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The Lion (Cannot Afford To) Sleep Tonight: Herding Carriers With Overlapping Policies

Narrative

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This discussion focuses on promoting strategies and techniques to tackle multiple insurer scenarios where coverage exists under multiple policies. In particular, we focus on maximizing the value-add by capturing coverage by identifying and herding carriers where policies overlap. Like herding cats, this not an easy task. Herding carriers with overlapping policies requires a coordinated effort by the insurer (including senior management, in-house counsel, and adjusters), coverage and outside insurer counsel, retained defense counsel, and, of course, the insured. In this narrative, we often use the word "you." You refers, generally, to the reader because in one sense or another the goal of protecting the insured and maximizing coverage to, funnily enough, minimize risk, is a common one.

As a starting point, when do we most often see multiple policies or insureds?

I. Common Scenarios Involving Multiple Insurers and Coordination of Coverage

In general, multiple insurers will be involved in a claim when insurers insure the same risk or different aspects of the same risk. As to the former, insuring the same risk, when multiple policies apply to insure the same entities, the same interest in the same property, and the same risk, the policies overlap. This is also known as "concurrent coverage." As to the latter, multiple insurers may insure the same insured but for different risks. It is not often that a particular claim triggers both insurer's policies, but in such a case, the policies don't overlap but instead fit together like Tetris blocks.

There are several scenarios where an insured will find themselves with overlapping policies, or concurrent coverage for a loss, or, more rarely, where the loss underlying the risk triggers policies covering entirely different risks. Identifying these scenarios early on will enable you to minimize risk for your insured by maximizing coverage and enabling sharing.

Concurrent Policies

The simplest circumstance of concurrent coverage is when the insured has multiple policies for the same property, project, or to cover the same risk.[1] Similarly, when multiple insureds have policies for the same

[1] When concurrent coverage exists may vary by jurisdiction. *Compare Hartford Fire Ins. Co. v. Lo Brutto*, 711 N.Y.S. 2d 639, 640 (2000) (Stating, "[c]oncurrent coverage exists where multiple insurance policies provide primary insurance coverage for the same interest and against the same risk.") *with Security Ins. Co. of Hartford v. NationsBank, N.A.*, 5 Fed. Appx. 279, 283 (4th Cir. 2001) (Stating, "[u]nder South Carolina law, concurrent insurance

property, project, or to cover the same risk. For example, a construction project owner and the general contractor obtain separate policies to cover the same project. Both policies will cover the same loss.

Policies will provide concurrent coverage in the construction defect context, through contractual means, when an additional insured (the "AI") is added by endorsement to another's policy and the additional insured has his own coverage, whether that is a commercial general liability policy ("CGL") or property coverage, for the same loss. Consider the following example.

> **Example A**
> *General Contractor requires all subcontractors working on the Project to add General Contractor as an additional insured by endorsement on their required commercial general liability policies. Subcontractor, a subcontractor on the Project, obtains a CGL policy and, as required, adds General Contractor as an AI. A covered loss occurs and Claimant asserts a claim against General Contractor. Even though General Contractor has their own insurance, General Contractor tenders Claimant's claim to Subcontractor because General Contractor is an AI under Subcontractor's policy. Barring applicable exclusions and other coverage issues, Subcontractor's policy provides coverage to General Contractor for Claimant's claim.*

Policies will also provide concurrent coverage when the insured has policies, perhaps one that covers a specific risk and another that is general, i.e., a builder's risk policy and a CGL or floater policy.

Note some CGL policies consider an insured's property manager to be an insured—not just an additional insured—under the policy. Accordingly, as explained below, it is prudent to think broadly about your insured's role in a particular matter to determine whether there is a concurrent policy which may apply even where they may not be added as an insured by endorsement.

Policies That Fit Together Like Puzzle Pieces

However, multiple insurers and multiple policies may be implicated even when the policies don't overlap. This is most common when the duty to defend against a lawsuit triggers coverage under both policies.[2]

Consider the following insuring agreement in a professional liability ("PL") policy:

> *Insurer will pay on behalf of the Insured all Damages that an Insured becomes legally obligated to pay for a Wrongful Act by an Insured in the rendering of Professional Services*.

The PL policy specifically excludes coverage for a claim alleging or arising out of bodily injury or property damage. By contract, a CGL policy expressly provides coverage for property damage.

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coverage exists if separate policies insure (1) the same entity, (2) against the same risk, (3) to the same object, (4) absent some express intent to the contrary"). A common example of concurrent coverage is an insured driver operating a vehicle belonging to an insured owner. *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319 (1965). Here, a loss to the driver may be covered under both an omnibus clause in the owner's policy as well as a drive-other-car clause in the driver's policy.

[2] "Where an insured has multiple policies from various insurers, each insurer has a duty to defend, whether primary or otherwise, if the facts alleged arguably bring the claim within the coverage of the respective policies." Thomas Smith, *§19:11. Insurer's duty to defend where insured has multiple insurance policies*, 16A. GA. JUR. (2022); *see Home Indem. Co. v. Godley*, 122 Ga. App. 356 (1970). This does not mean that every insurer always needs to defend. For example, in Illinois, an insured may "knowingly forgo an insurer's assistance resulting in the insurer being relieved of its obligation." *Statewide Ins. Co. v. Houston General ins. Co.*, 397 Ill. App. 3d 410, 429 (2009). In this situation an insured may selectively tender a claim to one insurer alone resulting in the duty to defend remaining on the targeted insurer. *Id.*

> *We will pay those sums that the insured becomes legally obligated to pay as damages because of … "property damage" to which this insurance applies*.

Together, the CGL and PL policies create holistic coverage for the insured. Typically, a loss implicates a single policy, i.e., either there is property damage arising out of a loss or there isn't. But a well-crafted complaint can trigger coverage under both policies. Consider the following example.

> **Example B**
> *Construction Consultant obtained a CGL policy and a PL policy to cover Construction Consultant's construction and consulting services. A loss occurs during the policy period for both policies. A lawsuit is filed against Construction Consultant. The allegations in the lawsuit are broad, such that they trigger the duty to defend under both the CGL policy and the PL policy.*

In the above example, the complaint could allege both that Construction Consultant's consulting work was negligent and resulted in property damage to the plaintiff's property and that Construction Consultant's professional negligence forced plaintiff to hire another consultant to re-do Construction Consultant's work. While the policies don't overlap, they nevertheless provide coverage to the insured in that they fit together like puzzle pieces. A similar policy relationship is often found in the condominium coverage context, where condominium association policies mesh with homeowners/unit-owner's policies.

Overlapping Coverage
Policies will overlap where the insured has policies that were issued with overlapping policy periods.

> **Example C**
> *Restauranteur has a CGL policy with Awesome Insurance Company with an effective date of May 1, 2019 to April 1, 2020. Restauranteur decides not to renew with Awesome and instead procures a policy with Bonkers Insurance with an effective date of December 1, 2019 to December 1, 2020. Restauranteur does not cancel the Awesome policy before the end of the Awesome policy period.*

In many cases, policy coverage dates will overlap in the environmental and habitability context. In just as many cases, the insured is diligent and has procured policies that line up year-over-year without overlap, e.g., Insurer A covers May 1, 1975 to May 1, 1976, Insurer B covers May 1, 1976 to May 1, 1977 and so on. There, while the policies do not overlap, a claim extending over many years, like a pollution claim, can trigger multiple policies at once. In such circumstances, bringing insurers whose policies may be implicated to the table can be a challenge.

Note should a multiple policy scenario present itself, an insured is not entitled to double recovery. The insured is entitled to coverage for their loss or the damages sought by a claimant. Insurers, between themselves, will often determine whether the risk are borne solely by one insurer or whether they are shared (and how). If they are borne solely by one insurer, that insurer will demand contribution from the other insurer(s). The apportionment of contribution, like sharing, varies from jurisdiction to general jurisdiction. The general rule is that insurers share the risk proportion to the extent of the risk borne. In other words, by limits.[3]

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[3] *See e.g., CAN Casualty of California v. Seaboard Surety Co.*, 176 Cal. App. 3d 598, 620 (1986) (Stating that where "two insurers cover the same risk, defense costs must also be shared between them pro rata in proportion to the

II. Coordination of Coverage

Priority of coverage and allocation of defense and indemnity are key considerations for insurers when a claimant files suit in a multiple insurer scenario and the suit triggers the duty to defend. As a preliminary matter, we address the "duty to defend" and the "duty to indemnify," two separate but important insurer duties.

Duty to Defend

Simply, the duty to defend describes the insurer's obligation to provide a defense to its insured in a lawsuit when that lawsuit triggers coverage under the policy.[4] The policy usually describes the insurer's obligations to defend the insured. This obligation is usually found in the policy's insuring agreement, e.g., "We have the right and duty to defend any insured against a suit asking for such damages." Consider the following illustration of the duty to defend.

> **Example D**
> *In his complaint, Paulina Plaintiff alleges that Carl Contractor negligently performed the installation of windows at Paulina's home, causing water to enter the home and damage the flooring. Carl Contractor had a CGL policy in effect at the time of the alleged losses.*

In the above example, John's allegations against Carl trigger Carl's insurer's duty to defend Carl in John's lawsuit. This is the case in most jurisdictions, even where an exclusion might apply to preclude coverage. Where, for example, an exclusion applies to preclude coverage, the insurer can decline to indemnify the insured.

Jurisdictions vary widely on what an insurer can use to determine the duty to defend, or whether coverage exists. For example, California allows extrinsic evidence to both establish and negate the duty to defend[5] while Washington and New York generally only allow extrinsic evidence to establish a duty to defend (but not to negate coverage),[6] and Texas generally only allows extrinsic evidence to negate coverage.

Duty to Indemnify

Where the duty to defend is focused on the insurer's obligation to provide a defense, i.e., retain counsel to defend the insured, and pay related costs and fees, the duty to indemnify focuses on the insurer's paying covered claims and judgments. An insurer's duty to indemnify the insured depends on whether

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respective coverage afforded by them to the insured." However, other courts may base the pro rata distribution on the number of years the insurer was on the risk. *See e.g, Roman Catholic Diocese of Joliet, Inc. v. Interstate Fire Ins. Co.*, 292 Ill. App. 3d 447, 457 (1997) (Holding under diocese's liability policies covering its negligent supervision of priest, losses attributable to abuse were to be apportioned, pro rata, according to percentage of time or period of child's molestation occurring during each policy period).

[4] An insurer's duty to defend is separate from and boarder than its duty to indemnify. *Webb v. USAA Casualty Insurance Company*, 12 Wash. App. 2d 433, 444 (2020). It arises when the policy could "conceivably" cover the allegations in a complaint. *Id.* Whether an insurer has a duty to defend a complaint must be determined from the four corners of the complaint and the four corners of the insurance policy. *Id.* (citation omitted). This is known as the eight-corners rule and is followed in some other jurisdictions such as Texas. *See e.g., GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006) (Stating "Under the eight-corners or complaint-allegation rule, an insurer's duty to defend is determined by the third-party plaintiff's pleadings, considered in light of the policy provisions, without regard to the truth or falsity of those allegations.").

[5] *Montrose Chemical Corp v. Superior Court*, 6 Cal. 4th 287 (1993) (Holding extrinsic evidence may be used to defeat as well as generate duty to defend).

[6] *See QBE Ins. Corp. v. Adjo Contracting Corp.*, 997 N.Y.S 2d 425, 440-41 (2014); *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wash. 2d 751, 761 (2002).

the insured is found liable for the covered claim.[7] As the following example illustrates, an insurer may have a duty to defend even though it does not have a duty to indemnify the insured.

> **Example E**
> *In her complaint filed in a four-corners jurisdiction, like Washington, Paula Plaintiff alleges that Carl Contractor negligent performed his scope of work at her home in June 2020. Carl Contractor had CGL coverage with Awesome Insurance from June 3, 2019 to June 3, 2020 and with Best Fire Insurance from June 3, 2020 to June 3, 2021. Through discovery, Awesome and Best learn that Carl performed the alleged negligent work on June 20, 2020.*

In this example, Paula's allegations against Carl trigger Awesome's duty to defend Carl because, if taken as true, coverage exists for the claim. However, as Awesome and Best learn through discovery, the alleged negligent act occurred *after* Awesome's policy period. Awesome therefore has no duty to indemnify Carl. Awesome is, however, on the hook for costs and fees related to the duty to defend.

Apportionment in a Multiple Policy Scenario

Courts generally consider four things when apportioning costs amongst concurrent policies. Courts will consider (1) the nature of the claim, (2) the relation of the insured to the insurers, (3) the particulars of each policy, i.e., the "other insurance" provisions, and (4) any other equitable contribution.[8]

If a claim implicates coverage under the policy, the inquiry next turns to the policy's other insurance clause. A policy's other insurance clause governs the contribution each insurer should make. Consider the following.

> **Example F**
> *Peter Plaintiff's complaint implicates coverage under both Awesome Insurance Company's policy and Zeta Indemnity's policy. Awesome Insurance Company's policy has a clause requiring pro-rata contribution if it was considered primary. Zeta Indemnity's policy had an excess insurance clause, stating that the Zeta Indemnity policy would be considered excess over another, applicable primary policy.*

In this example, an excess and a pro-rata clause appear in concurrent effective policies. Most courts will disregard the pro-rata clause and give full effect to the excess clause, making the pro-rata policy the primary insurance. Awesome Insurance Company's policy would need to be exhausted before Zeta Indemnity has any defense or indemnity obligations. Where possible, courts will enforce the other insurance policies as written. However, where they conflict, e.g., primary v. primary, pro-rata v. pro-rata, excess v. excess, or pro-rata v. primary, court's will apply different methods to apportion costs.

Washington follows the maximum loss doctrine of apportionment, stating that "each company to contribute equally until the limits of the smaller policy were exhausted, with any remaining portion of the loss then being paid from the larger policy up to its limits."[9] Contrary to its name, this is the minority

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[7] The duty to indemnify means "the insurer will 'pay all covered claims and judgments against an insured.'" *Colony Ins. Co. v. Peachtree Const., Ltd.*, 647 F.3d 248, 253 (5th Cir. 2011) (citation omitted). Generally, the duty to indemnify "arises when an insured 'becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy.'" *United National Ins. Co. v. Frontier Ins. Co., Inc.*, 99 P.3d 1153, 1157 (Nev. 2004). In other words, the duty to indemnify arises when the insured is found liable for a covered claim. *Vito v. RSUI Indemnity Company*, 435 F. Supp. 3d 660, 667 (E.D. Penn. 2020). Unlike the duty to defend, in order for the duty to indemnify to be triggered the insured's activity must actually fall within coverage. *Id.* at 1158. Accordingly, an insurer may have a duty to defend even though it has no duty to indemnify. *Vito*, 435 F. Supp. 3d at 667.

[8] *Scottsdale Ins. Co. v. Century Surety Co.*, 182 Cal. App. 4th 1023, 1031-1033 (2010).

[9] *Mission Ins. Co. v. Allendale Mut. Ins. Co.*, 95 Wash. 2d 464, 467 (1981).

rule.[10] By contrast, the majority rule adopts pro-ration as the method of apportionment. Courts will pro-rate the cost of defense and indemnity in proportion to the coverage each insurer provides.[11] Simply, if two policies provide an equal amount of coverage, each should share equally in the cost to defend and settle all claims.[12] Here is an illustrative example.

> **Example G**
> *Prasad Plaintiff's complaint implicates coverage under both Awesome Insurance Company's policy and Zeta Indemnity's policy. Awesome's limit of liability is $1 million. Zeta's is $5 million. In a majority rule jurisdiction, Awesome and Zeta would share the loss 1:5, or Awesome's share of defense and indemnity would be 20% and Zeta's 80%. In a minority rule jurisdiction, Awesome and Zeta would contribute equally to the loss until Awesome's policy is exhausted, leaving Zeta as excess for the remainder. In a loss for $3 million, Awesome would contribute $1 million and Zeta would contribute $2 million.*

Apportionment in Cumulative Losses

For cumulative losses over time, such as environmental claims (like pollution or asbestos), courts generally take a pro-rata approach where the costs of defense and indemnity are pro-rated in proportion to the time on the risk. For example.

> **Example H**
> *Landowner Larry filed a lawsuit against the Insured for alleged pollution damage over many years. So far, three insurers have agreed to defend and indemnify the Insured. Awesome Insurance Company insured the Insured from 1950 to 1956, Best Fire Insurance from 1956 to 1957, and Charred Insurance from 1957 to 1958. Taking a pro-rata based on time on the risk approach, most courts would apportion the pro-rata sharing on a 6:1:1 basis. Awesome's share would be 75%, Best 12.5%, and Charred 12.5% of the loss.*

III. Maximizing Indemnity Between Insurers

As mentioned at the outset, herding carriers with overlapping policies is a coordinated effort and defense counsel and *their* client, the insured, play a critical role. The insurer, the defense counsel it retained for the insured, and the insured share a special relationship known as the tripartite relationship.[13] Defense counsel play a unique role and, as such, wear quite the unique hat: defense counsel is retained by the insurance carrier but represents the insured. In that relationship, the defense counsel's duty focuses on what is best for their client, the insured, and owes the same ethical and professional duties to the insured as if the insurer retained counsel directly.[14] Generally, maximizing the amount of indemnity available to an insured, i.e., settlement dollars, is near the top of the list of a skilled defense lawyer. Thus, insured counsel have many tools in their belt which they can use to identify other carriers who may *or should* be on the hook to indemnify their insured.

Triggering Coverage under Multiple Policies

A skilled defense counsel's first and most important strategy is to conduct a thorough investigation of the matter. Most importantly, this includes having detailed conversations with the insured to identify any other policies which may provide coverage to the insured for the alleged loss. (***Note*** that depending on the nature of the loss, i.e., construction defect, close examination of any contracts can also lead to the

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[10] *Id.*
[11] *See Travelers Lloyds Ins. Co. v. Pac. Employers Ins. Co.*, 602 F.3d 677, 687 (5th Cir. 2010).
[12] *Id*.
[13] Leslie S. Ahari & Sean M. Hanifin, § 33:9. *The tripartite relationship between the insurer, the insured, and the insured's defense counsel*, 3 L. AND PRAC. OF INS. COVERAGE LITIG. (2021).
[14] *See id.*

discovery of other policies which may provide coverage through required designation as additional insureds or through contractual indemnification obligations.[15]

Example I

In her contract with her architect and engineer, Charlene Contractor agrees to indemnify Archibald Architect and Ellora Engineer from any losses or expenses (including costs and attorneys' fees) because of any liability imposed upon them by law because of any bodily injury because of damage to the property whether caused by or contributed to by Archibald or Ellora.[16]

Earlier, we articulated that the duty to defend is triggered when a policy covers the allegations in a complaint. But what if the policy isn't clear on the scope of its coverage? In most states, a question concerning coverage in the face of ambiguous policy language is whether a "reasonable interpretation" of the policy language results in coverage.[17] Once all possible insurance policies are identified by defense counsel, defense counsel should view those policies through two primary lenses, with the goal of maximizing coverage and available defense for the insured: the facts as identified from the investigation, and the complaint's factual allegations.

Should counsel identify other sources of coverage for their insured, counsel should tender the lawsuit to those other insurers, whether or not they are already aware of it. Tender is a colloquial term which refers to the submission detailed correspondence which identifies a position and requests the recipient insurer accept coverage under their policy. Generally, this process is repeated for each additional policy identified. As you can imagine, this can amount to numerous pieces of correspondence in a construction defect matter. Consider the following example.

Example J

Homebound HOA's homeowners file suit against all tiers of contractors that performed work in their neighborhood. In the course of their investigation, Superior Contractor's, a supervising contractor/consultant at the project, defense counsel learns that Owen Owner's, the project owner, policy states that property managers are "additional insureds" but does not define the term. Superior's counsel decides to tender the lawsuit to Owen Owner's insurer, seeking coverage for itself as an additional insured. Superior's counsel also notes that the homeowners' allegations against Superior, among others,

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[15] Indemnification permits a party held legally liable to shift the entire loss to another. *General Conference of Seventh-Day Adventists v. AON Reinsurance Agency, Inc.*, 860 F. Supp. 983, 986 (S.D.N.Y. 1994). It commonly arises from an express agreement by which one party agrees to hold the other harmless for claims brought against it by a third party. *Id; see also* Joni Katz Mackler, *Contribution and Indemnity*, MA. Torts L. Manual (2021) (Stating "[c]ontractual indemnity provisions seek to allocate by written agreement responsibility for risks relating to the subject matter or performance of a contract by requiring one party (the indemnitor) to indemnify the other (the indemnitee) against claims, injuries, damages, or expenses sustained by the indemnitee."). However, contractual indemnification is not always express and there can be a right to implied contractual indemnity. *See Mackler*, *supra* note 15 (Stating that under Massachusetts law, "[t]he creation of a right to implied contractual indemnity requires the existence of a contract between parties revealing an intent to require one party . . . to indemnify the other party . . . for liability sustained by the indemnitee caused by the indemnitor's failure to perform its obligation under the contract."). Indemnity agreements do not affect the rights of a plaintiff to recover damages, they merely determine who will ultimately bear that loss. *David C. Cook et al.*, *§10:31. Contractual Indemnification*, 14 N.Y. PRAC., N.Y.L. OF TORTS (2021). An agreement to procure insurance is not an agreement to indemnify. *Id.*

[16] Albert Dib, *§6.23. Indemnity, ACEC 2.4.05, ART.29,35*, FORMS AND AGREEMENTS FOR ARCHITECTS, ENGINEERS AND CONTRACTORS (2021).

[17] *See e.g., India Harbor Insurance Company v. City of Tacoma, Washington Department of Public Utilities*, 354 F. Supp. 3d 1204, 1214 (Holding that because a reasonable interpretation of the plain language of the policy and the complaint could result in coverage, the insurer had a duty to defend under Washington law).

implicate some services that Superior provided to the homeowners. Having previously identified a professional liability policy Superior carrier, counsel seeks authorization from Superior to tender the lawsuit to Superior's PL carrier for coverage.

In the above example, Superior's counsel carefully reviewed other policies to identify whether they might provide additional coverage for Superior. Counsel identified two: first, the project owner's policy had ambiguous language concerning its scope of coverage which may be reasonably interpreted to provide coverage for Superior; and second, identification of additional coverage Superior had available to it even though it might not obviously apply to the situation at hand.

Defense Counsel as Ringleader

In situations involving multiple carriers, especially with a recalcitrant carrier, it is important for defense counsel to play the role of the ringleader and manage everything, to the extent they can, that goes on under the big top. Counsel should pull everyone together and take the lead in dealing with all carriers (which includes the challenging task of repeatedly requesting coverage from the recalcitrant parties) while at the same time maximizing coverage for their client, the insured, and driving the matter towards resolution. Additionally, and as discussed later, defense counsel play a key role in circling the circus around the recalcitrant carrier.

For defense counsel to accomplish their many goals, it is important that counsel thoroughly understand all parties' positions in order to be able to articulate these positions to the benefit of the insured. Defense counsel should undertake this task because plaintiffs' counsel are generally reluctant to intrude into coverage disputes between defendants and their carriers. These disputes may provide the insured additional time to resolve these disputes and to ensure the correct parties are at the negotiation table.

Above all else, however, defense counsel should always keep all insurers providing coverage apprised in writing of developments, especially those where they attempt to capture additional coverage, in the matter.

Note defense counsel and coverage counsel's roles are generally separate, but when it comes to strategizing and executing methods to maximize coverage for the insured, defense and coverage counsel are like Siegfried & Roy.

IV. Strategies When Dealing with Recalcitrant Insurers

Imagine there is coverage for a loss under multiple policies and one insurer (who just happens to have the largest policy and therefore the largest pro-rata share) is recalcitrant,[18] or in other words, isn't playing ball. What are the other insurers, who have stepped up to the plate and are providing a defense and incurring costs on their insured's behalf to do? Strategies to bring a recalcitrant insurer to the plate range from gentle nudges to litigation.

Involving the Insured

Although must of the cost sharing and apportionment issues are isolated to the insurer-level, the ultimate goal is to protect the insured, the party *with* the insurance. Thus, effective communication with the insured is the first step in dealing with recalcitrant insurers.

Where a lawsuit has been filed, the first inquiry should be whether the insured or its agent or broker has other insurance and, if so, whether it has placed those carriers on notice, i.e., has it tendered the lawsuit for defense and indemnification. If the insured has, it is prudent to obtain the contact information for those carriers. If the insured has not tendered the claim, it is not improper to request that they do so or

[18] Obstinately defiant of authority or restraint. Recalcitrant, Merriam-Webster Dictionary (2022).

request authority to do so on its behalf.[19] A sound strategy in this regard is to include such a request in a reservation of rights letter to the insured.[20]

Dealing With The Recalcitrant Carrier

If an insured or its broker or agent has tendered the lawsuit to another carrier, it is incumbent upon insurer participating in the defense and indemnification of the insured to contact the tendered-to insurer to determine whether they are or intend to participate in the insureds defense and indemnification. If the tendered-to carrier is not participating, it is crucial to ask "why?" As provided above, a carrier has a duty to defend a lawsuit if coverage is triggered under its policy. If a carrier is not defending and claims to have denied coverage (or, at least, argue that there is a coverage issue), ask for a copy of its coverage position letter. Further, it is prudent to verify with the insured whether they received a coverage denial letter from the carrier.

Many states have addressed the timeliness of coverage denial letters and reservation of rights letters.[21] If a coverage denial letter was sent, its validity may be in question unless it was timely issued. Failure to timely issue a coverage denial letter or reservation of rights letter may waive an insurer's right to deny coverage.[22] Consider the following:

> **Example K**
> *A plaintiff filed a lawsuit against the Insured following their trip-and-fall at the Insured's premises. The Insured had concurrent policies with Awesome Insurance Company and Best Fire Insurance on the date of loss. Insured timely tendered the lawsuit to Awesome and Best. Awesome accepted coverage and is providing a defense to Insured under a reservation of rights. Best did not immediately respond. Almost a year later, Best issued a coverage declination letter.*

In several jurisdictions, Best's untimely coverage declination letter results in a waiver of its right to deny coverage to Insured. In such a case, Awesome should seek to bring Best to the table so it can share defense and indemnity.

It is also a best practice to ask for other carrier's policies. If the carrier refuses or declines to share its policy, it is appropriate to request the policy from the insured or broker. Analyzing another carrier's policy serves several purposes, including verification of the carrier's coverage position (especially if it is a declination) and the other insurance clause. Where the stakes are high—and they usually are—forwarding a carrier's coverage position letter (declination or otherwise) to coverage counsel for analysis may be helpful in bringing a carrier to the table. Specifically, if the declination letter is based on improper grounds or is in contravention of the applicable jurisdiction's law, instructing coverage counsel to prepare a pushback letter may serve to bringing that carrier to the table.

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[19] *See* Scott M. Seaman and Jason R. Schulze, *§5.2. Equitable Contribution*, ALLOCATION OF LOSSES IN COMPLEX INS. COVERAGE CLAIMS (2021) (Stating that Florida law incentivizes " an insurer on notice to request that the policyholder place other insurers with defense obligations on notice or to provide information to enable the insurer on notice to notify other insurers.").

[20] *See Id.*

[21] *See e.g., State Farm Mutual Automobile Insurance Company v. Dabbene*, 511 F. Supp. 3d 600, 621 (E.D. Penn. 2021) (Noting that under Pennsylvania law, an insurer's reservation-of-rights letter is timely if it is sent to the insured close in time to the institution of a potentially covered legal action). In some states such as Florida a statute may dictate the timing. *See* FLA. STAT. ANN. §627.426 which provides that a liability insurer cannot "deny coverage based on a particular coverage defense" unless "[w]ithin 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured[.]"; Douglas R. Richmond, *Reconnoitering Reservation of Rights in Liability Insurance*, 51 Tort Trial & Ins. Prac. L.J. 1, 11 (2015).

[22] Richmond, *supra* note 18, at 10.

Where a recalcitrant coverage position is invalid, another highly effective strategy in bringing a recalcitrant carrier to the table is to forward the recalcitrant carrier's coverage declination letter to the insured and their personal counsel (if they have one). It is in the insured's best interest to have its carriers participate in the defense and indemnification of a lawsuit.

Finally, short of litigation, another sound strategy is to cooperate with other carriers that are providing a defense as a united front to pressure the recalcitrant carrier into participating in the defense. If, after all the foregoing attempts to gently (or not so gently) nudge a carrier to the defense table are unsuccessful, it is prudent to keep a paper trail of all communications and continue to flood the carrier with information on why their coverage position is incorrect.

Legal Strategies

When the above strategies don't work, the only remaining choice is often litigation. As with other things, whether to initiate an action against another insurer is a business decision. One factor affecting such a business decision is whether the recalcitrant carrier has a sizable time on the risk percentage, i.e., their apportionment of the loss is significant. In such a case, carrier's will often employ the "pay and chase" method of recovery. That is, the carriers that have accepted coverage or are defending resolve the loss and reserve their rights to pursue contribution[23] or subrogation[24] action against the recalcitrant carrier (hence the moniker, "pay and chase"). Especially in matters where the insured may have to pay out of pocket to fill a coverage gap, it is recommended that the insured be kept in the loop in the event they wish to join such litigation.

> **Example L**
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> *Drastic Insurer insured Positive Apartments, LLC and issued Positive three consecutive policies, each for a one-year term, from May 6, 2010 to May 6, 2013. After Drastic's policies expired, Positive changed insurers and Super Casualty became Positive's new insurer. Super issued a general liability policy on May 5, 2013 that remained in effect until May 6, 2014. The Super policy only covered losses that occurred during the policy period.*
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> *A few days before the Super policy took effect, Positive was sued by its tenants who sought recovery for personal injury and property damage caused by conditions on the property. Although most of the damage occurred during the Drastic policy periods, Super agreed to defend and indemnify Positive in the lawsuit. Super maintained it was not liable for damages that occurred before its policy took effect. Super, therefore, repeatedly asked Drastic to join Super in Positive's defense. Drastic declined Super's requests. Drastic never joined the defense or contribute to the settlement paid Positive's behalf.*

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[23] If two or more insurers bind themselves to pay the entire loss insured against, and one insurer pays the whole loss, the one so paying has a right of action against his co-insurer, or co-insurers, for a ratable proportion of the amount paid by him, because he has paid a debt which is equally and concurrently due by the other insurers. The right of action is one of contribution, the elements of which require that the several insurers share a common obligation or burden and that the insurer seeking contribution has made a compulsory payment or other discharge of more than its fair share of the common obligation or burden. *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 772 (Tex. 2007).

[24] There are two types of subrogation. Contractual (or conventional) subrogation is created by an agreement or contract that grants the right to pursue reimbursement from a third party in exchange for payment of a loss, while equitable (or legal) subrogation does not depend on contract but arises in every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter. *Id.* In either case, the insurer stands in the shoes of the insured, obtaining only those rights held by the insured against a third party, subject to any defenses held by the third party against the insured. *Id.*

In the above example, Super executed a "pay-and-chase" strategy. After exhausting attempts to involve Drastic in Positive's defense, Drastic—the recalcitrant insurer—forced Super to indemnify their insured and attempt to recover funds Super paid on Drastic's behalf. Super has several claims at its disposal against Drastic, including bad faith and equitable subrogation.

If the pay-and-chase method is not in the cards for an insurer, that insurer may consider filing a declaratory judgment action against the recalcitrant insurer to adjudicate that insurer's obligations. In the above example, had Super not wanted to pay-and-chase Drastic, Super could have filed a declaratory judgment action against Drastic around the time it agreed to defend and indemnify Positive. In its action, Super could have asked the court to adjudicate Drastic's obligations under its policy to Positive and to share in the defense and indemnification.

Key Takeaways In The Fight Against An Insurer That Doesn't Want To Pay (But Should!)

- Understand the carrier's coverage position. If they haven't accepted coverage, ask "why not" and for proof of their coverage position. This means the policy and materials documenting their coverage position. Utilize coverage counsel as necessary to determine the validity of their coverage position.
- The insured is a key player. Their knowledge of the coverage available and the reasons for not capturing it is tantamount to successfully bringing a recalcitrant carrier to the table. Ask, is the insured aware of the position taken by the recalcitrant insurer? If there are issues with the carrier's coverage position, have those issues been explained to the insured?
- Consider the value the recalcitrant carrier brings to the matter. Of course, having another carrier at the table may decrease your share of costs or the loss, but does that outweigh the recalcitrant carrier's value? Do they have a sizable time on the risk such that their apportionment of the loss is significant?