CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

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Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 4: Friday, April 11, 2014 (10:25 am – 11:25 am)

Addressing and Resolving Disputes Among Different Insurers Covering the Same Risk

I. Do We Have All Of the Players? Identifying All Potentially Responsible Insurers at the Outset of a Claim

Certain claims involve or potentially involve issues, theories or parties that could give rise to additional coverage. Construction defect claims, for example, often involve multiple policies and multiple insureds, each with its own coverage. Identifying all potentially applicable coverage should be part of the initial investigation of a claim. Other insurance is often implicated in situations where the claim is made by an entity that is not the "named insured." In that instance, other coverage may be identified by obtaining contracts between the party seeking coverage and the "named insured", indemnity agreements and corporate transactional documents. Sometimes, the allegations of an underlying complaint will trigger more than one line of coverage, thus implicating more than one primary insurer or policy. Indemnity contracts between the policyholder and its vendors and business partners may also give rise to additional coverage. Part of the initial investigation and analysis of a claim should include an assessment that brings other potential coverage to light so that the all insurers or potentially responsible insurers are promptly notified of a claim.

II. Taking Charge of the Underlying Defense

If more than one primary insurance policy has a "duty to defend" an underlying claim, it is important to determine if the "priority of coverage" is evident based upon the language of the policies. The other insurance clauses may be instructive in determining which carrier is truly "primary" for a given claim. Certain jurisdictions, such as Illinois, allow a policyholder to "target" a single insurer and cut-off contribution rights in certain circumstances, regardless of the language contained in the other insurance clauses. If that happens, the targeted carrier will have to defend, but the non-targeted carrier may have an interest in associating in the defense if the exposure is significant. If the insurers do not agree on counsel, case strategy or settlement value, "controlling" the defense becomes a significant issue. There are instances where a "non-targeted" primary may want to be involved in the defense and pay some of the

fees to control the indemnity. Identifying these issues early in the claim process will allow the carriers to consider appropriate options, such as defense and cost share agreements.

III. Indemnity Issues

While defense can be undertaken pursuant to a reservation of rights, funding indemnity dollars for settlement or judgment may be more difficult. Ideally, the parties will reach an agreement which governs not only defense cost sharing, but also addresses funding of settlement or judgment. Often times, however, the parties do not agree on the coverage issues, at least not before a case is ripe for settlement or trial. To the extent a jurisdiction allows it, the "fund and fight" option provides a workable mechanism for minimizing the underlying exposure and preserving coverage defenses. Alternatively, the policyholder or an insurer can "fund and chase" a non-participating insurer. In that instance, it is important to preserve a claim for equitable contribution or subrogation by preserving evidence and providing the insurer with proper notice. Consent of the insurer may be required. Where an insurer breaches its policy by refusing to defend or indemnify, it repudiates the contract and consent may not be required. Because the requirements may be different depending on applicable law, it is important to understand which state's law applies.

IV. Strategies for Addressing Disputes Among Insurers

There are several avenues insurers can take to resolve disputes regarding coverage prior to the resolution of an underlying claim. Interim cost sharing agreements can be very effective in identifying coverage issues, preserving coverage defenses and encouraging participation early in the life of a complex claim. Mediation and binding arbitration may be appropriate in certain instances where, for example, all parties would benefit from a resolution of coverage issues prior to resolution of the underlying claim or where certain parties want to avoid establishing precedent on an issue. Where alternative dispute resolution is not an option or fails, an insurer who funds indemnity should ensure that all steps are taken to preserve claims for contribution, indemnity or subrogation in the given jurisdiction.

V. Issues for Consideration

There are certain issues that frequently arise in the context of claims that trigger coverage under multiple policies. Sometimes those issues arise under umbrella or excess policies. For example, if a primary carrier contends that it has no defense obligation due to exhaustion or otherwise, the policyholder may turn to an umbrella carrier to defend. The umbrella carrier may dispute the primary carrier's position but agree to provide a defense pursuant to a reservation of rights and seek to recoup from the primary carrier. Parties seeking coverage under policies issued to a predecessor may also pursue policies under different "lines." In those instances, the party seeking coverage must prove in the first instance that it is an insured or has rights to coverage under the policy before any duty to defend or indemnify is triggered. Finally, resolution of coverage issues and issues relating to priority of coverage may depend on which state's law applies. It is important to understand the potentially applicable jurisdictions and nuances of each in order to preserve a claim for contribution, indemnity or subrogation.