



2015 CLM Annual Conference

Palm Desert

### **When Your Policy Limit Isn't Enough**

**Presenters:** Matt McColley, *Riverport Insurance Company*  
Clark Monroe, *DunbarMonroe, P.A.*  
Kathleen Olear, *Markel Service, Incorporated*  
Richard Ranieri, *Weber Gallagher Simpson Stapleton Fires & Newby LLP*  
M. Shane Sumrall, *McGriff, Seibels & Williams*

#### **Excess Claim Issue Identification Guide**

(Assumes potential for excess verdict over policy limit exist)

1. What measures can be taken early to obtain trust and cooperation of the insured where excess exposure is clear?
  - a. Is the insured sophisticated enough to understand the issues or should more time be invested?
  - b. If trust or cooperation of the insured is an issue:
    - i. Can the broker or agent help bridge the gap in understanding?
    - ii. Would a one-on-one meeting with the insured and/or broker to explain the process help?
  - c. What investigation must be done to meet the insurer's duty to the insured?
  - d. Has defense counsel taken steps to garner the trust and cooperation of insured?
2. A demand to settle within limits has been received:
  - a. What state law applies regarding the right to independent counsel?
    - i. Is the insured entitled to independent counsel in an excess claim and/or is it the insurer's obligation to notify the insured to consult excess counsel?
    - ii. Is independent counsel paid for by insured or the insurer to advise insured on excess exposure?
    - iii. Does the answer to (i) and (ii) change if a reservation of rights has been issued?
  - b. Are there any state specific time requirements to respond to the demand?
  - c. When and with what party can the insurer settle under applicable state law:
    - i. Is settlement first come, first serve until limits are exhausted?
    - ii. Must a settlement be reached with all parties simultaneously?
    - iii. May the insurer choose who to settle with based on evaluation of each claim independently? If so, what is the standard applied to that decision?
      1. Must the decision to settle with less than all claimants be approved by the insured? If not legally required, should it be sought for practical reasons?

2. Is the standard one of reasonableness of the settlement or another standard?
    3. Does the investigation and insurer's file support its decision to settle or refuse to settle?
  3. Have all potential sources of recovery been identified to transfer risk or mitigate excess exposure to the insured?
    - a. Are there contracts with indemnity provisions leading to parties with additional available insurance?
    - b. Is common law indemnity available to the insured and how should it be asserted?
    - c. Can fault be allocated to other parties in the case or those that may not be in the case?
    - d. Is the insured potentially a named insured, additional insured by endorsement, omnibus insured, or insured under the covered contracts provision under the policy of one or more parties or potential parties?
  4. Is there excess insurance above your primary policy (or above your excess policy)?
    - a. What duties does the primary or subsequent excess layer owe to the layer above it under state law?
    - b. What reporting obligations exist to the layer above your insurance?
    - c. Does the excess carrier or re-insurer have rights similar to the insured to demand settlement within limits?
    - d. Remember, just because there is excess insurance above your layer it does not mean that you have no duty to the excess carrier upon receipt of a demand within your company's limits.
  5. Has there been a reservation of rights and how does that further impact the duty to settle within limits in the applicable jurisdiction?
  6. Does the jurisdiction allow a claim for bad faith arising from a failure to settle?
    - a. What is the standard applicable to the insurer for failure to settle?
    - b. What actions by the insurer in the applicable jurisdiction would put policy limits in jeopardy (waiver)?
  7. Do I need help in evaluating this claim?
    - a. What in-house resources, legal or otherwise, are available to evaluate the issues arising from a demand within limits? (\*Don't forget the state-by-state CLM Resources.)
    - b. Should counsel be retained for the insurer to address any of the above issues?