Managing Insurance Coverage Issues in the Defense and Resolution of New and Emerging Large-Scale Environmental, Mass Torts and Products Liability Cases

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The Problem

• A new type of claim has been filed against a handful of companies involving an allegedly harmful substance used in hundreds of products over many years
• Plaintiffs’ bar’s untiring quest for the next asbestos
• If successful, the claims could involve many companies, thousands of claims, hundreds of millions of dollars for defense and payment of claims
• E.g.: Guns, tobacco, lead paint, opioids, fast food
The Insurance Picture

• Defendants and potential defendants all have, to varying degrees, fairly typical historical liability insurance programs
• Mostly “occurrence” based, but often “claims-made” in recent years
• Primary policies typically have a duty to defend
• But in later years that duty could be affected by large deductibles, or self-insured retentions, captives or other first dollar self-insurance arrangements
Implementing the Duty to Defend

Three possible scenarios

• The insurer denies coverage
• The insurer accepts tender, subject to a reservation of rights
• The insurer accepts tender without reservation – the rare case
If an Insurer Denies Coverage

• Insured is entitled to act as a reasonable uninsured would in conducting its defense and can sue the insurer for coverage.
• The insurer’s defense obligation extends to reimbursing counsel for its “reasonable” fees and expenses incurred in conducting the defense.
• If it is successful in establishing coverage, the only issue is: were its defense costs – and settlements – reasonable?
  • Luria Bros v. Alliance Assurance Co., 780 F.2d 1082 (2d Cir. 1986)
If an Insurer Denies Coverage

• The existing body of case law on what constitutes “reasonable” attorneys’ fees is sparse.

• How is reasonableness determined?

• *Luria Bros v. Alliance Assurance Co.*, 780 F.2d 1082 (2d Cir. 1986)

• *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987)

If an Insurer Denies Coverage

_Ctr. Found. v. Chi. Ins. Co._, 278 Cal. Rptr. 13 (Cal. App. 1991) (defense counsel may be subjected to stricter-than-normal standards in its billing practices and should be prepared for heightened scrutiny of conduct of the defense).
If an Insurer Denies Coverage

- After having been denied coverage, the best measure of reasonableness is what a company agrees to pay a lawyer:
  - *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 200 F.3d 518, 521 (7th Cir. 1999) (“If the bills were paid, this strongly implies that they meet market standards.”)
  - *Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996)
  - *Taco Bell Corp. v. Cont’l Cas. Co.*, 388 F.3d 1069, 1075-76 (7th Cir. 2004)
If an Insurer Accepts Tender Under a Reservation of Rights

• It becomes much more complicated:
  • Who selects and manages counsel?
    • Policies generally provide that an insurer assuming the policyholder’s defense is entitled to control that defense. The insurer’s right to control the defense is an essential part of their ability to control risk and predict potential exposure.
  • Ideally, the insured also benefits from the insurer’s control of the litigation because the end objectives are the same for both - to win the case. Both want to minimize the financial impact. Difficulties arise, however, when the insurer tries to restrict the lawyer’s defense of the insured based upon cost control or other considerations, such as when the insurer and insured are not in agreement regarding a settlement.
If an Insurer Reserves Rights

• Can an insurer force use of panel counsel?
  • Alabama - *L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298 (Ala. 1987) (carrier’s defense under reservation of rights does not create a conflict of interest such that policyholder is entitled to engage defense counsel; carrier not obligated to pay for policyholder’s independent counsel under reservation of rights)
If an Insurer Reserves Rights

- Florida – While policyholder may retain independent counsel under certain circumstances, Florida law puts a great deal more onus on the policyholder to establish why the insurer’s counsel of choice is unacceptable. One court concluded that the policyholder must show actual prejudice, harm, or some equally compelling reason why the insurer’s choice was not agreeable. *Prime Ins. Syndicate, Inc. v. Soil Tech Distrib*, 2006 WL 1823562 (M.D. Fla. June 30, 2006).

- Illinois - *Tews Funeral Home, Inc. v. Ohio Cas. Ins. Co.*, 832 F.2d 1037, 1047 (7th Cir. 1987) (applying Illinois law) (carrier entitled to control defense with attorneys it chose; interest in negotiating policy coverage is not enough for conflict). If there is a true conflict of interest, the carrier must decline to defend and pay for independent counsel. *Murphy v. Urso*, 88 Ill. 2d 444, 454, 430 N.E.2d 1079, 1084 (1981) (“the insured has the right to be defended by counsel of his own choosing”)
If an Insurer Reserves Rights

- New York - The insured is entitled to independent counsel at the carrier’s expense if there is a clear conflict of interest. *N.Y. State Urban Dev. Corp. v. VSL Corp.*, 563 F. Supp. 187 (S.D.N.Y. 1983) (where conflict of interest is shown, carrier’s choice of independent counsel upheld).

- Texas - An insurer’s “right to defend” a lawsuit “encompasses the authority to select the attorney who will defend that claim and to make other decisions that would normally be vested in the insured as the named party in the case.” *N. Cty. Mut’l Ins. Co. v. Davalos*, 140 S.W.3d 685, 688 (Tex. 2004). Not every reservation of rights creates a conflict of interest allowing an insured to select independent counsel.
If an Insurer Reserves Rights

• Can an insurer impose limits on counsel rates and if so, how are they determined?

• Panel rates are routinely set below rates policyholders pay their lawyers
  • When an insurer’s billing guidelines capped attorneys’ fees at $105 per hour for attorneys and $55 per hour for paralegals, with no reimbursement for secretarial overtime, and no reimbursement for meals or overnight travel without pre-approval, a Rhode Island court held that the insurer breached its duty to defend by its failure to reimburse independent counsel for all reasonable fees and expenses incurred. *Nortek, Inc. v. Liberty Mut. Ins. Co.*, 858 F. Supp. 1231 (D.R.I. 1994).
  • California Code § 2860
If an Insurer Reserves Rights

• Can an insurer impose billing guidelines?
  • Guidelines may:
    • Prohibit “block” billing
    • Limit the number of billers who may participate in an activity
    • Require prior consent to engage in certain activities such as research and attendance at depositions and hearings
    • Limit use of electronic research
    • Bar certain costs as clerical or administrative
If an Insurer Reserves Rights

• ABA, and many state bars, and a few courts have concluded that a “lawyer must not permit compliance with ‘guidelines . . . relating to the lawyer’s services to impair materially the lawyer’s independent professional judgment in representing an insured.’”
  • ABA Opinion No. 01-421.
  • Utah State Bar Ethics Advisory Opinion No. 02-03.
  • In re Rules of Prof’l Conduct & Insurer Imposed Billing Rules & Procedures, 2 P.3d 806 (Mont. 2000).
  • Texas Center for Legal Ethics, Opinion 533
  • Lawyer Disciplinary Bd. For the West Virginia Bar, Opinion No. 2005-01.
Managing the Defense

• Defending in light of the possibility that a new claim is a harbinger of much more to come
  • Appointing and paying for national coordinating counsel
  • Investing in early self-discovery and fact research
  • Investing in early development of experts
• Tension between policyholder facing a potential “bet the company” exposure and insurers facing only “limits” exposure
• Joint defense among co-defendants
• Common interest doctrine
• Do bar opinions on billing guidelines bear on insurer’s obligation to pay the cost of these defense activities?
Managing Privilege Issues

• As between policyholders and insurers – the tripartite relationship
• As between policyholder and insurers on the one hand and claimants on the other
• Differing treatment in three scenarios
• Insurer accepts defense of claim
  • Privileged communications shared between insured and insurer but protected from plaintiffs in underlying negligence action
  • See Lectrolarm Custom Sys., Inc. v. Pelco Sales, Inc., 212 F.R.D. 567 (E.D. Cal. 2002) (“Where an insurer has agreed that it has a duty to defend and to indemnify its insured, they are both clients of the lawyer . . . [a]nd the attorney client privilege applies to protect communications between the lawyer and the insurer.”)
Managing Privilege Issues

• Insurer agrees to defend but reserves rights
  • Privileged communications between insured and insurer may be protected as to plaintiffs in underlying action but may be discoverable in coverage litigation
  • But not always
  • Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 249 Conn. 36, 60-63 (1999) rejected the cooperation clause, the “common interest” doctrine, and the “at issue” doctrine as grounds for compulsory disclosure, finding that if an insurer had reserved its rights or denied coverage, it was not entitled to receive privileged communications from the policyholder or its independent defense counsel.
Managing Privilege Issues

• Insurer denies coverage, insured hires own lawyer
  • Privileged communications between insured and its lawyer protected from plaintiffs in underlying action and from insurer in coverage litigation
  • *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408 (D. Del. 1992) (denying insurer motion to compel production of privileged documents from underlying litigation, holding that “either the policy provides coverage, in which case the denial of coverage breaches the insurance contract and relieves [insured] of the duty to cooperate, or there is no duty to cooperate because the damage is not the type” covered by the policy)
Other Defense Issues

• Engaging in and paying for “non-traditional” defense activities
  • Combating plaintiffs’ efforts to tilt playing field through legislation
  • Combating plaintiffs’ efforts to capture the hearts and minds of the people who decide cases through the media
  • No case law
  • Some policies provide coverage for crisis management and addressing adverse publicity (e.g. D&O)
Other Defense Issues

• Tensions between defense strategy and coverage issues
  • Dealing with pressure from insurers to pursue discovery or early resolution of a legal issue that might get some or all of them off the hook
  • Does failure to pursue such efforts give insurer a defense based on prejudice?
  • Seeking dismissal of coverage claim that triggers duty to defend
  • Discovery and adjudication of potential intentional conduct that might defeat coverage
  • Insurer files a declaratory judgment action to resolve coverage issues – particularly the duty to defend – while underlying cases are still in early stages of development
Other Defense Issues

• Often raises a conflict of interest
  • Coregis Ins. Co. v. Lewis, Johns, Avallone, Aviles & Kaufman, LLP, No. 01 CV 3844 (SJ), 2006 U.S. Dist. LEXIS 55326, at *44-45 (E.D.N.Y. July 28, 2006) ("[A] defense counsel’s loyalty to the insured is at issue when ‘the defense attorney’s duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds which would render the insurer liable.’” (citations omitted)).
Paying for the Defense and Resolution of Claims

• Allocating claims involving multiple policy years or types of policies
  • Establishing occurrence definition
  • Allocating historical costs and establishing prior erosion of coverage
  • Accounting for agreements with other insurers and lump sum insurer settlements
  • Accounting for settlements made for less than policy limits
  • Treatment of insolvents and gaps in coverage
  • Trigger Period/Allocation Period
  • Allocating NCC defense costs and defense costs for dismissed or uncovered claims
Paying for the Defense and Resolution of Claims

• Negotiating and Implementing Cost Sharing Agreements
  • The parties’ duties to cooperate with each other
  • Approaches to keeping insurers informed
  • Coverage-In-Place agreements for occurrence based coverage
  • Estimating liability associated with future claim filings and scenario modeling
  • Impact of various allocation methodologies and common cost sharing provisions
  • Using simplifying assumptions in cost share agreements
  • Tracking erosion and determining exhaustion
  • Reporting to other non-participating insurers
Paying for the Defense and Resolution of Claims
Managing Claims Information

• Claimant data needed to prepare allocations
• Defense cost transaction data kept on a claimant level when possible
• Other data fields that could potentially be useful for forecasting liability or modeling the impact of a master settlement agreement
• Maintaining and updating claimant data during discovery
• Responding to insurer audits
“Best Practices” Under the Duty to Cooperate

- Cooperation is a two-way street
- Early and routine communications on strategy, developments and deadlines
- Obtaining “buy-in”
- Understanding the litigation guidelines and the purposes for the insurer reporting requirements
- Document communications that alter or depart from standard protocols
- Working together in defense of claims with a common strategy typically helps iron out disputes
Recoupment of Costs Paid by Insurers

• Does insurer have right to recoup defense costs it paid under reservation of rights if it later wins a determination of no coverage?

• Right to reimbursement must be expressly stated in policy or an amendment to the policy; a unilateral reservation of a purported right to reimbursement is ineffective.

  • *Excess Underwriters of Lloyd’s of London v. Frank’s Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008)
  
  
  • *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 108 P.3d 469, 480 (Mont. 2005) (reimbursement of defense costs permitted when an insurer timely and explicitly reserves its rights to such costs, provides specific and adequate notice of the possibility of reimbursement, and the insured accepts the benefits of the defense without objection).
Recoupment of Costs Paid by Insurers

• But Not Always
  • *Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997) (California law permits reimbursement of defense costs following a determination of noncoverage regardless of express policy language).
Making Decisions to Settle or Try Cases

• Cost of defense v. potential liability
  • In individual case
  • Across entire docket of cases
• Insurers’ interest in extinguishing defense obligation by paying limits
• Policyholder’s interest in avoiding bad PR from adverse judgments v. its interest in defeating pending claims to discourage new claims
• Insurer consent
• Policyholder consent
Making Decisions to Settle or Try Cases

• Insurer’s obligation to put policyholder’s interest above or at least equal to its own
  • *Harbison v. Am. Motorists Ins. Co.*, 636 F. Supp. 2d 1030, 1039 (E.D. Cal. 2009) (“The insurer, when determining whether to settle a claim, must give at least as much consideration to the welfare of its insured as it gives to its own interests.”);
  • *Merritt v. Reserve Ins. Co.*, 110 Cal. Rptr. 511 (Ct.App.1974);
  • *Fulton v. Woodward*, 545 P.2d 979 (Ariz. Ct. App. 1976);
  • *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255 (Miss. 1988).
Making Decisions to Settle or Try Cases

• Use and abuse of “hammer clauses”
  • Some liability policies provide that the Insurer shall have the right to appoint counsel, investigate and conduct negotiations and, with the consent of the Insured, to enter into the settlement of any Claim that the Insurer deems appropriate. If the Insured refuses to consent to a settlement acceptable to the claimant in accordance with the Insurer’s recommendations:
    • The Insured will thereafter be solely responsible for negotiating and defending such Claim at their own expense; and
    • Subject to the Insurer’s aggregate Limit of Liability, the Insurer’s liability with respect of any such Claim will not exceed the amount for which such Claim could have been settled by the Insurer, including Defense Expenses incurred up to and until the time that the Insured refuses to consent to settlement.
Making Decisions to Settle or Try Cases

- Hammer clauses have been upheld
  - *Sec. Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377 (7th Cir. 1995)
  - If clause contains a “reasonableness” limitation, insurer cannot force the insured to accept an unreasonable settlement
    - *Clauson v. New England Ins. Co.*, 254 F.3d 331 (1st Cir. 2001)
Assessing Risk and Valuing Claims

• Each claimant in a mass tort has a set of facts that, if litigated, could lead to an award or a dismissal.

• The known information about the extent of any one individual claimant’s injuries/damages is often incomplete.

• Use decision trees and probabilistic analysis to create scenarios where unknown claimant data is estimated based on the known information to more accurately value the group of claimants.

• Statistical sampling can offer additional information about the prevalence of key characteristics in the claimant group.