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The Other Tripartite Relationship:
Navigating the Relationship between TPAs, Insurers, and Panel Counsel

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I. What is a Third-Party Administrator and when are they used?

A third-party administrator (TPA) is a company, other than the insurer, who has been hired to handle claims. The TPA relationship is typically governed by contract that sets forth items such as pay, levels of authority, and liability. The reasons for using TPAs varies. Sometimes it is a question of volume. Perhaps the insurer does not want to hire enough claims adjusters to handle a book of business so as to avoid the costs and risks associated with taking on new employees (employee benefits, insurance, overhead, etc.) Perhaps the insurer is located in an area where there are not a high number of qualified adjusters and does not want the hassle of managing adjusters remotely, or hiring new employees at a supervisory level. This paper will address the relationship, use, and liabilities surrounding the use of TPAs and panel counsel in handling claims.

II. What is/should be contained in a contract with a TPA?

Like most contracts, the typical TPA contract contains a list of duties, a system of record keeping, an outline of claims handling procedures, a loss funds account, and often an indemnity agreement.

In the property and casualty context the typical TPA contract will be an agreement for the TPA to perform claims management services on behalf of the insurer related to a specified set of policies or a specific program. The TPA may be given full authority to conduct an investigation, hire experts, and hire counsel, or such decisions could be limited by the insurer and/or require prior approval. The TPA is typically responsible for setting reserves on claims within a set period of time. Settlement authority is generally granted within certain pre-arranged dollar figures. When that settlement authority is to be exceeded certain reporting guidelines are set. Subrogation is another area that is usually addressed in a TPA's contract.

III. What can each party do on the file?

Seems easy, doesn't it? The TPA is hired to administer the file for the insurer, the lawyer is hired either to address coverage, or to represent the insured, but is it always so clear what each party can do? Let's take each party in turn:

A. The Lawyer

A lawyer must be very careful on a file to make sure they know who they represent. A lawyer can be hired to represent the insured or the insurer, depending on the type of case or work

involved. This is the oft referred to tripartite relationship between the lawyer, the insured and the insurer. However, when dealing with a TPA, it is particularly important to define the parameters of what the lawyer is being hired to do. Does the TPA have full authority under the contract with the insurer to hire the lawyer? Can a lawyer be hired whenever the TPA deems it necessary? Are there incentives or disincentives in the TPA's pay regarding hiring counsel?

B. The TPA

The TPA's duties are typically governed by its contract with the insurer. Seems easy enough, or is it? As discussed below, there are courts around the country that allow insureds to seek damages against a TPA for negligence in handling claims. TPA's however are contractually bound to their insurer "client" and thus must comply with the TPA contract in that regard. Typically, these two actions should not be contradictory because, after all, the insurer has a duty to its insured as well, and in fact, perhaps an even stronger duty because it is not only a duty to avoid negligence, but a contractual duty to comply with the insurance contract. However, what happens if these conflict. What happens if the TPA, for example, believes a case should be settled for an amount above its contractual authority, but the insurer disagrees? In some states, as discussed below, this may create different causes of action against the TPA and the insurer.

IV. Who's on the hook?

Over the years, there have been attempts to hold TPAs responsible and accountable as insurers. In other words, insureds have attempted to sue the TPA for breach of the insurance contract and/or bad faith. Note, that these claims are different than claims by an insurer against a TPA for breach of the TPA contract. These claims are typically not permitted by the courts because the insureds are not in privity of contract with the TPAs. *Brand v. AXA Equitable Life Ins. Co*., 2008 WL 4279863 (2008) is a district court case out of Pennsylvania that addresses this issue. In *Brand*, *supra*, Brand filed suit against his insurer as well as a reinsurer and TPA for breach of contract related to a partial denial of disability benefits following a car accident. The Court found that the insurer and reinsurer needed to be dismissed from the suit because they never contracted directly with Brand. The Court found, "it is the general rule than an insured may bring claims for breach of contract and bad fail against the insurer who issued the policy, but not against related parties, such as reinsurers and third party administrators, who are not in privity with the insured." Brand argued that while not in privity of contract with the TPA and reinsurer he was a third party beneficiary of those entities' contracts with Brand's direct insurer. The Court rejected that argument finding that the contracts between the insurer and the TPA do not express an intention for the insured to benefit. In contrast, the contract between the insurer and the TPA was to the benefit of the insurer, i.e., to assist the insurer with the administrative duties arising from claims, including rendering decisions on those claims. In this case, however, the insurer retained the duty of disbursing funds for meritorious claims. By making this statement, it seems as if the Court was implying that if part of the duty of the TPA was to disburse funds, even in a limited amount, the insured may have hd a proper claim against the TPA as a third party beneficiary.

There are jurisdictions that do hold that TPAs may be held liable for negligence and/or bad faith. These courts do not address privity of contract, but instead find a tort duty to insureds to reasonably administer and investigate claims. One of the most cited cases on this issue is *Continental Insurance Company v. Bayless and Roberts, Inc.,* 608 P.2d 281 (1980) a case out of

the Supreme Court of Alaska. In the *Bayless and Roberts* case, *supra*, the Court found that an adjuster could be held liable for failing to settle a claim against an insured. The liability arose not out of a breach of a contractual, fiduciary duty, but rather out of a breach of a tort duty of ordinary care. This liability has been extrapolated by other courts to apply to TPAs.

V. How do you make it work?

As with any relationship, communication is key. The known issues should be defined up front. Decide who is going to conduct the investigation and who is going to control the litigation. Set authority and a manner and method for evaluating cases up front.

Set guidelines for your attorneys. Make sure they know what kind of reporting you need. If the TPAs authority is exceeded and they need to report back to the insurer, the attorney needs to heed this and report earlier. Sometimes and attorney may need to follow a separate set of rules when reporting to the TPA for this very reason. It is a good idea to revisit these ideas and parameters often.

VI. Conclusion

TPAs serve a very important purpose for insurers. However, as with any contractual relationship it is very important to make sure the parameters are very clear for everyone involved. TPAs, insurers, risk managers, and attorneys need to all have a meeting of the minds as to who does what tasks on a file and how they are to be accomplished. Similarly, insurers cannot hide behind the actions of TPAs to avoid liability and TPAs cannot hide behind a lack of privity of contract to avoid liability to an insured. The relationship between a TPA, insurer, and attorney may truly be the other tripartite relationship.