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Insured/Third-Party Settlements and Consent Judgments After Insurer Denies Coverage

Navigating Collusive Settlements Between Insureds and Third-Party Claimants and Their Impact on Coverage

WEDNESDAY, MARCH 15, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Plaintiff-Insured Settlements and Excess Consent Judgments After Insurer Denies Coverage

Strafford Publications Webinar

March 15, 2017

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- **Christopher R. Dunsing**
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Collecting Excess Judgments Against Insurers

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Prejudgment Agreements

- Assignment
  - Assignment of insured's rights to injured party
  - In some instances, insured may agree to prosecute a lawsuit against the insurer and to assign proceeds
  - In other cases, parties may agree that the injured party will prosecute the lawsuit in the insured's name pursuant to an assignment of rights
- Covenant not to execute
  - Promise by injured party not to execute against the insured's personal assets
- Judgment
  - Judgment establishing the insured's liability and the injured party's damages
    - Stipulated or consent judgment
    - Judgment entered by a court following a judicial or quasi-judicial proceeding (*e.g.*, arbitration)
    - Actual judgment by a judge following an adversarial trial or the insured's defaults

Reasonableness of the Judgment

- The manner in which the judgment creating liability is obtained may be a significant factor in determining whether it should be binding on the insurer
- Question of reasonableness is one of fact for the jury
- Party asserting claims against insurer bears the burden of demonstrating reasonableness
  - Burden may shift where arbiter sets damages amount. *DC-10 Entertainment, LLC v. Manor Insurance Agency, Inc.*, 308 P.3d 1223 (Colo. App. 2013).
- *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116 (Colo. 2010)
  - "[T]he actual amount of damages for which an insurer will be liable will depend on whether the stipulated judgment is reasonable."
  - "If the jury finds that the full amount of the stipulated judgment is unreasonable, then it may choose to instead award whatever damages, up to the amount of the stipulation, it does find reasonable."
  - "[T]he particular amount of the stipulated judgment merely serves as evidence of the value of [the third-party's] claims as bargained for and does not represent the presumptive value of the actual damages in the bad faith case."
- *Metcalf v. Hartford Acc. & Indem. Co.*, 126 N.W.2d 471 (Neb. 1964)
  - "There was evidence in the record that the judgment was reasonable and within the range of a possible jury verdict. The trial court's judgment was supported by evidence and, it not being clearly wrong, no basis exists for any interference by this court with the judgment entered."

Compare

- A stipulated pre-trial judgment is not binding where the third party fails to successfully prosecute its claims against the insurer
  - *Old Republic Ins. Co. v. Ross*, 180 P.3d 427 (Colo. 2008)
    - Insured and third party entered into stipulated pre-trial judgment and immediately proceeded to garnish the insured's policy.
    - Cannot "enforce a pretrial stipulated judgment against an insurer who was not a party to the underlying settlement agreement unless the insurer acted in bad faith, denied coverage, or refused to defend the claim on behalf of the insured."
    - "Under the rule we adopt today, the stipulated judgment would have been enforceable pursuant to a valid pretrial *Bashor* agreement if the defendant-insureds had proceeded successfully with any of their claims against [the insurer], or if the settlement agreement had provided for the assignment of claims against Old Republic to the Rosses and the Rosses had successfully litigated those claims."
  - *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995)
    - Pretrial settlement between third party and an insured "may not actually represent an arm's length determination of the worth of the plaintiff's claim."
    - *See also Serna v. Kingston Enters.*, 72 P.3d 376 (Colo. App. 2003)

Affirmative Defenses: Fraud or Collusion

- The insurer may raise fraud or collusion as an affirmative defense to a third-party's attempts to collect on an excess judgment in a bad faith action
  - *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116 (Colo. 2010)
    - "[T]he mere specter of fraud or collusion need not render all stipulated judgments unenforceable against an insurer, because the existence of fraud or collusion can be determined at trial like any other issue of fact . . . Thus, if [the insurance company] chooses to do so, it may assert, as an affirmative defense, that [the insured's and third-party's] settlement was the product of fraud or collusion."
- When the defenses may be raised
  - "Proof of [fraud] or collusion in this context requires proof of something more than an agreement which results in the termination of any right of contribution. 'The notion of collusion advanced by the Uniform Law Commissioners implies something more than mere confederacy. Any negotiated settlement involves cooperation, but not necessarily collusion. It becomes collusive in this context when it is aimed to injure the interests of an absent tortfeasor.'" *Stubbs v. Copper Mountain, Inc.*, 862 P.2d 978 (Colo. App. 1993) (quoting *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972)).
- The party challenging the good faith of a settlement otherwise barring a claim for contribution has the burden of establishing that the settlement was collusive.

Affirmative Defenses: Fraud or Collusion (Cont'd)

- Some courts have developed procedures to determine whether a prejudgment agreement was obtained by fraud or collusion
  - *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969)
    - If insurer denies its defense obligations, and is subsequently found to have done so wrongfully, it will not be permitted to question the reasonableness of the judgment amount, whether it was stipulated to or reached by any other mechanism
  - *United Servs. Auto Ass'n v. Morris*, 741 P.2d 246 (Ariz. 1987)
    - If insurer refuses to settle a case while defending under a reservation of rights, and it is later determined that coverage exists, the insurer will be bound by a judgment when:
      - The insurer is fairly notified by the insured of its intent to enter into a prejudgment agreement;
      - The agreement is created fairly; and
      - The agreement is not the result of fraud or collusion
    - Insured still bears burden of establishing that the settlement was reasonable

State-by-State Variations in Approach to Consent Settlements

- Common law

  e.g. *Miller-Shugart* (MN), *Coblentz* (FL), *Gandy* (Texas)

- Statutory

  e.g. Missouri Collaborative Settlement Statute § 537.065

- Direct action rights against insurer

  e.g. Louisiana

Relevant Policy Terms and Obligations

- Insurer Right and Duty to Defend
- The “Duty to Cooperate” Condition
- The “Legally Obligated to Pay” Condition
- The “Voluntary Payment” Condition
- The “Contractual Liability Exclusion
- Insurer duty to settle claims in good faith
- “No Assignment” clause
- “No Action” clause

Miller-Shugart

While the ... insureds have a duty to cooperate with the insurer, they also have a right to protect themselves against plaintiff's claim.... If ... the insureds are offered a settlement that effectively relieves them of any personal liability, at a time when their insurance coverage is in doubt, surely it cannot be said that it is not in their best interest to accept the offer.... [W]e hold, therefore, that the insureds did not breach their duty to cooperate with the insurer, which was then contesting coverage, by settling directly with the plaintiff.

Miller v. Shugart, 316 N.W.2d 729, 733-34 (Minn. 1982)

Miller-Shugart

Insured's right to pursue a *Miller-Shugart* is dependent on the insurer's coverage position:

- When an insurer disputes the existence of ***any insurance coverage*** for claims brought against the policyholder, the policyholder is entitled to protect its own self-interests in the underlying case by entering into a settlement with the claimant without the insurer's consent.
- It is not necessary for the insurer to deny the duty to defend; the only prerequisite is that the insurer has reserved the right to challenge or deny ***all indemnity coverage***.
- A dispute concerning the amount of coverage does not generally entitle an insured to enter a *Miller-Shugart* settlement.
- As long as an insurer acknowledges the existence of some coverage for some of the claims in the underlying case, the insured is not entitled to enter into a *Miller-Shugart*.

Miller-Shugart

	Insurer's Position			
	Defends Insured, no ROR	Defends under ROR: some coverage for some claims	Defends, but ROR reserves right to contest existence of any coverage	Refuses to Defend or Pay Any of Claim
M-S Settlement permitted?	No	No	Yes	Yes
Notice required?	N/A	N/A	Yes	No

Cases following *Miller-Shugart*

- Arizona
  - *United Services Auto Ass'n v. Morris*, 741 P.2d 246 (Ariz. 1987)
- Delaware
  - *Sun-Times Media Grp., Inc. v. Royal & Sunalliance Ins. Co. of Canada*, No. CIV.A. 06C-11108RRC, 2007 WL 1811265, at *12 (Del. Super. June 20, 2007)
- Iowa
  - *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 535 (Iowa 1995)
- Maine
  - *Patrons Oxford Ins. Co. v. Harris*, 2006 ME 72, ¶ 16, 905 A.2d 819, 826
- Missouri
  - *Gulf Ins. Co. v. Noble Broad*., 936 S.W.2d 810, 816 (Mo. 1997)
- North Dakota
  - *Wangler v. Lerol*, 2003 ND 164, 670 N.W.2d 830

Compare

State Farm Fire and Casualty Corp. v. Gandy, 925 S.W.2d 696 (Tex. 1996)

- Supreme Court of Texas held that under specific circumstances, an insured's assignment of his claims against his insurer to a tort claimant is invalid.
- Concerned about the difficulty of evaluating a tort claimant's claim against an insured when a settlement is reached before the claim has actually been adjudicated, the Texas court found that an insured's assignment of his rights against his insurer to a claimant is simply invalid if: (1) the assignment was made prior to an adjudication of the claimant's lawsuit against the insured in a fully adversarial trial; (2) the insurer has tendered a defense; and (3) either (a) the insurer has accepted coverage or (b) the insurer has made a good faith effort to adjudicate coverage issues prior to adjudication of the claimant's lawsuit. *Id.* at 714.
- The court also found that a judgment for the claimant against the insured, rendered without a fully adversarial trial, was not binding on the insurer or admissible as evidence of damages in an action against the insurer by the claimant as the insured's assignee. *Id.*

Different approaches to Enforcement

- Garnishment against insurers
- Judicial determination of reasonableness
- Res-judicata/issue preclusion
- Declaratory judgment/real party-in-interest
- Direct action rights against insurer
- Claims against state guarantee funds

Recent Cases

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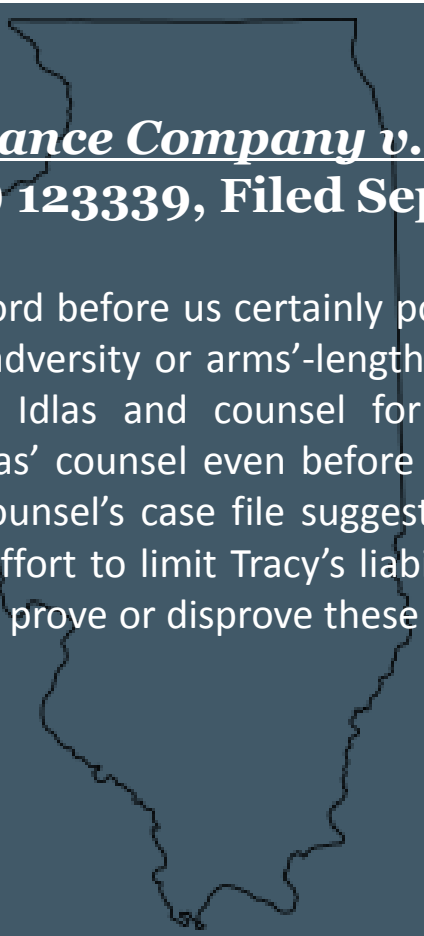
Recent Illinois Cases

- ***Central Mutual Insurance Company v. Tracy's Treasures, Inc.*, 2014 IL App (1st) 123339, Filed September 30, 2014**
  - "When an insurer cedes control of the defense of an action against its insured, the insured may enter into a reasonable settlement agreement without the insurer's consent. ... Thus, the fact that [the insured] voluntarily entered into the settlement without [the insurer's] permission is not a bar to [the insurer's] obligation to pay the settlement." *Central Mutual Insurance Co.*, ¶¶ 44, 46.
  - "Even where an insurer has breached its duty to defend, it may nevertheless be heard on the issue of the reasonableness of the decision to settle and the amount of the settlement before being required to pay it." *Central Mutual Insurance Co.*, ¶ 50, citing *Guillen v. Potomac Insurance Co.*, 203 Ill.2d 141 (2003).

Recent Illinois Cases

- ***Central Mutual Insurance Company v. Tracy's Treasures, Inc.*, 2014 IL App (1st) 123339, Filed September 30, 2014**
  - "The risk of collusion and fraud can be lessened, if not avoided altogether, by placing a requirement upon the plaintiff to prove that the settlement it reached with the insured was reasonable before that settlement can have any binding effect upon the insurer." *Central Mutual Insurance Co.*, ¶ 55, citing *Guillen v. Potomac Insurance Co.*, 203 Ill.2d 141 (2003).
  - "[A] settlement becomes collusive when the purpose is to injure the interests of an absent or nonparticipating party, such as an insurer or nonsettling defendant. Among the indicators of bad faith and collusion are unreasonableness, misrepresentation, concealment, secretiveness, lack of serious negotiations on damages, attempts to affect the insurance coverage, profit to the insured, and attempts to harm the interest of the insurer. They have in common unfairness to the insurer, which is probably the bottom line in cases in which collusion is found." *Central Mutual Insurance Co.*, ¶¶ 80 - 81.

Recent Illinois Cases



- ***Central Mutual Insurance Company v. Tracy's Treasures, Inc.*, 2014 IL App (1st) 123339, Filed September 30, 2014**
  - "Certain facts on the record before us certainly point to a finding that there was not even the illusion of adversity or arms'-length negotiations between counsel for [the class plaintiff,] Idlas and counsel for [the insured,] Tracy's. Ellis's communications with Idlas' counsel even before his substitution and before he had access to defense counsel's case file suggest the lack of a true adversarial relationship or any real effort to limit Tracy's liability or the settlement amount. More evidence will either prove or disprove these impressions." Id.

Recent Illinois Cases

- ***C.E. Design, Ltd. v. King Supply Co., 791 F.3d 722 (7th Cir. 2015)(Decided June 29, 2015)***
  - Seventh Circuit Court of Appeals case stressing the importance of early intervention or defense under a reservation of rights.
  - Three separate insurers denied coverage early in a Telephone Consumer Protection Act "blast-fax" case based on policy exclusions. The insurers then filed a successful declaratory judgment action in Illinois state court, which was won but was on appeal in state court at the time of this Seventh Circuit decision.
  - In the interim, two years after the original denial of coverage, the Plaintiff class and the insured defendant, King Supply, agreed to a consent judgment for $20 million, only 1% of which could individually be collected upon King Supply.
  - Prior to approval of the settlement agreement by the district court, the insurers moved to intervene and seek a stay on the approval of the consent judgment.

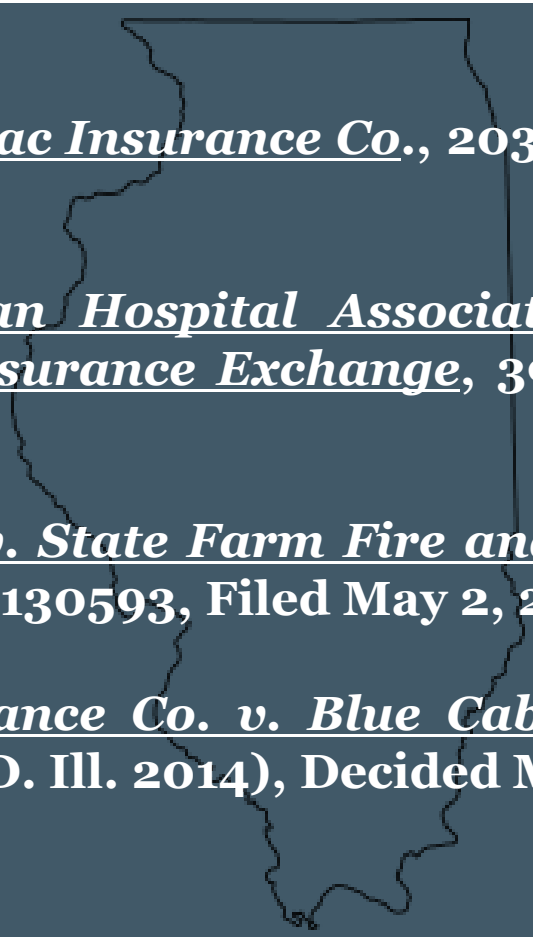
Recent Illinois Cases

- ***C.E. Design, Ltd. v. King Supply Co., 791 F.3d 722 (7th Cir. 2015)(Decided June 29, 2015)***
  - The U.S. District Court for the Northern District of Illinois denied the motion to intervene and stay the consent judgment, citing that "the insurers should have moved to intervene in 2009, when they had disclaimed coverage of the claims that King Supply, their insured, had violated the Telephone Consumer Protection Act."
  - "The insurers in this case were right to worry that class counsel in the Telephone Consumer Protection Act class action suit and the defendant in that suit, King Supply, might collude to mulct the insurance company for an excessive recovery, favorable to the class and to class counsel and harmless to the class action defendant. But they should have begun worrying when the suit was filed rather than almost three years later. Almost all class actions are settled, and as we've noted in recent cases a class action settlement may be the product of tacit collusion between class counsel and defendant."

Recent Illinois Cases

- ***C.E. Design, Ltd. v. King Supply Co., 791 F.3d 722 (7th Cir. 2015)(Decided June 29, 2015)***
  - "A prospective intervenor must move to intervene as soon as it 'knows or has reason to know that [its] interests might be adversely affected by the outcome of the litigation.'"
  - "Rather than intervene belatedly, the insurers might have been expected to exercise from the outset of the class action their right under the insurance policies to control and conduct the insured's (King Supply's) defense. Then they could have refused to agree to a settlement that cost them $20 million (minus $200,000). At argument their lawyer said they'd decided not to take over the defense because that would have required them to incur legal fees. Yet expending a few hundred thousand dollars on legal fees to defend against a possible loss of $20 million would have been a reasonable investment."

Other Pertinent Illinois Cases



- *Guillen v. Potomac Insurance Co.*, 203 Ill.2d 141, 785 N.E.2d 1 (2003)
- *Swedish-American Hospital Association v. Illinois State Medical Inter-Insurance Exchange*, 395 Ill.App.3d 80 (2nd Dist. 2009)
- *G.M. Sign, Inc. v. State Farm Fire and Casualty Company*, 2014 IL App (2d) 130593, Filed May 2, 2014
- *Cincinatti Insurance Co. v. Blue Cab Co.*, 2014 U.S. Dist. LEXIS 64107 (N.D. Ill. 2014), Decided May 9, 2014

Recent Indiana Cases

- ***Carpenter v. Lovell's Lounge & Grill, LLC, 59 N.E.3d 330 (Ind. Ct. App. 2016)(Decided September 8, 2016)***
  - Insured, "Lovell's Lounge" tendered civil assault and battery, premises liability and Dram Shop claims by an injured combatant to its insurer.
  - Insurer denied coverage based on the policy's assault and battery exclusions.
  - The insured and the plaintiff entered into a consent judgment for $1,125,000.00 and entered into a post-judgment agreement in which plaintiff agreed not to execute said amount against Lovell's Lounge as well as pay the owner of the insured defendant the first $7,000.00 collected from the insurer
  - In a declaratory judgment action, the insurer filed a motion for summary judgment, arguing it had no duty to paid the consent judgment because it was "procured by fraud, collusion or bad faith."

Recent Indiana Cases

- ***Carpenter v. Lovell's Lounge & Grill, LLC, 59 N.E.3d 330 (Ind. Ct. App. 2016)(Decided September 8, 2016)***
  - The trial court found that the insurer did not have a duty to pay the consent judgment because "[u]nder Indiana law, a consent judgment will not bind an insurer if the consent judgment was the product of bad faith or collusion."
  - The Indiana Court of Appeals addressed what constitutes bad faith or collusion in a consent judgment, and cited *Continential Cas. Co. v. Hempel*, 4 F.App'x 703 (10th Cir. 2011) and *Miller v. Shugart* in analyzing the collusion, bad faith and the reasonableness of the consent judgment. Id. at 341 – 342.
  - Court of Appeals found collusion and bad faith because the defendant clearly stipulated to findings of fact that were consistent with assault and battery, but framed in a way to evoke insurance coverage.

Other Pertinent Indiana Cases

- *Klepper v. ACE American Insurance Company*, 999 N.E.2d 86 (Ind. Ct. App. 2013)(Decided December 5, 2013)
- *American Family Mutual Ins. Co. v. C.M.A. Mortg., Inc.*, 682 F. Supp. 2d 879 (S.D. Ind. 2012)(Decided January 10, 2010)
- *Midwestern Indem. Co. v. Laikin*, 119 F. Supp. 2d 831, 842 (S.D. Ind. 2000)
- *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8 (Ind. Ct. App. 2006)
- *Frankenmuth Mut. Ins. Co. v. Williams*, 690 N.E.2d 675 (1997)

Recent Missouri Cases

- ***Missouri Collaborative Settlement Statute***

§ 537.065. Claimant and tort-feasor may contract to limit recovery to specified assets or insurance contract--effect

Any person having an unliquidated claim for damages against a tort-feasor, on account of bodily injuries or death, **may enter into a contract with such tort-feasor or any insurer in his behalf or both**, **whereby, in consideration of the payment of a specified amount, the person asserting the claim agrees that in the event of a judgment against the tort-feasor, neither he nor any person, firm or corporation claiming by or through him will levy execution**, by garnishment or as otherwise provided by law, **except against the specific assets listed in the contract and except against any insurer which insures the legal liability of the tort-feasor for such damage and which insurer is not excepted from execution, garnishment or other legal procedure by such contract**.

Recent Missouri Cases

- ***Cincinnati Ins. Co. v. Mo. Hwys. & Transp. Comm'n*, 2014 U.S. Dist. LEXIS 128394 (W.D. Mo. September 15, 2014)**
  - "After Cincinnati denied [the additional insured]'s tender for a defense, the plaintiffs in the [underlying] suit and [the additional insured] entered into an agreement pursuant to *Mo. Rev. Stat. § 537.065*." *Cincinatti Insurance Co.*, 2014 U.S. Dist. LEXIS 128394, 22.
  - "In particular, the [settlement] agreement stipulated that [the primary paving contractor insured] had begun performing construction on and was in control of the relevant portion of I-29 when the accident occurred. The agreement further stated that the plaintiffs and [the additional insured] believed that the insurance policy issued by Cincinnati provided coverage for the claims asserted against [the additional insured] and that Cincinnati had wrongfully refused to defend and indemnify [it]." *Cincinatti Insurance Co.*, 2014 U.S. Dist. LEXIS 128394, 22-23.

Recent Missouri Cases

- ***Cincinnati Ins. Co. v. Mo. Hwys. & Transp. Comm'n*, 2014 U.S. Dist. LEXIS 128394 (W.D. Mo. September 15, 2014)**

  - In the declaratory action before the U.S. District Court for the Western District of Missouri, Cincinnati Insurance Co. argued that facts ascertained in discovery in the underlying action indicated that there was no coverage. The Court refused to rely on this, holding "[t]his evidence has no bearing on the duty to defend, which is determined based on the pleadings and actual facts known or ascertainable at the time the action is commenced, not from what discovery or a trial of the case may ultimately show the true facts to be." *Cincinnati Insurance Co.*, 2014 U.S. Dist. LEXIS 128394, 38.

  - "Because Cincinnati refused to provide a defense, [the additional insured] was free to limit its potential liability by entering into the section 537.065 agreement with the [underlying] plaintiffs." Id at 46.

Recent Missouri Cases

- ***Cincinnati Ins. Co. v. Mo. Hwys. & Transp. Comm'n*, 2014 U.S. Dist. LEXIS 128394 (W.D. Mo. September 15, 2014)**
  - "Furthermore, because Cincinnatti's refusal was unjustified, Cincinnati cannot relitigate relevant findings made in the underlying state court lawsuit." Id.
  - "Cincinnati contends there was collusion in the underlying lawsuit. But Cincinnati has not shown that the [underlying] plaintiffs colluded with [the additional insured] much less that an independent state court judge participated in any collusion. Cincinnati points to [the additional insured's] failure to contest the [underlying] plaintiffs' evidence, but there is no requirement that [the additional insured] contest evidence presented in the state court action." Id.

Recent Missouri Cases

- ***Columbia Cas. Co. v. Hiar Holding, L.L.C.*, 411 S.W.3d 258 (Mo. banc 2013)(Decided August 13, 2013)**
  - Insured and the plaintiff class entered into a § 537.065 agreement on "blast-fax" claims brought under the Telephone Consumer Protection Act after the insurer denied defense and indemnification obligations.
  - "Applying *Schmitz v. Great Am. Assur. Co., 337 S.W.3d 700* (Mo. banc 2011), Columbia's wrongful failure to defend HIAR precludes its complaints that it is not liable to indemnify HIAR for the settlement amount." *Columbia Casualty Co.*, 411 S.W.3d 258, 273.
  - "As noted earlier, Columbia is too late in attempting to contest the reasonableness of the settlement. It wrongly refused to defend and thereby is not permitted to contest liability." Id.

Collected Case law

- California
  - *Hamilton v. Maryland Casualty CO.*, 41 P.3d 128 (Cal. 2002)
- Arizona
  - *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969)
  - *United Services Auto Ass'n v. Morris*, 751 P.2d 246 (Ariz. 1987)
- Texas
  - *State Farm Fire and Casualty Corp. v. Gandy*, 925 S.W.2d 696 (Tex. 1996)
  - *Wilcox v. American Home Assur. Co.*, 900 F. Supp. 850 (S.D. Tex. 1995)
- Montana
  - *State Farm Mut. Auto Ins. Co. v. Freyer*, 312 P.3d 403 (Mont. 2013)
- Wyoming
  - *Gainsco Ins. Co. v. Amoco Production Co.*, 53 P.3d 1051 (Wy. 2002)

Collected Case law

- Connecticut
  - *Black v. Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 681 A.2d 293 (1996)
- Florida
  - *Coblentz v. American Surety Co.*, 416 F.2d 1059 (5th Cir. 1969)
- Virginia
  - *Beckner v. Twin City Fire Ins. Co.*, 58 Va. Cir. 544 (2002)
  - *Liberty Mut. Ins. Co. v. Eades*, 248 Va. 285, 448 S.E.2d 631 (1994)
- New Jersey
  - *Griggs v. Bertram*, 88 N.J. 347, 443 A.2d 163 (1982)
- New York
  - *McDonough v. Dryden Mut. Ins. Co.*, 276 A.D.2d 817, 713 N.Y.S.2d 787 (2000)
  - *Home Depot U.S.A., Inc. v. National Fire & Marine Ins. Co.,* 55 AD3d 671, 673-74, 866 NYS2d 255, 258 (2d Dep't 2008)

Strategies for Insurers to Address Collaborative Settlement Agreements

- ***Preserving the Insurer's Rights to Challenge Coverage Under The Policy, Insured's Decision to Settle and the Reasonableness of a Settlement Amount By:***

  - Issuing a Reservation of Rights Letter to the Insured and Providing a Defense Under Reservation of Rights;
  - Denying Coverage and Filing A Declaratory Judgment Action; or
  - Issuing a Reservation of Rights, Defending the Insured and Filing an Immediate Declaratory Judgment Action.
  - **Check Your Jurisdiction's Case Law and Statutes to Fully Protect the Insurer**. Some Jurisdictions Bar an Insurer from Challenging the Facts Supporting the Reasonableness of a Insurer-Claimant Settlement if the Insurer Did Not Participate in the Defense of the Insured.

Strategies for Insurers to Address Collaborative Settlement Agreements

❑ Contractual and Policy Language Issues

- Whether the Claim is Covered Under the Policy;

  ✓ Does the defendant meet the definition of an "insured";
  ✓ Is the claim for an insured risk?

- Whether the Claim is Specifically Excluded Under the Policy; and

- Specific General Policy Conditions, Exclusions and Endorsements Applying to Collaborative Agreements or "Collusive Settlements", such as:

  ✓ The "Legally Obligated to Pay" Condition;
  ✓ The "Voluntary Payment" Condition;
  ✓ The "Duty to Cooperate" Condition; and
  ✓ The "Contractual Liability" Exclusion.

Strategies for Insurers to Address Collaborative Settlement Agreements

- ***Equitable and Non-Contractual Arguments***

  - Whether an insured-claimant settlement breaches the covenant of good faith and fair dealing essential to the policy?
  - Is the settlement against public policy?

- ***Statutory Concerns***

  - **Missouri Settlement Statute**
  - **Wisconsin Cooperation Clause Statute**

  § 632.34. Defense of noncooperation. If a policy of automobile liability insurance provides a defense to the insurer for lack of cooperation on the part of the insured, the defense is not effective against a 3rd person making a claim against the insurer unless there was collusion between the 3rd person and the insured or unless the claimant was a passenger in or on the insured vehicle.

Strategies for Insurers to Address Collaborative Settlement Agreements

❑ Pre-Collaborative Settlement Agreement Considerations

- Advising the insured of continuing obligation to keep insurer informed of events in the underlying action pursuant to cooperation clause.

  - Obligation to cooperate or inform may be held void if there was a denial. *Select Ins. Co. v. Superior Court*, 226 Cal. App. 3d 631,

- Insurer panel-selected defense counsel and conflict of interest as a bar to enforcement of policy exclusions or conditions.

  - *Maryland Casualty Co. v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24 (1976)
  - *Prashker v. U.S. Guar. Co.*, 1 N.Y.2d 910, 136 N.E.2d 871 (1956)
  - California Civil Code § 2860

- Moving to directly intervene in underlying liability action to stay proceedings or challenge a determination of the reasonableness or good faith nature of a settlement between claimant and insured.

Strategies for Insurers to Address Collaborative Settlement Agreements

Post-Collaborative Settlement Agreement Challenges

- ✓ Was the decision to settle reasonable?
- ✓ Was the amount of the settlement reasonable?
- ✓ Is the insurer barred from contesting or "re-litigating" the facts supporting the settlement or the amount of the settlement by factual findings, a good faith finding or final approval by the trial court?
- ✓ Can you demonstrate "bad faith" or "collusion"?

"Among the indicators of bad faith and collusion are unreasonableness, misrepresentation, concealment, secretiveness, lack of serious negotiations on damages, attempts to affect the insurance coverage, profit to the insured, and attempts to harm the interest of the insurer." *Cont'l Cas. Co. v. Hempel*, 4 Fed. Appx. 703, 717 (10th Cir. 2001).

Excess Insurers and XPL Settlements

- Excess insurers can be bound by consent judgments to the same extent as primary insurer, subject to the same conditions, limitations, and affirmative defenses (*e.g.* notice, participation in defense, reasonableness of settlement, coverage issues)
- Excess insurers subject to different duty to defend and ROR obligations.
- Notice and right to participate in reasonableness hearings.
- Impact of stipulated settlement on excess insurer claims for failure to settle within policy limits.