IADC COMMITTEE NEWSLETTER

INSURANCE AND REINSURANCE

April 2023

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This article discusses the role of coverage counsel in resolving risk in the complex trucking industry defense as verdicts continue to skyrocket.

The Role of Coverage Counsel in Resolving Risk – Trucking Edition

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As reptilian tactics have taken root and nuclear verdicts sprouted, defending trucking cases has become more complex than ever. One need only look at the $89.7 million verdict entered by a Houston jury against Werner Enterprises in 2018 or the subsequent $150 million settlement reached by Werner in 2022 to begin to understand the risk associated with litigating commercial transportation matters. According to the American Transportation Research Institute (ATRI), from 2010 to 2018, the average verdict in trucking cases rose from $2.3 million to $22.3 million, an increase of nearly 1000%.[1]

While settlements and verdicts continue to skyrocket, the Federal Motor Carrier Safety Administration has continued to require minimum limits of just $750,000 under the MCS-90.[2] This form, and the minimum limits it provides, is designed to address public liability and to provide compensation for the often-significant consequences that come when tractor-trailers and motor vehicles collide. But the pace of trucking verdicts and settlements has greatly outpaced the minimum insurance requirements. Even policies that exceed these minimum requirements often can't keep up. As a result, the expectations of plaintiffs and the lawyers that represent them are often at odds with the finite availability of monies to settle. For every large scale, otherwise solvent trucking carrier, there are many more individual, otherwise insolvent actors with limited resources to pay in the event of a catastrophic loss. In these circumstances, coverage counsel and their ability to explain the limits of available coverage, can be a significant asset in resolving risk.

There is a fundamental difference between whether a party can prevail and whether it can collect. The question of insurance, how it applies, and who is responsible is often a threshold issue. Understanding the constellation of collectible funds is the key to all parties' ability to reach a well-reasoned and practical resolution. The most sophisticated plaintiff's lawyers in the country understand and appreciate the value of insurance and the need to understand its application in cases involving catastrophic loss. Others, lured by the marketing value of a large verdict, blinded by ego, or simply lacking the experience to understand the time-value of effort and resources press on regardless of practical consequences. In these circumstances, coverage counsel, on both sides of the aisle, are often the key to resolving a case. Coverage counsel can help assess what coverage is (and isn't) available. Perhaps most importantly, they can have direct conversations with both parties as to the likely consequences of continuing to litigate. A bird in the hand, as the saying goes, is worth two in the bush.

With increased frequency, coverage counsel are asked to participate in settlement discussions relating to underlying trucking matters. Such participation, while

[1] https://www.fleetowner.com/operations/article/21254975/nuclear-verdicts-in-trucking-large-fleets-a-target-for-pricey-litigation

[2] https://www.fmcsa.dot.gov/registration/form-mcs-90-endorsement-motor-carrier-policies-insurance-public-liability-under

informative and often useful, can also have unintended pitfalls and unforeseen consequences.

As a threshold issue, every lawyer must consider the ethical considerations in the representation of their respective clients. Model Rule of Professional Conduct Rule 1.3 provides as follows:

- A lawyer shall act with reasonable diligence and promptness in representing a client.
- A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.
- A lawyer is not bound, however, to press for every advantage that might be realized for a client.

Model Rule of Professional Conduct 1.7 provides:

- A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.
- A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client.
- Two types of conflict: directly adverse, and material limitation.

Read collectively, these rules can help to guide coverage counsel when asked to engage in settlement discussion. Coverage counsel must be clear about their role, who they represent, and on whose behalf, they are advocating. While the insurer's interest in reducing the underlying risk is the same as that of the insured, these parties may well be adverse when it comes to the question of coverage. Even in cases where coverage is not "at issue", the prospect of excess verdicts and pressure to resolve within policy limits, even in the face of viable defenses, can complicate the question of coverage. It is thus imperative that coverage counsel "stay in their lane", addressing the relevant coverage issues, while leaving the underlying case to liability defense counsel retained for that purpose. In doing so, coverage counsel should pay particular attention to protecting its insurer client from the prospect of bad faith.

Under the general implied covenant of good faith and fair dealing, an insurer has a duty to act in good faith in responding to settlement offers. Courts have expressed this duty as, variously, an obligation to act reasonably in the payment and settlement of claims, a duty to settle claims within the policy limits on objectively reasonable terms, and a duty to do what the average person would do in a similar situation, so that it had a duty of settling if that was a reasonable thing to do. While states vary widely in the application and consequences of claims of bad faith, it is an almost universal truth that the pressure of excess verdicts is giving rise to the prospect of bad

faith and the need to carefully consider competing rights and responsibilities in any insurance contract. Examples of this consideration and how Courts have addressed the same are as follows:

New York

Bad faith failure to settle requires a showing that the insurer failed to treat the insured's interests equal to its own, which can be shown by a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted. *Pinto v. Allstate Ins. Co*., 221 F.3d 394, 399 (2d Cir.2000).

California

The test is whether a prudent insurer without policy limits would have accepted the settlement offer. When the insurer fails to accept a reasonable offer when liability and coverage is clear, then the insurer will be liable for any excess judgment. *McDaniel v. GEICO Gen. Ins. Co*., 55 F. Supp. 3d 1244, 1253 (E.D. Cal. 2014).

North Carolina

An insurer owes a duty to its insured to act diligently and in good faith in effecting settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy. *Alford v. Textile Ins. Co*., 248 N.C. 224, 229, 103 S.E.2d 8, 12 (1958).

Illinois

The duty to settle arises when a third party demands settlement within the policy limits, a claim has been made against the insured, and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. *Surgery Ctr*. at 900 N. *Michigan Ave., LLC v. Am. Physicians Assurance Corp., Inc*., 922 F.3d 778, 785 (7th Cir. 2019).

While the prospect of a bad faith claim can seem daunting, the use of coverage counsel in considering demands designed to give rise to bad faith will provide both calm and clarity to the insurer's decision-making process. Coverage counsel can and should advise his/her client as to the consequences of settling and not settling. By thinking creatively, counsel can also work with their clients and the opposition to develop a framework for resolving risk without giving rise to bad faith. Stipulations as to claimed damages within policy limits, high-low agreements, and clear delineation of the source of any coverage dispute can help avoid those situations where a verdict is entered before the coverage question becomes ripe.

As noted above, sophisticated plaintiff's counsel are interested in the insurance landscape. They want to understand what coverage is available and how it will operate in the event a verdict is entered in favor of his/her client. By providing a clear picture of available coverage early, coverage counsel

can help frame the discussion in a way that reduces the inflammatory consequences of a reptilian verdict. Success in this space requires two key elements: integrity and thoroughness.

The practice of law is, by its nature adversarial. But that dynamic does not have to give way to dishonesty or a perception that one is "hiding the ball." Addressing the concerns of all involved through a direct, thorough exchange of information will often help to resolve the underlying dispute. Where it doesn't, such an exchange will at least help to narrow the dispute and make the litigation a more predictable endeavor for all involved. Coverage counsel thus needs to be able to say where the coverage extends to and where it ends. To do this, a robust understanding of all coverage that may come into play is critical.

In a trucking context, where brokered loads, independent drivers, shippers, and more come into play, these questions are often complicated by the existence of multiple policies covering different insureds and different vehicles. The multi-state nature of trucking lends an additional layer of complication with a necessary application of conflicts of law principles to interpret both the underlying tort and the policies that provide protection. Even when policies and conflicts can be addressed, they must still be compared for priority. While states often have nuanced interpretation of the various other-insurance clauses of a particular policy, the basic break down of such clauses, generally, is as follows:

- **Excess Clause:** Provide coverage only for liability above the maximum coverage of the primary policies.
- **Standard Escape Clause:** No coverage when there is other valid and collectible insurance.
- **Super Escape Clause:** Expressly provides that the insurance does not apply to any loss covered by other specified types of insurance, including the excess insurance type.
- **Standard Escape v. Excess Clause**: The former provides primary coverage and the latter secondary.
- **Super Escape v. Excess Clause**: The former is absolved from liability.

Where the policy is unambiguous, it must be presumed the parties intended what the language used clearly expresses, and the policy must be construed to mean what on its face it purports to mean. *Hartford Acc. & Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946). Where it was impossible to determine which policy is primary, the excess clauses are generally deemed repugnant, with neither clause being given effect. As a result, the claim must be prorated between the two insurers according to their respective policy limits. *Integon Nat. Ins. Co. v. Phillips*, 212 N.C. App. 623, 630, 712 S.E.2d 381, 386 (2011).

To complicate these cases even further, a situation may arise where priority isn't determined by the "other insurance" provisions in the policies involved. In

general, "other insurance" is insurance that covers the same risks, interests, and subject matter concurrently with another policy. *Upjohn Co. v. New Hampshire Ins. Co.,* 178 Mich. App. 706, 721, 444 N.W.2d 813, 819-20 (1989) *rev'd on other grounds* 438 Mich. 197. Depending on the jurisdiction, a commercial general liability policy, automobile policy and broker's contingent liability policy for example, may not be "other insurance" because they don't cover the same risks, interest, or subject matter. In these circumstances coverage counsel should be familiar with the "specific versus general" approach to determining priority of coverage. See e.g., *Liberty Mut. Ins. Co. v. Home Ins. Co.,* 583 F. Supp. 849, 852 (W.D. Pa. 1984).

Under this approach, if two policies cover the same loss, a policy providing more specific coverage must pay up to its limits, before a policy affording more general coverage can be required to pay. *Id.* This approach has been applied by courts in California, Utah, Missouri, Georgia, and New York. See e.g. *Gillies v. Michigan Millers Mutual Fire Ins. Co.* (1950) 98 Cal.App.2d 743, 747 (the court explained that when two policies provide specific coverage for a risk, then both policies prorate; however, if one policy provides specific coverage and the other only general or floater coverage, then proration is not applied); *Caribou Four Corners, Inc. v. Truck Ins. Exchange*, (10th Cir. 2002) 443 F.2d 796, 802-803 (applying Utah law to find that a general policy is excess and does not contribute until after the exhaustion of a specific policy); *United Services Auto. Ass'n v. U.S. Fidelity & Guaranty Co*. (Mo.App.1977) 555 S.W. 2d 38, 43 (applying Missouri law to find that a specific policy provides primary coverage and a general or floater policy provides excess coverage); *Mill Factors Corp. v. Ming Toy Dyeing Co.* (D.C.N.Y. 1941) 41 F. Supp. 467, 469 (applying New York law to find that a specific policy covering goods at a specific location must bear loss before coverage under a general policy is triggered although both policies contained "other insurance" clauses); *Hartford Steam Boiler I. & Ins. Co. v. Cochran P.M. & G. Co.* (Ga.App. 1921) 26 Ga.App. 288, 105 S.E. 856 (applying "specific v. general" rule to hold that specific policy provides primary coverage and general policy provides excess coverage). See also *Frankenmuth Mut. Ins. Co., Inc v. Con't Ins. Co.,* 450 Mich. 429, 438, 537 N.W.2d 879 (1995) (noting "where there is a policy more specifically tailored to the circumstances of the claim, it would be appropriate to designate that policy as the primary insurer….").

When discussing the application of available coverage, counsel should come prepared to explain both what policies are in place and the priority in which they will operate. Where other insurers are potentially on the risk, counsel should come prepared with an assessment of this additional coverage as well. Armed with this information and a clear and credible explanation of where coverage applies (and where it doesn't apply), coverage counsel can serve as a valuable resource for resolving risk, protecting

insureds, and avoiding extra-contractual exposure.

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