

Multiple Claimants, Multiple Insureds and Insufficient Policy Limits

Settlement Considerations for Insurers

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Discussion Topics

- Multiple Claimants and Insufficient Policy Limits



- Multiple Insureds and Inability to Obtain Releases for All Through Settlement



- One Insured's Consent to Settlement Impacting Settlement for Others



Multiple Claims & Insufficient Limits Under E&O Policies

- Medical Professionals



- Lawyers



- Other Professionals



Typical Scenarios Giving Rise to Multi-Claim Dilemma

- Numerous suits or claims made within one claims-made policy period
- Multiple claimants within a single suit
- Defense of several suits (or certain significant suits) begins depleting limits
- Settlement demands of one or more claimants (but not all) would exhaust limits

Multi-Claim Settlement Dilemma

Possible post-exhaustion claims against the insurer by:

- Remaining claimant(s)
 - Extra contractual
- Insured(s)
 - Breach of contract (continuing duties to defend/indemnify)
 - Extra contractual

Policy Language re Settlement and Defense



B. Defense and Settlement

The Company will have the right and duty to defend any **Claim** against an Insured seeking **Damages** to which this policy applies, even if any of the allegations of the **Claim** are groundless, false or fraudulent. The Company's right and duty to defend any **Claim** shall end when the Company's Limit of Liability has been exhausted by payment of **Damages** and/or **Claim Expenses**, or has been tendered to the Insured or to a court of competent jurisdiction.

The Company shall not settle any **Claim** without the Insured's written consent. If, however, the Insured refuses to consent to any settlement recommended by the Company and elects to contest the **Claim**, or continue any legal proceedings in connection with such **Claim**, then the Company's maximum liability shall be limited to the amount for which the **Claim** could have settled, including the total amount of **Claims Expenses** incurred up to the date of the Insured's refusal. Such amounts are subject to the provisions of section **C. Policy Limits**.

Judicial Approaches



1. Deference to Insurer in attempting to settle fewer than all claims.

Miller v. Georgia Interlocal Risk Management Agency, 501 S. E. 2d 589 (Ga. App. 1998)

2. Permissible for insurer to settle one claim and leave another potentially excess claim open.

State Farm v. Murphy, 348 N. E. 2d 491 (Ill App 1976)



Florida Approach



Insurer Has 3 Obligations:

1. Fully investigate all the claims to determine how to best limit the insured's liability
2. Seek to settle as many claims as possible within the limits
3. Avoid indiscriminately settling selected claims and leaving insured at risk of excess judgments that could have been minimized by wiser settlement practices

Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555
(Fla. Dist. Ct. App. 2003)



“Let’s Be Reasonable” Texas Approach



“...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. Such an approach, we believe, promotes settlement of lawsuits and encourages claimants to make their claims promptly.”

Texas Farmers Ins. Co. v. Soriano, 881 S. W. 2d 312 (Tex. 1994)

To Interplead or Not To Interplead...

- Interpleader – statutory vehicle for stakeholder to deposit property with the court
- Typical use in insurance context – life insurance policy (fixed amount) with competing claimants
- Interpleader in third-party liability context?

Interpleader – the Statute



FRCP 22. Interpleader

(a) GROUNDS.

(1) *By a Plaintiff.* Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

Interpleader Recognized as Proper in Multiple Claim Situation

- “Interpleader actions, while not recognized in situations such as this, are to be encouraged as part of the duty of good faith of the insurer.” *Boris v. Flaherty*, 672 N.Y.S.2d 177 (N.Y. Sup. Ct. 1998)
- One of the three alternative courses of action an insurer can take when faced with competing claims in excess of limits. *Club Exchange Corp. v. Searing*, 567 P.2d 1353 (Kan. 1977).
- Use of interpleader in multiple claim situation can provide “... a judicially supervised forum for the collective resolution of all competing claims, the very purpose of the interpleader.” *Lehto v. Allstate Ins. Co.*, 31 Cal. App. 4th 60 (1994)

Concerns With Interpleading Liability Policy Proceeds

Defense Obligation Continues During Interpleader

- Exhaustion must be per policy terms – “payment of judgments or settlements”
- Interpleader could be “artificial exhaustion” not contemplated by policy provisions
- Defense within limits policies – interpleader creates possibility of payment for defense beyond limits
 - Is stay of multiple suits possible during interpleader?

Concerns With Interpleading Liability Policy Proceeds

- Potentially inconsistent with duty to remove as much exposure as possible from insured
- Once policy proceeds are interpleaded, insurer (and insured) loses control over them
- Questionable whether large exposure cases would be settled before trial

Practical Pointers - Multiple Claims

Majority Approach – Most Jurisdictions

1. Keep insured well informed about the case and settlement opportunities
2. Gather all available information necessary to make informed decision
3. Seek a global settlement
 - a. Individual negotiations, or
 - b. Tell claimants that limits are available if claimants can agree on division
4. Offer insured control of available limits to settle cases it believes are most appropriate to settle, or solicit insured's input on which claims to settle
5. Consider whether interpleader advisable
6. If "global" not possible – use "reasonable" approach to individual settlements
7. Document all activity and communications



Multiple Claimants – California Rule



- Insurer that settles on anything less than global basis risks liability for extra-contractual claim
- “A carrier, faced with multiple claims, must, with due regard for the interests of its insured, attend to [the insured’s] best protection against all of these.” *Kinder v. Pioneer Ins. Co.*, 231 Cal. App. 2d 894 (1965)

Practical Pointers - Multiple Claims (California)

1. Keep insured well informed about the case and settlement opportunities
2. Gather all available information necessary to make informed decision
3. Seek a global settlement
 - a. Individual negotiations, or
 - b. Tell claimants that limits are available if claimants can agree on division
4. Offer insured control of available limits to settle cases it believes are most appropriate to settle, or solicit insured's input on which claims to settle
5. Make sure claimants know the policy limits and that insurer can't settle piecemeal



Settling Claims Against Less Than All Insureds



Majority Approach

Insurer is permitted to tender limits on behalf of only one insured, if not possible to settle on behalf of all.

- Florida, Illinois, Louisiana, Massachusetts, Missouri, Ohio, Pennsylvania, Texas

Majority Approach

- “It is an insurer’s unreasonable failure to pursue a settlement offer, rather than its acceptance of one, which will expose it to liability for bad faith.”
- Exhaustion of limits through payment for one insured terminates insurer’s duty to defend other insureds.
 - *Country Mutual Insurance Co. v. Anderson*, 257 Ill. App. 3d 73 (1993).

Impact of Set-Off Considerations

Availability of set-off for remaining insured may be important factor -

- Remaining insured's right to setoff supports propriety of settlement for other insured.
 - *Millers Mut. Ins. Co. Ass'n of Illinois v. Shell Oil Co.*, 959 S.W. 2d 864 (Mo. Ct. App. 1998)
- Absence of set-off for remaining insured warrants finding settling insurer has continuing duty to defend
 - *Shell Oil Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 44 Cal.App.4th 1633 (1996)

Practical Pointers in Majority View States

1. Attempt to settle for a release of all insureds
2. Notify all insureds of claimant's refusal to release all insureds
3. Confirm that claimant's counsel knows that coverage is provided to multiple insureds
4. If repeated attempts to settle for all insureds are unsuccessful, attempt to reasonably settle (up to policy limits) on behalf of less than all insureds
5. Document all settlement efforts in writing!

Settling Claims Against Less Than All Insureds

Minority Approach

Insurer cannot tender policy limits unless all insureds are released

- Alaska, California, New York

Minority Approach

- “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.”
 - *Smoral v. Hanover Ins. Co.*, 37 A.D. 2d 23 (N.Y. App. Div. 1971)
- Failure to consider the interests of every insured during the process of settling indicates lack of good faith.
 - *Palmer v. Financial Indem. Co.*, 215 Cal. App. 2d 419 (1963).

Practical Pointers in Minority View States

1. Attempt to settle for a release of all insureds
2. Notify all insureds of claimant's refusal to release all insureds
3. Confirm that claimant's counsel knows that coverage is provided to multiple insureds
4. If repeated attempts to settle for all insureds is unsuccessful, advise insureds and claimant's counsel that claim cannot be settled under the circumstances
5. Document all settlement efforts in writing!

Multiple Insureds and Settlement Consent

- Insurer's right to settle contingent on "Insured's" consent to settlement
- Reasonableness requirement for withholding consent?
- Can one insured's refusal to consent prevent a settlement involving multiple insureds?



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Consent Language



The Company shall not settle any Claim without the Insured's written consent. If, however, the Insured refuses to consent to any settlement recommended by the Company and elects to contest the **Claim**, or continue any legal proceedings in connection with such **Claim**, then the Company's maximum liability shall be limited to the amount for which the **Claim** could have settled, including the total amount of **Claims Expenses** incurred up to the date of the Insured's refusal. Such amounts are subject to the provisions of section **C. Policy Limits**.

Settlement Without Unanimous Consent

- PL Policy allowed insurer to settle “with the written consent of the Insured.”
- Hospital (named Insured) consents to settle medical malpractice suit
- Individual doctor won’t consent
- Insurer settles and doctor sues insurer
- Holding → Insurer not required to seek doctor’s consent
- Rationale → Giving each individual doctor (and others) right to refuse consent “would virtually paralyze [the insurer] in its efforts to fulfill its contractual duty to defend.”
 - *Jayakar v. North Detroit General Hospital*, 451 N.W. 2d 518 (Mich. Ct. App. 1990).

Complete Consent Required

- Suit only against employee of Named Insured
- Employee's defense counsel, with insurer's authority, makes settlement offer, contingent on client consent
- Employee refuses consent, so employer also withholds consent
- Claimant attempts to enforce oral settlement agreement
- Holding → Settlement not enforceable
- Rationale → Employer's consent was not sufficient where policy requires "the INSURED's consent"
 - Had the intent of the policy been to allow settlement based on Named Insured's consent, policy would have said that

Mosely v. Wilson, 1991 WL 134285 (E.D. Pa. 7/18/91)

Practical Considerations – Multiple Insureds & Consent Requirement

1. Use of “hammer clause” warranted?
2. Reasonable to settle for consenting insured(s) and continue litigating claim against non-consenting insured?
3. Is consenting insured the Named Insured?
4. Is consenting insured a party to the case?

Questions?



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