CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™
ADVANCING ETHICS, COOPERATION AND EDUCATION

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Can't We Agree to Disagree and Save Money? A New Approach to the Use of Intercompany Dispute Resolution Agreements

I. Identification of the Problem Needing an Overhaul

The costs associated with transferring the risk to other insurers as well as enforcing rights and obligations as between primary and excess insurers are continuing to skyrocket without any "game changer" in sight. This outline, after briefly acknowledging the legal duties owed between and amongst insurers, will propose a model utilizing intercompany dispute resolution agreements that could save insurers literally hundreds of thousands of dollars.

II. Basic Duties Owed Among/Between Primary Insurers

A. Equitable obligations tangential to the insurance policies - contribution
B. In the context of long-tail claims that span multiple policy years, courts have employed a variety of different allocation methods to apportion responsibility for indemnity among insurers and, in some cases, the insured.
C. These are court-imposed methodologies that most often are stated to be grounded upon equitable concepts, as opposed to contractual rights and obligations.
D. A growing number of courts have held in recent decisions that the obligation to indemnify an insured in cases that involve continuous or progressive injury or damage is to be prorated among carriers based upon their time on the risk over the triggered period.

III. Duties Owed Between Primary and Excess Insurers

A. Courts often impose non- contractual duties on primary insurers in their dealings with excess insurers in the context of claims that are likely to exceed primary limits
B. There is no contractual relationship between a primary insurer and an excess insurer that gives rise to contractual obligations between the two. Instead, the insurance contracts, whether excess or primary, create obligations only between the insured and the respective insurer.

C. Under the insurance contract, an insurer typically does not assume any duties to another insurer, including those that provide coverage at a different layer for a common insured. Notwithstanding the absence of contractual obligations, some courts have imposed non-contractual duties on primary insurers in their dealings with excess insurers in the context of claims that are likely to exceed primary limits.

D. Because of the absence of any contractual relationship between a primary and an excess insurer, concepts of duty and breach are less clear when a primary insurer's failure to settle implicates the excess insurer's coverage, as opposed to an insured's assets.

E. The majority of jurisdictions confronting this question have found that an excess insurer's rights against a primary insurer arise through the doctrine of equitable subrogation. Under the doctrine of equitable subrogation, an insurer paying a loss under a policy becomes subrogated to a cause of action that the insured may have against a third party who caused the loss. An excess insurer can use the doctrine of equitable subrogation to assert the insured's right to insist that the primary insurer use due care to avoid an excess judgment against the insured. Liberty Mutual Ins. Co. v. American Home Assur. Co., 348 F.Supp.2d 940, 961 (N.D. Ill. 2004) (citing Westchester Fire Ins. Co. v. General Star Indem. Co., 183 F.3d 578, 582-83 (7th Cir. 1999)); Haddick Ex Rel. Griffith v. Balor Ins., 198 Ill.2d 409, 261 Ill. Dec. 329, 763 N.D.2d 299, 303-04 (2001)). The doctrine of equitable subrogation thus allows an excess insurer to "step into the legal shoes" of the insured and acquire the insured's right against the primary insurer. Id. Between excess and primary insurers, this duty comes into play in determining whether the primary insurer has been negligent or has exercised bad faith in failing to settle a claim within primary limits.

F. While the doctrine of equitable subrogation has been widely accepted, in contrast, the majority of courts considering the question have found that primary insurers have no direct duty to excess insurers.
   a. There are a minority of courts that have held that an excess insurer may maintain a direct action against a primary insurer for bad faith.

IV. ADR – Sample Agreement to Submit to Intercompany Dispute Resolution Procedures

INTER-COMPANY DISPUTE RESOLUTION AGREEMENT

It is the object of companies which are now or may hereafter be signatories to resolve disputes among themselves, by mediation and/or arbitration. The undersigned hereby accepts and binds itself to the following for inter-company dispute resolution.

I. Signatory companies are bound to forego litigation and in place thereof submit to mediation, and then, if necessary, arbitration any questions or disputes which may arise as hereinafter set forth:

a. Any controversy, including policy coverage and interpretations, between or among signatory companies involving any claim or other matter relating thereto and not excluded under b below.
b. This Agreement shall not apply to:

II. The signatory companies agree that a committee consisting of one representative from each company will be formed ("Company Committee") and authorized:
    a. To make appropriate rules and regulations for the presentation and determination of controversies under this Agreement.
    b. To select the places where arbitration facilities are to be available, and adopt a policy for selection and appointment of Mediation and Arbitration Panels.
    c. To prescribe territorial jurisdictions of Mediation and Arbitration Panels
    d. To make appropriate rules and regulations to apportion equitably among signatory companies the operating expense of the mediation and arbitration program.
    e. To authorize and approve as signatories to this Agreement such insurance carriers as may be invited to participate in the mediation and/or arbitration program and also to compel the withdrawal of any signatory from the program for failure to conform with the Agreement or the rules and regulations issued thereunder.

III. A Mediation/Arbitration Advisory Board ("M/A Advisory Board") shall be appointed by the Company Committee, who shall exercise general supervision of the implementation of the Agreement and the rules and regulations thereof. Mediation and Arbitration Panels shall be appointed under the authority of the M/A Advisory Board and shall function in the following manner:
    a. Mediation - the key here is to have mediation, between upper management, without attorneys, as a pre-requisite to engaging in the arbitration.
    b. An Arbitration Panel shall consist of a chairman and two other members selected by him or her, except that controverting parties may mutually agree to less than three arbitrators in a specific case.
    c. The members of Arbitration Panel shall be selected on the basis of their experience and qualifications.
    d. All Panel members shall serve without compensation.
    e. The decision of the majority of an Arbitration Panel shall be final and binding upon the parties to the controversy without the right of rehearing or appeal.
    f. No member of an Arbitration Panel shall serve on a panel hearing a case in which his company is directly or indirectly interested.

IV. DIRECTED ARBITRATIONS
    a. 0option of selecting a chairman mutually acceptable, who will in turn select the other two members of the panels as per above.
    b. Should the parties be unable to agree on a chairman, they shall each

i. Submit the names of two qualified panel members to the M/A Advisory Board.
ii. The M/A Advisory Board will randomly draw the Chairman from the four names submitted.
iii. The Chairman shall proceed as per above.

V. Any signatory company may withdraw from this Agreement by notice in writing to the M/A Advisory. Such withdrawal will become effective sixty (60) days after receipt of such notice except as to cases then pending before Arbitration. The effective date of withdrawal as to such pending cases shall be upon final settlement

VI. ARBITRATION RULES AND REGULATIONS

The rules and Regulations hereinafter set forth are promulgated under authority of the M/A Advisory Board. As a condition precedent to arbitration, senior claims representatives of at least supervisory status of involved companies must make sincere efforts to settle controversies by direct negotiations in a scheduled mediation.

a. GENERAL
   i. This Agreement shall be considered applicable to accidents, insured events, or losses occurring within the territorial limits on the United States, except with the mutual consent of the controverting parties.
   ii. Copies of the Agreement, the rules and regulations, and current list of signatory companies shall be sent to the Head Office of each signatory company.
   iii. This Agreement shall not be construed to create any causes of action or liabilities not existing in law or equity.
   iv. This Agreement is applicable only to controversies involving the interests of insurance companies. The interest of the parties other than insurance carriers may not be arbitrated under the Agreement. The fact that such parties may be insureds of signatory companies does not alter this prohibition.
   v. In arbitration proceeding and practice the company which initiates the proceeding by filing a request for arbitration of a controverted claim or issue, shall be known as the "applicant", and the company or companies against which such controverted claim or issue is asserted shall be known as the "respondent".
   vi. Controversies between signatory companies and non-signatory companies, if there is mutual consent, may be arbitrated, provided the signatory company involved first obtains and files with the M/A Advisory Board a duly executed "Inter-Company Arbitration Statement".
   vii. Arbitration of a controversy must be deferred until all companion claims or suits, not subject to arbitration, have been disposed of by

settlement or otherwise, except that all parties to the arbitration may agree to waive deferment.

viii. Signatory companies are not precluded from interposing a counterclaim when defending a suit instituted by a non-signatory party even though such counterclaim may involve another signatory company in the litigation. Such counterclaim is not to be regarded as a separate and distinct cause of action, but merely as a defense in the lawsuit over which neither signatory company has control.

ix. Submission of a case to Arbitration under the Agreement shall have the same force and effect upon signatory companies, with regards to the applicable Statute of Limitations, as if litigation has been instituted. The Agreement does not have application, unless there is mutual consent of the controverting companies, when a case is not submitted prior to the expiration of the governing Statute of Limitations. In the event of a disagreement, in any particular case, as to the application of this regulation, all controverting companies thereto will be bound by any ruling thereon by the M/A Advisory Board.

x. The arbitrator(s) shall be bound to apply rules as existing at the date of occurrence for any case in arbitration under this Agreement.

xi. This Agreement shall not apply to a case in which there are two or more tortfeasors, one or more of which is insured by non-signatory companies, in respect to the case in dispute.

b. ORGANIZATION

   i. An Arbitration Chairman shall be selected by the M/A Advisory Board from among the signatories and shall serve for a period of one year or until a successor is selected.

   ii. An Arbitration Secretary shall be appointed, where necessary.

c. JURISDICTION

   i. Cases shall be under the territorial jurisdiction of any Arbitration Panel appointed by the M/A Advisory Board in the State where the accident or other event, which gave rise to the controversy, occurred, except with the prior mutual consent of the controverting parties.

d. PROCEDURES

   i. As a condition precedent to arbitration, an applicant must have held pre-arbitration discussions with the respondent indicating the date the discussions were held on the application form. The applicant should appoint a pre-arbitration officer for this purpose. Failure to pre-arbitrate will result in the case being returned to the applicant

by the M/A Advisory Board. The filing fee will not be refunded and must be resubmitted should the case be refiled.

ii. An Arbitration proceeding is commenced by a senior claims representative of a signatory company filing an "Inter-Company Arbitration Statement." At the same time a copy of the statement are to be submitted by the applicant directly to the senior claims representative of the respondent. If there is more than one respondent company in a case the applicant shall so indicate on the "Inter-Company Arbitration Statement" and send a copy thereof to each respondent company.

iii. Statements filed by applicants shall set forth the following information:

1. Name of applicant and respondent company together with names and addresses of the local representatives having supervision over the case in controversy.
2. The names of the respective insureds of both applicant and respondent.
3. Claim file numbers of applicant and respondent (if known).
4. Kinds of coverage involved under applicant's insurance policy and also respondent's insurance policy (if known).
5. Date and place of alleged accident, loss or other insured event.
6. Amount of company's claim payment and amount of any applicable deductible interest of its insured.
7. A statement describing any pending litigation and its proposed disposition.
8. A certification that settlement efforts have been unsuccessful and that the respondent company has agreed to arbitrate.
9. Brief statement of allegations solely as to the issue of controversy.
10. Signature of applicant's representative and date signed.
11. A copy of the "Inter-Company Arbitration Statement" as received from the applicant, shall be completed as to the respondent's portion hereof and filed within 30 days with the M/A Advisory Board by the respondent company as an answer to the applicant's allegations. A copy thereof shall also be transmitted directly to the senior claims representative of the applicant as well as to any other respondent.

iv. Answers filed by respondents shall set forth the following information:
    1. Supplement, if and as necessary, the information furnished by applicant as the respondent company's name and address, name of senior claims representative, name of insured, file number and kind of policy coverage.
    2. State whether coverage and liability as alleged by applicant is admitted.
    3. Amount of applicant's alleged damages conceded by the respondent.
    4. Amount of respondent insured's interest in the case, such as deductible property damage coverage, if any.
    5. Description of any pending litigation and its proposed disposition.
    6. Whether there is objection to arbitration. If so, the grounds on which the objection is base should be fully stated.
    7. Brief statement of allegations as to the issue in controversy.
    8. Signature of respondent's representative and date signed.

v. The procedure set out in the preceding paragraphs of this section is also applicable to counterclaims. The "Inter-Company Arbitration Statement" should clearly indicate that it is submitted as a counterclaim and the original arbitration case to which it pertains shall be plainly identified.

vi. If a respondent company fails to submit its answer within 30 days after receipt of the applicant's contentions, the M/A Advisory Board shall request the reasons for delay and endeavor to expedite the submission of the respondent's answer. If a respondent company thereafter fails to submit its answer, after being requested to do so, the Secretary shall refer the pertinent facts of the case to the M/A Advisory Board. The head office of the signatory company concerned will then be informed of its representative's failure to conform to the prescribed arbitration procedure so that appropriate instructions may be issued by such head office.

vii. In the event settlement of a case is effected directly between the parties after it has been referred for arbitration, the applicant company shall forthwith notify the M/A Advisory Board of such settlement and withdraw the case from arbitration.

e. HEARINGS

i. When the M/A Advisory Board has received the essential facts and contentions from the controverting companies, the issue in the case shall be scheduled for hearing by an Arbitration Panel, and one or more cases may be considered at any scheduled hearing.

ii. Hearing date shall be determined by the Chairman of the Arbitration Panel, and one or more cases may be considered at any scheduled hearing.

iii. Representatives of controverting companies shall be notified by the M/A Advisory Board of the time and place of a scheduled hearing at least four weeks in advance of the hearing date, when personal representation at such hearing has been requested.

iv. Each controverting party shall be entitled, as a matter of right, to only one adjournment of a scheduled hearing which adjournment shall be authorized by the M/A Advisory Board.

v. Evidence which controverting companies desire to submit in support of their allegations shall be made available for examination by the arbitrators at the hearing. Such evidence may also be examined by opposing parties at the hearing. If one of the controverting companies fails to produce evidence at a scheduled arbitration hearing, after due notice thereof, the arbitrators may at their discretion consider the information in the "Inter-Company Arbitration Statement" of such party, and render a decision accordingly.

vi. Procedures at arbitration hearings shall be informal. Controverting companies are expected to present the facts of their representative cases in a brief, frank and direct manner.

vii. The controverting companies shall submit for consideration of the arbitrators, briefs of the law involved, when requested by the Arbitration Panel hearing the case.

viii. Controverting companies may if they also desire be represented at arbitration hearings by members of their staffs or attorneys.

ix. Documentary evidence submitted by controverting companies shall be left with the arbitrators for their scrutiny and consideration while reaching a decision.

x. If representatives of controverting companies attend an arbitration hearing they must withdraw after presentation of their cases and may not be present while the arbitrators are considering their decisions.

f. DECISIONS

i. Arbitration Panels may, upon their own request, render a decision in favor of a respondent company without production of evidence by such respondent if the Panel unanimously agrees following presentation of the applicant's evidence that which applicant has not made out a prima facie case.

ii. Arbitration Panels are authorized to make their findings on the law of the locality in which the accident, insured event, or loss occurred. A finding as to the amount of damages in issue should be based upon the facts presented to the arbitrators.

iii. Decisions of the arbitrators shall be promptly rendered after consideration of the case, and the evidence submitted by the controverting parties shall be returned promptly.

iv. The Chairman of the Arbitration Panel shall prepare a written decision in each case and a copy of same shall be submitted to applicant and respondent companies. The decision of an Arbitration Panel shall include the following minimum information:

1. date and place of hearing
2. names of arbitration panel member
3. decision or reward
4. brief statement of the basis of the findings, such as lack of proof, degree of negligence of the respective parties, other controlling principles of law at the discretion of the arbitration panel
5. signature of panel chairman.

v. A decision of an Arbitration Panel shall be complied with as soon as practicable. Any unwarranted delay on the part of the parties concerned should be reported to the Arbitration Chairman by the prevailing party. Once a decision of the panel has been communicated to the parties, payment of the award(s) shall be made within 30 days. Awards under this Agreement shall have the full force and effect of a judgment rendered in a court of the jurisdiction.

VI. Benefits of Intercompany Dispute Resolution Procedure

1. Advantages include the fact that it usually takes far less time to reach a final resolution than if the matter were to go to trial.

2. Usually (but not always), it costs significantly less money, as well.

3. Furthermore, in the case of arbitration the parties have far more flexibility in choosing what rules will be applied to their dispute (they can choose to apply relevant industry standards, domestic law, the law of a foreign country, a unique set of rules used by the arbitration service, or even religious law, in some cases.).

4. The parties can also have their dispute arbitrated or mediated by a person who is an expert in the relevant field.

    a. In an ordinary trial involving complicated and technical issues that are not understood by many people outside a relevant industry, a great deal of time has to be spent educating the judge and jury, just so they can make an informed decision. This large time investment often translates into a great deal of money being spent. Both sides might have to call expert witnesses, who may charge very large fees for their time. If an arbitrator has a background in the relevant field, however, far less time needs to be spent on this, and the parties can get to the actual issues of the case much sooner.

VII. Disadvantages of Intercompany Dispute Resolution Procedure

1. Generally, arbitrators can only resolve disputes that involve money. They cannot issue orders requiring one party to do something, or refrain from doing something (also known as injunctions).
2. Some of the safeguards designed to protect parties in court may not be present in ADR.
    a. These might include the liberal discovery rules used in U.S. courts, which make it relatively easy to get evidence from the other party in a lawsuit.
3. Also, there is very limited opportunity for judicial review of an arbitrator's decision. While a large arbitration service could, if it so chose, have some kind of process for internal appeals, the decision is usually final and binding, and can only be reviewed by a court in limited cases.
    a. This generally happens when the original arbitration agreement is found to be invalid. Because both parties must voluntarily agree to arbitration, if the consent of one party is obtained by fraud or force, it will not be enforced.
    b. Also, if the decision of the arbitrator is patently unfair, it may not be enforced. This is a difficult standard to meet. The fact that the arbitrator made a decision that the court would not have made is not, by itself, a basis to overturn the decision.
    c. A court might also overturn an arbitrator's decision if it decided issues that were not within the scope of the arbitration agreement.

IV. Case Studies

Case Study One

Giant University retains Big Dog General Contractors to construct a new Student Union building. Big Dog contracts with Little Dog Steel to do the structural steel for the building. Little Dog contracts with Small Puppy Steel to erect the steel. Little Dog also contracts with Cranes R Us to provide a crane and operator to do the lifting onsite. SlideRule Engineers are hired directly by Giant U to perform engineering services and to design the steel structure.

On the day of loss, a crane is lifting and setting a steel beam into place, taking hand signals from Small Puppy employees. The load strikes a temporarily placed beam, knocking it loose, and when it falls, it creates a domino effect, knocking down 3 other temporarily placed beams. 3 employees of Small Puppy are seriously injured, and the job is shut down and then delayed for 2 months.

It is claimed that the steel beams failed to have predrilled holes for temporary attachment, resulting in the beams instead being tied with steel wire, which obviously did not prevent the accident.

Claims for BI are made against Giant, Big Dog, Little Dog and SlideRule, with claims then made by everyone against Small Puppy, based on contractual indemnity and against Small Puppy's carrier based on insurance procurement/additional insured. Claim is also made by Big Dog against everyone for delay claims. It appears that Little Dog's carrier has already accepted as an additional insured Giant and Big Dog. Declaratory Judgment Actions filed by Little Dog's carrier vs. Small Puppy and its carrier, seeking coverage and attorney's fees.

The graphic depiction is:

Giant University (owner)

Big Dog General Contractor (GC) SlideRule Engineers (engineering)

Little Dog Steel (Steel Sub) Cranes R Us (Lessor of crane)

Small Puppy Steel (steel sub-sub)

Case Study Two

Plaintiff sues BigBucksGrocery ("BBG") for injuries sustained when he is shot in BBG's parking lot in a gang shooting. BBG had two security companies to provide security. SecureTwo provided security services inside the store. Parking Lot Security provided security outside. The plaintiff alleged that BBG should have seen that the shooter had been flashing gang signals inside the store, and then should have provided better lighting and better security for patrons outside the store. Plaintiff suffered severe injuries, with a verdict potential of $6 to $10M. BBG is additional insured under policies issued by different insurers to SecureTwo and Parking Lot Security, and is also an additional insured under the policy issued to MallOne, which owns the mall in which BBG is located. All have indemnity agreements with BBG as well as additional insured coverage. BBG sues SecureTwo and Parking Lot Security for contribution and indemnity, but SecureTwo receives summary judgment finding that SecureTwo's negligence did not proximately cause the loss. BBG files a DJ against the insurers for SecureTwo, Parking Lot Security and MallOne, all of which have either denied coverage or are defending under a ROR.

Defense counsel estimates that case can be settled for $2.5 to $3M, but a verdict could be $8M to $10M.

BBG has coverage from its own carrier with a $500,000 SIR.

What is the best way for the insurers and BBG to resolve this to avoid a disastrous verdict?