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Multiple Insurer Disputes

Recovering Other Insurance

Disputes often arise between insurance carriers when their respective policies each provide coverage for the same loss. Typically, one insurer asserts that by virtue of its policy's "other insurance" clause, its insurance is excess to the other carrier's insurance.

Since insurance policies frequently have conflicting "other insurance" clauses, insurers often resort to litigation. Consequently, a large body of case law has developed in which courts have formulated rules for resolving inter-insurance disputes.

Unfortunately, the development of case law has not proceeded in a fully consistent, logical, and coherent fashion. Recently, however, courts in some states have issued opinions wherein they specifically seek to clarify many of the rules and doctrine concerning "other insurance" clauses.

This article's purpose is clarify the rules regarding an insurer's right to seek contribution from other insurers on risk, including a discussion of "other insurance" clauses, theories of recovery, and methods of apportionment.

"OTHER INSURANCE" CLAUSES

Insurance policies commonly include "other insurance" clauses by which insurers seek to limit their liability to the extent that other insurance covers the same risk. Three general types of "other insurance" clauses are commonly found in liability insurance policies: pro rata, excess, and escape clauses.

Under a pro rata clause, the insurer attempts to limit its liability to the total proportion that its policy limits bear to the total coverage available to the insured.

Under an excess clause, the insurer attempts to limit its liability to the extent the loss exceeds the policy limits of other insurance covering the same loss.

Under an escape clause, the insurer attempts to extinguish its liability if the loss is covered by any other insurance policy.

Where "other insurance" clauses are in effect, each insurer's ultimate liability is generally determined by the explicit provisions of the respective "other insurance" clauses. For example, if each policy on risk provides for sharing the loss equally, courts will generally uphold that method of apportionment. Problems arise, however, where multiple liability insurance policies covering the same risk at the same level have conflicting "other insurance" clauses.

Historically, courts have resolved such inter-insurance disputes by developing rules as to how each particular type of "other insurance" clause functions in relation to the same or different types of clauses.

With respect to conflicts between excess clauses, most courts simply ignore the conflicting clauses and prorate the loss among the insurers. Likewise, courts usually ignore conflicting escape clauses, which are highly disfavored by courts.

With respect to conflicts between a pro rata clause and an escape clause, many courts rule that the escape clause is unenforceable and prorate the loss on an equitable basis.

With respect to conflicts between a pro rata clause and excess clause, the case law is inconsistent. Some courts hold that an excess clause prevails over a pro rata clause, whereas other courts simply ignore the conflicting clauses and prorate the loss.

In recent years, courts in some states, such as California, have steered a clear course away from simply applying mechanical rules based upon the types of "other insurance" clauses at issue. Instead, these courts look to see if all the policies on risk are, in fact, primary policies. If so, these courts are likely to find that all primary policies are on risk and must share the loss on an equitable bases.

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In determining whether all policies on risk are primary, courts will look to see if any policy is true excess insurance. Generally, primary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability. In contrast, true excess coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of specifically-identified primary coverage has been exhausted. The identification of the underlying primary insurance may be as to a specifically-identified policy or insurer.

In summary, excess insurance is insurance that is expressly understood by both the insurer and insured to be secondary to specific underlying coverage which will not begin until after that underlying coverage is exhausted and which does not broaden that underlying coverage.

THEORIES OF RECOVERY

A cause of action for equitable contribution is the primary method employed by an insurer seeking to compel the participation of another insurer. The right to equitable contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss, or defended the action without any participation by the others.

Contribution should be not be confused with equitable indemnification. In the context of disputes between insurers, equitable indemnity involves the shifting of the entire loss. Specifically, it applies in cases in which one party pays a debt for which another is primarily liable and which in equity and good conscience should have been paid by the latter party.

If coverage litigation becomes necessary, equitable indemnity should usually be plead as an alternative to contribution. If the facts ultimately show that participating insurer's coverage does not apply, such as pursuant to an exclusion, that insurer may be able to shift the entire loss to the non-participating insurer.

METHODS OF APPORTOINMENT

Insurers sharing a common risk usually negotiate a mutually-acceptable arrangement for sharing defense and indemnity payments. In other instances, however, insurers may seek the assistance of a court in devising an equitable method of apportionment. In either event, insurers should be aware of the varying methods in order to advance the one that is most advantageous in light of all circumstances.

Unless the policies provide otherwise, courts generally apply equitable considerations to spread indemnity and defense costs among the several policies and insurers. The reciprocal rights of co-insurers are governed by equitable considerations not found in the respective insurance contracts, because they have no agreements among themselves.

No fixed rules exist for allocating defense and indemnity costs between and among coinsurers. Instead, courts consider the varying equitable considerations which may arise and which depend on the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers. In that context, the trial court has discretion to find the equitable result for that particular matter by selecting from a variety of options.

Various approaches to such apportionment include the following:

Policy Limits: Loss apportioned based upon the relative policy limits of each policy.

Premiums Paid: Loss apportioned based on the premiums each insurer received.

Graduated Maximum Limits: All insurers on the risk pay an amount equal to the lowest policy limits (exhausting the liability of the insurer with the lowest limits); they then pay an amount equal to the next lowest policy limits (exhausting that insurer's liability), etc.

Time on the Risk: Apportionment based upon the relative duration of each policy as compared with the overall period of loss (ignores difference in policy limits).

Policy Limits Multiplied by Time on the Risk: Loss apportioned based upon each insurer's policy limits multiplied by its years of coverage (insurers with higher limits bear a greater share of the liability per year than those with lower limits).

Number of Insureds: Loss apportioned based on the number of persons or entities insured under each policy (ignoring both time on the risk and policy limits).

Occurrence of Injury: Each insurer pays according to the extent of injury or damage actually occurring during its policy period (fairest, but often difficult to determine). ■

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