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One Insured, Multiple Insurers, Multiple Lawsuits: Managing Liability, Settlement, and Coverage Issues

WEDNESDAY, OCTOBER 12, 2022

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

Today's faculty features:

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October 12, 2022

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Overview of the Problem

Problems Arising Out of Multi-Litigation Against a Single Defendant Having Insurance From Numerous Insurers Over the Years

- Frequently, hundreds, if not thousands of lawsuits are brought against a single defendant arising out of a defective product or service
- The lawsuits are filed in state and federal courts across the country, and those in federal court may be put into an MDL
- Multiple claims and different theories of alleged liability and damages are asserted
- Certain cases may go through phases or stages, while other cases are stayed
- Bellwether or exemplar trials will happen along the way
- Global mediations, settlement conferences and/or settlement discussions will happen
- *As a consequence, many insurance-related issues and problems may arise*

Insurance-Related Issues And Problems Arising Out Of Multi-Litigation Against A Single Defendant

- Which insurers have any duty to defend and who pays how much of defense costs
- Does an insurer have the right to control the defense and how is that achieved
- When and how can the insured provide confidential and/or privileged information to its insurers
- How to resolve the underlying claims and lawsuits and taking into account the input of the insurers
- Involving insurers in any mediation/settlement conference/settlement negotiations
- Determining a reasonable settlement value and obtaining consent of the insurers
- Funding proposed settlement offers of the defendant insured and/or the agreed upon settlement amount
- *In today's presentation, we will address possible strategies with respect to dealing with these different issues*

Managing Defense, Liability and Settlement Issues When Multiple Insurers Are Involved

Determining Who Pays Defendant Insured's Defense Costs

- A threshold issue is whether any insurer has an obligation to defend and is there more than one such insurer having a duty to defend
  - Initially identify which insurers have a duty to defend and why
  - Confirm that such insurers agree to defend
  - Work out with insurers who will be defense counsel
- Often, with more than one insurer having an obligation to defend, the insured defendant and the insurers will enter into a defense sharing agreement
- Issues with respect to sharing of defense costs
  - Deductibles
  - SIRs
  - Shared defense costs per capita or pro rata?
  - Billing guidelines

How Is The Defense Handled?

- A threshold question where there are multiple insurers of the defendant insured is how the defense of multiple lawsuits handled and controlled
  - Selection of defense counsel
  - Will there be lead defense counsel along with other defense counsel?
- How do the primary insurers become involved in the defense of the multiple lawsuits?
- Whether and when excess insurers have any involvement in the defense of the multiple lawsuits?
- Use of periodic meetings or conference calls to discuss the proposed defense of the insured with respect to multiple lawsuits

Use of a Joint Defense – Common Interest Agreement

- The insured will need to keep its insurers apprised of the status and developments in the underlying litigation, including confidential and privileged information
- A joint defense-common interest agreement is often used
- This JDA is entered into among the insured defendant and each of the insurers and their respective counsel
- A JDA provides protection with respect to communications provided by the defendant insured and its defense counsel to the insurers and their coverage counsel
- Issues can arise with respect to the use of a JDA
  - Which insurers do and do not share a common interest with the insured defendant
  - To what extent can or should the insured's defense counsel share privileged advice and information

Use of Periodic Written Reports

- The insured defendant needs a mechanism to keep its insurers timely apprised of the status and developments with respect to the thousands of underlying claims and lawsuits
- Periodic written reports are frequently used
- The periodic reports are protected from any discovery by the JDA
- Typical issues addressed in the written reports
  - New claims and lawsuits
  - The disposition of certain claims and lawsuits
  - Major developments with respect to discovery
  - Major substantive developments
  - The extent privileged information will be disclosed

Use of Periodic Conference Calls

- Periodic conference calls are also protected from discovery by the JDA
- Usual participants
  - Defense counsel of the insured
  - Appropriate representatives of the insured defendant
  - Representatives of the insurers
  - Perhaps coverage counsel for the insurers
- Typical agenda items
  - Follow-up to periodic written reports
  - Defense counsel provides their analysis and evaluation and answer questions by the insurers
  - Proposed strategy in the defense of the underlying claims

Insurers Entering Into Their Own Joint Defense – Common Interest Agreement

- Frequently, when numerous underlying lawsuits implicate many insurers, they enter into their own joint defense-common interest agreement
- Participation is limited to those insurers having a common interest and will not include insurers having no common interest
  - Captive insurers
  - Insurers fronting for the insured
  - Insurers who disclaimed any coverage
- Their common interest includes
  - Resolving the underlying lawsuit in an appropriate manner
  - Discussing relevant factual and legal issues with respect to the underlying lawsuit
  - Discussing mediation and settlement issues
  - Discussing insurance-related issues

Insurance-Related Issues Arising Out Of Efforts To Settle The Underlying Lawsuits

Efforts To Mediate and Settle the Numerous Underlying Lawsuits

- With numerous underlying lawsuits, frequently there are efforts to mediate and/or settle such lawsuits
  - Plaintiffs may make a settlement demand that requires a response
  - The insured may wish to make a settlement offer to trigger settlement discussions
  - There may be a requirement that the parties engage in a mandatory mediation or settlement conference
- The defendant insured either cannot or will not settle without the involvement and participation of its insurers
- What steps are taken by the insured and insurers in this situation?

Different Ways to Involve the Defendant's Insurers With Respect to Efforts to Mediate and/or Settle

- Often, there is a court rule or like requirement that the insures of the defendant must personally participate in a mandatory settlement conference/mediation
- The defendant insured may ask the court to order the insurers of the defendant to participate personally in a settlement conference/mediation
- The defendant insured itself may insist that relevant insurers participate in a settlement conference/mediation
- There may be grounds upon which such insurer need not participate
  - The insurer has denied any coverage and takes that position with respect to any effort to mediate or settle
  - The insurer is engaged in a coverage action with the insured seeking a declaration of no coverage
  - Foreign insurers cannot be ordered to participate/will not participate – lack of jurisdiction
  - Insurance policies that negate any obligation to defend or settle and only impose an obligation to indemnify the insured after the insured has settled

The Likely Necessity of Obtaining Prior Consent of the Insurers of the Defendant

- Generally, an insured defendant cannot settle underlying claims and lawsuits without obtaining the prior consent of its insurers
  - The policies may have a provision requiring such consent
  - The policies may have a provision prohibiting voluntary payments
- If the insured defendant settles without even seeking consent, that may create a serious coverage problem for that insured
- Therefore, the insured defendant must make an effort to seek consent, explaining the basis for why consent should be provided
  - However, consent is not needed from any insurer which denied coverage
- If the insured defendant settles without obtaining the prior consent of the insurer, the next issue is whether the insurer reasonably withheld consent
  - However, the burden is on the insured to demonstrate it provided all necessary and sufficient information to the insurer seeking consent
  - If the insurer was not provided with such information, it may withhold consent

The Issue of What Is A Reasonable Settlement Value To Resolve The Underlying Lawsuits

- One of the most important issues that will arise with respect to multi-lawsuits brought against the insured is determining what is a reasonable settlement value that is acceptable to the insured and the various insurers
  - Reasonable settlement value is a benchmark whether to settle or not settle
  - The reasonable settlement value may change from time to time depending on events and rulings in the underlying claims
- The typical method is to evaluate the underlying lawsuits and estimate the likelihood that the insured defendant will or will not prevail, sometimes on a claim-by-claim basis, with the next step to estimate what are the likely damages and the probability of such damages being awarded should the plaintiffs prevail
  - The decision by the Second Circuit in the *Luria* case of determining what is a reasonable settlement value
- How does one evaluate the likelihood the plaintiffs would prevail on liability
  - Advice and views of defense counsel
  - Opinions of the defendant's experts
  - Results of mock trials or focus group settings
- Estimating potential damages and likelihood thereof is basically done the same way

Reasonable Settlement Value Has Important Coverage Implications

- Insurers are only obligated to pay the reasonable settlement value and not some inflated amount asserted by the plaintiffs or the policyholders
- As a general rule, an insurer cannot withhold consent if the proposed settlement amount is reasonable
- If an insurer declines to agree to and/or fund a reasonable settlement and thereafter there is an excess verdict, that may help demonstrate the insurer is liable for such excess verdict

Trying To Settle Claims Involving Continuing Bodily Injury and/or Property Damage

- Frequently, with multiple lawsuits arising out of a defective product or service, the claims are based on continuous bodily injury and/or property damage occurring over various policy periods
  - The injurious process leading to bodily injury/property damage occurred over several years
  - The bodily injury/property damage continued to occur and worsened over several years
  - The pollution spread and contaminated ground water, surface water and/or soil over the years
- In these situations, it is possible that multiple policy years will be “triggered”, such that each different insurer may have a possible obligation to help fund a settlement offer and/or the actual settlement amount
- There are many different ways the insured can deal with this situation, and likewise, there are different ways the insurers can deal with this situation

Obtaining The Necessary Funding For a Large Settlement of the Underlying Lawsuits – When the Claims Are Covered

- In making settlement offers and entering into a settlement agreement, the easiest situation is where the insurers have acknowledged coverage and agree among themselves who pays how much of the settlement
- Frequently, the covered settlement amount is paid by the first layer of coverage and then each succeeding layer of coverage upon exhaustion of such layer
  - The issue of what is a reasonable settlement
  - The issue of what is or is not covered in the settlement
- Where the covered settlement involves multiple policy years, the settlement amount may be allocated pro rata over the triggered policy year and then each insurer will pay its allocated amount until its limits are exhausted, depending on applicable law
- Issues with respect to joint and several liability
- However, there can be issues with respect to any such funding
  - Deductibles/SIRs
  - Number of occurrences/per occurrence and aggregate limits
  - Policy limits that include defense costs

Strategies With Respect To When The Insurer Will Not Agree To Fund A Judgment or Settlement

Coverage Disputes Preventing the Insured From Obtaining the Necessary Funding To Satisfy a Judgment or Settlement

- Many times, the defendant insured is not able to satisfy a judgment or pay a settlement, because the insurers are disputing coverage in whole or in part
- The issues with respect to what steps the insured should take and when they should be taken
  - Whether and why to file an early declaratory judgment action or not
  - Whether to focus the declaratory judgment action on certain but not all insurers or not
  - Where to bring such declaratory judgment action and why
- The issue of any insurer(s) commencing their own coverage action
  - Does the insured defendant need to bring in other insurers if they were not named
- Issus with respect to the coverage action pending at the same time the underlying lawsuits are going forward

Can the Insured Contend Any Insurer Has Joint and Several Liability

- In asking its insurers to fund a settlement offer and/or settlement amount, the insured may have a right to demand that certain insurers pay everything
- Under the law of some jurisdictions, an insurer can be jointly and severally liable for all covered damages if there is any covered bodily injury or property damage that occurred during its policy period
    - For example, Pennsylvania law
- Under the law of some jurisdictions, if the insurance policy has a “non cumulation” provision, that may also result in joint and several liability
- If an insurer is jointly and severally liable to pay all covered damages to the extent of its policy limits, that insurer should have rights of contribution and indemnity from other insurers

If Joint And Several Liability Is Not Available, Then Covered Damages Must Be Allocated Among the Defendant's Insurers

- In a situation where multiple policy years are triggered and the alleged damages are covered, one of the easiest and simplest ways to resolve which insurer pays how much is to allocate the settlement amount over the triggered policy year
  - Allocation based on relative time on the risk
  - Allocation based on relative amount of policy limits as against all applicable policy limits
  - Allocation focusing on when the relative amount of BI or PD occurred assuming that is available and can be done
- However, there are issues with respect to any allocation
  - Deductibles/SIRs
  - Policy periods where there is no available insurance or no insurance can be located
  - Bankrupt insurers
- There is always a risk an insurer may pay more than its fair share, but it has a right of contribution

The Right of An Insurer To Assert A Contribution Claim Against Another Insurer

- When an insurer has paid more than its fair share of either defense costs, a judgment or a settlement, that insurer will ordinarily have the right to seek contribution from other insurers

- Contribution can be available when two insurers share the same level of coverage (e.g., primary, umbrella, excess) for the same insured and both cover the same loss, but one pays more than its appropriate share. *See* Fireman's Fund Ins. Co. v. Maryland Cas. Co., 65 Cal. App. 4th 1279, 77 Cal. Rptr. 2d 296 (1998); West's Ann.Cal.Civ.Code § 1432; West's Ann.Cal.C.C.P. § 877(b).

- "Equitable contribution ... is the right to recover, not from the party *primarily* liable for the loss, but from a *co-obligor* who *shares* such liability with the party seeking contribution. In the insurance context, the right to contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others." (Am. States Ins. Co. v. Nat'l Fire Ins. Co. of Hartford, 202 Cal. App. 4th 692, 701 (2011)).

Contribution Sought by an Excess Insurer from a Primary Insurer

- The primary insurer and the excess insurer cover the same loss, but the excess insurer has provided coverage for something that should have been covered by the primary insurer.
  - There was a dispute over the number of occurrences, where the primary insurer only provided coverage on a one occurrence basis.
- The excess insurer may assert a claim for contribution.
  - The excess insurer was forced to pay on a one occurrence basis but contended that there were actually multiple occurrences for which the primary insurer was still liable.
  - The excess insurer has a potential contribution claim against the primary insurer.

Contribution Sought by a Primary Insurer from an Excess Insurer

- The primary insurer and the excess insurer cover the same loss, but the primary insurer has provided coverage for some amount that should have been paid by the excess insurer
  - For example, if the primary insurer paid more than it should have toward a judgment or settlement. The primary insurer can seek contribution from an insurer providing excess coverage above the primary coverage
  - As another example, because the primary insurer was forced to pay on a multiple occurrence basis but contended that there was actually one occurrence for which the primary insurer was still liable, the primary insurer has a potential contribution claim against the excess insurer

An Indemnity Claim Asserted By One Insurer Against Another

- Under certain circumstances, an insurer may have an indemnity claim against another insurer where that insurer had the obligation to pay
- Indemnity is an obligation that one insurer must reimburse another insurer, on the basis that such insurer is responsible for the loss.
  - An indemnitor is the insurer which is obligated to pay the other insurer.
  - An indemnitee is the insurer which is entitled to receive the payment from the indemnitor.

Statutes of Limitations/Time Bar Defenses

- As a general rule, the statute of limitations for a contribution claim and an indemnity claim is tolled until the liability for which contribution or indemnity is determined

- The applicable statute of limitations with respect to a contribution and indemnity claim is usually set forth in a statute, and it can vary from state to state

- However, the applicable SOL period may be modified by the relevant insurance policy or by agreement of the insurance company

Handling Subrogation-Related Issues

In the Underlying Litigation, the Defendant Insured Is Entitled To Contribution or Indemnity From a Co-Defendant

- In many cases, a defendant may have a claim against some other defendant on the ground the other defendant is responsible, in whole or in part, for the claims being asserted
- That insured defendant can seek to hold such other party responsible
  - Assert a cross claim
  - File a third-party action
  - Bring a separate lawsuit
  - Agree with such other defendant to resolve the claim at a later date
- The situation can arise that in a settlement of the claim against the insured defendant, the actual or potential claims of the insured defendant against someone else are not settled or resolved
- Important questions arise with respect to whether and to what extent the defendant insured and/or its insurers are entitled to recover should the claim against this other party is successful

What Happens After the Insurer Pays a Judgment or a Settlement of the Underlying Lawsuit But Believes the Insured Had a Claim Against Some Other Party For the Loss

- Should the insurers pay any settlement or judgment in a situation where the defendant insured has actual or potential claims against another party, under the doctrine of subrogation, they have the right to such claim
- "In the case of insurance, subrogation takes the form of an insurer's right to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid." *See* Allstate Ins. Co. v. Loo, 46 Cal.App.4th 1794, 1799 (1996); Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co.,59 Cal.App.3d 860, 864, (1976); 16 Couch on Insurance, Subrogation, §§ 61:2, 61:36, at pp. 75–76, 118–120; 11 Witkin, Summary of Cal. Law, Equity, § 169, pp. 848–850.)
- Subrogation arises as a matter of law and is not dependent on policy language
- The insurer stands in the shoes of its insured for whom it paid the loss
- A right of subrogation can arise before an insurer makes payment on behalf of an insured

Subrogation Involving Multiple Insurers Having Paid a Judgment or Settlement

- Once an insurer pays a judgment or settlement on behalf of its insured, as a matter of law, it becomes subrogated to the rights and claims which its insured had against the other party
    - One exception is where the policy expressly negate subrogation claims against certain parties
- Under the doctrine of subrogation, the insurer stands in the shoes of its insured and has no greater or lesser rights of claims that its insured had
- Where the subrogation claim is successful, the issue arises how to reimburse each of the insurers who pays the judgment or settlement
    - General rule, reimburse from top to bottom
    - However, reimbursement of subrogation expenses may be required first
    - Possibly pro rata allocation

Impairment of Subrogation Rights

- On occasion, the insured defendant may settle or otherwise agree in a manner which precludes any subrogation claim by its insurers
- If subrogation rights are impaired
  - It negates the obligation of the insurer to pay
  - Alternatively, the insured may have to reimburse the insurer
- Ways in which subrogation rights can be impaired:
  - Waiver by the insured
  - Waiver through a settlement agreement
  - Limits on the insurer's right to object
  - Allow SOL to expire

The Right of An Insurer To Assert Claims Against Another Insurer Under the Doctrine of Equitable Subrogation

- Equitable subrogation focuses on the loss suffered by the insured.
- Equitable subrogation is a product of equity and is not dependent on any contract, assignment or privity.
  - It arises by operation of law out of "fairness"
  - It is automatic and requires no policy language or subrogation contract
  - However, it's also subject to certain equitable defenses, such as the Made Whole Doctrine, Common Fund Doctrine, etc.

Elements of Equitable Subrogation

- Equitable subrogation requires:
  - The defendant insurer must be primarily liable to the insured for a loss under a policy of insurance;
  - The plaintiff insurer must be secondarily liable to the insured for the *same loss* under its policy; and
  - The plaintiff insurer must have discharged its liability to the insured and at the same time extinguished the liability of the defendant insurer.

Equitable Subrogation Asserted By An Excess Insurer Against a Primary Insurer

- The primary insurer rejects an opportunity to settle the underlying lawsuit within or below its limits.
- The underlying claims are tried and result in a huge verdict, in excess of primary limits.
- Believing the case should have been settled, the excess insurer has a right or claim of equitable subrogation that it can assert against the primary insurer.

Thank You & Any Questions

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