

ACC NCR Insurance Recovery – From Insurance Placement to Favorable Claim Resolution

March 7, 2023

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■ Procuring Insurance Policies

Overview of Commercial Insurance Policies

- Commercial General Liability Insurance
- Directors and Officers' Liability Insurance
- Errors and Omissions Liability Insurance
- Employment Practices Liability Insurance
- Cyber Insurance Policies
- Crime Insurance Policies
- Property Insurance Policies
- Rep and Warranty Insurance Policies

■ Deconstructing The Insurance Policy

- 1) Review Declarations Page
- 2) Read carefully the coverage grant
- 3) Review the Definitions and Exclusions for any narrowing of coverage
- 4) Understand conditions required under the policy (particularly notice provisions)
- 5) Review Endorsements

■ Tips During The Underwriting Process

- For most, the universe of what is available starts with pre-printed forms endorsed or enhanced in the placement process
- Ask your broker for recommendations about endorsements
- Renewal should not simply be re-issuing the same policy
- Independent policy audits are helpful and prudent
- Regularly evaluate risks and industry trends

■ Considerations In Selecting a Broker

- Experience in your industry
- Takes the time to understand your risk profile
- Has established track record with placement
- Will work to improve “off the shelf” policies
- Adds value at renewal
- Has relationship with senior members in claims department

■ Considerations In Procuring Coverage

- Start early enough to pursue options
- Address known exposures and risks
- Seek endorsements tailored to your needs
 - Beware of sublimits
 - Be careful of endorsements that grant coverage by deleting exclusions
- Consider other language that the insurer uses in the market to broaden coverage
- Ask broker about insurer's claims handling reputation
- Keep all marketing materials and placement correspondence
- Keep abreast of relevant coverage developments

Commercial Risk Transfer Methods: Insurance Provisions In Contracts

- Requiring counterparty (e.g., vendor, contractor, subcontractor, supplier) to have minimum levels of specific types of insurance
- Becoming an “additional insured” under counterparty’s insurance policies
 - Key benefits: coverage without premium and does not erode your own insurance policies
 - Backstop’s counterparty’s ability to pay
 - Not all “additional insured” protection is equal
 - Seek actual copies of policies, rather than certificate of insurance
 - Make sure insurer’s obligation is not limited by indemnification provision and vice versa. *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015).

Other Commercial Risk Transfer Methods

- Contractual indemnification provisions
 - Who will be indemnified
 - What is indemnified
 - Duty to defend, defense cost reimbursement, or no defense?
 - Does indemnitee's negligence impact the indemnitor's obligation?
 - All indemnified losses, or only some?
 - Impact of state public policy
- Waiver of subrogation
- Hold-harmless agreements

Achieving Favorable Resolution of Claims

Hypothetical # 1

- On Friday afternoon, you receive an email from a business competitor that contends that you made a defamatory statement, requests a meeting, and demands that you retain pertinent documents.
- Should you report this to your insurer?
 - a) Yes
 - b) No
 - c) Probably
 - d) Probably not

Hypothetical # 2

- Which insurance company do you report the claim to?
 - a) D&O insurer
 - b) CGL insurer
 - c) Professional Liability insurer
 - d) It depends
 - e) All of the above
 - f) None of the above

■ Notice

- Know when to provide notice of a loss or claim
- Noticing the correct insurers
- Notice to excess insurers or other lines of coverage
- Avoid claim characterization – unless the policy requires otherwise, just attach the demand or complaint and ask for full extent of coverage/defense
- Check for prior notice exclusion

TIP: Handle notice properly - review specifics of notice provisions and have process established

Role of The Broker On Claims

- Insurance is a “relationship” business. Brokers can be effective at keeping communication channels open and advocating for coverage.
- In many situations, there is not a privileged relationship between a policyholder and broker.
- In some states, policyholders may waive privilege by providing to a broker coverage counsel and/or defense counsel generated documents, communications, mental impressions, settlement documents, etc. *See, e.g., SR Int’l Bus. Ins. Co. v. World Trade Ctr. Properties LLC*, No. 01 CIV. 9291 (JSM), 2002 WL 1334821, at *1-6 (S.D.N.Y. June 19, 2002); *Cellco Partnership v. Certain Underwriters at Lloyd's London*, 2006 US Dist. LEXIS 28877, at *5 (D. N.J. May 11, 2006); *but see In re Tetra Technologies, Inc*, 2010 US Dist. LEXIS 33012 at *12 (S.D. Tex. August 10, 2010).

Tension Created When Your Insurer Agrees To Defend Under a Reservation of Rights

- Acceptance: Insurer's complete acceptance of the defense of third-party claim
- ROR: Insurer's defense subject to a complete reservation of rights
- Denial

TIPS: Do not engage in needless back and forth – reserve and resolve

Provide Information Your Insurer Needs To Resolve Your Claim Without Waiving Privilege

- The duty to cooperate begins when the insurer has accepted coverage
- Assess the reason for the request
 - Certain requests are reasonable
 - Some requests are to satisfy reinsurers
 - Watch out for requests designed to defeat coverage
- Maintaining privilege and confidentiality
 - Some states have insurer-insured privilege
 - Consider a joint defense agreement

Insurance Companies' Rights May Be Impacted by Their Reservation of Rights

- Failing to specifically list grounds for reservation in RoR may result in waiver. *See Central Armature Works, Inc. v. Am. Motorists Ins. Co.*, 520 F. Supp. 283 (D.D.C. 1980) and *Commonwealth Lloyds Ins. Co. v. Marshall, Neil & Pauley Inc.*, 32 F. Supp. 2d 14 (D.D.C. 1998).
- Insurer's failure to explain the basis for reserving rights can result in waiver. *Harleysville Group Insurance v. Heritage Communities, Inc.*, 803 S.E.2d 288 (S.C. 2017).
- Depending on the policy language, some states allow insurers defending under a reservation of rights to seek repayment of defense costs for uncovered claims if there is a later determination of no coverage. *See, e.g., Buss v. Superior Court*, 16 Cal.4th 35 (1997).

Hypothetical # 3

- On Christmas eve, your company is served with a multimillion-dollar copyright infringement lawsuit alleging that your advertisement infringes on your competitor's copyright. Your CGL carrier reserves the right to deny based on seven different exclusions but seeks to appoint panel counsel from an unknown law firm to defend you.
- Do you have grounds to challenge the insurers selection of defense counsel?
 - a) Yes
 - b) No
 - c) Probably
 - d) Probably not

Who Controls The Defense?

- When an insurer defends subject to a reservation of rights, the law in many jurisdictions requires the insurer to relinquish control of the defense.
- Law varies by state. *Petition of Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995).
- When a conflict of interest exists, in most states, the insured has sole control over the defense of the underlying litigation. *Brohawn v. Transamerica Ins. Co.*, 347 A.2d 842, 854 (Md. 1975); *Norman v. Insurance Co. of N. Am.*, 239 S.E.2d 902 (Va. 1978); *O'Connell v. Home Ins. Co.*, CIV. A. No. 88-3523, 1990 WL 137386, at *4 (D.D.C. Sept. 10, 1990).

TIP: Legal positions aside, establish common defense goals with insurer and try to get the insurer's support for defense and settlement strategy

Hypothetical # 4

- After you retain coverage counsel to help you obtain defense counsel, the insurer agrees that you can select the defense counsel. However, the insurer insists that rates be limited to \$195/hour for partners and \$125/hour for associates. Additionally, the insurer seeks to impose its guidelines on the law firm, including limitations on any internal meetings and restrictions on counsel's ability to proceed with any discovery or research without prior approval.
- Is the insurer's position subject to challenge?
 - a) Yes
 - b) No
 - c) Probably
 - d) Probably not

■ Defense Counsel/Litigation Guidelines

- Litigation guidelines usually are not part of the policy
- Defense counsel's ethical obligations to you and your insurer
 - The ABA Standing Committee on Ethics and Professional Responsibility and state ethics committees have developed guidelines governing panel counsel's obligation to withdraw from representation of an insured, panel counsel's obligations to abide by "panel counsel guidelines," and panel's counsel's submission of work description and legal bills to insurers and third-party auditors

TIP: Use ethical rules to avoid unreasonable guidelines; set parameters of what you will accept up front

Securing Your Preferred Defense Counsel at Full Hourly Rates

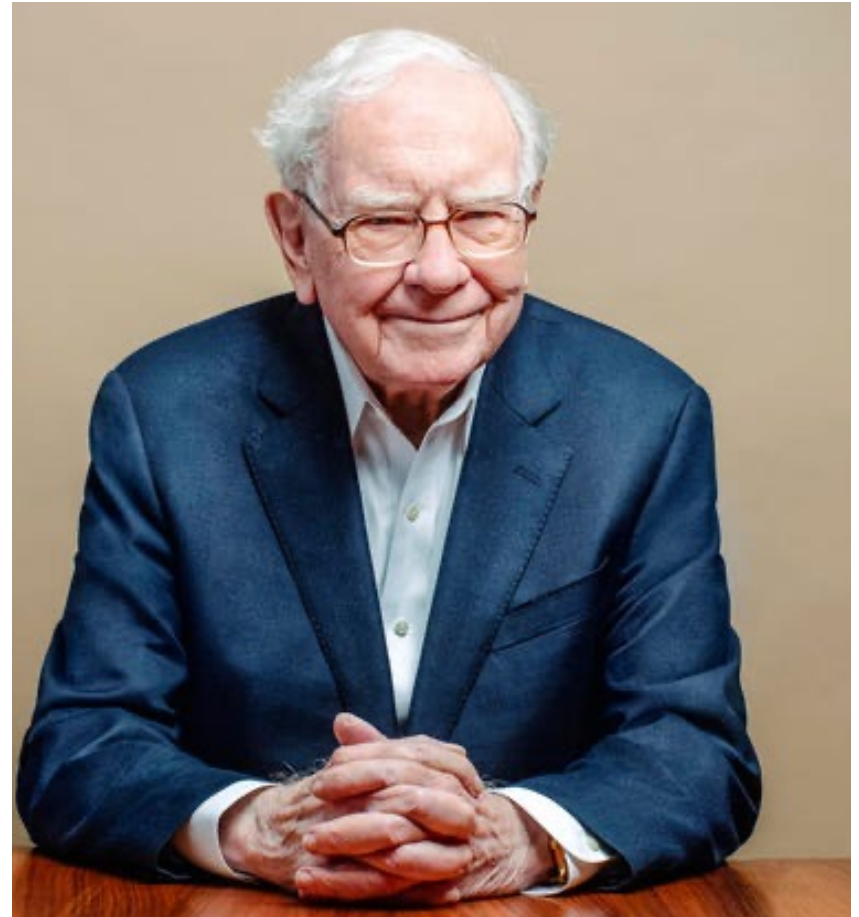
- Easier in certain lines of coverage
- Use helpful comparisons
 - the firms hired by the insurers to defend their interests
 - the counsel approved by insurers in other cases
 - rates paid by the carriers in other cases
- Highlight benefits to your counsel (deep experience with type of claim; familiarity with insurer's policies and procedures; knowledge of insured's business)
- Have objective survey of rates in jurisdiction by the type of lawyer

The Insurer's Advantage of "Float"

"One reason we were attracted to the P/C business was the industry's business model: P/C insurers receive premiums upfront and pay claims later. In extreme cases, such as claims arising from exposure to asbestos, or severe workplace accidents, payments can stretch over many decades.

This collect-now, pay-later model leaves P/C companies holding large sums – money we call "float" – that will eventually go to others. Meanwhile, insurers get to invest this float for their own benefit. Though individual policies and claims come and go, the amount of float an insurer holds usually remains fairly stable in relation to premium volume. Consequently, as our business grows, so does our float. And *how* it has grown....."

-Berkshire Hathaway Annual Report



Shortcuts To Favorable Insurance Claim Resolution

- **The Goal: Settle Claim Quickly For Fair Value**
 - Approaches
 - Using broker, in-house person, or coverage counsel as lead
 - Do you get more with the carrot or the stick?
- **View from the inside: in-house counsel observations on resolving claims disputes**

Pre-Litigation Strategies for Persuading Insurers To Pay The Fair Value

- Present factually and legally compelling claims, with a full understanding of the strengths and weaknesses of the claim
- Bring business relationships to the table
- Use ongoing business to your advantage
- Decide who is best to represent your company in the negotiation
- What other terms may help to close the deal?
(agreement not to pursue similar claims, renewal, etc.)
- State insurance department inquiry
- Demand mediation

Putting Your Best Foot Forward

- Determine the applicable law
- Understand three nearly universal insurance principles
 - Insurance companies have the burden of proving a claim or loss falls within an exclusion
 - Coverage grants are construed broadly
 - Exclusions generally are construed narrowly
 - Ambiguities are construed in favor coverage
- Consider the language in the policy
- Consider language outside the policy

Putting Your Best Foot Forward (cont.)

- Challenge denials based on citation to material with specificity – for example, cite to specific paragraphs in complaint that trigger a duty to defend
- Review the insurer's representations regarding the scope of coverage
 - The underwriting file
 - Regulator filings
 - Marketing materials
 - The reinsurance gold mine
- Consider whether the issue is forum sensitive, potentially requiring the filing of early litigation

■ Beware of Consent-to-Settle Provisions

- Consent-to-settle provisions require obtaining insurer's consent before settling an underlying lawsuit
 - Failing to obtain insurer's consent before settlement may jeopardize coverage
- While the insurer's withholding of consent typically must be reasonable, consent may still be required if the insurer is defending

■ Exceptions to Consent-to-Settle Requirement

- Lack of consent may be excused for reasonable settlement if the insurer wrongly denies coverage
 - *Eureka Inv. Corp., N. V. v. Chicago Title Ins. Co.*, 530 F. Supp. 1110, 1119 (D.D.C. 1982) (insurer that denies coverage “may be held liable for the costs of a reasonable settlement reached by the insured even if the insurance company has refused to consent to the settlement.”)
 - *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 151 A.D.3d 632, 633, 58 N.Y.S.3d 38, 39 (N.Y. App. Div. 2017) (insurer’s denial “justifies plaintiffs’ settlement of those claims without [insurers’] consent.”)
- Sometimes, the insurer has control over settlement decisions
 - Impact of hammer clauses

Are Attorney's Fees In Coverage Cases Recoverable?

- The law varies by state
- In a few states, attorney's fees may be recovered as consequential damage for the insurer's breach. See, e.g., *Motorists Mutual Insurance Company v. Trainor*, 33 Ohio St. 2d 41, 47 (Ohio 1973); *Houston Casualty Company v. Prosight Specialty Insurance Company*, 462 F. Supp. 3d 443, 444 (S.D.N.Y. 2020); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 78 (W. Va. 1986).
- In many states, attorney's fees may be recovered if the insurer is liable for bad faith

■ Asserting Bad Faith Claims

- An insurer that commits bad faith can be required to pay judgments in excess of policy limits, punitive damages, attorney's fees, and/or consequential damages
- The claims for bad faith against insurers could be based in tort, contract, or statute
 - Bad faith claims handling
 - Bad faith failure to settle
 - Unfair Trade Practices Act

TIP: Merely threatening bad faith rarely promotes resolution

Evaluating Bad Faith Claims

- What are the elements of bad faith under applicable law?
- Do you have significant consequential damages?
- Does the insurer face liability for bad faith failure to settle?
 - *Haghnazarian v. State Farm Mut. Ins. Co.*, 21 Va. Cir. 140 (1990): “an insurer acts in bad faith where it acts ‘in furtherance of its own interest, with intentional disregard of the financial interest of the insured.’”
 - *Hughes v. Progressive Direct Ins. Co.*, No. CIV. CCB-12-1555, 2012 WL 4480726, at *3 (D. Md. Sept. 27, 2012): Maryland courts recognize “a tort action based upon a liability insurer’s wrongful failure to settle a claim against its insured within policy limits.”

**TIPS: 1) Show that the insurer faces liability in excess of limits
2) Consider use of the insurance commissioner**

■ Mediation Techniques and Strategies

- Learn who is going to attend and authority in advance
- Selection of mediator is very important
 - Clients should use a mediator who understands insurance but does not treat the insurers like a client
- Articulate the full claim (e.g., prejudgment interest, attorneys' fees)
- Frame concerns about insurer authority strategies with the mediator in advance
- **Understand the game before you walk in the door**

■ Anticipating Mediation Tactics of Insurers

- The “Oldest Trick” - frustrate you with wasted mediation day
- Start very low and move incrementally
- Send representative with limited settlement authority
- Refuse to “bid against themselves”
- Negotiate toward a middle point

Reaching Settlement Agreements With Insurance Companies

- Common Obstacles
 - Absence of Term Sheet
 - Scope of Release
 - Indemnification of Insurer

- Confidentiality
 - Courts may make “Confidential Settlements” discoverable
 - States that have adopted the Uniform Mediation Act or similar statutes that provide a framework to protect information relating to the mediation
 - For example, in Illinois settlement discussions conducted “during or in furtherance of mediation” are protected from disclosure by the Illinois Uniform Mediation Act. *Royce v. Michael R. Needle, P.C.*, 2015 WL 5095721 (N.D. Ill. Aug. 20, 2015).

Settlement Strategies To Employ When The Insured's Liability Is Open-Ended vs. Fixed

- Scope of Release Impacted
- Interim Allocation Agreement
- Insurers Usually Seek Finality

■ Insurance Litigation In 2023

- There may be advantages to more detail in pleadings, because insurers are more commonly pursuing motions for judgment on the pleadings
- Federal courts have less patience for broad discovery
- Impact of remote discovery and proceedings
- Filing in federal court v. state court
- Litigation v. Arbitration

Resources on Insurance Updates

- <https://www.businessinsurance.com/>
- <https://www.law360.com/insurance>
- <https://www.dandodiary.com/>
- Law Firm and Broker Content

■ Observations About Claim Resolution

- Choose insurer with good reputation for resolving claims
– track records matter
- In procuring an insurance policy, consider adding a mandatory mediation clause requiring mediation in the event of disputes between the policyholder and the insurer
- Make sure you have systems in place to quickly identify all applicable insurance policies in the event of a claim
- Some carriers have hired claims handlers incentivized to not promptly or fully pay claims
- Define your goals and strategies up front

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