METROPOLITAN
CORPORATE
COUNSEL®

MAY 2017

WWW.METROCORPCOUNSEL.COM

Policyholders' Hands Are Strengthened When Insurance Companies Refuse to Settle

Appellate decisions in a California case suggest the tables may be turning

By Pamela D. Hans & Christina Yousef / Anderson Kill

A lawsuit of any magnitude can be devastating for your business, whether it manifests its hardship financially or otherwise. The stress of making the right decision for your company's future can seem insurmountable at times. And just like that, a light at the end of the tunnel: a settlement offer that is reasonable and good for your business. The only problem is that your insurance company will not consent.

This places policyholders in an all-too-common, and difficult, situation: Settle an underlying case absent the insurance company's consent, or fail to settle out of fear that the insurance company will not cover the claim, given the "consent-to-settle" provisions in a policy. The problem is often compounded by the need to obtain not just the primary insurance company's consent, but also that of any excess insurance companies sharing the risk.

While insurance companies may have had the upper hand in the past, the tables may be turning in favor of policyholders. A recent decision in the U.S. Court of Appeals for the Ninth Circuit seemed to herald this change.

Diamond Heights and *Teleflex*

On March 21, the Ninth Circuit, in *Teleflex Medical Incorporated v. National Union Fire Insurance Co. of Pittsburgh, PA,* upheld a California Court of Appeals holding that seems to be an outlier in insurance coverage precedent.

In *Diamond Heights Homeowners Association v. National American Insurance,* the California Court of Appeals established that when a policyholder and primary insurance company have approved a proposed settlement, an excess insurance company can either (1) approve the proposed settlement; (2) reject the settlement and assume the defense of the policyholder; or (3) reject the proposed settlement, refuse to take over the defense and leave itself open to potential suit by the policyholder, seeking contribution toward the settlement.

> ***Regardless of whether your insurance companies have consented to a settlement, you should be sure to know your rights and their responsibilities (and vice versa).***

In *Teleflex*, a policyholder, LMA North America Inc. (LMA), sued its excess insurance company, National Union, in connection with the insurance company's refusal to either contribute over $3 million toward settlement with a third party – to which LMA's primary insurance company had consented – or take over LMA's defense in the matter. In considering the holding in *Diamond Heights*, the United States District Court for the Southern District of California denied National Union's motion for summary judgment. A jury ultimately found in LMA's favor.

National Union's policy contained several provisions that are commonly found in commercial general liability insurance policies: a "no voluntary payments" provision, which stated that "no insureds will, except at their own cost, voluntarily make a payment, assume any obligation or incur any expense, other than for first aid, without [National Union's] consent"; a "no action" clause, which states, in relevant part, that "there will be no right of action against us under this insurance unless … the amount you owe has been determined with our consent or by actual trial and final judgment"; and a provision recognizing that the excess insurance company's right to "participate" in the defense of a claim and, after exhaustion by the primary insurance company, a "duty to defend" the claim.

Ultimately, National Union refused to consent to the settlement and did not offer to take over the defense of the claim. Thereafter, LMA solidified the settlement and promptly notified National Union. Soon after, National Union offered to take over the defense if the settlement agreement could be "undone." LMA responded that it could not undo the settlement. LMA then filed suit for breach of contract and bad faith, seeking contract damages, interest, attorney fees and costs, and punitive damages. Following discovery, National Union moved for summary judgment, arguing that it possessed the "absolute right to veto the settlement" pursuant to the policy's "no voluntary payments" and "no action" clauses.

National Union was unsuccessful in convincing a Ninth Circuit panel that *Diamond Heights* would not be followed by the California Supreme Court. Upholding LMA's bad-faith claim, the panel held that a jury could reasonably conclude not only that the settlement was reasonable, but also that any dispute about coverage was less than genuine. The Ninth Circuit panel, therefore, affirmed the district court's judgment in favor of LMA and upheld the award of attorney fees.

The Ninth Circuit's Implications

Teleflex gives policyholders a unique advantage and affords protections that are not otherwise available. Generally speaking, should an insurance company reject a proposed settlement, policyholders are essentially left with two options: (1) pursue the settlement despite the objection of its insurance company and seek reimbursement later through litigation; or (2) roll the dice, decline to settle and hope for the best.

ANDERSON KILL
ATTORNEYS AND COUNSELORS AT LAW

The latter is much easier said than done. Often policyholders find it difficult to relinquish control of decisions that so significantly affect the future of business to an insurance company that is entirely removed from the day-to-day operations of the business. How can an insurance company make a better decision about *your* business than you? It is *your* company. You know it best, and you are the one who will have to answer for its successes and failures. You are more invested in the outcome of the underlying litigation than your insurance company is. Certainly, *you* should be the one "calling the shots" and making the ultimate decisions about whether a settlement will ultimately be to your benefit.

Luckily for policyholders, primary and excess insurance companies alike will now take heed before rejecting a proposed settlement under the *Teleflex* and *Diamond Heights* construct. Insurance companies subject to this rule will be compelled to accept settlements that they may have otherwise rejected. In some instances, the defense costs may exceed the amount that an excess insurance company would have been liable for under a proposed settlement. In that case, the fear of excessive costs may be enough to persuade excess insurance companies to agree to settle. *Diamond Heights* and *Teleflex* give policyholders an extra card (or two) to play when seeking the consent and cooperation of their excess carriers.

That said, *Teleflex* does not clear all visible hurdles standing in the way of resolving underlying litigation. According to *Diamond Heights* and its progeny, the policyholder must have the approval of the primary insurance company before being afforded the upper hand, which can be a daunting task in and of itself.

Regardless of whether your insurance companies have consented to a settlement, you should be sure to know your rights and their responsibilities (and vice versa). Here are a few tips on how you can protect your business.

1. Know Your Insurance Policy

When evaluating your options, first analyze your insurance policies' terms. Determine whether your policies contain provisions that prevent you from settling without your insurance companies' consent, or if policies contain other parameters such as those found in *Teleflex*.

2. Consult Insurance Coverage Counsel

It is always advisable to consult with coverage counsel. Not only can they offer you a fresh set of eyes, but this specialized expertise can save your company money. As the laws differ between jurisdictions, it is important that you know whether, for example, the *Teleflex* construct applies to your business, or whether a different standard is expected of your excess insurance provider in a particular jurisdiction.

3. Keep Your Insurance Companies Updated

Even if your policy does not contain a consent-to-settle provision, most policies require that the policyholder cooperate with the insurance company. While what constitutes cooperation may differ amongst jurisdictions, keeping your insurance companies informed of developments in the underlying litigation, and particularly settlement discussions and negotiations, is generally something that will only help you in the long run.

4. Seek the Consent of Your Insurance Companies, If Required

An insurance company failing to provide its consent to settle is something all too common for policyholders. In many states, while a policyholder's breach of a consent-to-settle provision does not excuse an insurance company of liability under the policy absent a showing of prejudice, policyholders should keep their insurance companies apprised of updates in the case and seek consent, regardless of whether consent is ultimately obtained.

In sum, when looking for the settlement light at the end of the litigation tunnel, it's vital to a) know your rights and responsibilities and those of your insurance companies with respect to accepting a settlement; b) keep all of your insurance companies apprised of settlement negotiations as they progress; and c) be prepared to fight if an insurance company unreasonably withholds consent from a settlement in violation of its contractual obligations.

Pamela D. Hans, *managing shareholder in Anderson Kill's Philadelphia office, concentrates her practice in insurance recovery. She is a member of Anderson Kill's Women's Network, which works to foster women attorneys' efforts to reach their full professional and leadership potential. She can be reached at phans@andersonkill.com.*

Christina Yousef, *an attorney in Anderson Kill's Newark office, concentrates her practice in insurance coverage recovery. She can be reached at cyousef@andersonkill.com*