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Resolving Issues Arising Out Of Settlement Of Multiple Underlying Claims That Exceed Policy Limits

I. Overview: Resolving less than all underlying claims where the per occurrence and aggregate limits are insufficient to satisfy all claims.

Insurance adjusters regularly face the difficult situation that arises when an insured seeks coverage for multiple underlying claims which in the aggregate exceed policy limits, even though each particular claim does not. The adjuster must decide which underlying claims should be resolved in exhausting policy limits and thereby, which underlying claims will *not* be resolved. Numerous issues arise out of this.

In this situation, the adjuster is confronted with complex problems in determining which claims should be resolved before the per occurrence and aggregate limits are exhausted. The general rule is that the insurer is entitled to resolve underlying claims in the manner in which it chooses and not in the manner in which the insured chooses. *However*, there are other ways for resolving underlying claims that need to be discussed. For example, what limitations are there on an insurer when an insured objects to the insurer's approach?

The panel will discuss a recent jury verdict that the insurer had purportedly acted in bad faith where it exhausted its policy limits by paying the most significant underlying claim first, even though it had the right to settle the underlying claims in any order it wished pursuant to a decision by the Sixth Circuit. In addition, the Sixth Circuit agreed that this insurer had properly exhausted its applicable limits in settling this claim first. The panel will explore the key factual and legal arguments made by the insured and the insurer and provide their views on whether the jury verdict in that case was correct.

II. The panel discussion will not focus on any rights of claimants where the total amounts sought exceed policy limits.

There is another panel discussion scheduled for the same time and day as this panel discussion: "Multiple Insureds with Insufficient Limits: The Law, Considerations, and Recommendations." That panel discussion appears to focus on the rights of claimants in situations where claims exceed policy limits and obligations which the insurer may owe to those claimants. The focus of this panel discussion is different—we are not focusing on the claimants' rights, but the rights and obligations of the insured and the insurer.

III. Different methods of resolving underlying claims where the total amounts sought exceed the per occurrence and aggregate limits.

A. A typical liability policy does not specify the order or manner in which an insurer must resolve or settle multiple underlying claims.

A typical liability policy does not specify the order or manner in which an insurer must resolve or settle multiple underlying claims in connection with exhausting the applicable limits.

The provisions with respect to the per occurrence and aggregate limits do not address the manner in which aggregate limits can be properly impaired or exhausted when there are multiple claims, including when the amount of those claims exceeds policy limits.

B. The general rule is that an insurer can settle/resolve underlying claims in any order that it wishes.

Because a typical liability policy does not specify the order or manner in which an insurer must resolve or settle multiple underlying claims, the general rule is that an insurer has discretion to settle multiple claims in whatever order it chooses provided that it does not do so in bad faith. *See In re September 11 Prop. Damage Litig.*, 650 F.3d 145, 151 (2d Cir. 2011); *Stryker Corp. v. XL Ins. Am.*, 735 F.3d 349, 357 n. 3 (6th Cir. 2012) ("the general rule is that an insurer may pay claims in any order it chooses").

Stated another way, an insurer may exercise its discretion in how it elects to settle claims, and may "even choose to settle certain claims to the exclusion of others, provided [that] this decision is reasonable and in keeping with its good faith duty." *Farinas v. Florida Farm Bureau Gen. Ins. Co.*, 850 So. 2d 555, 560–61 (Fla. Dist. Ct. App. 2003); *see also Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 316 (Tex. 1994) (finding the insurer had no duty to settle the more serious claims before less serious claims).

C. Settling/resolving claims based on the date of presentation.

Where there are multiple covered claimants, one approach—and the majority rule—is "first come, first served." *New Appleman on Insurance Law Library Edition* § 157.05 (2020) (*citing* Duana J. Grage & Suzanne L. Jones, *Settling with Limited Funds*, ABA Section of Litigation, Insurance Coverage (Aug., 2012)). This approach is also referred to as "first in time, first in right."

This approach is grounded in principles of equity and is aimed at:

(1) Protecting insurers from inordinate delays;

(2) Promoting settlements; and

(3) Encouraging claimants to make their claims promptly.

See Voccio v. Reliance Ins. Companies, 703 F.2d 1, 3 (1st Cir. 1983) (finding the carrier did not engage in bad faith where it met with counsel for multiple claimants, sought suggestions on how to divide the money and only one of the claimants was willing to settle); *see also David v. Bauman*, 196 N.Y.S.2d 746, 748 (Sup. Ct. 1960) (finding that an insurer was not required to share insurance proceeds with a second claimant who had not yet secured a judgment).

D. Settling/resolving as many underlying claims as possible before exhaustion.

Another approach—one that is not necessarily an alternative to the "first come, first served" rule—is settling or resolving as many underlying claims as possible. Under this approach, policy limits should be exhausted by attempting to settle as many claims as possible.

The goal of this approach is to relieve the insured of as much potential liability as is reasonably possible. *See*, *e.g.*, *DeMarco v. Travelers Ins. Co.*, 26 A.3d 585, 613–14 (R.I. 2011) ("the insurer has a fiduciary duty to engage in timely and meaningful settlement negotiations in a purposeful attempt to bring about settlement of as many claims as is possible, such that the insurer will thereby relieve its insured of as much of the insured's potential liability as is reasonably possible given the policy limits and the surrounding circumstances"); *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475, 481 (5th Cir. 1969) ("the fund should not be exhausted without an attempt to settle as many claims as possible").

E. Settling/resolving the highest-exposure dollar claims first.

A third approach is to prioritize settling or resolving the highest-exposure dollar claims first. This approach works well where the insured's exposure can be minimized by settling certain claims first. *See General Security Nat. Ins. Co. v. Marsh*, 303 F. Supp. 2d 1321, 1326 (M.D. Fla. 2004) (finding the insurer was permitted to prioritize one claim to the exclusion of another after it completed an investigation and concluded that one claim was more likely to result in a possible excess judgment).

F. The right of the insurer under the policy to settle/resolve underlying claims and cases.

Generally speaking, a liability policy provides that an insurer can settle or resolve underlying claims and does not require this to be done with the prior consent of the insured. Thus, this is unlike the situation in which the insured cannot settle an underlying claim without the prior consent of the insurer.

The panel will discuss whether and to what extent the insured's consent is needed where the insurer settles some but not all of the underlying claims in exhausting policy limits.

G. The possible use of an interpleader action.

A fourth approach is interpleading policy limits. This is frequently referred to as an incomplete or imperfect approach and depends largely on the applicable law.[1]

For example, some courts consider interpleading policy limits evidence of good faith. *See*, *e.g.*, *Gilbert v. Cong. Life Ins. Co.*, 646 So. 2d 592, 594 (Ala. 1994) ("an interpleading stakeholder cannot logically be subjected to a claim alleging bad faith refusal to pay"); *Farmers Ins. Exch. v. Schropp*, 567 P.2d 1359, 1367 (Kan. 1977) ("as a third alternative, [the insurer] could have promptly and in good faith commenced an interpleader action, and paid its policy limits into court").

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[1] *See*, *e.g.*, Christopher J. Bannon & Thomas K. Hanekamp, *Multiple Claimants, Multiple Insureds and Insufficient Policy Limits: Settlement Considerations for Insurers*, Apr. 2018, https://www.agdglaw.com/FFDBF8/assets/files/Documents/Multiple%20Claimants,%20Multiple%20Insureds%20and%20Insufficient%20Policy%20Limits%204-17-18.pdf; Douglas R. Richmond, *Too Many Claimants or Insureds and Too Little Money: Insurers' Good Faith Dilemmas*, 44 Tort Trial & Ins. Prac. L.J. 871, 877 (2009); Jonathan M. Stern, *Multiple Claims and Insufficient Limits*, For the Defense (Sept. 2009); Stephen S. Ashley, *Too Many Claimants, Too Little Money*, 3 Bad Faith Law Rep. 123–25 (1987).

By contrast, other courts are more skeptical about this approach. *See Emcasco Ins. Co. v. Davis*, 753 F. Supp. 1458, 1461 (W.D. Ark. 1990) ("[t]he insurance carrier's contract does not by its terms permit it to artificially exhaust the limits of liability by paying them into the registry of the court and walking away, leaving the insured without the carrier's assistance to accomplish all of those things that they rightfully thought that they had hired the insurance company to do for them").

The greatest concern for insurers to consider is whether use of an interpleader action will assist in settling as much liability as possible and protect the insured's interests.

IV. Case Study: *Stryker Corporation, et al. v. XL Insurance America, Inc.* (W.D. Mich. 1:17-cv-66)

Just recently, a jury found that XL, an insurer, had acted in bad faith in exhausting its policy limits by resolving the single most important claim against Stryker, its insured. The jury finding was in light of a prior Sixth Circuit ruling that XL could settle the underlying claims in any order of its own choosing, and that settling the most important claim first exhausted the XL policy limits.

For purposes of the panel discussion, the relevant facts of *Stryker* are:

- Stryker purchased a subsidiary of Pfizer that manufactured and distributed an artificial knee replacement product known as the Uni-Knee.
- When Stryker purchased Pfizer's subsidiary, it agreed to indemnify Pfizer for any costs associated with claims brought against Pfizer relating to the Uni-Knee.
- A number of knee replacement parts exceeded their shelf life, became brittle and were no longer suitable for knee replacements.
- Various persons who had knee replacements with allegedly defective knee replacement parts brought lawsuits against Pfizer and Stryker.
- Pfizer sought indemnity from Stryker and Stryker refused.
- Thereafter, Pfizer sued Stryker and obtained a $17 million judgment (the "Pfizer Judgment").
- Stryker sought coverage from XL and TIG, the excess insurer above XL. XL and TIG declined to provide coverage.
- Thereafter, Stryker settled some of the Uni-Knee claims for approximately $8 million (the "Uni-Knee Claims").
- Stryker sued XL and TIG and obtained rulings that they owed insurance coverage.
- At a settlement conference, XL was unable to settle both claims (the Pfizer Judgment and the Uni-Knee Claims) within its available policy limits. Therefore, it settled only the Pfizer Judgment, which was for more than twice the amount of the Uni-Knee Claims.
- Importantly, for all intents and purposes, TIG essentially failed to meaningfully participate in the settlement conference and declined to contribute any part of its policy towards a possible settlement.
- Years later, the Sixth Circuit reversed the trial court and held that TIG had no obligation to provide coverage for the Uni-Knee Claims because Stryker failed to seek its consent prior to settling.

- In light of the Sixth Circuit's decision, Stryker turned around and brought a bad faith claim against XL contending that XL should have settled the Uni-Knee Claims first—not the Pfizer Judgment.

A. <u>Stryker's Claim of Bad Faith</u>

Stryker argued that XL should have paid the Uni-Knee Claims before settling with Pfizer. Stryker asserted that it had been harmed by XL's decision because Stryker was unable to recover for the Uni-Knee Claims from TIG.

Stryker claimed that XL breached its duty of good faith to Stryker by:

(1) Settling with Pfizer in order to minimize XL's liability for penalty interest while compromising Stryker's ability to obtain excess coverage from TIG;

(2) Failing to investigate the impact of settling with Pfizer on Stryker's ability to obtain excess coverage; and

(3) Failing to effectively negotiate with Pfizer.

After the claims were tried, the jury found that XL acted in bad faith in settling the Pfizer Judgment first. The verdict is currently on appeal.