IT’S ONLY MONEY: How Insurance Companies Settle Disputes

Sheryl Mintz Goski
Attorney / Mediator
Adjunct Professor Rutgers Law – New Jersey

with
Robert H. Jerry, II
Isidor Loeb Professor of Law
Senior Fellow, Center for the Study of Dispute Resolution
University of Missouri School of Law
Two types of insurance policies

“First Party” Insurance
- For example, protects against damage to the insured’s interest in property pursuant to contract between insurer and insured
- Is the damage within the insuring agreement?
- Are there any exclusions to coverage?

CGL and other kinds of Liability (“Third Party”) Insurance
- Protects against liability asserted by third parties against the insured
- Twin duties --
  - (a) A duty to defend the insured?
  - (b) A duty to indemnify the insured?
First party insurance claims

- Insured vs. insurer for damage to insured’s own property
- Insured’s interests are opposed to insurer’s interests
- Example: mass disasters, e.g. hurricanes
- Flood (homeowners) vs. wind (FEMA under NFIP)
- What is covered?
- What if concurrent causes – flood and wind?
- Role of declaratory judgment action by insured against carrier
Third party insurance claims

- CGL: the “Comprehensive General Liability” policy for liability asserted by third parties against business insureds
- Question of scope of defense/ scope of indemnity
- Can the carrier tender a defense but take a no indemnity position?
- Dynamic between insured/ insurer on one hand and the claimant (plaintiff) and plaintiff’s counsel
- Duty of carrier to settle (i.e., respond reasonably to plaintiff’s settlement offers)
Common first party issues

- Insurable interest:
  - Property insurance
  - Life insurance
  - Timing of insurable interest

- Exclusions and carrier considerations
  - Concurrent causes: excluded cause occurring concurrently with covered cause
  - Prior existing loss
  - Failure to mitigate
  - Other insurance covering loss
  - Life insurance: the incontestability period and relation to insured’s representations

- Late notice
- Wear and tear
Common third party issues

- Presentation of claim
  - Timing
  - Late notice asserted by carrier
  - Need for insurer to establish prejudice due to late notice
- Insured’s duty to cooperate with carrier
- Carrier’s duty to defend the insured against the third party claim
- What triggers the duty to defend?
  - What are the settlement obligations of the carrier?
  - What if the carrier fails to settle within the limits of the policy? Might the insured have an action against the carrier in excess of the policy limits?
- Conflicts of interest between carrier and insured:
  - Carrier controls defense, but might steer towards exclusion to coverage (e.g., the insured acted intentionally rather than negligently)
Settlement considerations

• How do these issues impact settlement?
  • Carrier will not resolve until claim is investigated (whether first party or third party insurance)
  • Carrier will require confidentiality surrounding any settlement
  • Carrier will have set reserves based upon its analysis of the claim; disclosure of reserves is usually unavailing through discovery
  • Carriers will be reluctant to disclose treatment of other insureds in connection with similar claims/events
  • Some carriers will not resolve at mediation but will try cases to discourage future litigation
How do we address these issues in mediation?

• Speak privately to plaintiff’s counsel & insured’s counsel prior to mediation

• Determine if adequate information has been exchanged prior to mediation with regard to the claims and defenses

• Look at the mediation as a problem solving exercise: particularly if it is a commercial/business dispute, problem solvers will use the opportunity to work towards a resolution
How do we address these issues in mediation?

• Always include the carrier in the discussion if the mediation involves third party liability coverage; welcome and invite the carrier even if the carrier has not accepted coverage; suggest to the insured that the carrier be kept informed of the scheduled mediation and all information exchanged

• Make sure that the carrier is included in a timely and meaningful way - never had a situation where wished that there was less involvement of the carrier
Multiple defendants and carriers create multiple challenges

- The challenges presented by --
  - joint-and-several tortfeasors
  - having different insurance companies on the risk
  - having the same insurance companies providing coverage to different insureds

- Allocation among insureds/carriers may be more difficult than crafting a settlement with the plaintiff(s)

- Consider an aggregate settlement with the plaintiff (to limit total liability) and reserving the allocation issues for future decision (possibly through arbitration)
Insured/uninsured claims and exhaustion of limits

• Possible need for private counsel for insured – expense issues and desire of insured to settle vs. interest of carrier (another conflict)

• Example: An insured employer; the employee is individually named and is acting outside the scope of employment; the individual employee may have a private liability that is not insured.

• Questions regarding settlement and exhaustion of the primary layers, thereby triggering excess layers of coverage: informing and including excess carriers if there is a possibility that the excess layers of coverage will be reached
Concluding thoughts

• When insurance is in the picture, the carrier will be integral to resolving the litigation (this is true not only where the case is brought directly against the carrier as, for instance, in a declaratory judgment action, but also where the insurance is present as the eventual funding source for the injury or damage to the third party-victim).

• Carriers must be noticed, informed, and educated -- and most importantly must be an active participant whenever the plaintiff’s claim is (or is possibly) insured
“You look great for someone who’s just come through two years of litigation.”