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Designing and Drafting Insurance Settlements and Releases

Covered and Non-Covered Claims, Multiple Defendants, Overbroad Language

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Today's faculty features:

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Paul R. Koepff and Jay M. Levin

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Provisions To Include In Settling Underlying Actions To Protect The Insurers

Situations Where the Insurer Will Want Protection in the Settlement of Underlying Action

- The insurer is responsible for negotiating the settlement.
- The insurer contributes to the settlement amount.
- The insurer is one of several insurers paying the settlement amount.
- The insurer contributes to the settlement amount on a without prejudice basis.
- The settlement does not resolve all, but only some, of the underlying actions.
- There may be other defendants who are insured by the same insurer of the settling defendant.
- Thus, there is a need to have provisions protecting the insurer.

The Importance of Defining the "Releasors"

- Have a broad definition of the Releasors to protect both the defendant-insured and the insurers.
- The Releasors should be defined to include all actual plaintiffs, in their individual capacity, in any other relevant capacity (for example, as a guardian of a minor), other family members, administrators, successors and assigns, are a few examples.
- Is the release from the plaintiff-claimant for all claims or just certain claims?

The Importance of Defining the "Releasees"

- Plaintiffs and policyholders should be wary of definitions of Releasees that are too broad.
  - Including too many related entities
  - This is particularly important with LLPs and LLCs
- Include not just the specifically named defendant, but its respective agents, parents, subsidiaries, affiliates, owners, officers, directors, shareholders, employees, attorneys, predecessors, successors, insurers and assigns.
- Problems arising when there are non-settling co-defendants and how to handle.

The Scope of the Release Should Be As Broad As Possible

- Plaintiffs and policyholders want to limit the scope of the release.
- Insurer of the defendant-insured should get the same broad release.
- Releases, acquits and discharges [defendant and defendant's insurers] from any and all claims, demands, rights, controversies, damages, liens, expenses, attorneys' fees, costs, actions, and causes of action, whether known or unknown, foreseen or unforeseen, accrued or unaccrued, which the plaintiff has now or may have in the future against the defendant which is included in the Complaint or which could have been included in the complaint.
- Arising out of the loss at [location] on [date].

Protecting What Amount The Insurer Pays

- If one or more insurers contribute to the settlement amount, the settlement agreement between the plaintiff and the defendant should protect them against paying anything more.
- Such protection can be accomplished with a provision limiting the insurer's contribution and providing no obligation to pay some other insurer's share or to pay the entire settlement.
- The settlement agreement should specify how much each insurer is contributing to the settlement.
- If the insured-defendant insured is to contribute, that likewise should be set forth in a specific provision.
- Will released party be liable if insurer)s) fail to pay?
- Alternatively, have a separate side agreement among the insured and its insurers with the same provisions.
- Preserving claims between insured and insurer.

Specificity With Respect To Payment Terms

- To protect the insurer, the settlement agreement with respect to the underlying action should specify: who, when and in what manner must pay the amount it agreed to the settlement.
  - The insured?
  - Each insurer?
  - Payment by wire transfer, check or some other means.
  - Who is the payee?
- Other specifics should be included, such as necessary tax forms, including a W-9.
- Tying receipt of the settlement amount to the effective date of other provisions of the settlement.
- Providing for the nature of the payments to the plaintiff – payment of compensatory damages and/or punitive damages

Including the Insurer(s) in the Release Given By the Plaintiff to the Defendant-Insured

- Release by the plaintiff to the defendant should include a release to the defendant's insurers.
- The objective is to preclude the plaintiff from later bringing any kind of direct claim against the insurer.
  - The release should be co-extensive to the release given to the insured.
- Example:

  Plaintiff agrees to release, acquit and discharge defendant and defendant's insurers [add specific names] and their respective agents, parents, subsidiaries, affiliates, officers, directors, shareholders, employees, attorneys, predecessors, successors, and assigns, from any and all claims . . . Whether known or unknown, foreseen or unforeseen, accrued or unaccrued, which the plaintiff has now or may have in the future against the Released Parties in any way related to the facts giving rise to this Lawsuit.

Must the Defendant-Insured Give a Reciprocal Release to the Plaintiff-Claimant?

- Generally, the defendant-insured is not obligated to give a reciprocal release to the plaintiff-claimant.
- However, if there are actual or potential claims that defendant has, a release may be necessary.

There Is Generally No Need Or Requirement For The Insurer To Give A Release To The Plaintiff-Claimant or the Defendant-Insured

- The plaintiff-claimant is not entitled to a release from the insurer of the defendant.
- In a settlement of the underlying action, the defendant-insured is not entitled to a release of coverage defenses asserted by its insurer(s).
- Alternatively, the defendant-insured and its insurers may enter into their own separate settlement agreement with respect to the insurer contributing to the settlement of the underlying action.

Protecting The Insurer's Claim For Subrogation

- An insurer may have a right of subrogation or an actual subrogation claim if there is some other party responsible, in whole or in part, for the incident other than the insured-defendant.
    - In this instance, if the insurer makes a payment to its insured, the insurer has a subrogation claim against that other party.
- A claim for subrogation does not require a provision in the insurance policy but can arise as a matter of law.
- The insurer "stands in the shoes" of its insured with a subrogation claim.
- In any settlement of the underlying action, the defendant insured must be careful not to release any claim against a co-defendant or other party potentially liable.
- In any settlement agreement, therefore, the defendant-insured should include a provision that the settlement and release was not for any other defendant or potentially responsible party and that all claims against such other party are not being released but being reserved.
- Joint tortfeasor releases and their effect on subrogation

Settlement Agreements Between The Insurer And The Policyholder Only

The Need For A Settlement Agreement and/or a Release When The Insurer Makes A Payment To The Policyholder

- When an insurer pays a disputed coverage claim, it is a good practice to have a settlement agreement or a release.
  - Otherwise, the insured may use such a payment as an admission of coverage with respect to other claims.
  - Otherwise, the insurer may do the same thing.
  - Use of a settlement agreement can provide protection.
- If a coverage action is being settled, a settlement agreement is especially needed.
  - Such settlement agreement protects the insured.
  - It also protects the insurer.

Basis Upon Which the Insurer Is Entitled to a Release From the Insured

- If the insurer makes a payment under the policy, in return, it is entitled to a release or some like assurances that the insured will not thereafter assert a claim or bring a lawsuit that the insurer breached the policy in making such payment.
- This is not necessarily the case in standard first-party claims – policyholders should be careful of scope of any settlement agreement.
- Just like a defendant is entitled to a release from the plaintiff when the defendant settles the claim and makes the payment, in similar fashion, the insurer is entitled to get a release or like assurances that the insured will not contend otherwise.
- Both the insurer and the insured should have an agreed upon "record" that when the insurer makes a payment on a claim or settles a coverage action, the amount of the payment and the release to the insurer are satisfactory and agreed upon.

Need to Define Appropriately the Insured and the Insurer To A Settlement Agreement and Release

- One should identify/define the Insured(s) which is entering into a settlement agreement and/or giving a release to the insurer.
  - The issue of subsidiaries or affiliates which are no longer part of the insured.
  - The issue of additional insureds which are not affiliated with the insured.
  - The issue of minority-owned affiliates where questions of authority may arise.
- The need to define the Insurer(s) entering into the settlement agreement or getting a release from the insured or giving a release to the insured.
  - Only include the insurer which issued the policy or has responsibility for the policy.
  - Query: What about adjusters or claims handling companies?

Settlement Amount and Method of Payment

- Any settlement agreement between the insured and the insurer should have specifics with respect to any payment(s) to be made by the insurer.
  - Manner of payment – check, wire transfer or other means
  - Who is the payee
  - Date when payment to be made
  - Interest if late payment
- Tying the payment of the settlement amount to the effective date of the settlement agreement.

Scope of Release from Insured(s) to Insurer(s)

- To protect the insurer, the definition of the Insured as the releasing party should be complete and all-encompassing.
- Likewise, the definition of the Insurer-Releasee should be appropriate.
- The problem of an overly broad release.
  - In favor of the insurer
  - In favor of the insured

Kinds of Releases Between Insured and Insurer

- A “Claim” Release
  - The release is limited to the specific claim/lawsuit brought against the defendant-insured
- The release will not include other claims/lawsuits
- An “Occurrence” or “Event” Release
  - The release will cover all claims and lawsuits arising out of a particular occurrence or event
  - The insurer will have no responsibility for any pending or future claims or lawsuits arising out of the occurrence/event
- A “Policy Buy-Back” Release
  - The release will preclude any further claims for coverage for any and all pending, past, and future claims for coverage of any kind
  - Can the insured and insurer deprive rights of claimants/plaintiff to insurance of the defendant-insured?

Self-Insured Retentions and Deductibles

- Settlement agreement may need to address self-insured retentions and deductibles.
  - For example, if the amount being paid by the insurer to be net of a SIR or deductible.
  - Is the issue of SIRs and deductibles to be addressed at a later date with the insurer's payment made on a non-waiver basis?
- Settling for excess insurers.
  - If the primary insurer is paying limits or remaining limits.
  - If the primary insurer is not paying limits or remaining limits.

Non-Assignment of Interest

- Include a provision that the insured has not assigned any rights to coverage to anyone else.
- Protects the insurer from some other party having received an assignment from the insured, seeking coverage from that insurer, which was not otherwise released by the insured.
- In property claims remember that the public adjuster has an assignment.
- Example of language:

  The Insured expressly warrants and represents that any claim, demand, cause of action or obligation which is the subject of this Settlement Agreement, has not been assigned to any person or entity.

Additional Insureds

- Some claims and lawsuits involve alleged coverage for an additional insured, or the potential for coverage for an additional insured.
  - To be safe, any release should include any claim for coverage by an additional insured.
- The problem of binding any additional insured to any settlement agreement or release.
  - The additional insured is an unrelated company
  - The additional insured is no longer part of the insured.
  - The additional insured is a minority-owned subsidiary of the insured.
  - There may be a conflict of interest between the insured and the additional insured.
- How to address the authority of the insured to bind additional insured.

Impairment and Exhaustion

- When an insurer makes a payment impairing or exhausting limits, it may be advisable to document the extent of any impairment or exhaustion of applicable limits.
- Such a provision avoids any later dispute about whether the policy limits have been exhausted or how much in limits remain.
- However, the insurer and the insured can document such impairment in ways other than in a settlement agreement between them.

Extinguishing Any Possible Liability But Also Getting Indemnity/ Hold Harmless From the Insured

- In an abundance of caution, an insurer may ask the insured to agree that by making the payment under the policy, that means all liability under the policy has been extinguished for that claim and that the insured waives any possible claims against the insurer.
- Example of such language:

  "This Agreement and Release is intended to extinguish any and all liabilities and/or responsibilities of the Insurer to any of the Insureds. The Insureds expressly understand and agree that the Insurers are entitled to protection from contribution claims. The Insureds agree to indemnify and hold the Insurers harmless in the event of any such contribution claim."
- Potential issues of such language:
  - Issue of unlimited indemnity/subject to a cap
  - Issue of who should defend/settle a contribution claim by some other insurer

Confirming All Applicable Limits of Liability Have Been Exhausted

- If the insurer is exhausting its applicable limits to resolve the underlying lawsuit(s)/claim(s), it is advisable to make that clear in the settlement agreement.
- This is additional and appropriate protection for the insurer.
- Basically, the provision confirms that by making the agreed upon payment, the insurer and the insured, including additional insureds, agree that all applicable limits of liability have been exhausted.
- Where the same insurance policy provides coverage for multiple defendants, may the insurer exhaust limits for one insured and leave other insureds without coverage?

Non-Admission

- One of the most important provisions in a settlement between the insured and the insurer is that there is no admission, one way or the other, with respect to coverage or lack of coverage.
- The insurer wants such protection from the insured later contending the insurer admitted coverage.
- The insured wants such protection protecting it from the insurer arguing the insured conceded no coverage.
- The insured and the insurer want this provision to apply to all negotiations and discussions that led to the settlement.
- Example of such language:

  "Neither the negotiation or execution of this Settlement Agreement by the parties or their attorneys, nor compliance with its terms, shall constitute an admission of any kind, including without limitation as to whether or not there is any potential or actual coverage under the Insurance Policy. The Insured and the Insurer also agree that this Settlement Agreement does not constitution any adjudication of the merits of the coverage dispute, nor is it based on the merits of the coverage dispute."

Requiring Dismissal With Prejudice and Without Costs

- If there is a coverage action that is being settled or resolved, there should be a provision that it is dismissed with prejudice and without costs.
- Example:

  "This Agreement and Release is conditioned upon the dismissal with prejudice of Plaintiffs' claims against Defendants in the Litigation, and with each party to bear their own fees and costs."

Integration Clause

- Where there has been extended discussions and negotiations that led to the settlement agreement and release, it may be advisable to have an “integration” clause so that the only relevant document is the signed settlement agreement or release.
- Example of such language:

  “This Agreement and Release sets forth the entire agreement between the Parties, and fully supersedes any and all prior agreements or understandings between the Parties pertaining to the subject matter hereof.”

Confidentiality

- Almost always, settlement discussions, drafts of settlement agreements/releases and the final settlement agreement/release are strictly confidential.
- The settlement agreement/release should have a confidentiality provision such as:

  "The terms of this Settlement and Release and all information relating to the negotiation of this Settlement and Release shall remain confidential and shall not be disclosed by any of the Parties."

- However, there will have to be exceptions to this broad confidentiality provision, including to outside auditors and reinsurers.
- A provision is needed with respect to breach of confidentiality.

Non-Disparagement

- If there is a contentious coverage dispute, the insurer may want a non-disparagement provision but this a rare exception.
- Example of such language:

  "Insured agrees that they will not directly or indirectly, participate in, establish, or create individually or in concert with others, any communication (verbal, electronic or written) that makes, represents, or advertises, by way of fact or opinion, any slanderous, libelous, injurious, disparaging or adverse statements about the Insurer."

- Are there any regulatory or like issues with respect to such a provision?

The Settlement Agreement Is Binding

- The parties to a settlement agreement may want to make clear it is binding:

  "The terms and conditions of this Agreement and Release shall be binding upon and shall inure to the benefit of the Parties hereto and their predecessors, successors, and assigns."

- Also, the parties may want a provision confirming that the signatories have authority to sign the settlement agreement, especially if there is any question with respect to whether the release is binding upon former subsidiaries or affiliates which may also seek coverage for their lawsuits/claims under the same policy.

Applicable Law

- Parties can often disagree over what law governs a settlement agreement or a release.
- If possible, therefore, there should be a provision about what law governs the settlement agreement/release.
- Example of such provision:

  "This Agreement and Release shall be governed by and interpreted in accordance with the laws of the State of [state], without regard to or application of any conflicts-of-law principles."

How Can Policyholders Preserve Rights to Seek Supplemental Benefits

- To the extent a policyholder wants to preserve rights for supplemental benefits, it should insist on carve-outs or exceptions to the release which it is giving to its insurer.
  - The carve-out or exception can be included in defining the scope of the release being given.
  - Alternatively, the carve-out or exception can be achieved through a provision that "notwithstanding anything to the contrary to this agreement, the Insured and Insurer agree the Insured is entitled to the following additional or supplemental coverage and/or benefits to the Policy . . . ."
- Make sure this provision complies fully with any provision in the policy with respect to amending or modifying policy terms.

What is the Best Way to Protect Rights of Third Parties

What is the Best Way to Protect Rights of Third Parties

- Have them become parties to the agreement if possible.
- Limit the scope of the settlement agreement.
- Specifically identify parties who are not bound by the agreement.

Thank You & Any Questions

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