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Settlement Conflicts in Concurrent Coverage

Resolving Coverage and Allocation Issues Among Multiple Insurers

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Settlement Issues

Resolving Coverage and Allocation Issues Among Multiple Insurers

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Resolving Coverage Issues With Multiple Insurers – Priority of Coverage

Daniel J. Struck, Esq.
Much Shelist

Why Concurrent Coverage Matters: An Overview

A Common Misconception: If there is concurrent coverage, that must mean that there is extra coverage to go around. So there is nothing to worry about, right?

The One Word Answer: No

The Big Picture Answer: When there are multiple insurance policies available to respond to a particular liability claim (in other words, when there is concurrent coverage), there are unique insurance coordination issues that must be dealt with and addressed early on in order to avoid delays and/or surprises in the defense of a claim, when there is an opportunity to settle a claim, when there it is time to pay a judgment, or in the status of the coverage subsequent to the resolution of a claim.

Why Concurrent Coverage Matters: An Overview

A Policyholder's Perspective:

I am careful in managing my business and its risks. I am equally careful in selecting my business' suppliers, service providers, contractors and other business partners.

Nonetheless, I appreciate that no matter how careful I am, accidents happen and my business may be sued or become liable for some unintended third-party injury or damage.

To address these risks, I buy business insurance that I expect will cover me in that event. Because I am concerned that my business may become liable due to the negligence of a contractor or supplier, I require them to add my business to their policies as an additional insured.

But then, what happens my business is sued and the claim is potentially covered by multiple insurance policies under which my business is either the named insured or an additional insured?

Why Concurrent Coverage Matters: A Few Follow-up Questions In the Aftermath of a Hypothetical Lawsuit

- **To which insurer(s) should I provide notice?**
- **What if I fail to provide notice to one of the potentially response insurers?**
- **Under duty to defend policies, which insurer(s) is/are responsible for providing a defense?**
- **What if some of the applicable policies have a duty to defend, but some have a duty to reimburse defense costs?**
- **What if one or more insurers reserve their rights?**
- **The accident wasn't my fault, and I don't want to be saddled with negative claim experience with my insurers?**
- **Are my rights different depending on whether I am the named insured or an additional insured?**
- **What if the claim triggers policies spanning multiple policy periods?**

Why Concurrent Coverage Matters: A Few Follow-up Questions In the Aftermath of a Hypothetical Lawsuit

- **What if one of the concurrent policies was issued by a now insolvent insurer?**
- **What if the policies have different deductibles or SIR's?**
- **What if one or more of the policies is excess to any other available insurance? Whose version of excess is "more" excess?**
- **What if there is an applicable exclusion in one of the applicable policies, but not in any of the others?**
- **What if there is an opportunity to settle a claim, but one of the insurers disagrees with the potential settlement amount?**
- **What if a potential settlement that would result in the dismissal of my business would exhaust the available coverage but would also leave the other defendants (who are also insureds) in the claim and potentially liable?**

Have you had enough questions? We've only scratched the surface.

Some of the Approaches to Dealing With Concurrent Coverage

The approaches for dealing with concurrent coverage and the respective rights and obligations of policyholders and insurers varies from state to state, and the differences in outcome can be substantial.

- **Reconcile the so-called “other insurance” clauses contained in the respective responsive primary insurance policies. But this may be easier said than done depending on whether the respective clauses cancel each out, contain conflicting or inconsistent formulations, contain formulae for dividing up obligations perhaps based on respective limits.**
- **Allocation of coverage obligations without looking to “other insurance” clauses but apportioning based on formulae such as an “equal-shares” basis or the respective limits of coverage.**
- **Minority “targeted-tender” or “selective-tender” approach allowing insured to “select” one primary insurer for defense. But is there a difference between “selection” and “de-selection” for the purposes of defense? But what about indemnification: is it necessary to take back a “de-selection” before triggering excess coverage?**

Problem One: Who is Responsible for Providing a Defense?

BuildCo is a commercial construction company building an office tower. BuildCo's primary general liability insurance policy has \$2 million in limits and a supplemental duty to defend which continues until the limits are exhausted by the payment of settlements or judgments. BuildCo also maintains umbrella coverage with \$5 million in limits.

BuildCo requires all of its subcontractors to name it as an additional insured on their general liability insurance policies on a primary and non-contributory basis with respect to the operations of the subcontractor. Some of the additional insured endorsements cover BuildCo only if the loss was "caused by" the subcontractor and some of the additional insured endorsements provide coverage for losses "arising out of" the named insured's work or operations.

One of the subcontractors is GlassCo which is responsible for securing the curtain wall. GlassCo's primary general liability policy has a \$1 million limit of liability and a supplemental duty to defend and it has an umbrella policy with \$5 million in limits. A compressor used by GlassCo falls onto an adjacent street, leaving a passer-by permanently disabled. The injured bystander sues BuildCo alleging that it failed to supervise GlassCo adequately and to make sure that the subcontractor's equipment was properly secured.

Problem One: Who is Responsible for Providing a Defense?

- **What are BuildCo's options for the defense under each of the three approaches for dealing with concurrent coverage?**
- **What if one insurer acknowledges coverage and one reserves its rights?**
- **Does the "primary and non-contributory" language in the additional insured endorsement make a difference?**
- **What if the additional insured endorsement in the GlassCo policy extends coverage only for injuries "caused" by GlassCo? What if the additional insured endorsement in the GlassCo policy extends coverage for injuries "arising out" of GlassCo's work or operations?**
- **Would it make a difference if the GlassCo policy contained a duty to reimburse defense costs?**

Problem Two: Who Pays for Damages?

Continuing BuildCo's story, on the eve of trial the plaintiff offers to settle the bodily injury lawsuit for \$6 million. BuildCo is eager to accept the settle, because it had estimated that the lawsuit could not settle for less than \$10 million.

- **Assume that BuildCo is in a “targeted-tender” state and it had “de-selected” its primary insurer for defense purposes. What must it do?**
- **What if one of the policies has a \$500,000 SIR for indemnification payments?**
- **What if GlassCo's insurer became insolvent just before the settlement was offered?**
- **What if GlassCo is a defendant as well, and the settlement opportunity proposal would not include a release of GlassCo?**

Comments and Considerations:

- Each insurer must be treated separately, as each contract of insurance has separate terms and conditions to which the policyholder is contractually bound.
- Resolution of priority of coverage is proper between each insurer and policyholder, and preferably vis-à-vis all other insurers.
- Reconcile obligations of primary, umbrella, excess and “specialty” coverages (e.g. EIL policies).
- Identify the “occurrence-based” versus “claims-made” coverages.
- Analyze which policies have a duty to defend, a duty to indemnify for defense costs or no duty to defend or indemnify for such costs. Then analyze if the defense obligation is within, or in addition to, policy limits.
- Ascertain facts of claim (e.g. nature and timing of events causing damage, nature and timing of damage, amount of past damage and potential for future damage).

Mary Ellen Scalera, Esq.
Riker Danzig

SUBROGATION AND ADDITIONAL INSURED CONSIDERATIONS

Sherilyn Pastor
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Additional Insureds

- When an Insured has its own coverage and also is an Additional Insured under another's policy, the issues can be challenging
 - Priority of coverage
 - Sharing available limits
 - Navigating subrogation issues

Limitations on Settlement?

- Case law mixed
- In some states, absent bad faith, an insurer may exhaust its policy limits by funding a settlement entered into by only one insured if it was unable to resolve all claims against all insureds
- In some states, insurer acts in bad faith if it settles for policy limits but does not obtain a release for all insureds

A Related Issue: “Deeming” Policies Exhausted

- Case law not uniform on effectiveness as against third parties
- Some courts hold that an AI cannot extinguish the coverage rights of the NI by agreement
- Some courts allow an insurer to exhaust a policy by good faith agreement, even if payments do not actually exceed the policy limits

Subrogation

- Imposes liability on an ultimately responsible party
- Allows entity that pays another's loss to succeed to that party's rights and obtain reimbursement from the ultimately responsible party

Subrogation-Related Settlement Considerations

- Allowed or waived
- “Made Whole” doctrine
- Details relating to any subrogation suit
- Limitations on confidentiality agreements
 - Information necessary to establish right to pursue subrogation claims

Comments and Considerations:

- Should/may the subrogation right against other insureds or other carriers be assigned to policyholder for finality of settlements?
- Will monies obtained through subrogation be paid back to insurer, used as an offset for future payments or serve to “revive” policy limits?
- Should any settlement agreement contain a re-opener for monies recouped through subrogation?
- What is the knowledge of insurer and/or policyholder regarding other potential insureds under the policy, and how is that risk assumed or handled upon settlement?
- Is there an effect by settlement with one insured upon another insured’s rights to coverage, access to policy limits, etc.?
- Once settled, what is the current relationship, if any, between the signatory insured and any non-signatory insureds, and how does that affect the nature and extent of the release of the settling insurer? Can the risk of exposure to a settling insurer be reduced through an indemnification by the signatory settling insured?
- Who, generally, assumes the risk of competing subrogation claims, and can that risk be contractually assumed?

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Resolving Coverage Issues in the Context of Covered and Uncovered Claims

Mary Ellen Scalera

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Considerations:

- Extent, if any, of duty to defend
- Duty to defend versus duty to indemnify
- Timing of coverage disputes
- Need for consultants/experts to establish divisible damages
- Use of decision trees to assist in analysis
- Allocation of divisible damages
- Nuances of applicable law (e.g. NJ, CA *Cumis* counsel appointment) re: defense duty
- Exclusions which bar coverage or provide coverage discount/methods of calculating coverage discounts

Considerations:

- Whose burden of proof to establish covered damages and does it shift?
- Avoidance of creating coverage gaps through individual insurer settlements
- Attempts to settle globally with insurers with “like” policy terms (e.g. same layer, similar policy terms)
- Resolution of key issues:
 - Who retains control of the litigation and settlement authority
 - Who processes new claims (if any) and under what protocol
- Timing of negotiations – wait until judgment on underlying claim or commencement of declaratory judgment
- By retaining control of litigation does policyholder risk rendering a covered claim uncovered due to actions [e.g. failure to abide by policy conditions precedent (notice) and ongoing obligations (cooperation clause, voluntary payments)]

Settlement Options:

- Final Funding Agreement
- Funding Agreement with “opt-out” or automatic termination on date or event certain
- Coverage-in Place (“CIP”) Agreement
- Policy Buyback

Key terms and issues in settlement negotiations:

- Use of Definitions section for:
 - Identification of type of claims and costs to be covered (e.g. defense costs, environmental property damage, asbestos property damage, asbestos bodily injury)
 - Identification of Insurance Companies, Specific Policies and Policyholders subject to settlement (including identification of specific lines of coverage if multiple policyholders involved)
 - Effective and termination dates
- Current impairment and/or “deemed” exhaustion of policy limits (both subject to and not subject to agreement)
- Defense obligations and effect on limits
- Allocation of payments among signatories (percentages, etc.)
- Allocation of payments for purposes of impairment or exhaustion (may be left open for insurer or policyholder to calculate internally)
- Anticipation of exhaustion and continuation of payment by unexhausted carriers (or automatic termination upon exhaustion of specific policies, layers, etc. or option of re-negotiation prior to termination)
- Scope of releases for signatories/resolution of any pending coverage lawsuits
- Any “carve-outs” from agreement
- “Direct Action” statutes

Key terms and issues in settlement negotiations:

- Protocol for administration/defense and settlement of claims subject to agreement (including approval of defense counsel and settlements by multiple signatories)
- Funding v. direct billing for defense and indemnity payment
- What constitutes “necessary documentation” of claims by policyholder for other signatories (e.g. product exposure, medical documentation/diagnosis for asbestos bodily injury)
- Dispute resolution provisions
- Representations and warranties/signatory expectations
- Indemnification provisions/judgment reductions and retro premiums/fronting arrangements
- Contribution waivers
- Confidentiality clauses
- Reservation of rights as to theories, carved out claims, policies, etc.

Other terms and issues in settlement negotiations:

- Amendments
- Integration clause
- Severability clause
- Provision for notices under agreement
- “Most Favored Nations” clause
- Construction of agreement (titles, etc.)
- Appendices (identification of policies, bound signatory participants/subsidiaries)

RESOLVING COVERAGE ISSUES WITH MULTIPLE INSURERS IN THE CONTEXT OF LONG-TAIL CLAIMS

Sherilyn Pastor
McCarter & English, LLP

Resolution of Coverage Disputes

- Many long-tail, multi-insurer coverage disputes are resolved (in whole or part) by settlement
- Settlement can resolve disputes, including future claims handling, in ways that differ from the precise terms of the involved insurance policies

Potential Advantages

- Avoid expense and burden of litigation
- Control disclosure of sensitive information
- Avoid rulings that can affect other litigations
 - Underlying liability case
 - Other coverage lawsuits
- Preserve amicable business relationship

Basic Considerations

- The policies to be settled
- The claims and costs to be resolved
- Any offsets to be addressed
- The applicable allocation law

Allocation Considerations

- All sums
- Pro rata
- Pro rata by years and limits

The allocation method utilized can lead to different outcomes

Understand the allocation method(s) that may apply & their results

Settlement Structures

- Release of Specific Claims
- Policy Buy-Back
- Coverage in Place
- Interim Defense Agreements

Considerations for CIP Agreement

- Payment for past costs
 - Lump sum vs. Series of payments
- Types of future claims to be paid
- Protocol for submission
- Policies involved
- Allocation to relevant coverage block
- Confidentiality
- Termination

Allocation of Payment to Specific Policies or Claims

Specific and Binding Allocation

VS.

Reserving Right to Allocate Independently

Potential Impact on Non-Settling Insurers

- Exhaustion of underlying limits
- Contribution Rights
- Settlement Credits
- Discovery of Settlement Terms

Confidentiality Considerations

- Confidentiality and F.R.E. 408
- Limitations
 - fact of settlement
 - settlement allocation if the settlement pertains to pooled, stamp, quota share arrangements among non-participating and/or insolvent insurers

“Most Favored” Insurer

- Some insurers request that they be notified if the policyholder agrees to “better terms” with another insurer and provided those same terms

Indemnification Requests

- Indemnification can obligate insured to defend and indemnify the settling insurer
 - Contribution claims by non-settled insurers
 - Direct action claims by tort claimants
 - Claims by non-settled insureds
 - Reinsurance claims
- Limitations
- Alternatives

Discussions with Multiple Insurers

- The more insurers and parties involved the more likely they will disagree with each other
 - Finger pointing over obligations and liability
 - Insurer disagreements over coverage issues
 - Does the excess follow form?
 - Are the coverage positions consistent?
- Policyholder positions taken with one carrier may prejudice coverage with another carrier

Comments and Considerations:

- Early establishment of coverage chart (including pre-term cancellations, stub policies, multi-year policies)
- Applicable law on policy terms and limits
- Actual or created gaps in coverage
- Early use of consultants (locate coverage establish coverage chart, calculations of past and estimations of future damages)
- Claims reporting requirements before, during and after settlement negotiations
- Allocation principles to be applied (*Carter-Wallace*? pro-rata? hybrid? thresholds?)

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Resolving Coverage Issues with Multiple Insurers When Policyholder Must Contribute

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Important Initial Considerations:

- As full a picture of coverage as possible, including all insured and uninsured periods.
- Likely law to be applied and effect on allocation and treatment of uninsured periods (e.g. NJ *Carter-Wallace* allocation, pro-rata, equal shares or "all sums").

Other Considerations:

- Agreement as to actual or method of exhaustion of underlying policies
- Actual or “deemed” triggered policies (site by site, claim by claim, “touch the block”)
- Drop down methodology

Resolving Coverage Mindful of Exhaustion and Trigger Issues

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Sherilyn Pastor is the Practice Leader of McCarter & English's Insurance Coverage Group, and a member of the Firm's Executive Committee. 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 recognized by *Chambers USA* as among "*Leaders in their Field*" and she is a recipient of the YMCA's Tribute to Women in Industry award. She was named one of New Jersey's "Best 50 Women in Business" by NJBIZ, a weekly business journal recognizing women for their outstanding contributions to their industry and community; and also is recognized in The International Who's Who of Insurance & Reinsurance and as a New Jersey Super Lawyer.

Ms. Pastor is the Vice-Chair of the ABA's Insurance Coverage Litigation Committee. She publishes and lectures frequently on a variety of topics including insurance coverage, trial advocacy, pretrial practice and professional responsibility. She serves on the Editorial Boards of the Insurance Coverage Law Bulletin, and Appleman on Insurance. She teaches the National Institute for Trial Advocacy's trial and deposition skills programs. She is a member of the New Jersey Supreme Court's Professional Responsibility Rules Committee.

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Mary Ellen Scalera, a partner with the Firm, practices in Riker Danzig's Insurance Group. Her 20+ years of complex litigation experience has had a heavy emphasis in insurance coverage. She has represented major insurance companies in matters involving losses under first-party property, commercial/general liability, automobile, multi-peril and marine policies. She has litigated for, and provided coverage advice to, insurance companies on various types of claims, including but not limited to those related to property losses, environmental contamination and remediation, asbestos bodily injury and abatement, products liability, completed operations, advertising injury, copyright/trade dress/patent infringement and business interruption.

She is also a trained mediator, and has long held an AV® Peer Review Rating from LexisNexis Martindale-Hubbell -- which places her at the highest level of professional excellence. She has been named as a NJ *Super Lawyer*, and is included in the 2011 Martindale-Hubbell *Bar Register of Preeminent Women Lawyers*.

Ms. Scalera has represented major domestic, U.K. and Bermuda insurance companies in both trial counsel and national/coordinating counsel capacities on coverage issues under primary, umbrella and excess policies. She also has extensive experience litigating asbestos bankruptcy matters.

ms. Scalera has litigated matters in the New Jersey state and federal courts, and has acted in a national counsel capacity in coverage matters in the state and federal courts of New Jersey, New York, Ohio, Illinois, Texas, Pennsylvania, West Virginia and California.

Ms. Scalera serves on the Firm Management Committee. She has served on the Editorial Board of The Environmental Claims Journal, and has lectured on insurance coverage allocation issues at Mealey's and other conferences in various states.