilyn Pastor is the Practice Leader of McCarter & English's Insurance Coverage Group. She has secured hundreds of millions of dollars in insurance assets for a broad range of policyholder clients. She also provides advice to clients assessing their potential risks, analyzing new insurance products and considering the adequacy of their existing insurance programs.

Ms. Pastor is immediate past Chair (Policyholder side) of the ABA's Insurance Coverage Committee. She publishes and lectures frequently on a variety of topics including insurance coverage, trial advocacy, pretrial practice and professional responsibility. She is on the Board of Regents of the American College of Coverage and Extracontractual Counsel.

Ms. Pastor was named one of New Jersey's "2010 Best 50 Women in Business" by NJBIZ, a weekly business journal recognizing women for their outstanding contributions to their industry and community. She is recognized in *The International Who's Who of Insurance & Reinsurance*, as a *New Jersey Super Lawyer* and by *Best Lawyers,* and in Chambers USA .

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When Is Allocation an Issue?

- Complaint alleges covered and uncovered claims ("Mixed" Action)

- Multiple parties potentially responsible for covered claims
  - Multiple policies covering same liability concurrently
  - Primary and excess insurance
  - Liability extends over multiple policy periods

- Insurer and Insured responsible for covered claims
  - Liability may extend to uninsured time periods depending on allocation method employed

“Mixed” Action

- Suits may include both covered and non-covered claims
  - E.g., tort action alleges both intentional (non-covered) and negligent (covered) injuries
  - E.g., injury may have been caused either by acts during policy period (covered) or by acts outside the policy period (non-covered)

"Mixed" Action

- General rule - Insurer defends entire action until no potentially covered claims remain
  - *Garden Sanctuary, Inc. v. Ins. Co. of N. Am,* 292 So.2d 75, 78 (Fl. App. Ct. 1974; *Aetna Cas. & Sur. Co. v. Continental Cas. Co., 413 Mass. 730 (1992); Seaboard Sur. Co. v. Gillette Co.*, 476 N.E.2d 272, 276 (N.Y. 1984)
- In some jurisdictions, insurer may be seek reimbursement of costs defending claims not even potentially covered
  - *Buss v. Super. Ct.*, 939 P.2d 766, 768 (Ca. 1997); but *see American & Foreign Ins. Co. v. Jerry's Sport Ctr, Inc.*, 2 A.3d 526 (P.A. 2010)

“Mixed” Action

- In some jurisdictions, “mixed” action cause conflicts of interest transforming duty to defend to a duty to reimburse
  - *Flomerfelt v. Cardiello*, 202 N.J. 432, 997 A.2d 991 (N.J. July 7, 2010); *Burd v. Sussex Mut. Ins. Co.*, 267 A.2d 7 (N.J. 1970)
  - *Waite v. Aetna Cas. & Sur. Co.*, 467 P.2d 847, 858 (Wash. 1970)

“Mixed” Action - Possible Conflicts

- Vigorous defense on covered claims but not uncovered claims to end defense obligation and avoid indemnity obligation
- Steer defense to make the likelihood of plaintiff success higher on uninsured (vs. insured) theories
- Gain access to confidential and privileged information which insurer may use to its advantage in a coverage action

Allocation in "Mixed" Action

- Insurance contract obligates insurer only to pay for those claims covered by the policy

  – "The duty to defend arises solely under contract. An insurer contracts to pay the entire cost of defending a claim which has arisen within the policy period. The insurer has not contracted to pay defense costs for occurrences which took place outside the policy period. Where the distinction can be readily made, the insured must pay its fair share for the defense of the non-covered risk."

    Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1224-25 (6th Cir. 1980)

Allocation in “Mixed” Action

- Policy or controlling law may require insured and insurer to attempt to reach agreement
  - “We presume that the insurer and insured can negotiate a satisfactory settlement that fairly apportions the defense costs.”

    SL Indus. Inc. v. Am. Motorists Ins. Co., 607 A.2d 1266, 1280 (N.J. 1992)

Allocation in “Mixed” Action

- If parties cannot agree, court will determine fair division by analyzing complaint in light of coverage under policy
  - “When [the insurer and insured] are unable to agree [on apportionment of defense costs between covered and uncovered claims], we likewise presume that our courts will be able to analyze the allegations in the complaint in light of the coverage of the policy to arrive at a fair division of costs.”

    SL Indus., Inc. v. Am. Motorists Ins. Co., 607 A.2d 1266, 1280 (N.J. 1992)

Allocation in “Mixed” Action

Who bears the burden of proving an expense was for an uncovered claims?

- The insurer?
  - *Health-Chem Corp. v. Nat’l Union Fire Ins. Co.*, 559 N.Y.S.2d 435, 438 (Sup. Ct. 1990); *see also Weinstein & Riley, P.S. v. Westport Ins. Corp.*, Civ. A. No. C08-1694JLR, 2011 WL 887552, *32 (W.D. Wash. Mar. 14, 2011).
- The insured?
  - Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co., 130 S.W.3d 181, 198 (Tex. App. 2003) (allocation of damages); UnitedHealth Group Inc. v. Columbia Cas. Co., 47 F. Supp. 3d 863, 873-874 (D. Minn. 2014) (allocation of settlement)

Allocation in “Mixed” Action

- What if the insurer controlled the defense without raising the “mixed” claim issue or using a special verdict form?
  - *World Harvest Church v. Grange Mut. Cas. Co.,* No. 13AP-290, 2013 WL 6843615, at *4 (Ohio Ct. App. Dec. 24, 2013) (insurer’s burden when controls defense and failures to use special verdict form to allocate)
- What if it breaches its duty to defend?
  - Narragansett Elec. Co. v. Am. Home Assurance Co., 999 F. Supp. 2d 511, 522 (S.D.N.Y. 2014) (insurer that breaches duty it pays all defense costs under MA law)

Allocation in “Mixed” Action

- If neither parties nor court can apportion defense costs between covered and uncovered claims, insurer is responsible for all defense costs

  – “Following . . . the general rule, an insurer is clearly liable for all expenses if they cannot be apportioned.”

    Crist v. Ins. Co. of N. Am., 529 F. Supp. 601, 6045 (D. Utah 1982)

Allocation in "Mixed" Action

- Some courts assume most defense costs can be apportioned
  - *SL Indus., Inc. v. Am. Motorists Ins. Co.*, 607 A.2d 1266, 1279 (N.J. 1992) ("However, the lack of scientific certainty does not justify imposing all of the costs on the insurer by default. The legal system frequently resolves issues involving considerable uncertainty.")
- Other courts presume apportioning defense costs is difficult or impossible
  - *Crist v. Ins. Co. of N. Am.*, 529 F. Supp. 601, 605 (D. Utah 1982) ("Typically, ... an apportionment of expenses . . . is nearly impossible.")

Allocation Among Parties

- Concurrent Policies
  - Multiple policies provide overlapping coverage for same risk
- Consecutive Policies
  - Multiple policies provide successive coverage in same policy period (primary and excess insurance)
  - Multiple policies provide successive coverage over multiple policy periods

Concurrent Policies

- Analyze “other insurance” clauses to determine if policies are concurrent or consecutive
  - If clause renders both insurers as “co-primary” insurers, policies are concurrent – *Great N. Ins. Co. v. Mount Vernon Fire Ins. Co.*, 708 N.E.2d 167, 170 (N.Y. 1999)
  - If clause renders one carrier primary and other excess, policies are consecutive – *Samuels v. State Farm Mut. Auto. Ins. Co.*, 939 So. 2d 1235 (La. 2006)

Concurrent Policies

- Examples of Concurrent Policies:
  - Primary policy covers some of the claims but umbrella policy covers others - *Jostens, Inc. v. Mission Ins. Co*., 387 N.W.2d 161 (Minn. 1986)
  - Insured covered under own policy as well as named additional insured under another's policy – *Sloan Constr. Co. v. Cent. Nat'l Ins. of Omaha*, 236 S.E.2d 818 (S.C. 1977); *but see Pecker Iron Works of New York, Inc. v. Travelers Insurance Co., 786 N.E.2d 863 (N.Y. 2003)*
  - Insured covered under own policy and under corporate policy as officer of corporation – *U.S. Fid. & Guar. Ins. Co. v. Executive Ins. Co.*, 893 F.2d 517 (2d Cir. 1990)

Concurrent Policies

- General rule permits allocation of defense costs among concurrent policies
  - *U.S. Fid. & Guar. Ins. Co. v. Executive Ins. Co.*, 893 F.2d 517, 520 (2d Cir. 1990)
- Minority rule disallows because insurers' obligation is identical and to the insured (not each other)
  - *Auto-Owners Insurance Company v. Travelers Casualty and Surety Company of Americal; Sloan Constr. Co. v. Cent. Nat'l Ins. of Omaha*, 236 S.E.2d 818, 820 (S.C. 1977)

Concurrent Policies

- In at least one jurisdiction, when primary and umbrella insurer each liable for part of defense, burden of allocating defense costs rests on primary insurer
  - *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 166-67 (Minn. 1986)

Concurrent Policies – D&O

- Significant allocation issues developed around D&O coverage
  - Suits against Ds & Os also named company
  - Gave rise to entity/Side C coverage
- Policies typically address
  - Predetermined allocation percentages
  - “Best efforts” provisions
  - Larger settlement rule vs. relative exposure test

Allocating Among Concurrent Policies

- Majority – Pro Rata by Policy Limits
  - Each insurer contributes ratio of individual insurer's limits as portion of entire applicable limits
    - *Brice Bldg. Co. , Inc. v. Clarendon America, 378 Fed. Appx. 915, 916 (11th Cir. 2010)*
- Minority – Pro Rata by Equal Shares
  - Total cost divided by number of insurers
    - *Am. Cas. Co. of Reading, Pa. v. PHICO Ins. Co.*, 702 A.2d 1050 (Pa. 1997)

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Consecutive Policies

- Examples of Consecutive Policies:
  - Primary and excess policies in single policy period
  - Multiple primary and excess policies covering multiple policy periods impacted by single long-tail loss

Consecutive Policies

- Excess policy duty to defend arises from contractual language of policy
  - Duty to defend upon exhaustion of primary; or
  - Duty to pay "ultimate net loss", including defense costs, but not provide defense to insured
- Policy language generally determines whether excess must provide a defense or reimburse insured for defense costs
  - *Valassis Commc'ns, Inc. v. Aetna Cas. & Sur. Co.*, 97 F.3d 870, 876 (6th Cir. 1996)

Consecutive Policies

- Minority of jurisdictions imply excess has duty to defend if not explicitly excluded by policy
  - *See Aetna Cas. & Sur. Co. v. Certain Underwriters*, 56 Cal. App. 3d 791, 800 (1976)

Consecutive Policies

- "The majority rule is that where the insured maintains both primary and excess policies, the excess liability insurer is not obligated to participate in the defense until the primary policy limits are exhausted."
  - *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 20 S.W.3d 692, 700 (Tex. 2000) (internal quotations omitted)

Consecutive Policies

- When case involves multiple claims, primary is responsible for defense costs until it has paid out its policy limits in settlement
  - *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, 789 F.2d 214, 220 (3d Cir. 1986)
- Excess is responsible for subsequently incurred defense costs for remaining claims

Consecutive Policies

- When case concludes with settlement in excess of primary limits, how are defense costs allocated between primary and excess insurers?
  - Primary pays all defense (no defense costs incurred after excess triggered by settlement)
    - *Colo. Farm Bureau Mut. Ins. Co. v. N. Am. Reinsurance Corp.*, 802 P.2d 1196, 1198 (Colo. Ct. App. 1990)
    - *Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532, 538 (5th Cir. 2002)
  - Primary and excess pay pro rata share based on percentage of settlement paid by each
    - *Am. Fid. Ins. Co. v. Employers Mut. Cas. Co.*, 593 P.2d 14 (Kan. Ct. App. 1979)

Consecutive Policies

- Various methods exist for allocating defense costs for long-tail claims that impact multiple policies and policy periods
  - All Sums/Pick and Choose
  - Pro Rata by time on the risk
  - Pro Rata by time on the risk weighted by limits

Consecutive Policies

- All Sums/Pick and Choose
  - Allows insured to pick which of the triggered insurers will provide a defense
  - Picked insurer has right to seek reimbursement later from other insurers
  - Insured not allocated any of the costs
    - *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 508 (Pa. 1993); Hercules Inc. v. AIU Ins. Co., 784 A.2d 481 (Del. 2001)

Consecutive Policies

- Pro Rata by time on the risk
  - Defense costs allocated to insurers based on the amount of time covered by each insurer's policies in relation to the total time of the risk
  - Allocates defense costs to insured for periods of self-insurance (i.e., no insurance purchased)
  - Defense costs not allocated to insured for periods for which insurance was unavailable
    - *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1225 (6th Cir. 1980)

Consecutive Policies

- Pro Rata by time on the risk weighted by limits
  - Defense cost allocation formula is “proration on the basis of policy limits, multiplied by years of coverage.”
  - Insured responsible for defense costs allocated to uninsured periods or policies excluding coverage
  - Defense costs are not allocated to periods for which coverage was unavailable
    - *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994)
    - *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116 (N.J. 1998)

Pre-Tender Defense Costs

"No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur an expense, other than for first aid, without our consent."

- Many jurisdictions hold they are not covered if insurer accepts its defense obligation
  - *E.g., Elan Pharm. Research Corp. v. Employers Ins. of Wausau,* 144 F.3d 1372 (11th Cir. 1998) (apply Ga. law)
- Some jurisdictions find them covered
  - *E.g., Sherwood Brands, Inc. v. Hartford Acc. and Indem. Co.*, 698 A.2d 1078, 1083 (Md. 1997)

Allocation to Uninsured Time Periods

- In a scenario involving long-tail claims over multiple policy periods that include uninsured time periods:
  - If insurance was available but the insured did not procure insurance and retained the risk, the insured is responsible for defense costs allocable to uninsured periods
  - If insurance for the loss was not available, those uninsured time periods are not included in the allocation and all losses are allocated to insured, not uninsured, time periods
    - *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994)

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Insurer's Duty to Defend: Resolving Cost Issues

Strategies for Defense Cost Reimbursement and Allocation

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"Reimbursement" – Framing the Issue

- Insurer agrees to defend pursuant to reservation of rights, including "right of reimbursement"
- What does that mean - defense fee payments simply are an "advance"?
- Problems for policyholders created by insurer claimed "right of reimbursement"
- Policyholders should not presume that insurer's claimed "right" is legally enforceable

Claimed "Majority" View

Buss v. Superior Court, 16 Cal.4th 35 (1997)

- Reimbursement is proper if no potential for coverage ever existed
- Insured would receive a "windfall" if reimbursement not allowed

Other Claimed "Majority" View States

1. Colorado: *Cotter Corp. v. American Empire Suprlus Lines Ins. Co.*, 90 P.3d 814 (Colo. 2004)
2. Connecticut: *Security Ins. Co. of Hartford v. Lumbermens Mut. Ins. Cas. Co.*, 826 A.2d 107 (Conn. 2003)
3. Florida: *Jim Black & Assoc. Inc. v. Transcontinental Ins. Co.*, 932 So. 2d 516 (Fla. Dist. Ct. App. 2006)
4. New Jersey: *Hebela v. Healthcare Ins. Co.*, 851 A.2d 75, 86 (N.J. App. Div. 2004)

Other Claimed "Majority" View Jurisdictions

Additionally, federal courts in Alaska, Hawaii, Kentucky, Michigan, New York and Tennessee have allowed reimbursement.

The "New Majority" View

National Surety Corp. v. Immunex Corp., 176 Wash.2d 872 (2013)

- "We reject National Surety's view that an insurer can have the best of both options: protection from claims of bad faith or breach without any responsibility for the costs of defense if a court later determines there is no duty to defend. This 'all reward, no risk' proposition renders the defense portion of a reservation of rights defense illusory. The insured receives no greater benefit than if its insurer had refused to defend outright."
- "Additionally, allowing recoupment to be claimed in a reservation of rights letter would allow the insurer to impose a condition on its defense that was not bargained for."

Principles Underlying the "New Majority" View

1. Reservation of Rights letters cannot be used to create "unilateral contracts"
2. CGL policies (unlike D&O policies) generally do not include language allowing insurers to obtain "reimbursement"
3. "Reservation of Rights" has its benefits for insurers, but to receive benefit, insurer has to take on risk
4. Insurer agreement to defend evidences potential for coverage

Other "New Majority" View States

Illinois: *General Agents Insurance v. Midwest Sporting Goods,* 828 N.E.2d 1092 (Ill. 2005)

- "The fact that the trial court ultimately found that the underlying claims against Midwest were not covered by the (General Agents) policies does not entitle (General Agents) to reimbursement of its defense costs"

Arkansas: *Medical Liability Mutual Ins. Co. v. Alan Curtis Enterprises, Inc.*, 373 Ark. 525 (2008)

- "A unilateral reservation of rights letter cannot create rights not contained within the insurance policy—namely reimbursement of costs and expenses prior to a declaratory judgment that determines there is no duty to defend or indemnify"

Pennsylvania: *American and Foreign Ins. Co. v. Jerry's Sports Center, Inc.*, 2 A.3d 526 (Pa. 2010).

- "Where the insurance contract is silent about the insurer's right to reimbursement of defense costs, permitting reimbursement for costs the insurer spent exercising its right and duty to defend potentially covered claims prior to a court's determination of coverage would be inconsistent with Pennsylvania law."

Wyoming: *Shoshone First Bank v. Pacific Employers Ins. Co.*, 2 P.3d 510 (Wyo. 2000).

- "Endorsing such conduct is tantamount to allowing the insurer to extract a unilateral amendment to the insurance contract. If this became common practice, the insurance industry might extract coercive arrangements from their insureds...."

Texas: *Texas Ass'n of Counties v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000) (*citing Shoshone*)

Other "New Majority" View Jurisdictions

Additionally, federal courts in Georgia, Idaho, Iowa, Maryland, Massachusetts, Missouri, and Minnesota have refused to allow reimbursement. For example:

- Pekin Ins. Co v. TYSA, Inc., 2006 WL 3827232 (S.D. Iowa 2006)
- St. Paul & Marine Insurance v. Holland Realty, 2008 WL 3255645 (D. Idaho 2008)
- Employers Mutual Casualty v. Indus. Rubber Products, 2006 WL 453207 (D. Minn. 2006)
- Westchester Fire Insurance v. Wallerich, 563 F.3d 707 (8th Cir. 2009)
- *Transport. Ins. Co. v. Freedom Elecs.*, 264 F. Supp. 2d 1214 (N.D. Ga. 2003)
- *Perdue Farms v. Travelers Cas. & Sur. Co.*, 448 F.3d 252 (4th Cir. 2006)

How Can Policyholders Protect Themselves?

1. Know Your Jurisdiction
2. Know Your Policy
3. Expressly Object to Reservation of Rights
4. Challenge the "Majority" view argument – (*Immunex*)

From representing clients in headline-grabbing cases to defining new law benefitting the financial bottom line of corporate policyholders, Linda D. Kornfeld, the Managing Partner of the firm's Los Angeles office, has dedicated her trial and appellate practice to representing companies in high-stakes insurance coverage litigation for over 25 years. She assists her clients in the recovery of hundreds of millions of dollars in insurance assets in a variety of complex insurance matters through settlements and trial. Her clients range from telecommunications companies, universities, and real estate developers to manufacturers and nonprofit organizations. She also provides strategic counseling to senior executives and in-house counsel on how to mitigate risk and maximize their insurance recoveries.

Her experience includes claims involving data breach and privacy issues; directors' and officers' liability; business interruption and extra expense; employee fidelity; professional errors and omissions; employment; entertainment industry liabilities; intellectual property infringements; construction defects; and asbestos, environmental, and product liabilities.

Linda is considered one of the nation's leading insurance recovery litigators by Chambers USA and Legal 500, with Chambers describing her in its 2016 edition as "valued by clients as a 'very thorough and prepared lawyer' with a deep level of insurance expertise across a broad range of coverage areas. She is praised for the quality and practical applications of her advice, as well as her oral advocacy, which one client describes as 'professional, economical, very direct and matter-of-fact.'"

She is listed as one of Lawdragon's top 500 "leading lawyers" in America, and is also named as one of California's "Top 100 Women Lawyers" by the Daily Journal, a "Litigation Star" and a "Top 250 Women in Litigation" by Benchmark Litigation, a 2008-2016 Super Lawyer for the Southern California region, and as a leading insurance & reinsurance lawyer by Who's Who Legal. Additionally, Linda is recognized as a 2016 "Woman Worth Watching" by Diversity Journal, a recognition highlighting women based on their trailblazing strategies, concepts and ideas that make a difference in their workplace, marketplace and around the world. Linda is a frequently requested speaker, media resource, and author on complex litigation and insurance recovery issues. She is a member of the American College of Coverage and Extracontractual Counsel, an Advisory Board Member for the Insurance Coverage Law Bulletin and co-author of the treatise A Policyholder's Primer on Insurance, published by the Association of Corporate Counsel.

Kirsten C. Jackson works on behalf of companies to recover insurance assets. She has obtained millions of dollars in insurance coverage for clients under commercial general liability, professional liability, directors and officers liability, errors and omissions liability, and life insurance. Kirsten is experienced in all stages of litigation and non-adversarial dealings with insurers, including coverage analysis and advising, claims correspondence, mediations, pleadings, written discovery, document production, depositions, motion practice, trial preparation and settlement. In 2014, Kirsten was named to the Lawyers of Color “Hot List.” In 2015, 2016, and 2017, Kirsten was recognized as a Southern California "Rising Star" by Super Lawyers.

Kirsten maintains a thriving pro bono practice. She successfully argued the Ninth Circuit appeal in Gallagher v. San Diego Unified Port District, Appeal No. 11-56469, and as a result the Ninth Circuit reversed the district court’s grant of summary judgment against her client (who was represented by different counsel in the lower court).

Kirsten is actively involved in various organizations, including the American Bar Association (Insurance Coverage Litigation’s Diversity Subcommittee Co-Chair), the National Bar, the Langston Bar Association and the California Minority Counsel Program..

Questions?

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