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Resolving Catastrophic Injury Cases from Primary through Excess

I. Inception: Primary v. Excess

This presentation will focus on the resolution of catastrophic injury cases in various stages of litigation. The panel, which consists of an experienced coverage and trial attorney, and experienced primary and excess claims adjusters, will focus on the initial analysis of coverage, associating defense or monitoring counsel, investigation of the incident, marshaling evidence and experts, bad faith exposure and resolution or trial. The panelists will discuss the interaction between layers of insurance and how they work together with counsel to resolve the lawsuit or claim. The presentation will also discuss the risks of large loss cases across the country, touch on several large jury verdicts and the implications to resolution of future cases. Overall, the focus will be on the issues presented by the relationship between a defending primary carrier and the excess carriers above it.

a. Notice of Claim:

i. Investigation

When a primary carrier is first notified of the claim, the usual first step is to undertake an investigation. This can involve site inspections, witness statements, and in some cases immediate retention of experts. In cases of severe bodily injury, it can become immediately apparent that the excess carrier should be notified. This does not always happen as soon as it should, perhaps due to a mutual misunderstanding of who has the obligation to notify the excess carrier. It is often unclear at what point, and by whom, the excess should be put on notice. Ultimately, the policy holder bears the obligation to tender their claim to their carrier for coverage, but there are other parties that can be subject to liability exposure for failure to do so. In some cases, defense attorneys could be exposed to malpractice exposure for failure to timely notify the excess carrier. Insurance agents and brokers could also be exposed to errors and omissions claims arising out of untimely excess notices.

ii. Notice to Excess

The progress of an investigation can be closely tied to when the excess carrier becomes involved with the claim handling. In many cases, once the primary carrier has obtained sufficient information to determine that there is a potential exposure in excess of its limits, the primary carrier will often request the insured or broker to notify the excess carrier. Similarly, if the excess carrier determines in the process of its investigation that the risk of exposure more than primary limits, an excess carrier may at some point choose to close its file. An excess carrier will sometimes attempt to shift the responsibility to the primary carrier by sending closure letters and requesting that primary notify them of significant reserve changes, or mediation or trial dates.

b. Retention of defense counsel

When a claim goes into suit, a typical CGL carrier's obligation to defend a covered claim begins. In many cases, at the discretion of the carrier, counsel can be retained immediately to maintain privilege of any investitive materials, including expert reports and initial case valuations. In an unendorsed CGL policy that is not subject to a self-insured retention, the choice of counsel remains with the primary carrier. However, in certain cases, the policy will provide for the insured's selection of counsel. Many carriers have staff counsel that they will assign initially to all suits as a matter of practice. If the excess carrier perceives that there will be exposure to its policy, it may choose to retain monitoring counsel, or to associate in its own defense counsel. There are many strategic considerations to make regarding selection of counsel on a catastrophic injury case, particularly early in the life of a claim.

II. Life of the Claim:

a. Investigation

When a claim goes into suit and defense counsel is retained, it is the obligation of defense counsel to investigate the incident and the allegation in the lawsuit. For example, when a serious automobile occident occurs, defense counsel will obtain a copy of the police crash report and death investigation and may also retain an accident reconstructionist to take measurements of the scene and inspect the vehicles involved in the occurrence. Further, defense counsel will speak with the Insured to obtain preliminary information about potential defenses and act as a barrier between Plaintiff's counsel and the Insured. Depending on the type of litigation (i.e. automobile, fire, construction), defense counsel may recommend a number of actions be taken, including retention of experts or testing of evidence. Of paramount importance in any catastrophic case, is for defense counsel to speak with witnesses early in the litigation to determine strength and weaknesses of the case.

b. Discovery

As a case proceeds through discovery, the primary carrier is on the front lines. Depending on the valuation of the case, it may or may not be clear whether, or at what point the excess will become involved. Carriers and adjusters differ as to their practices for monitoring a case during discovery where the valuation of the case is unknown. Some carriers'

best practices are to handle every excess claim as if they were the primary adjuster, while others may choose to take a more hands-off approach. At certain times a carrier will retain monitoring counsel. There are number of reasons for assigning monitoring counsel in a severe bodily injury case; however, one significant reason is lack of cooperation from the insured selected counsel. Monitoring counsel may represent the entire excess tower, or certain carriers within.

Defense counsel will propound written discovery upon the other parties and issue subpoenas for medical records, police reports, etc. After defense counsel has obtained all the pertinent materials, defense counsel will take the oral depositions of the parties and witnesses.

c. Valuation

After defense counsel has conducted their investigation, he/she is able to provide an opinion on potential exposure. Depending on the type of lawsuit (i.e. personal injury, property damage, etc), defense counsel will take into consideration medical bills, lost wages, cost of repair to the property, etc. Defense counsel's valuation of a lawsuit is important to both a primary and excess insurer to determine whether the exposure is within the carrier's policy limits and in order to set reserves.

d. Experts

Defense counsel may retain expert witnesses at any time prior to the deadline to disclose. Depending upon the type of lawsuit, defense counsel will retain liability and/or medical experts. Generally, in a lawsuit involving a catastrophic injury, such as a traumatic brain injury, defense counsel will retain a team of experts, including neurologist, pain management, life care planner, economist, etc. It is important that defense counsel property vet any expert to determine their education, experience and ability to be a strong witness for the defense. The failure to retain an expert witness, in some jurisdiction, can be legal malpractice.

e. Bad Faith Exposure

If a carrier fails to settle a case within its limits, and exposes the insured to uncovered damages, the carrier can be responsible to pay those damages even if the damages are not covered under the policy. A common situation where this occurs is insufficiency of limits. In catastrophic bodily injury cases, the alleged damages can be virtually unlimited and often have the potential to exceed the amount of insurance that the insured-defendant has obtained. There are many factors to consider in these scenarios, particularly with respect to each state's laws regarding the burden on the carriers to resolve claims that potentially exceed the insured's available limits. There can be a conflict between the carriers if there are differences in coverage afforded by the primary and excess policies, or if coverage is uncertain under one of the policies.

Interests can also diverge where there is a settlement demand within a carriers' limit, but the value of the case is uncertain. Carriers higher in the tower of coverage will send the infamous "hammer" letter to the carrier in whose layer the demand falls, requesting that the carrier settle the case within its limits. There may be a disagreement among the carriers in the tower as to the value of the case. Excess carriers are limited by exhaustion of the policy below them in order to pay out on their own policy.

There is variation among jurisdictions as to the impact of "hammer" letters and the obligations created therein. Certain states find that primary carriers have a duty to the excess carrier to ensure that their policy is not exposed. These states would allow an equitable subrogation claim by an excess carrier against a primary carrier. Other states find that the primary does not have any duty to the excess, but that primary carriers only have a duty to protect the insured from exposure to uncovered damages.

A challenging situation for the excess carrier to navigate is a demand within excess limits, but an underlying carrier that is unwilling to tender its limits. The excess carrier often must persuade the underlying carrier to negotiate resolution at or within its limits without obligating itself to any settlement contribution.

III. Resolution

a. Trial / Mediation

Attendance at trial and mediation is subject to a number of considerations on the part of both the primary and excess carrier. Each is acting from a different vantage point. An excess carrier will need to consider whether to appear at mediation or trial to protect its own interests, or whether to be absent from a trial or mediation to create the impression that the value of the case is clearly within underlying limits. Personal attendance and observation by the adjuster at trial or mediation can have significant impact on the dynamic of settlement negotiations, particularly where one carrier is present and the other is relying on reports from counsel or an independent adjuster.

At mediation, the parties made a good faith effort to resolve plaintiff's claims against the Insured. Often, Plaintiff's counsel will make an opening statement, which some attorneys opine will polarize the room. There are differing opinions as to whether an opening statement is beneficial and it is usually the decision of the parties and/or the mediator as to whether an opening statement will be made. In most case, mediation is a slow process, which requires patients by both parties. If mediation is not successful, parties may attempt additional mediations prior to trial.

It is rare that a catastrophic injury case goes to trial. There are benefits to settling a lawsuit prior to trial, primarily the benefit of reducing exposure to a large jury verdict. If a lawsuit goes to trial, it is important that defense counsel have a strong team of attorneys and sufficient support to navigate the intricacies of trial and the scheduling or multiple witnesses and experts.

b. Relationship between Primary and Excess at mediation and/or trial.

In certain cases, a policy will attach above a large self-insured retention or fronted program. This can create ethical and business considerations resulting from "hammering" a primary layer which is the policy-holder's own money. Some policies contain "soft hammer"

clauses, which make insured liable for defense costs and damage awards in excess of the demand. This can also impact a self-insured's decision on whether to settle a claim.

c. Post-Verdict

Verdicts also present a number of issues between primary and excess carriers. There can be disagreement as to when the duty to defend under the primary policy terminates. Carriers can try and terminate their defense obligation in various ways such as tendering to the excess or interpleading its limits.

The decision of whether to appeal the verdict can be cause for further conflict in that the insured, and the primary and excess carriers may have differing opinions as to whether to appeal the verdict. The selection and cost of appellate counsel can present issues for consideration as well. The duty to defend, including taking any appeal, rests with the primary until their limits are paid. Where much of the verdict is within the excess layers of coverage, the excess carrier(s) will undoubtedly have a say in who represents the insured in any appeal.

In many cases, based on the parties' interests and the policy language in the respective policies, the carriers may elect to enter into a cost sharing agreement. There can also be disagreement as to which carrier bonds the appeal, and which portion of the judgment each carrier must bond. Further, there can be debate over which carriers pay the post-judgment interest and which party pays the cost of the appeal itself. Ideally, the carriers in the tower can work together to resolve these issues and cooperatively pursue the appeal absent coverage litigation.