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Today's faculty features:

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Section of Litigation Insurance Coverage

Settling with Limited Funds

By Duana J. Grage and Suzanne L. Jones* – August 1, 2012

How does an insurer comply with its obligation to settle when there are too many claims or too many insureds and insufficient limits? It depends on which jurisdiction's law applies. An approach that is safe from liability for bad faith in one jurisdiction may constitute bad faith in another. An insurer usually has to consider two issues: whether or not an insurer is allowed to resolve only some covered claims or claims against some insureds within its policy limits and, if it does, whether or not the insurer can withdraw from the defense of the remaining claims and insureds.

Unfortunately, very few courts have identified a bright-line rule for insurers to follow in these circumstances to protect itself from extra-contractual liability. In the most general terms, courts have adopted three approaches: (1) resolve claims on a first-come, first-served basis, (2) pay limits to all successful claimants on a pro rata basis, or (3) file an interpleader action. As for withdrawing the defense, an insurer should only withdraw from the defense upon payment of the limits if allowed by the policy language and applicable case law and if the insurer can demonstrate that its policy limits were paid to resolve claims against the insured, not merely paid into court in an interpleader action.

The First-Come, First-Served Approach

Under New York law, an insurer has discretion to settle multiple claims on a first-come, first-served basis as long as it acts in good faith.[1] "First-come, first-served" is the conventional rule: "[I]t has been generally held that a liability insurer can settle with some claimants although to do so may exhaust the insurance fund or so deplete it so that a subsequent judgment creditor is unable to collect his judgment in full from the remaining proceeds."[2] An insurer may settle with less than all claimants under a particular policy even if such settlement exhausts the policy proceeds.[3]

While New York law permits an insurer to settle on a first-come, first-served basis, it does not require an insurer to settle with the first insured that makes a reasonable settlement offer. For example, in *In re Axis*, the Southern District of New York held that the case law "does not impose a bright line obligation to settle with the first insured who tenders a reasonable settlement offer."[4] Rather, an insurer does not necessarily act in bad faith by funding the first claimant's settlement offer, nor is failure to apply the "first in time rule" substantial evidence of bad faith.[5]

The Massachusetts courts have similarly held that an insurer may settle with less than all claimants even if it results in an exhaustion of the policy proceeds. In *U.S. Fire Insurance Co. v. Worcester Insurance Co.*, the Massachusetts Supreme Court explained that an insurer should not "squander" its policy limits: "That duty [to defend], the argument continues, precludes an insurer from squandering its policy limit and then abandoning the insured without having obtained so much as protection for its insured as is reasonably possible while leaving the insured subject to further litigation."[6] The court rejected any contention that an insurer "squandered" its policy limit by settling five claims and obtaining a partial settlement on the sixth.[7] Similarly, in *Scott v. Gallacher*, the Massachusetts Court of Appeals held that when multiple claims on a single policy exist, each of which are likely or certain to exceed the coverage limitations, an insurer is entitled to exercise its business judgment in settling the claims.[8] The court rejected the notion that a "first-come, first-served" settlement is a violation of the insurer's duty. [9] The court also rejected the notion that an insurer is required to effectuate a global settlement simultaneously with all potential claimants. [10]

In *Aetna Casualty & Surety Co. v. Sullivan*, the Massachusetts Court of Appeals held that an insurer would be discharged from any further duty to defend if it should make a payment equal to the maximum policy limits—either to settle a claim against the insured or in total or partial satisfaction of a judgment against the insured—upon conclusion of the litigation.[11] However, the court distinguished this result from the situation in which "an insurer seeks to pay the full amount of coverage without a judgment and without obtaining a release of the insured from at least one personal injury claimant."[12] Essentially,

tendering the full amount of insurance coverage does not necessarily satisfy the insurer's duty to defend its insured if the insurer fails to secure a settlement or release.[13] Relying on a case from the Supreme Court of Illinois, the court held that if the policy limits were tendered to a claimant before any judgment or settlement, then the duty to defend had not been terminated.[14]

Pro Rata Payment of the Limits to All Successful Claimants
Some jurisdictions allow an insurer to pay its limits to all claimants with successful claims on a pro rata basis. Courts in Missouri have held that a pro rata approach is warranted.[15] In *Underwriters for Lloyds of London v. Jones*, the Kentucky Supreme Court distributed the insurance proceeds on a pro rata basis following adjudication of multiple claims.[16] In jurisdictions that have advocated a pro rata approach, it would be prudent for the insurer to file an interpleader action for guidance in resolving multiple claims prior to trial.

In Florida, where multiple claims arise out of one accident, the insurer may exercise its discretion in how it elects to settle claims and may choose to settle certain claims to the exclusion of others, provided that the decision is reasonable and "in keeping with its good faith duty."[17] To satisfy these requirements, the insurer must

fully investigate all claims;
seek to settle as many claims as possible within the policy limit;
minimize the magnitude of possible excess judgments against the insured by reasonable claim settlement; and
keep the insured advised of the claim resolution process.[18]

This inquiry is highly fact-specific, and whether an insurer has acted in good faith is a question for a jury to decide.[19]

Filing an Interpleader Action Rule 22 of the Federal Rules of Civil Procedure provides that a party may bring an action in court for "interpleader." The rule states that "persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead."[20] An action for interpleader may also, in certain circumstances, be brought pursuant to statute.[21] Some courts have encouraged an insurer's use of an interpleader action; other courts have required its use to avoid a claim for bad faith in these situations; and still other jurisdictions, like Florida, do not allow interpleader actions in these circumstances.

In *Boris v. Flaherty*, a New York Supreme Court encouraged the use of interpleader: "Interpleader actions, while not required in situations such as this, are to be encouraged as part of the duty of good faith of an insurer."[22] The court commended the insurer's use of this mechanism, "rather than simply paying judgment creditors in the order that the judgments are entered until coverage is exhausted."[23] As long as the insurer does not act in bad faith, however, it has no duty to pay out claims ratably or to consolidate them.[24]

In *Club Exchange Corp. v. Searing*, the Kansas Supreme Court set out three alternative courses of action that an insurer can take when faced with competing claims in excess of policy limits:

1. invite all the parties to participate jointly in efforts to reach agreement as to the disposition of the available funds;
2. attempt to settle claims within the policy limits; or
3. promptly and in good faith commence an interpleader action and pay its policy limits into court.[25]

Where an insurance carrier is faced with multiple unliquidated claims far in excess of its limits of liability, the court found that interpleader is an appropriate remedy so long as the insurer acts promptly and in good faith.[26]

Arizona does not explicitly recognize a duty on the part of an insurer to "manage policy limits."[27] But an insurer does have, as in most states, an "implied contractual 'duty to treat settlement proposals with equal consideration' to its interests and those of an insured."[28] In *McReynolds v. American Commerce Insurance Co.*, the court held that where the available coverage is not adequate to resolve all claims, the insurer can find a safe harbor and avoid extra-contractual liability taking the following steps:

the prompt, good-faith filing of an interpleader as to all known claimants;
the payment of the policy limits into the court; and
the continued provision of a defense for the insured as to each pending claim.[29]

Pursuing this course is a safe harbor for an insurer against a bad-faith claim for failure to properly manage the policy limits or for failure to give equal consideration to settlement offers when multiple claimants are involved and the value of the expected claims exceeds the applicable policy limits.[30]

Even if an insurer files an interpleader and deposits its limits into court, the insurer should not withdraw the defense unless it has clear policy language that would permit a withdrawal. In *Jenkins v. Insurance Co. of North America*, the California Court of Appeals held that use of an interpleader action can be proper, but the court cautioned that an insurer should not merely pay its policy limits into the court and abandon the insured.[31]

Similarly, in *American Standard Insurance Co. v. Basbagill*, the Illinois Court of Appeals demonstrated disfavor with an interpleader action if an insurer uses it to avoid providing a defense.[32] The court held that tendering the policy limit to the court in an interpleader action, without more, does not free an insurer from its duty to defend.[33] The court observed that a plaintiff has not paid its policy limit, as required under most policies in

order to withdraw from the defense, if it has not delivered money to a party who is legally entitled to it.[34] The court reasoned:

> We believe that our holding accords not only with a reasonable reading of the policy language but also with the reasonable expectations of policyholders. When an ordinary citizen, likely unversed in the niceties of insurance law, purchases an insurance policy, he expects to receive indemnification for damages owed and also a defense of any suit brought against him. A typical policyholder would normally expect to be defended until the claims against him have been resolved.[35]

However, generally, after the policy limits are exhausted by the payment of judgments or settlements, the insurer is discharged from its duty to defend if the policy language so allows.[36] The rationale is that "'[o]nce the applicable indemnity limits of a policy are exhausted by the payment of judgments or settlements, no insurance is afforded by that policy and the insurer 'is no longer obligated to defend any actions against [the insured] whether such actions are pending at the time of exhaustion or commencement thereafter.'" [37]

Too Many Insureds and Not Enough Limits In situations involving multiple insureds and a claim that exceeds the policy limits, courts generally follow one of two approaches. The majority of jurisdictions allow an insurer to resolve the liability of one insured, in good faith, even if the result is that another insured is left without a defense and without remaining limits to pay a judgment. The minority of jurisdictions, on the other hand, have found that an insurer that settles the liability of only one insured to the detriment of other insureds can be exposed to a claim of bad faith.

California is in the minority. In California, as in all states, an insurer is obligated to make reasonable efforts to settle a claim against its insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits.[38] In *Strauss v. Farmers Insurance Exchange*, the plaintiff offered to settle the limits of the policy proceeds but would release only one defendant from liability.[39] Had the insurer accepted this offer, two insureds would have been left without coverage, and the insurer would have been in violation of the implied covenant of good faith and fair dealing.[40] The insurer was not obligated to pay the demand if it did not resolve the liability for all of its insureds. The California Court of Appeals reasoned that had the insurer acted in bad faith by accepting the offer, it could not also be held in bad faith for refusing it.[41] Similarly, in *Lehto v. Allstate Insurance Co.*, the California Court of Appeals ruled that if an insurer had accepted a settlement offer that would have left one of its insureds bereft of coverage, that would be considered an act of bad faith.[42] Accordingly, the insurer's refusal to accept such a settlement cannot itself be deemed an act of bad faith.[43]

New York follows a similar approach. In *Smoral v. Hanover Insurance Co.*, the court observed that "[i]t is absolutely no answer for the [insurer] to say that it paid the full amount of its policy if in so doing it fully protected one of its insureds and left the other completely exposed."[44] According to the *Smoral* court, there was "no legal justification" for its preferring one insured over the other.[45] The insurer was therefore found to have violated its duty of good faith.[46]

In sharp contrast to the case law in California is the recent case in Texas, *Pride Transportation v. Continental Casualty Co.*[47] Under Texas law, as first explained in *G.A. Stowers Furniture Co. v. American Indemnity Co.*, an insurer can be held liable for negligently failing to settle a claim within policy limits.[48] An insurer has been effectively *Stowerized* in Texas when three prerequisites have been met: (1) the claim against the insured is within the scope of coverage; (2) the demand is within the policy limits; and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the potential exposure to the insured. Courts in Texas have held that, in light of the *Stowers* duty, an insurer is entitled to enter into a reasonable settlement with one of several claimants, even though the settlement exhausts the limits of the policy. The same is true when the insurer is defending multiple insureds that share one limit applicable to the claim.

In *Pride Transportation*, the insured, Pride, sued its insurers Lexington Insurance Company and Continental Insurance Company for breach of contract and violation of the Unfair Claims Settlement Practices Act after the insurers paid their combined policy limits of $5 million to resolve a lawsuit against Pride's employee and withdrew its defense.[49] The settlement left Pride, which was also a defendant in the case, with no coverage.[50] The Northern District of Texas court held that despite the problems this created for Pride, the insurers acted reasonably in accepting the claimants' demand for policy limits, which had been directed to one, but not both, of the insureds.[51] Pride had no claim against its insurers.[52]

In reaching its decision, the court held that the test is whether "an ordinary and prudent person would have accepted the [claimants'] demand."[53] Given the potential personal liability faced by Pride's employee if the insurers not settled the action, and all the parties to the case considered it to be a "limits case," the court held that the insurers acted reasonably in accepting the demand even though the result was that their other insured remained exposed.[54]

Most states embrace the approach used in Texas.[55] In *Anglo-American Insurance Co. v. Molin*, the Pennsylvania Commonwealth Court held that "given the dilemma faced by an insurer when faced with a reasonable settlement offer for less than all of the insureds, we conclude that the insurer should not be precluded from accepting that offer."[56] The court reasoned that "[b]y accepting an offer, the insurer will avoid being subjected to a liability exceeding the policy limits due to its rejection of a reasonable offer" and all insureds will

benefit from the settlement by decreasing the total amount of liability in the underlying action. Similarly, in *Elliott Co. v. Liberty Mutual Insurance Co.*, the Northern District of Ohio observed that "an insurer can settle or pay claims in good faith to one insured, even if this results in actual exhaustion of the policy limits to the detriment of another insured."[57] An exception to this rule "is when a first insured has already agreed to a settlement of claims with the insurer prior to the insurer exhausting the policy limits by paying a later claim of a second insured."[58] In *Millers Mutual Insurance Ass'n of Illinois v. Shell Oil Co.*, the Missouri court of appeals concluded that where a policy allows for the termination of the duty to defend upon exhaustion of the policy's limits, an insurer is not obligated to defend an additional insured after paying its limits in a reasonable settlement on behalf of the named insured.[59]

Under Florida law, an insurer can be held liable for bad faith arising out of its refusal to accept an offer to settle on behalf of one insured but not the other.[60] In *Contreras v. U.S. Security Insurance Co.*, the insurer tried but was unable to obtain a release of liability for both of its insureds.[61] Because the insured could have settled on behalf of one of the insureds and refused, it faced liability for bad faith.[62] Another Florida court noted, in *In re GunnAllen Financial, Inc.*, that in cases where "multiple insureds are covered by a policy that has insufficient funds to pay all claims, then the insurer has a duty to try to settle as many claims as possible within policy limits."[63] The court observed that "an insurer could be deemed to act in bad faith towards its insured if it refuses to settle simply because all other insureds are not being released as part of the settlement."[64]

Long before the settlement conference or mediation is scheduled, an insurer should consider what obligations it has under the applicable case law to resolve claims if presented with the opportunity to settle on behalf of one but not all of its insureds or to resolve some but not all claims presented. An insurer should always first make attempts to resolve all of the claims or the claim on behalf of all of its insureds. If the insurer is unsuccessful, it is essential to review the applicable case law to determine how and on whose behalf the insurer may or must settle the claim.

Practice Pointers

Explain the problem of potential excess exposure to the insured early on and in writing.
Keep the insured advised as claims are settled and limits are exhausted.
Notify all excess insurers and keep them apprised of the investigation and settlement efforts.
Consider immediately filing an interpleader action if the jurisdiction allows it. Deposit the money into court and continue defending until those funds are disbursed to claimants. In some states, an insurer must file an interpleader to avoid a claim for bad faith. Other courts do not allow an interpleader action in these circumstances.
Investigate all the known claims. Develop and attempt to implement a strategy to resolve all the claims.
Never artificially inflate the value of any claims, particularly the first claims that are made. Do not overpay a claim with the intention of exhausting the limit as soon as possible to justify withdrawing from the defense.
Pay the limits to claimants to resolve claims and obtain releases of liability for the insured; do not pay the limits to the insured in an attempt to "buy out" the coverage or the defense obligation. While this may be warranted in certain circumstances, usually the claimants wise up and commence litigation, meritorious or otherwise, directly against the insurer. By then, the insurer may not have the right to reclaim the money it paid to the insured, the insured may not have the funds to repay the insurer, and the insurer may be exposed to liability in excess of its limits.

Keywords: insurance coverage, litigation, obligation to settle; interpleader; first come, first served

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[2] *In re September 11 Litigation*, 723 F. Supp. 2d at 542 (quoting V. H. Cooper, Annotation, "Basis and Manner of Distribution Among Multiple Claimants of Proceeds of Liability Insurance Policy Inadequate to Pay All Claims in Full," 70 *A.L.R.2d* 416 (2009).
[3] *STV Grp., Inc. v. Am. Cont'l Props., Inc.*, 650 N.Y.S.2d 204, 205 (N.Y. App. Div. 1996); *see also Duprey v. Sec. Mut. Cas. Co.*, 256 N.Y.S.2d 987, 988–89 (N.Y. App. Div. 1965); *Richter v. Vitale*, 299 N.Y.S.2d 293, 296 (N.Y. Sup. Ct. 1969); *Gerdes v. Travelers Ins. Co.*, 440 N.Y.S.2d 976, 978 (N.Y. Sup. Ct. 1981).
[4] *In re* Axis Reinsurance Co. Refco Related Ins. Litig., No. 07-CV-07924-JSR, 2010 U.S. Dist. LEXIS 33377, at *15 (S.D.N.Y. 2010).
[5] *In re Axis Reinsurance Co.*, 2010 U.S. Dist. LEXIS 33377, at *15.
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[7] *U.S. Fire Insurance Co.*, 821 N.E.2d at 94.
[8] *Scott v. Gallacher*, 939 N.E.2d 803 (Mass. App. Ct. 2011).
[9] *Scott*, 939 N.E.2d 803.
[10] *Scott*, 939 N.E.2d 803.
[11] *Aetna Cas. & Sur. Co. v. Sullivan*, 597 N.E.2d 62, 64 (Mass. App. Ct. 1992).
[12] *Aetna Casualty & Surety. Co.*, 597 NE.2d at 64.

[13] *Aetna Casualty & Surety. Co.*, 597 NE.2d at 64.
[14] *Aetna Casualty & Surety. Co.*, 597 NE.2d at 65, *citing* Conway v. Country Cas. Ins. Co., 442 N.E.2d 245 (Ill. 1982).
[15] *Christleib v. Luten*, 633 S.W.2d 139 (Mo. Ct. App. 1982); Countryman v. Semour R-II School Dist., 823 S.W.2d 515 (Mo. Ct. App. 1992).
[16] *Underwriters for Lloyds of London v. Jones,* 261 S.W.2d 686 (Ky. 1953).
[17] *Farinas v. Fla. Farm Bureau Gen. Ins. Co.*, 850 So. 2d 555, 560–61 (Fla. Dist. Ct. App. 2003).
[18] *Farinas*, 850 So. 2d at 560–61, *citing* Fla. Stat. § 624.155; *see also Gen. Sec. Nat'l Ins. Co. v. Marsh*, 303 F. Supp. 2d 1321 (M.D. Fla. 2004).
[19] *See Farinas*, 850 So. 2d 555.
[20] Fed. R. Civ. Pro. 22(a)(1).
[21] *See* 28 U.S.C. § 1335. ◆
[22] *Boris v. Flaherty,* 672 N.Y.S.2d 177, 180 (N.Y. Sup. Ct. 1998).
[23] *Boris*, 672 N.Y.S.2d 177 at 181.
[24] *Allstate Ins. Co. v. Russell,* 788 N.Y.S.2d 401, 402 (N.Y. Sup. Ct. 2004).
[25] Club Exch. Corp. v. Searing, 567 P.2d 1353, 1356 (Kan. 1977).
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[29] *McReynolds*, 235 P.3d at 284.
[30] *McReynolds*, 235 P.3d at 284.
[31] *Jenkins v. Ins. Co. of N. Am.*, 272 Cal. Rptr. 7, 12 (Cal. Ct. App. 1990).
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[34] *American Standard Insurance Co.*, 775 N.E.2d at 262.
[35] *American Standard Insurance Co.*, 775 N.E.2d at 261.
[36] *Zurich Ins. Co. v. Raymark Indus. Inc.*, 514 N.E.2d 150, 165 (Ill. 1987).
[37] *Liberty Mut. Ins. Co. v. Lumbermens Mut. Cas. Co*., 525 F. Supp. 2d 993, 996 (N.D. Ill. 2007), *citing Zurich*, 514 N.E.2d at 163 .
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[40] *Strauss*, 31 Cal. Rptr. 2d at 813.
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[42] *Lehto v. Allstate Ins. Co.*, 36 Cal. Rptr. 2d 814, 822 (Cal. Ct. App. 1994).
[43] *Lehto*, 36 Cal. Rptr. 2d at 822.
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[45] *Smoral*, 322 N.Y.S.2d at 14 .
[46] *Smoral*, 322 N.Y.S.2d at 14.
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[48] *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929).
[49] *Pride Transportation*, 804 F. Supp. 2d at 524.
[50] *Pride Transportation*, 804 F. Supp. 2d at 524.
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[52] *Pride Transportation*, 804 F. Supp. 2d at 532.
[53] *Pride Transportation*, 804 F. Supp. 2d at 530.
[54] *Pride Transportation*, 804 F. Supp. 2d at 530.
[55] *See, e.g.*, *Millers Mut. Ins. Assoc. of Ill. v. Shell Oil Co.*, 959 S.W.2d 864 (Mo. Ct. App. 1997) (insurer relying on unambiguous policy language may terminate its duty to defend additional insured when policy limits are exhausted in good faith settlement on behalf of named insured); *Underwriters Guarantee Ins. Co. v. Nationwide Mut. Fire Ins.* Co., 578 So. 2d 34 (Fla. Dist. Ct. App. 1991) (insurer not obligated by its policy to continue to defend the additional insured after payment of policy limits in settlement for its named insured).
[56] *Anglo-American Ins. Co. v. Molin*, 670 A.2d 194, 199 (Pa. Commw. Ct. 1995).
[57] *Elliott Co. v. Liberty Mut. Ins. Co.*, 434 F. Supp. 2d 483, 499 (N.D. Ohio 2006).
[58] *Elliott Co.*, 434 F. Supp. 2d at 499.
[59] *Millers Mut. Ins. Ass'n of Ill. v. Shell Oil Co.*, 959 S.W.2d 864, 870 (Mo. Ct. App. 1997).
[60] *Contreras v. U.S. Sec. Ins. Co.*, 927 So. 2d 16 (Fla. Dist. Ct. App. 2006).
[61] *Contreras*, 927 So. 2d at 18–19.
[62] *Contreras*, 927 So. 2d at 21–22.
[63] *In re GunnAllen Fin., Inc.*, 443 B.R. 908, 917 (M.D. Fla. 2011).
[64] *In re GunnAllen Financial*, 443 B.R. at 917.

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