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BALANCING THE INTERESTS OF MULTIPLE CARRIERS IN TIME ON RISK CASES

1. Selecting Defense Counsel

The selection of defense counsel must take into account a number of factors including the timing of the selection of defense counsel, the responsibility for the selection of defense counsel, the role of the first notified carrier, and the role of the carrier with the largest share of the risk.

The insurance carrier's obligation to assign defense counsel arises from the clause of the commercial general liability (CGL) policy, which states:

> *We will have the right and duty to defend the insured against any suit seeking those damages….We may, at our discretion, investigate any offense and settle any claim or suit that may result.* (ISO CG 0 001 10 01)

Many courts hold and insurance carriers often take the position that the insurance carrier, in the absence of a coverage question or conflict of interest affecting the defense, a standard liability policy provision regarding the insurer’s right and duty to defend “gives the insurer the right to control the defense of the claim” and “the insured has no right to interfere with the insurer’s control of the defense." Certain policies may contain provisions which allow for the insured to retain some degree of control with respect to selection of counsel or situations may arise where such is proper (eg., conflict).

Generally, it is important to assign counsel for the insured as soon as possible to fully defend the claim, preserve evidence, and evaluate the possibility of early resolution. Upon the insured's or broker's notification of the claim to the carrier, selection of counsel is an issue that should be discussed amongst the carriers very early on in the process. Most likely, the first carrier on notice will retain counsel. Pending the timing of other carriers coming on board to defend the insured, it is generally more cost-efficient and overall beneficial for the carriers to proceed with retained counsel especially if counsel has been handling the claim for an extended period and has performed substantial work. Situations may arise, however, where a particular insurance carrier may insist on its own articular counsel, specifically, when it may be the carrier with the largest share of the risk. Once again, early communication amongst all involved carriers is critical to resolving these issues.

Finally, as case law generally provides little guidance as to the proper division of defense costs in a multi-insurer cases, the parties may have to adopt their own formula. The defense cost arrangement

should be in writing, as well as any amendments. The arrangement should account for the probability that there will be add-ins and drop-outs during the course of the litigation. Situations may arise in which policy language and state law may affect division of defense costs.

2. The Insurance Policy

The insuring agreements/policies will guide and influence the discussions amongst the carriers. The contents of the policies will determine whether there is coverage, the type of coverage, and the limits of coverage. The policies will also address the insured's obligations under the policy. Issues involving the various policies will involve considerations of state law.

In determining whether a particular carrier has an obligation to pay under the respective policies, a number of questions must be answered including the following:

- Was there an occurrence during the policy period? In terms of long tail claims, "occurrence" can refer to exposures to conditions that result in injury and/or property damage.

- What is the value of the damage during the policy period?

- Is the policy triggered? "Trigger" is a term used commonly by courts to describe when a policy responds to a loss. However, simple triggering of a policy does not mean there is coverage. While a policy may be within a trigger period, there may be an exclusion for the particular type of loss. The four key trigger theories include the following:

  - exposure: applies policy that was in effect when exposure to the injury causing agent occurred

  - manifestation: applies policy that was in effect when the injury becomes reasonably apparent or known to the claimant

  - continuous trigger: applies the policy or policies that were in effect at any time from the initial exposure through the manifestation of the injury.

  - injury-in-fact. applies policy that was in effect at the time of actual injury

(*See Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co*., 210 F.3d 672, 682 n.10 (6th Cir. 2000) (citing *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1195–96 (2d Cir. 1995); *Carithers v. Mid-Cont. Cas. Co.* 2015 LEXIS 5540 (11th Cir. 2015 [applied injury-in-fact trigger to facts in construction defect/property damage case; Florida courts split as to whether manifestation or injury-in-fact trigger applies].)

- Is there a "deemer" clause and has it been triggered? "Deemer" clauses generally refer to clauses in a policy which allow the insurer to determine which single policy responds when an occurrence potential triggers m)ore than one policy. Courts have taken various views of these clauses with some courts finding them to be illusory while other courts have allowed. (*See United Techs. Corp. v. Liberty Mut. Ins. Co.*, 1 Mass. Rptr. 91 (1993); *Monsanto Co, v. Aetna Cas. & Sur. Co.,* 1993 Del. Super. LEXIS 464 at 15 (1993).)

- Is there "nose" or retroactive coverage?

- Are there any exclusions?

- Is there an "other insurance" clause? Many CGL policies have "other" insurance provisions. Such clauses have been used to determine which insurer pays first or how liability should be apportioned among multiple carriers.

3. Multiple Policies at Issue

a. Types of Policies

Coverage will depend on the type of policies at issue in the involved claim whether it is a "claims made" policy, an "occurrence" policy, or an excess policy. Once again, this is an issue that will be addressed by the carriers. Occurrence based policies provide coverage for an "occurrence" taking place during the policy period. Claims made policies provide coverage for claims made during the policy period. Excess policies may come into place under a wide variety of situations depending on the type and scope of claim.

b. Handling of Multiple Deductibles, Multiple Self-Insured Retentions, and Different Limits

These are issues that will involve the carriers, as well as the insured, and as a result may impact defense counsel.

With respect to deductibles and self-insured retentions (SIRs), insurance carriers may take the position that a full deductible or SIR must be satisfied for each triggered policy period before coverage is available. On the contrary, insureds will argue that they should only be required to satisfy only one deductible or SIR. Alternatively, insureds will argue that the deductibles and SIRs should be prorated consistent with the prorating of the insurer's obligations. Most courts, however, side with the insurers and require the insured to satisfy all deductibles and SIRs. (*See Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 275 Kan. 598, 750 (2003). A few courts have prorated deductibles and SIRs based on fairness or ambiguity. (*See Lafarge Corp. v. Hartford Ins. Co.*, 61 F.3d 389 (5th Cir. 1995).) Consideration of this issue may also involve stacking deductibles and the right of the "targeted/selected" carrier to seek reimbursement from the other carriers.

As to limits, situations may arise where there are varying limits of coverage from one policy to another. Limits of coverage come into play in determining pro-rata allocation of liability and possibly defense costs depending on the jurisdiction

c. Missing Policies

Often in the case of long tail claims covering many years, the possibility exists that policies may have been lost or misplaced, an insurer may be insolvent, or an insured may have been under-insured for a particular policy period. This is again an issue that should be addressed by the carriers as soon as possible.

The resolution of such situations will often turn on state law, whether the courts apply a pro rata allocation method or joint and several liability ("all sums") allocation method, and whether the issue is payment of indemnity or defense costs. Generally, courts which apply a pro rata allocation hold that the insured must generally bear that portion of the loss assigned to the gap periods. Where joint and several ("all sums") applies, the gap periods become the responsibility of the insurers. In general, states that apply an "all sums" or "joint and several" approach allow the insured to select the triggered policy or policies that will apply to a loss. (*See Montrose Chemical Corp. v. Admiral Ins. Co.,* 10 Cal.4th 645, 686-689 (Cal. 1995); *Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co.,* 45 Cal.App.4th 1, 55-56 (Cal. Ct. App. 1996).) It is also possible for the carriers to agree to delete the gap period and reallocate the gap policy period pending the jurisdiction and method of allocation.

With respect to defense costs, this is an issue that should be addressed and agreed to by the insurers if possible. Whether the is required to contribute will depend on the jurisdiction and the reason for the gap period.

d. When Guidelines/Requirements Vary Among Multiple Carriers

As with many of these issues, these are issues that should be addressed as soon as practicable and come to an agreement amongst the carriers—communication amongst the carriers and counsel is critical. From the perspective of defense counsel, it is generally best practices to abide by the most stringent reporting and case management requirements, as well as billing protocols, to ensure that all requirements are met. To the extent there are conflicts between various requirements and guidelines, such should be discussed and agreed to by the carriers whenever possible.

4. Defense/Indemnity Obligation Allocation

In nearly all, if not all jurisdictions in which the primary insurer has a defense obligation, the universal rule requires that the insurer provide a defense for the entire action including even those portions of the action that are not covered. Generally speaking, the duty to defend is very broad and broader than the duty to indemnify depending on the policy language and the jurisdiction. California, for example, has taken a very expansive view of the duty to defend, as have many other states including Florida. (*See Carithers, supra; MacLeod v. School Board of Seminole Cnty.,* 457 So.2d 511 *Fla. 5th DCA 1984).)

In looking at the allocation of indemnity of indemnity allocations, there are two approaches: pro rata allocation and joint and several or "all sums" allocations. Under a pro rata approach, the loss is spread across the entire trigger period and assigns liability shares on a proportionate basis. Pending the jurisdiction and policy language, pro rata allocation will be done on an injury in fact basis, a time on risk basis, a limits basis, or a time and limits basis. Generally, a time on risk basis tends to be the most common approach.

From the defense perspective, it is very important and helpful that the carriers have come to agreement on an indemnity allocation before key case events such as settlement conferences and mediations. If such issues have not been resolved, it may make resolution of the case more difficult.

Under a "joint and several" or "all sums" approach, each insurer is deemed liable in full for the insured's damages up to the limits of the policy. Generally, the insured will be entitled to select a tower of coverage issued for a specific year from which to seek indemnity and defense costs. Subsequently, the selected carrier or carriers may seek contribution from other triggered policies.

5. Issues That Arise When Attempting To Resolve A Claim

- Scenario: One carrier will only give authority less than that which has been requested by and/or approved by all of the other carriers

- Scenario: Insured resists the proposed resolution

- Scenario: One of multiple carriers requires additional terms in the proposed settlement agreement that the opposing party refuses to accept, and the other carriers do not require that may result in the pending settlement being rejected (eg. Medicare reporting; indemnification clause; confidentiality clause.