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Multiple Insureds with Insufficient Limits: The Law, Considerations, and Recommendations

I. The Problem: Claimants Propose to Release Some, But Not All, Insureds

One thing claims handlers, insurers and coverage counsel have in common is they all want to get the "right answer" when confronted with a policy limit settlement demand. Often that can be difficult. In a typical case, the question of whether to tender the policy limit turns upon a comparison of that limit to the exposure of the insured(s) on covered claims. But in the typical case, a limits demand includes an offer to release all insureds in exchange for the limit's payment. Not all cases are typical.

Consider this situation. You are tasked with evaluating a settlement demand on a wrongful death claim arising from an auto accident. The applicable limit is the state's minimum. The owner of the at-fault auto is the named insured. The at-fault driver was a permissive user of the vehicle and an additional insured on the owner's policy.
The decedent's family asserts that both, the owner, and the driver, are at fault. The family demands payment of the full policy limit in exchange for the release of the driver only.

What is the process for divining the right answer under these facts? Unfortunately, in most jurisdictions, there is no clear answer. Only a handful of states have addressed the question and, in those that have, courts evaluating the same policy concerns have reached opposite conclusions as to how such demands should be evaluated.

Courts and commentators have described the insurer's position in such a case as a "Catch 22." *Strauss v. Farmers Ins. Exch.*, 26 Cal. App. 4th 1017, 1022, 31 Cal. Rptr.
2d 811, 814-15 (1994) (the situation places insurers in a "Catch-22" situation where they "would be liable for either agreeing to or refusing to settle"); *see also Anglo-Am. Ins. Co. v. Molin*, 670 A.2d 194, 199 (Pa. Commw. Ct. 1995) (describing the situation as a "dilemma faced by an insurer"); *Contreras v. U.S. Sec. Ins. Co.*, 927 So. 2d 16, 20 (Fla.
Dist. Ct. App. 2006) (such offers "immediately place [] the insurance company then in the Hobson's choice. If they do not agree to that, they are sued for bad faith, and if they do agree to it, they're sued for bad faith").

Insurance professionals confronted with such a demand to settle on behalf of fewer that all exposed insureds need to know the relevant jurisdiction's rules for such situations and, where the jurisdiction has yet to adopt a position, to understand the options to best manage the situation.

II. Approach #1: The Individual Settlement Approach – Majority View

As an initial matter, practitioners should note that the two competing approaches to the multiple insured problem begin the same way. The first step under both approaches is to attempt to secure a global settlement on behalf of all insureds:

> the insurer must begin by seeking to protect both insureds. It is the claimant's refusal to enter a global release that triggers the insurer's duty to reevaluate its approach to the defense, considering such factors as the potential liabilities involved, the existence of separate or excess coverages, whether one insured has sought a defense from different insurer, and the real-world impact on litigation and settlement of releasing just one.

Adega v. State Farm Fire & Cas. Ins. Co., No. 07-20696-CIV, 2009 WL 3387689, at *6 (S.D. Fla. Oct. 16, 2009) (referencing the Individual Settlement Approach in Florida).

It is at the second step that the approaches differ. In jurisdictions following the Individual Settlement Approach, once the insurer has attempted in good faith to settle on behalf of all its insureds, it can – and in certain cases may be required to – enter a reasonable settlement that protects fewer than all its insureds. This is true even if the result not only leaves the non-released insureds exposed to tort claims, but also eliminates the insurer's duty to defend those non-released insureds against the tort claims.

A. Individual Settlement Approach Example: *Contreras v. U.S. Sec. Ins.*

Reasoning typical for this approach can be found in *Contreras v. U.S. Sec. Ins. Co.*, 927 So. 2d 16 (Fla. Dist. Ct. App. 2006). There a drunk driver struck and killed a pedestrian. The at-fault driver and the owner of the at-fault vehicle both were insureds under the owner's automobile liability policy. The decedent's estate made a demand for policy limit upon the owner. The owner's insurer tendered the limit for a release of both insureds. The estate responded that it would accept the limit in exchange for a release the owner and the insurance company, but not the at-fault driver. The insurer's counsel responded:

> Please note that [the insurer] agrees that this case is serious, however, [the insurer] must act in good faith to all its insureds. **Therefore, you can understand why [it] cannot enter a release which operates to fully exonerate one insured while not releasing the second insured.**

Id. at 19 (bold in original).

The estate eventually obtained a judgment against the owner and the driver more than $1 million. The policy limit was $10,000. The owner filed for bankruptcy protection. The bankruptcy trustee assigned the owner's bad faith claim to the estate.

In the subsequent bad faith action, the trial court entered a directed verdict for the insurer based on the "duty to all insureds" reasoning set forth in counsel's letter. The court of appeals reversed. In so doing, the court accepted the estate's recharacterization of the issue as:

> whether an insurer acts in bad faith in refusing to pay a reasonable settlement demand to obtain a release of one of its two insureds, where the claimant refuses to settle with the other insured.

Id. at 20.

In response to the insurer's arguments regarding the duty of good faith to both insureds, the court held that the insurer satisfied that duty by first attempting in good faith to secure a settlement on behalf of both insureds. Then, "having fulfilled" that duty to the at-fault driver, the insurer "was obligated to take the necessary steps before [the expiration of the limits offers] to protect [the owner] from what was certain to be a judgment far more than her policy limits." *Id.* at 21. The appellate court further noted, had the insurer "paid out its limits, its duty to settle or defend would have ceased." *Id.*

Some of the outcomes in cases applying the Individual Settlement Approach can appear shocking. Nevertheless, focusing on the insurer's separate duty to each insured, a clear majority of the courts confronting the multiple insureds question have adopted the Individual Settlement Approach, either explicitly or implicitly. *See* Philip L. Bruner and Patrick J. O'Connor, Jr., *Insurer's settlement duties where policy limits insufficient to secure release of all insureds*, 4Pt1 Bruner & O'Connor Construction Law §11:190 ("A majority of jurisdictions allow an insurer to resolve the liability of one insured, even if a consequence of doing so is to leave the other insured without a defense or sufficient limits to satisfy a judgment, but only so long as the insurer does so in good faith").

B. Jurisdictions Following the Individual Settlement Approach.

At this time, of the eighteen jurisdictions with authority on the question, at least seven have adopted some form of the Individual Settlement Approach explicitly, with another five jurisdictions predicted to follow that approach:

- **Conn.:** *See Elliott Co. v. Liberty Mut. Ins. Co.*, 434 F. Supp. 2d 483, 499 (N.D. Ohio 2006), ruling modified on reconsideration 239 F.R.D. 479 (N.D. Ohio 2006) (purporting to consider Connecticut, Delaware, New York, Ohio, and Pennsylvania law, but citing only Pennsylvania, Missouri and Texas authority for its holding that "[i]t is clear that an insurer can settle or pay claims in good faith to one insured, even if this results in actual exhaustion of the policy limits to the detriment of another insured").

- **Delaware:** *See Elliott, supra*; *see also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 717 (E.D. Pa. 2001) (noting there "is little law in Pennsylvania or Delaware on this subject," and that both sides cite to *Anglo–American Ins. Co. v. Molin*, 670 A.2d 194, 199 (Pa. Cmwlth.1995), in which the court held that an "insurer should not be precluded from accepting" a "reasonable settlement offer for less than all of the insureds").

- **Florida:** *Adega v. State Farm Fire & Cas. Ins. Co.*, No. 07-20696-CIV, 2009 WL 3387689, at *4 (S.D. Fla. Oct. 16, 2009) (observing that, under Florida law, "where there are two insureds, although the insurer has a duty of good faith towards both, there

is no *per se* rule that prevents the insurer from expending policy limits to settle with one insured even if doing so potentially exposes the other one to a personal liability").

- Illinois: *Country Mut. Ins. Co. v. Anderson*, 257 Ill. App. 3d 73, 79, 628 N.E.2d 499, 503 (1993) (rejecting claim that insurer acted in bad faith by setting on behalf of all but one insured after attempted global settlement failed).

- Louisiana: *Bohn v. Sentry Ins. Co.*, 681 F. Supp. 357, 365 (E.D. La. 1988) (holding that insurer had no duty to defend additional insured after insurer exhausted policy limit settling on behalf of named insured).

- Mass.: *Bay State Gas Co. v. Robert J. Devereaux Corp.*, No. CIV.A. 11-0309H, 2012 WL 5378084, at *9 (Mass. Super. Aug. 28, 2012) (insurer may settle in good faith on behalf of fewer that all insureds, but that reasonableness of decision to exhaust the policy limit was a fact question).

- Michigan: *See Auman v. Fed. Ins. Co.*, 81 Mich. App. 740, 742, 266 N.W.2d 457, 458 (1978) (where insurer exhausted limits settling on behalf of some, but not all, insureds, summary judgment for insurer was reversed, not because insurer was barred from settling on behalf of some but not all insureds, but because of a genuine issue of material fact as to insurer's good faith in negotiating the settlement that exhausted the limit).

- Missouri: *Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co.*, 959 S.W.2d 864, 865 (Mo. Ct. App. 1997) ("A settlement offer given to only one insured that would exhaust coverage under the liability limit of the policy creates a dilemma for the insurer. An insurer should not be precluded from accepting a reasonable settlement offer for fewer than all insureds." (further citation omitted)).

- Ohio: *See Elliott, supra* (purporting to consider Connecticut, Delaware, New York, Ohio, and Pennsylvania law, but citing only Pennsylvania, Missouri, and Texas authority for the proposition that "[i]t is clear that an insurer can settle or pay claims in good faith to one insured, even if this results in actual exhaustion of the policy limits to the detriment of another insured").

- Oklahoma: *See U. S. Fid. & Guar. Co. v. Tri-State Ins. Co.*, 285 F.2d 579, 582 (10th Cir. 1960) (holding that, where underlying settlements did not exhaust the primary limit, "[c]laims arising from the same transaction against different persons often warrant separate consideration. [The primary insurer's] obligation was only to exercise an honest discretion on behalf of its insureds and in view of the result in the Oklahoma courts it may well be that [the primary insurer] could justify a refusal to settle if the opportunity had existed").

- Penn.: *Anglo-Am. Ins. Co. v. Molin*, 670 A.2d 194, 199 (Pa. Commw. Ct. 1995) ("given the dilemma faced by an insurer when faced with a reasonable settlement offer for less than all of the insureds, we conclude that the insurer should not be precluded from accepting that offer").

- Texas: *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994) ("when faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims").

III. Approach #2: The No Individual Settlement Approach – Minority View

As its name implies, the No Individual Settlement Approach is exactly opposite to the majority rule discussed above. This rule is simple. Jurisdictions following the No Individual Settlement Approach hold that an insurer's duty of good faith to all its insureds trumps the right or obligation to use the policy's limit to settle on behalf of fewer that all insureds without the consent of all insureds – regardless of the reasonableness of the proposed partial settlement.

A. No Individual Settlement Approach Example: *Strauss v. Farmers Ins.*

Reasoning typical to this approach can be found in *Strauss v. Farmers Insurance Exchange*, 31 Cal. Rptr. 2d 811, 26 Cal. App. 4th 1017 (1994). There a California appellate court considered "whether an insurer must accept a settlement offer exhausting the policy in exchange for the release of only one of three insureds, leaving the remaining insureds subject to liability for a judgment that may exceed the policy limits." *Id.* at 37, 26 Cal. App. 4th at 1019. The underlying tort claim involved claims by a plaintiff whose vehicle was struck by a truck operated by an employee of the insured, New Wave Pool & Spa ("New Wave") in the course of his employment. New Wave's insurance policy insured the employee, New Wave, and New Wave's insurer.

The plaintiff made a limits demand to the employee only, seeking the $100,000 limit of New Wave's policy and the $50,000 limit of the employee's personal auto policy. New Wave's insurer rejected the demand because it did not include protection for New Wave or New Wave's owner. The insurer also made a counteroffer, tendering the full $100,000 limit in exchange for a release of the employee, New Wave, and New Wave's owner.

The plaintiff settled with the employee for (a) the $50,000 limit of the personal auto policy and (b) an assignment of the employee's potential bad faith claims against New Wave's insurer. Later the plaintiff obtained a $563,476 judgment against the employee and New Wave. After New Wave's insurer paid its $100,000 limit, the plaintiff sued the insurer for bad faith in failing to settle on behalf of the employee.

The trial court entered summary judgment for the insurer. The court of appeals affirmed. In so doing, after describing the insurer's situation as a "Catch-22," it reasoned that:

> acceptance of an offer that left two of its insureds bereft of coverage would have breached [the insurer's] implied covenant of good faith and fair dealing. An insurer who breaches this duty acts in bad faith and may be held liable for the entire amount of the judgment recovered against its insured, including any portion more than the policy limits. However, an insurer's duty extends to all its insureds. Therefore, an insurer may, within the boundaries of good faith, reject a settlement offer that does not include a complete release of all its insureds.

Id. at 813, 26 Cal. App. 4th at 1021-22 (internal and further citations omitted).

B. Jurisdictions Following the No Individual Settlement Approach

As noted in the prior section, of the eighteen jurisdictions that have considered the multiple insured question, twelve appear to employ the Individual Settlement approach. Of the remaining six jurisdictions, only three explicitly have adopted the No Individual Settlement Approach, and another three appear likely to follow it:

- **Alaska:** *Williams v. GEICO Cas. Co.*, 301 P.3d 1220, 1226 (Alaska 2013) ("We are persuaded that the [No Individual Settlement Approach] is the better one. An insurer has a duty to defend its insureds; seeking a settlement to the benefit of one insured while leaving others open to liability could cause unfairness. Further, the latter approach avoids a potential bad faith claim by an insured who was unprotected and efficiently adjudicates the rights and duties of the insurer and the insured").

- **Arizona:** *See Matison v. Transamerica Title Ins. Co.*, 845 F.2d 867, 868 (9th Cir. 1988) (where insurer entered a "Gallagher covenant," securing a release as to claims against the insurer, all claims against all but two insureds, and all covered claims against those two exposed insureds, and secured agreement from the plaintiff to credit insurer for recovery on the remaining claims against the exposed insureds, insurer breached its duty "not to benefit at the expense of its insured").

- **California**: *Strauss v. Farmers Ins. Exch.*, 26 Cal. App. 4th 1017, 1021-22, 31 Cal. Rptr. 2d 811, 814 (1994) (holding that an insurer's "acceptance of an offer [on behalf of one insured] that left two of its insureds bereft of coverage would have breached [the insurer's] implied covenant of good faith and fair dealing"); *Lehto v. Allstate Ins. Co.*, 31 Cal. App. 4th 60, 72, 36 Cal. Rptr. 2d 814, 821 (1994) ("An insurer owes the duty of good faith and fair dealing to each of its insureds, [] cannot favor the interests of one insured over the other . . . [and] can breach its duty to its insureds by disbursing the policy proceeds to the insureds' claimant without first obtaining a release of the insureds").

- **Kansas:** *See Brummett v. Am. Standard Ins. Co. of Wisconsin*, No. 04-1114-JTM, 2005 WL 1683610, at *12 (D. Kan. July 18, 2005) (after noting the absence of Kansas authority, following the California rule that, "because 'an insurer's duty extends to all of its insureds [and so] an insurer may, within the boundaries of good faith, reject a settlement offer that does not include a complete release of all of its insureds.'" (quoting *Strauss*, 26 Cal. App. 4th at 1021, 31 Cal. Rptr.2d at 814)).

- **New York**: *Smoral v. Hanover Ins. Co.*, 37 A.D.2d 23, 25, 322 N.Y.S.2d 12, 14 (1971) ("While [the duty of good faith] has most frequently been considered where the interests of the company have been preferred to the detriment of the insured . . . the same considerations would apply with equal force where the company preferred one of its insureds over another. It is absolutely no answer for the company to say that it paid the full amount of its policy if in so doing it fully

protected one of its insureds and left the other completely exposed. . .. [T]here is no legal justification for its preferring one over the other").

- Wash.: *See* Shell Oil Co. v. Nat'l Union Fire Ins. Co., 44 Cal. App. 4th 1633, 1647, 52 Cal. Rptr. 2d 580, 588 (1996) (finding no conflict between California and Washington law, and then holding based on California law that the insurer's "disbursement of its entire policy limits to indemnify [one insured] did not discharge [the insurer's] policy obligations to [a different insured] but rather constituted an actionable breach of those duties").

IV. Interpleader and Similar Procedures

Insurers faced with the multiple insured problem in any of the jurisdictions that have yet to weigh in on the question might consider interpleader as a path to a possible solution.

Indeed, one jurisdiction has adopted an interpleader approach to the multiple insured problem through legislation. *See* Mo. Rev. Stat. 507.060 (2018) (by complying with the statutory requirements in Missouri, "the plaintiff [insurer] shall not be liable to any insured or defendant for any amount in excess of the [insurer's] contractual limits of coverage in the interpleader or any other action, so long as the [insurer] defends all of its insureds in good faith from any claims or lawsuits for damages allegedly caused by the incident or occurrence for which the limits of coverage were paid into court . . . .").

In other jurisdictions, however, practitioners should proceed with caution. First, in most cases, the filing of an interpleader or similar proceeding will have no effect on the insurer's duty to defend. *See, e.g.*, Douglas v. Allied Am. Ins., 312 Ill. App. 3d 535, 541, 727 N.E.2d 376, 381 (2000) (holding that insurer breached its duty to defend by paying limit to the court and then withdrawing, noting that "[t]here are numerous cases from other jurisdictions which hold that an insurer cannot discharge its duty to defend by unilaterally tendering its policy limits to the court or the claimant").

In fact, ceasing the insured's defense after tendering the limit to a court might be viewed as bad faith. *See, e.g.*, Viking Ins. Co. of Wisconsin v. Hill, 57 Wash. App. 341, 349-50, 787 P.2d 1385, 1390 (1990) ("Since [the insurer] made a unilateral payment to the registry of the court of the policy limits without a settlement agreement with [the claimant] and before entry of a court judgment against [the insured], whether [the insurer] exercised good faith in the interest of [its insured] presents an issue of fact").

Second, interpleading and other similar proceedings come with their own traps. For instance, in many cases an interpleading stakeholder may recover its costs, sometimes including attorney's fees, from the stake deposited with the court. *See, e.g.*, *Gen. Elec. Capital Assur. v. Van Norman*, 209 F. Supp. 2d 668, 672 (S.D. Tex. 2002) ("it is well-settled that a district court has authority to award reasonable costs and attorney's fees to the disinterested stakeholder in rule interpleader actions"). It has yet to be decided whether an insurer's request for such costs or fees from interpleaded policy limits could lead to a bad faith claim.

Third, even where an interpleader generally would be well-received, the filing of an interpleader will have no effect on any alleged bad faith that preceded or was involved with the insurer's filing of the interpleader. *See, e.g.*, *Lehto*, 31 Cal. App. 4th at 69, 36 Cal. Rptr. 2d at 818 ("the filing of an interpleader action will not sanitize a claim that is being prosecuted in bad faith"); *Bitco Gen. Ins. Corp. v. Heartland Midwest, LLC*, No. 15-0384-CV-W-FJG, 2016 WL 6902461, at *11 (W.D. Mo. Mar. 24, 2016) (though interpleading insurer was continuing to provide defenses to its insureds, and though the court ordered deposit of the interpleaded policy limit, the court refused to make a finding of good faith as to the insurer's conduct and refused to provide any protection for the insurer or the insureds apart from claims as to the interpleaded funds).

V. Policy Considerations and Recommendations

A. No Uniform View as To Underlying Policy Considerations

If any one conclusion can be divined from analysis of the two approaches to the multiple insured problem, it is this:

> it is difficult to articulate any neutral principle for determining which of its two insureds the insurer should favor in settling the third party's claim.

Stephen S. Ashley, *Insurer's Duty in Case of Multiple Claimants and Multiple Insureds*, Bad Faith Actions Liability & Damages § 4:19 (2d ed. 2016).

This lack of a unifying policy basis to the problem is due, no doubt, to the fact-intensive nature of multiple insured cases. For instance, jurisdictions following the Individual Settlement Approach often reason that, although an individual settlement will leave other insureds exposed, the individual settlement presumably will reduce the total amount of that exposure. *See, e.g.*, *Soriano*, 881 S.W.2d at 315. That is true, so far as it goes. However, the exposed insured loses more than indemnity protection – they also lose the protection of an insurance-funded legal defense. It is simple to imagine scenarios in which this loss of a defense is itself inherently prejudicial to the insured left in the lawsuit.

Courts following the Individual Settlement Approach also reason that the approach fosters settlement. *See, e.g.*, *Soriano*, 881 S.W.2d at 315. That proposition would seem to be fact dependent. For instance, where the value of a tort claimant's injuries likely exceeds policy limits considerably, the Individual Settlement Approach indeed might lead at least to a partial settlement. However, the same might not be true where a claimant's damages exceed policy limits by a relatively small amount. In such a case, the Individual Settlement Approach could prompt the claimant to pursue an individual settlement with the tortfeasor having the fewest executable assets, whereas the No Individual Settlement Approach would encourage settlement. *See, e.g.*, *Lehto*, 31 Cal. App. 4th at 73, 36 Cal. Rptr. 2d at 821 (reasoning that the Individual Settlement Approach, would permit claimants to "introduce the issue of the relative wealth of the insureds into the equation").

One treatise reason that an "insurer, being unable to protect both of its insureds, should be able to protect the one insured." Allan D. Windt, *Insurer's Duty to Settle When There are Claims against More Than One Insured*, 1 Insurance Claims and Disputes § 5:9 (6th ed. 2020). Yet, the Individual Settlement Approach carries with its inherent uncertainty and risk for insurer. It is

one thing to evaluate, after the fact, whether it was "clear" to the insurer that a global settlement was not an option. It can be quite another matter during the negotiations to be confident in such a conclusion. A mistake at the time of negotiations could lead to a finding of bad faith after completing an individual settlement.

Similarly, the Individual Settlement Approach provides that an insurer has not acted in bad faith so long as its settlement on behalf of fewer than all insureds is reasonable. Yet, that determination of whether that individual settlement was reasonable typically is made after the fact, often in a subsequent action for bad faith. Thus, an insurer, acting with utmost good faith under the Individual Settlement Approach, buys little in the way of peace of mind when securing an individual settlement. The exposed insured always can second-guess the reasonableness determination in a later extra-contractual action.

Yet, the No Individual Settlement Approach has its own faults. Primary among those is that approach denies insurers any flexibility to settle in exchange for a release of fewer than all insureds even were doing so would be manifestly reasonable.

It takes little imagination to conceive situations where it would be better to permit an insurer to accept a reasonable settlement demand releasing fewer than all insureds even if the non-protected insureds refused to consent. For example, in the context of a burning limits policy, denying an insurer the ability to accept a reasonable settlement for fewer than all insureds could lead to exhaustion of the limits through ongoing defense costs. *Anglo-Am. Ins. Co. v. Molin*, 670 A.2d 194, 199 (Pa. Commw. Ct. 1995) (adopting Individual Settlement Approach in such a circumstance).

Indeed, it was the lack of an objective approach to the multiple insured situation that led to a call for a modified interpleader solution to this problem. *See* Patrick J. Kenny and Cynthia M. Juedemann, *A Lesson in Sharing: Recommendations and a Proposed Legislative Approach to Help Address the Problem of Multiple Insureds and Insufficient Policy Limits*, New Appleman on Insurance: Current Critical Issues in Insurance Law, Pub. No. 60098, Rel. # 44 (Fall 2017); *compare* Mo. Rev. Stat. §507.060 (2018) (modifying Missouri's interpleader statute to address multiple insured situations).

B. Recommendations for Addressing the Multiple Insureds Situation

1. Know the rule (or lack of rule) in your jurisdiction.

Determine whether your jurisdiction has adopted either the Individual Settlement Approach or the No Individual Settlement Approach. This is especially important if you already have received a limits demand.

2. Endeavor to secure a global settlement releasing all the insureds.

As noted above, this is the first step in all jurisdictions that have addressed the question.

3. Investigate promptly and obtain early exposure assessments.

Obtaining an assessment of each insured's liability exposure and their damage exposure (if liable), is helpful in jurisdictions following the No Individual Settlement Approach, and essential in all other jurisdictions.

Under the No Individual Settlement Approach, if efforts at a global settlement have failed, an insurer is prohibited from settling on behalf of fewer than all insureds – without the consent of all insureds. However, it is not difficult to imagine scenarios in which an insured might consent to a limits settlement even though it does not secure a release for the consenting insured. For example, an insured with low exposure and an alternative source for a defense might consent to such a settlement.

Under the Individual Settlement Approach, the insurer may – and might be required – to enter a reasonable settlement on behalf of fewer than all the insureds once efforts at a global settlement have failed. Absent a prompt investigation and exposure assessment, an insurer presented with a limits demand on behalf of fewer than all its insureds could find itself exposed to the risk of a bad faith claim for failing to settle, and the risk of a bad faith claim based on inadequate investigation and paying too much to settle.

4. Consider heightened engagement with the insureds.

Though insurers ordinarily should keep their insureds informed, in the multiple insureds with insufficient limits situation it often is advisable to engage insureds more extensively with respect to settlement efforts, especially where the insureds have personal coverage counsel. Though an insurer frequently has the unilateral right to control settlement, there is little downside to soliciting input from the insureds. Doing so can lead to consent to a settlement on behalf of fewer than all, to the discovery of optional approaches that might be broader than those available to an insurer (e.g., some business component to a settlement), or to buy-in from the insureds as to a particular approach.

5. In jurisdictions without a rule on the issue, consider court involvement with an ongoing defense.

An insurer faced with the multiple insureds and insufficient limits problem in a jurisdiction that has yet to address the question is in a particularly dangerous situation.

In such a circumstance, once an insurer has been unable to secure a global settlement, it might consider interpleading the policy limit, bearing its own costs (so the limit is not eroded), and advising all insureds that it will provide them with a defense until the claims against them are concluded. This approach should mitigate bad faith exposure, regardless of the approach later adopted by the jurisdiction. Of note, this is essentially the approach that Missouri adopted by statute in 2018. *See* Mo. Rev. Stat. § 507.060.

6. In jurisdictions without a rule on the issue, be cautious about relying on authority from multiple claimant cases.

Though there is little authority addressing the comparison, the problems posed by the multiple insured situations is distinct from the situation where multiple claimants are seeking damages from a single insured. The source of the insurer's duties in the two situations is different, with

the insurer having far more control over the satisfaction of its duties to its insureds in the multiple claimant situation. *See, e.g.*, Dennis J. Wall, *Multiple insureds: The role of the defense clause—Multiple insureds: General principles for a specific rule*, Litig. & Prev. Ins. Bad Faith § 3:47 (3rd ed.).