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ALLOCATION AND COORDINATION BETWEEN VARIOUS COVERAGES: POLLUTION, COMMERCIAL GENERAL LIABILITY, AND PROFESSIONAL LIABILITY

I. WHAT TO DO WHEN MULTIPLE COVERAGE PARTS APPLY

Due to the expansion of coverage offered to mid-market companies, an increasing number of insurers offer package policies that provide commercial general liability ("CGL"), professional liability ("PL"), and contractors' pollution liability ("CPL") coverages. Use of package policies requires claims professionals to determine which of multiple coverage parts in the same package policy applies to the claim or suit. Because the claims for injury or damage can occur over more than one year or the claim can be made in a different year, it also requires the claims professional to evaluate whether earlier or later package policies may also be implicated, and if so, how to allocate the loss among relevant policies and coverage parts.

CGL coverage generally applies to damages because of "bodily injury" or "property damage" caused by an "occurrence" or to "personal and advertising injury" caused by an offense to which the insurance applies. Most claims are for bodily injury or property damage. Losses that may trigger the CGL coverage do not automatically exclude the possibility that PL or CPL coverage could be triggered. For this reason, more recent CGL policies often include a "professional services" exclusion and a variant of the ISO-based Pollution Exclusion. (Earlier policies may contain older versions of the pollution exclusion, and state law varies widely in the construction and enforcement of these earlier clauses.)

PL coverage generally applies to damages because of a wrongful act, error or omission of the insured in the rendering or the failure to render defined professional services to which the insurance applies. The definition of "professional services" varies. PL coverage is claims-made and may include a retroactive date and larger deductible or self-insured retention ("SIR"). Defense costs usually erode limits. A subset of PL coverage includes consultants, architects, and engineers.

CPL coverage generally applies to compensatory damages because of bodily injury or property damage resulting from a pollution incident or event to which the insurance applies. CPL coverage may be occurrence-based, with a non-cumulation clause, or claims-made, with a retroactive date. Larger deductibles or SIRs are not uncommon in CPL policies. CPL policies may contain a "professional services" exclusion.

Applying the appropriate coverage part or parts in a package policy requires a thorough analysis of the policy terms, including the coverage grant and limitations on coverage. Arriving at the correct determination requires considering: (1) the relevant facts and circumstances of each case and how the

plaintiffs' counsel framed the allegations of liability; (2) the wording of the policy; (3) the law of the relevant jurisdiction; and (4) prior positions taken by the company regarding the application of policy language to a similar set of facts. A starting point is to discuss with the insured the known facts about the loss and the insured's position, if any, concerning which coverage part the claim/suit is tendered under. Questions about which package policy will respond to mixed allegations give rise to questions regarding which limits and deductibles apply, as well as how liability may be apportioned if two or more policies cover the claim. Again, a thorough evaluation is required at the outset to avoid inconsistent results or erroneous coverage positions. If additional information or time is needed to evaluate a claim, the insurer should communicate this information, in writing, promptly to the insured.

II. HOW TO ALLOCATE AMONG COVERAGE PARTS IN DIFFERENT YEARS

A. CGL v. PL

Hypothetical: The insured is a subcontractor that was retained by a general contractor to perform lead testing of paint at a jobsite. If a structural element contains lead paint, the insured must note that in a set of shop drawings provided by the general contractor and architect. The general contractor shows the insured an area of the jobsite where the insured can unload and access its testing equipment. The insured leans several metal pipes against a wall that had been left by a plumber in order to clear the area of debris and make room for the testing equipment. Meanwhile, an employee of a different subcontractor passes through the area. The insured accidentally bumps the pipes, which fall onto and injure the employee. The insured is sued two years later by the other subcontractor's employee, seeking compensatory damages. Which coverage part applies?

The PL coverage in the scenario above insures claims based on the rendering or failure to render "professional services." The policy defines "professional services" to include "testing" and "inspecting". The policy includes a duty to defend and defines the covered "loss" to include compensatory damages. The principal issue for the PL coverage, therefore, is whether the claim is based upon the insured's testing services. Stated differently, the focus is on whether the claim was caused by a particular set of conduct of the insured, regardless of whether the alleged injury was accidental.

States vary in their approaches to what constitutes a "professional" services. The test that many states use is whether the conduct being performed by the insured requires specialized skill or knowledge or, in the alternative, whether the conduct is administrative or ministerial. *See Jefferson Ins. Co. v. Nat'l Union Fire Ins. Co*., 42 Mass. App. Ct. 94 (1997) (holding under Massachusetts law that professional errors and omissions insurance policies provide "limited coverage" that typically supplements the CGL coverage for conduct undertaken in performing or rendering professional acts or services); *accord Lindheimer v. St. Paul Fire & Marine Ins. Co*., 643 So. 2d 636, 638 (Fla. Dist. Ct. App. 1994); *see also* J. Appleman, 7A *Ins. Law & Prac.* § 4504.01, at 310 (1979) ("An errors-and-omissions policy is professional-liability insurance providing a specialized and limited type of coverage as compared to comprehensive insurance . . . ."). The precise label appended to the insured in the underlying contracting documents—e.g., "testing contractor"—usually is of secondary concern. *See, e.g*., *Harad v. Aetna Cas. & Sur. Co*., 839 F.2d 979, 984 (3d Cir. 1988) (predicting that Pennsylvania law would hold, in accord with numerous jurisdictions, that the title or character of the party performing that act generally is irrelevant); *accord St. Paul Fire & Marine Ins. Co. v. Shernow*, 222 Conn. 823, 828 (1992) (applying Connecticut law). Determining the governing law must be a threshold issue.

The CGL coverage insures damages because of "bodily injury" caused by an "occurrence." The policy defines "occurrence" to include accidental conduct. The primary issue for the CGL coverage, therefore, is whether the insured is being held liable for covered damages due to an injury that was accidental. Stated differently, the focus is on whether the injury was accidental, irrespective of the particular conduct that caused the injury. *See, e.g*., *Voorhees v. Preferred Mut. Ins. Co*., 128 N.J. 165, 183 (1992) (applying New Jersey law); *see also Grissom v. Commercial Union Ins. Co*., 610 So. 2d 1299, 1305 (Fla. Dist. Ct. App. 1992).

The CGL coverage part may include one of several "professional services" exclusions: (1) an "Exclusion—Engineers, Architects or Surveyors Professional Liability" (CG 22 43); (2) an "Exclusion—Contractors—Professional Liability" (CG 22 79); and (3) a "Limited Exclusion—Contractors—Professional Liability" (CG 22 80). These exclusions are added by endorsement by the underwriters and do not appear on the schedule of forms. All three bar coverage for "bodily injury" "arising out of the rendering of or failure to render any professional services . . . ." The "Engineers" exclusion defines "professional services" to *include* "[t]he preparing, approving, or failure to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications." The "Contractors" exclusion contains the same definition of "professional services," but contains an exception for "services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor." The "Limited Contractors" exclusion contains the same definition of "professional services as the "Engineers" exclusion but contains an exception for the named insured's construction work, including construction work done on behalf of the named insured. The analytic approach to the exclusions, like the analytic approach to the PL coverage part, is conduct-based. *See, e.g*., *Reliance Ins. Co. v. Nat'l Union Fire Ins. Co*., 262 A.D.2d 64, 65 (1st Dep't 1999) (holding under New York law that, to fall within the exclusion, the task must involve a professional's special acumen and not just normal powers of supervision); *accord David Lerner Assocs. v. Phila. Indem. Ins. Co*., 542 F. App'x 89, 90 (2d Cir. 2013) (applying New York law); *Estate of Tinervin v. Nationwide Mut. Ins. Co.*, 23 So. 3d 1232, 1237 (Fla. Dist. Ct. App. 2009). Therefore, the insurer must determine what conduct the insured was performing, whether that falls within the scope of the exclusion, and whether an exception applies—all before determining whether the injury or damage arises out of such conduct.

The hypothetical above features a "mixed" claim whereby the CGL coverage part at the time of the accident and the PL policy when the claim was made might apply. The tension between the GL and PL insurer could exist with regard to whether the insured was performing "professional services." The GL insurer might argue that the insured was contracted to perform a service that required specialized skill and was onsite for no other purpose. The PL insurer might argue that the particular task being performed—clearing an area of the jobsite to serve as a "base of operations"—did not require specialized skill and does not fall within the scope of inspecting or testing operations. The PL insurer also will argue that the GL insurer bears the burden of showing that an exclusionary clause bars coverage and that determination cannot be made based on the allegations of the complaint.

B. CGL v. CPL

Hypothetical: The insured is a contractor that was retained by a condominium association to retrofit the condominium with a radon mitigation system (i.e., a special exhaust fan to draw radon from the earth and exhaust it to the outside, where it will not pose a hazard to the occupants of the condominium). The insured negligently installs the piping in the radon mitigation system such that the system is unable to exhaust the radon gas. As a result of the negligent installation, excessive levels of radon accumulate inside the individual condominium units from the date of installation onward. Years later, a condominium occupant files suit, alleging unspecified damages to his condominium unit and his person due to excessive levels of radon over a seven-year period of occupancy of the condominium unit. Which coverage part applies?

As discussed above, the CGL coverage insures damages because of "bodily injury" caused by an "occurrence." The alleged injury most likely will fall within the scope of the CGL coverage if the complaint can be read to allege a third-party injury as opposed to an injury to the insured's own work. The question therefore becomes whether the liability falls within the scope of a policy exclusion, e.g., a pollution exclusion. Most standard-form policies contain a version of the "total pollution exclusion," which provides that the CGL coverage does not apply to "bodily injury" "which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." "Pollutants" usually is defined to include "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste." Some policies will include additional conditions limiting the circumstances under which the pollution exclusion clause applies.

States vary widely in their enforcement of the pollution exclusion. Many states narrowly construe the term "pollutants." In New York, for example, "pollutants" means industrial or environmental pollution; it does not encompass risk associated with indoor releases of chemicals. *See, e.g*., *Belt Painting Corp. v. TIG Ins. Co*., 100 N.Y.2d 377, 387 (2003); *see also Sphere Drake Ins. Co. v. YL Realty Co*., 990 F. Supp. 240 (S.D.N.Y. 1997). A minority of states have taken a regulatory estoppel approach whereby the pollution exclusion will not apply unless the alleged pollutant is "traditional" contamination, e.g., an oil spill. *See, e.g*., *Kimber Petroleum Corp. v. Travelers Indem. Co*., 298 N.J. Super. 286 (App. Div. 1997) (collecting cases); *see also Morton Int'l , Inc. v. Gen. Accident Ins. Co. of Am*., 134 N.J. 1 (1993) (defining the regulatory estoppel theory). Other states, have taken a more expansive view of the term, thereby including carbon monoxide within the scope of "pollutants." *See, e.g*., *Zaiontz v. Trinity Universal Ins. Co*., 87 S.W.3d 565 (Tex. App. San Antonio 2002); see also *Matcon Diamond, Inc. v. Penn Nat'l Ins. Co*., 815 A.2d 1109 (Pa. Super. Ct. 2003) (applying Pennsylvania law); *Deni Assocs. v. State Farm Fire & Cas. Ins. Co.,* 711 So. 2d 1135, 1138 (Fla. 1998). In the hypothetical above, choice of law will be a significant issue and, indeed, may be dispositive of some or all coverage issues.

The CPL coverage is underwritten to insure certain pollution risks. A threshold inquiry is whether the injury or damage results from a "pollution condition" and "covered operations" of the insured. *See, e.g*., *Ackley v. Paramus Bd. of Educ*., No. A-2492-10T4, 2012 N.J. Super. Unpub. LEXIS 452, at *11, 2012 WL 634359 (App. Div. Feb. 29, 2012); *URS Corp. v. Zurich Am. Ins. Co*., No. 653952/2012, 2014 NY Slip Op 24016, ¶ 3, 43 Misc. 3d 391, 396, 979 N.Y.S.2d 506, 510 (Sup. Ct.) (interpting "pollution condition" by referring to similar language in a pollution exclusion included in a GL policy). It must also be determined whether the coverage part provides claims-made or occurrence-based coverage. CPL policies often apply if the "claim" or "loss" for which pollution liability coverage is sought is not covered "in whole or in part" under another insurance policy "in force prior to this policy."

For a loss occurring over multiple years, it must be determined whether multiple CPL coverage parts respond, and if so, how they are allocated with other policies. CPL policies often include language deeming a loss to have taken place within the time period of the first responsive CPL policy, irrespective of whether the loss continues into subsequent CPL policy periods. Other CPL policies contain non-cumulation clauses that have a similar effect. When such language does not exist, or is not enforced, the insurer will need to determine how to allocate a multi-year loss. Many insurers apply a *pro rata* allocation. Some insurers seek to allocate 50% to the CPL on the argument that environmental losses are meant to be covered by the CPL part.

In the hypothetical "mixed" claim above, the tension again falls on whether a policy exclusion in the GL coverage applies and whether the claim falls within the scope of the CPL coverage. State law governing the interpretation of "pollutants" could be determinative of some or all these issues. The timing of the injuries might be a significant issue. If the pollution exclusion was not applied to an indoor air exposure, both the CGL and CPL coverage parts would likely apply. Then the issue is in a package policy which coverage part should apply, and how many years of coverage are subject to allocation.

C. CPL v. PL

Hypothetical: The insured is a tank removal contractor that was retained to remove and replace an existing gasoline tank at a fueling station. During installation of the new tank, a subcontractor does not properly compact the soil. As a result of the subcontractor's failure to compact the soil properly, the tank settles shortly after being installed. A crack forms between the top of the tank and the valve where the tank is filled due to the settling. When the tank is filled for the first time, the tank overflows, thereby spilling gasoline onto the surrounding soil. The general contractor is sued (along with other parties) in a lawsuit seeking damages for the release, including the cost of removing the new tank installation, remediating the soil, and replacing the tank with a new tank. The general contractor is alleged to have negligently supervised the work of its subcontractor.

In the CPL versus PL dispute above, the analysis is similar to the CGL versus PL dispute. The insurers will evaluate whether the loss involves a wrongful act based upon the rendering or failure to render professional services or whether it more appropriately results from a pollution condition. The competing insurers will argue that the loss should be treated more appropriately as a PL loss rather than CPL loss, or vice versa, based upon the policy terms and exclusions and the nature of the allegations by the underlying plaintiff in its complaint or other parties in their claims. It may not be clear which coverage applies or does not apply such that a non-participating insurer risks breaching the duty to defend if it fails to participate in or undertake a defense obligation under a particular coverage part. It might be possible to use the allegations to affirmatively convince another insurer of the error of its coverage position.

As with above, policy exclusions may provide the insurers with bases to assert arguments in favor of non-coverage under a particular coverage part, but they may not be dispositive at the early stages of the litigation. A key interpretive issue at the early stage will be whether the insurer asserting non-coverage under a particular coverage part has enough evidence, and evidence in a form acceptable to render a judicial determination, to conclusively show that a position in favor of non-coverage under a particular coverage part is supportable. Choice of law may be a factor. The law may not be settled about which facts obtained in discovery may be used to relieve the insurer under a broad duty to defend due to a policy exclusion. In New York, for example, there is some appellate authority for the position that any undisputed facts in the discovery record may be used to accomplish this, but there are federal court

authorities that appear to contradict the appellate authorities. *See, e.g.*, *Pa. Millers Mut. Ins. Co. v. Rigo*, 256 A.D.2d 769 (3d Dep't 1998) ("Although an insurer's duty to defend is based upon allegations contained in the complaint, extrinsic facts may be considered by the insurer." (citation omitted)). *But see Int'l Bus. Machs. Corp. v. Liberty Mut. Fire Ins. Co*., 303 F.3d 419, 426 (2d Cir. 2002) ("[T]here is no consistent rule from New York's lower courts and it is unclear whether New York law allows reference to extrinsic evidence [to relieve an insurer of the duty to defend]."). Insurers should therefore be cognizant and cautious about the types of evidence being relied upon, if contradictory to the allegations of a pleading, to support the application of policy exclusions.

In addition, the allegations of the underlying pleadings commonly are vague or non-specific with regard the timing of an injury or damage. In the scenario above, for example, an issue exists about whether both the CPL and PL coverage parts could apply in different policy periods. Under the CPL coverage, the policy may be an "occurrence"-based form, whereby the date of the injury or damage is relevant. A vague pleading might allege an injury over a timeframe that includes the policy periods for the CPL coverage or, in the alternative, include allegations suggesting that the injury or damage took place over a number of years. For example, in the scenario above, the underlying pleading might allege that the release took place from years 1 through 5 of the coverage. It may be asserted, therefore, that the CPL policies for that five-year period apply due to the allegations of the complaint. The PL insurer could also provide coverage when the claim was made in year 6.

Insurers also should be aware that some states, for example Illinois, permit the insured to make a "target tender" to particular policy periods under certain circumstances. Insurers should be cognizant that other insurers may attempt to orchestrate such a target tender through the insured's name in a self-serving attempt to reduce their own exposure for up-front defense and indemnity costs.

Under the PL coverage, in contrast, the key timing issues are (1) when the claim is made against the insured and (2) whether the conduct leading to the claim took place subsequent to any applicable retroactive date of the policy. The claim may be asserted in year 6. The insurer asserting that the PL but not CPL coverage applies will need to determine how to contribute towards the ongoing defense obligation if the insured asserts that the CPL coverage applies but not the PL coverage.

D. Other Insurance and Additional Insured Considerations

In a scenario where the coverages overlap (e.g., CPL applies concurrently with the CGL or PL coverage), the competing insurers will need to determine the priority of coverage for defense and indemnity. Another significant issue often overlooked is application of the "other insurance" clauses of the respective policies. A threshold consideration is whether each coverage part contains its own "other insurance" clause that applies only to that coverage part or whether the policy as a whole contains an "other insurance" clause. Although the latter is rarely seen in standard-form policies, it is possible that a manuscript endorsement was added during the underwriting process. Once this determination is made, the insurer must consider whether an "other insurance" situation exists.

In a CPL versus PL dispute, the competing insurers may be in agreement that the policies cover different sets of risks and, therefore, the "other insurance" condition will not determine the priority of coverage. State law defines whether a policy covering different risks is "other insurance." In New York, for example, there is case law suggesting that the CGL provided to an insured as a Named Insured and the coverage provided to the same insured under a different CGL policy as an additional insured are not "other insurance" with respect to each other because the risk of different losses was undertaken under both

policies. *See, e.g*., *HRH Constr. Corp. v. Commercial Underwriters Ins. Co*., 11 A.D.3d 321, 323 (1st Dep't 2004) ("Each insurer afforded coverage to HRH only for claims arising out of work performed by that carrier's primary named insured" such that different risks were insured), *lv. denied*, 5 N.Y.3d 705 (2005); *accord N.Y. State Thruway Auth. v. KTA-Tator Eng'g Servs., P.C.,* 78 A.D.3d 1566, 1567 (4th Dep't 2010) (finding that a general liability and professional liability policy applied to the same insured but insured different risks such that a coinsurance situation did not exist); Pac. Indemn. Co. v. Linn, 590 F. Supp. 643 (E.D. Pa. 1984) (finding that PL and GL coverage did not insure the same risk and requiring the GL and PL insurers to contribute equally towards defense costs incurred by the insured). Some states, however, do not clearly define what constitutes a different risk so insurers will be left with competing arguments rather than clear guidance from the courts. *Cf. Home Ins. Co. v. Certain Underwriters at Lloyd's*, 729 F.2d 1132 (7th Cir.) (questioning whether a PL and GL were "other insurance"). Consideration also must be made for whether the language of the other insurance clauses requires collectible, both valid and collectible, or "any" other insurance.

Resolution of the "other insurance" issue will permit the insurers to proceed under the policy language or according to applicable common law. In a non-other insurance situation, the law in many states is that both coverages apply and, if the insured is seeking coverage under both coverages, the insurers must share in defense and indemnity in an equitable manner. See, e.g., *N.Y. State Thruway Auth.*, 78 A.D.3d at 1567 (applying New York law). Insurers should be aware that insureds may have business reasons (e.g., premium savings) for targeting one type of coverage over another. In an "other insurance" situation, the competing insurers will be governed by the language of the other insurance clause and any common law rules governing conflicts between the language.

The competing insurers also must be aware of possible additional insured coverage as a result of any insurance procurement by or for the insured. Construction and service contracts often feature detailed risk transfer provisions that include insurance procurement and indemnity requirements. The insurance procurement requirements in turn often require the addition of an owner, architect, or other parties as additional insured under various policies. There may be an opportunity for the insurer to reduce or eliminate its share of the risk by pursuing a tender of additional insured rights. Of course, the insurer should be aware of the insurance procurement requirements in case it, too, becomes the target of a tender.

E. Resolution Strategies

When attempting to resolve disputes between insurers relating to package policies, insurers always should seek an outcome consistent with past claims handling and underwriting intent, so long as those are supported or supportable by applicable law. Insurers should evaluate the nature of the loss, ask the insured for further information, and evaluate the available coverages. Obtain copies of the available policies from the other insurers, either through direct request or defense counsel. Added endorsements may not appear in the claims file copy of the policy; therefore, obtaining certified copies of the policies from underwriting in advance of evaluating coverage is a best practice.

When the above information has been obtained, evaluate which coverage part was meant to apply. Determine whether the underwriting intent was to handle risks of loss through one form of coverage as opposed to another. For example, determine whether the insured only performs its work at jobsites and obtained the CGL coverage merely to cover the risk of losses at its office location. This may be apparent from the face of the policy terms, or it might not. An evaluation of the premium attributable

to each coverage part might assist in the determination, if that information is itemized in the policy or available from underwriting.

Once the respective insurers have taken positions, attempt to negotiate a resolution. Interim cost share agreements involving all insurers (and possibly the insured) relating to the duty to defend may be a viable approach. These agreements can be evaluated depending on the course of the litigation, thereby permitting a decreased share of participation if facts reveal that the insured is principally being held liable for a professional loss as opposed to a non-professional loss. The agreement should clearly state whether the parties are reserving their respective rights to seek a judicial declaration about the appropriate allocation or whether the parties are resolving that issue for all defense costs incurred under the time period of the agreement. The agreement also should address indemnity, whether it is handled under a reservation of rights for another day or will follow the shares allocated with respect to defense. Regardless of whether an interim agreement is entered into, it is critical that the insurer promptly communicate its coverage position to the insured in writing.

Avoid the "wait-and-see" approach. In other words, avoid an approach that either leaves the insured undefended or lets the other insurers, or the insured or its broker, have too much control over the manner in which the suit is defended. Many insurers will withhold participation in a defense or defend without expressly stating which coverage part(s) potentially apply or do not apply. The wait-and-see approach leaves the insurer open to an argument that, on the one hand, it has breached its duty to defend by failing to participate in the defense or, worse, on the other hand, that it is estopped from denying coverage under a particular coverage part because it has been defending without clearly indicating which coverages apply or do not apply. Insurers should be proactive and communicative with the insured regarding the insurer's coverage position, even if the position is, "We require further information to evaluate coverage." The wait-and-see approach should be disfavored.

F. Litigation Risks Exist

The above strategies can help reduce the significant risks that can exist in litigation arising out of insurance coverage disputes. Insureds—particularly sophisticated insureds—should be expected to serve invasive discovery requests aimed at discovering past positions taken by the insurer based on the same or similar policy language for similar claims. Often, such discovery will be pursued under the guise of a bad faith claim asserted against the insurer, although some states will permit limitations on such discovery until a coverage obligation has been established. Insurers should be aware that insured coverage counsel is increasingly available to, and used by, middle market companies to pursue defense and indemnity. Therefore, invasive discovery request are becoming the norm in coverage litigations involving middle market insureds.

The best way to avoid bad faith claims is to avoid taking inconsistent or incorrect coverage positions. Internal roundtable discussions may be beneficial in working through difficult coverage and allocation-related issues. In ensuring that a consistent approach is being taken on a company-wide basis, these roundtable meetings may take place each time a claim comes in as well as periodically.

III. How to Apply Deductibles and Self-Insured Retentions

Quite often there are different deductibles and self-insured retentions (SIRs) applicable to the different types of coverages that might be triggered. In addition, more often than not, Claims Made polices (such as PL) include deductibles and SIRs that must be satisfied before any defense obligations of the PL carrier are triggered. On the other hand, CGL polices normally include some amount of deductible, however, the carrier owes "first dollar" defense with the deductible usually being satisfied at the time of any indemnity payment. Accordingly, in Example A above where both a CGL policy and a PL policy would potentially be triggered and both carriers would have a duty to defend, the CGL carrier would be required to pick up the insured's defense immediately while the PL carrier's obligation would not be immediately triggered. The PL carrier's application of the insured's deductible/SIR could present further tension between the carriers. Similar issues could arise under all of the above examples.

Resolving the application of these issues amongst different carriers once the coverage positions have been established is necessary for a smooth defense of the insured and to avoid potential sidetrack coverage litigation amongst the carriers. A practical approach is often the best way to resolve these disputes. One thing that the carriers must keep in mind is that, if these disputes were presented for resolution by way of Declaratory Judgment, Courts are unlikely to reach a decision that would result in an insured having to pay multiple deductibles on a single claim that might trigger 2 separate coverages. With that said, the contractual language of the policies cannot be ignored. Additional tensions amongst insurers could arise in situations where a Complaint reflects allegations that clearly fall into one line of coverage but also includes some vague allegations that arguably trigger a separate line of coverage, however, the carrier with the obvious majority of the coverage insists on sharing defense of the insured equally with the other carrier.

Consistency amongst the carriers in how the issue of applying deductibles and SIRs are addressed and resolved is the key to avoiding unnecessary distractions, and possibly coverage litigation amongst carriers, when multiple lines of coverage are triggered by a single claim.