

## Overcoming Obstacles to Recovering Settlement Costs from Insurers

by Joshua Gold

As many policyholders already know, prompt payments from insurance companies for settlement costs can be hard to come by. Often, the policyholder must settle a case without a commitment to help fund it from its insurer.

If the suit is substantial enough, a policyholder with cash-flow problems may be put out of business by its insurance company's refusal to cover a settlement opportunity. This scenario is what some in the insurance industry refer to as "death of company." But even if a policyholder has the wherewithal to fund a large settlement without its insurer's contribution, challenges remain in the pursuit of an eventual insurance recovery.

### Challenging the Settlement Conditions

If the underlying case is settled, the insurance company will question the extent to which it is bound by the settlement. After the policyholder settles and requests a payout from the insurer for that amount, the insurance company will often contend that the policyholder was not liable to the claimant or that the settlement was unreasonable.

In essence, it tries to force the policyholder to relitigate the case and prove its liability in the coverage action. Even after such efforts, the insurance company may reverse course and try to evade its coverage obligations by arguing that the "true liability or exposure" is for uncovered liability (e.g., "uncovered dishonest acts" vs. covered negligent or reckless acts).

### Insurance Companies that Just Say "No"

A second type of all-too-common dispute occurs when the insurance company simply withholds its "consent" to the settlement. In this situation, it may simply try to avoid coverage on the basis that it did not consent to the policyholder entering into a settlement — irrespective of an analysis as to whether the settlement reached by the policyholder was prudent and covered by the insurance policy.

Policyholders need to act carefully when dealing with the lack of consent argument. For example, a federal trial court in 2000 allowed an insurance company to void coverage after the policyholder failed to obtain the insurer's written consent to settle. The court reasoned that even

though the insurer sent a "preliminary" denial of insurance coverage, that fact did not relieve the policyholder of complying with the clause requiring written consent from the insurance company prior to reaching a settlement.

### Play It Smart

While many courts hold that policyholders dealing with a denial of coverage (whether "preliminary" or not) are permitted to protect themselves in a suit by entering into reasonable settlements without forfeiting their insurance coverage, there are still ways to reduce insurance coverage litigation risk with an insurance company that just refuses to cover settlements.

First, even if the insurance company denies coverage, it is still wise to keep it (and any applicable excess insurance companies) abreast of settlement negotiations and developments. This reduces the amount of Monday morning quarterbacking that insurers sometime play — arguing that they would have handled things differently if they had been informed of settlement issues. Also, providing this information may lead the insurance company to revisit its claims position where there had simply been some miscommunication during the claim process.

Second, if there is an imminent deal with the claimant, ask the insurance company to consent to the settlement. If it refuses, at least ask that it agrees to waive any coverage defense based upon its lack of consent. Many insurance companies will do this while they "preserve" other potential coverage defenses.

Third, given the lengths that a "claim investigation" can go — especially one conducted by a law firm "on behalf of the underwriters" — it is important to be mindful of statute-of-limitation issues. Policyholders can get preoccupied with channeling all of their attention to resolving the claim. While it certainly may be desirable to resolve the claim before proceeding to coverage litigation, policyholders still need to ensure that their litigation options remain open during this period.

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