



2022 Focus June Conference

June 15-16, 2022

Nashville, TN

## **I. Conflict of Interest – Defined**

Claim handlers are faced with a myriad of issues on a daily basis in the course of business. One of them being how to resolve conflicts created by competing interests. For the purposes of this training, the definition of Conflict of Interest would be from the perspective of the claim adjuster and or insurer assigned to manage the file. In simplistic terms, a conflict of interest is a situation in which the concerns or aims of two or more parties are at odds with each other. The diverging interests could create a situation where the full protection of either party could potentially be exposed to liability.

We will deal primarily with General Liability and Construction Defect claim examples where the relationships between the parties listed below may give rise to a conflict:

1. insured and insurance company
2. insured and the additional insured

The duty the insurance company has to the insurer is based on the policy contract and also a duty of good faith handling. This includes the duty to investigate and keep the insured informed, while exploring potential opportunities to bring an amicable resolution to the claim. The relationship that exists between the insured and the insurance carrier and/ or the assigned adjuster is governed by fair dealing. They have been assigned to act on behalf of the insured and to protect and defend the insureds' interests in accordance with the terms of the policy. The interests of the insured should be provided with equal consideration to that of the insurer. There is a legal, and ethical relationship that exists between the parties of the policy contract. Depending on the states where the claims are filed, there are varying jurisdictional laws governing the application of these duties.

Typically, the relationship between the insured and the additional insured arises from a legal agreement and/ or a defined relationship that is contained within the policy.

Some Examples Are:

Landlord/tenant

Owner/ Property Manager  
Contractor/ Subcontractor  
Insured/insured owner entities

Under the General Liability policy, the insurance company's duty to pay damages is triggered by the insured's legal liability to pay because of bodily injury and/ or property damage which is covered under the policy.

There are times when the claim being made against the insured and the additional insured could cause a conflict to exist.

For example, in TN the named insured who was the property owner was being sued by a plaintiff who allegedly slipped and fell in a condition where there was a foreign substance on the premise. The property manager was also named as a Co-Defendant. The owner was not on site and delegated the responsibility for the day- to- day maintenance to the property manager based upon the contract. The owner pointed the finger at the manager. They both could not be represented by the same counsel since their liability positions were adverse to one another. The same defense position could not be utilized by both defendants, as such the file had to be handled by different defense firms, and different adjusters.

In CA, the named insured was the property manager and was sued by the plaintiffs and multiple owners of a building. The plaintiffs who were tenants of the building alleged that there were habitability issues with the units which included some structural defects inside the building that caused them to be exposed to mold. The owners of the building had it retrofitted for earthquakes. The property manager was not involved in the repairs of the building. The contract between the owners and the property manager had an additional insured provision in it that favored the owners. The policy issued to the property manager afforded additional insured coverage to the owners. Separate defense firms, and adjusters were assigned due to the potential conflict.

## **II. The Conflict Identified**

In order for you to be able to address the conflict issue you have to know one exists. How will I be put on notice when there is a conflict? In most cases it will arise from the allegations being filed by the plaintiff in a lawsuit or a complaint.

The conflict created between the insured and the insurer often time arises when there is a difference of opinion as to what is covered under the policy. The dispute can range from a number of different coverage issues. The most common being, whether the type and amount of damages are covered under the policy, to whether the name of the insured seeking coverage is eligible for coverage, is the loss location a covered premises, to whether the policy was in effect on the date the loss. Often times some of the allegations contained in the complaint are covered when others potentially may be precluded. A Reservation of Rights letter maybe in order to reserve the insurance carriers' defense under the policy. This could potentially give rise to a

conflict. Depending on the jurisdiction, the insured may be entitled to retain separate counsel. It is important that the file handler consult with their coverage counsel to know what statutes and regulations govern these type of coverage issues.

There are occasions when the insured may contest the coverage position taken by the carrier. This creates a conflict for the adjuster to manage the defense of the insured while also defending the coverage position taken by the carrier. Consideration should be given to splitting the claim file after conferring with claims management personnel. Possibly a separate file handler could be assigned to handle the coverage file while another adjuster is assigned to manage the litigation of the insured's defense. This would resolve the conflict and could potentially avoid a claim for bad faith.

There are two seminal cases that are followed nationally which deal with conflicts of interests. The first is *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187 (Ill. 1976) Illinois Supreme Court case, and the second is *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal.App.3d 358 (Cal. Ct. App. 1984). The obligations of "Cumis" Counsel have been codified now under California Civil Code Section 2860 which forth legislation pertaining to *Cumis* counsel. It outlines the various elements of an insurer's obligation to provide independent legal counsel to an insured client in circumstances where there is a potential conflict of interest between the two. This has been followed by several other states as the model.

California Civil Code Section 2860 states that the insured party may expressly waive this right in writing, and that the insurance policy may include provisions regarding the process of obtaining independent counsel. It further describes what a conflict of interest entails, namely "when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist." Further, it outlines certain limitations, such as the insurance company's right to require that any independent counsel meet certain professional qualifications and that the fees charged align with those that the insurance company pays to its own lawyers.

Identifying the conflict is only part of the claims handling. The second part is often finding a solution, where coverage issues, and the best of interests of the insured client are considered in tendendum. Its also important to find solutions where you may not need to engage multiple sets of attorneys.

In the next set of case scenarios lets identify the conflict and provide some Practical Tips for addressing the conflict.

#### Scenario #1 Property Damage

Insured is a general contracting roofing company that is in charge of the remodeling project at a single family home. The insured signed written contracts outlining defense and indemnity clauses to multiple contractors, they subcontracted the performance of the exterior siding, the soffit & fascia, and the exterior painting work on the residence. Water intrusion occurred during the construction project creating water damage to the interior of the home. The points of entry appear to be through ceiling and around the windows. The claimant files a claim and suit against the general contractor and all the sub-contractors involved in the re-model project.

#### Scenario #2 Bodily Injury

The insured is a landscaping company contracted to maintain the landscaping for a commercial chain store. In their contract the landscaper is contracted to service the property bi-weekly and warn the store of areas of concern or hazard on the exterior of the premises from the parking lot to the front door. A patron trips and falls on a portion of the walkway outside of the establishment the pavement is raised as the result of a tree root growing under the pavement. The chain seeks defense and indemnity from the landscaping company's insurance.

#### Scenario #3 Construction Defect

The Insured is a stucco contractor that works on new build large community construction projects. They are contracted by the home builder to perform stucco work on a certain number of homes within the project for a period of two years, during that time the builder must add the home builder as an Additional Named Insured on their policy per contract terms. The initial recipients of the home file a construction defect claim 5 years after the home is completed against the home builder company who in turn tenders the claim to the all sub-contractors hired to perform work on the project.

#### Scenario #4 Bodily Injury

The insured is a real estate investor that owns multiple properties. The plaintiff was a tenant in one of the properties and alleges among to other things, that she was exposed to mold and toxic gas. She also claims she sustained injuries from an electrical shock from exposed electrical wire. The owner of the property is sued, but is not named on the policy as an insured. The premise location is listed on the policy. The named insured is not a defendant to the litigation, but claims the premises where the loss occurred is owned by a subsidiary of the insured. The owner of the property seeks a defense.

In most cases, staff adjusters act as a fiduciary agent for the insurer. They have authority granted by the insurer to investigate, evaluate and settle the claim. They are making decisions within their authority that will bind the insurer and benefit the insurer. The adjuster is charged with acting in good faith.

In general, the insurance carrier owes a duty to the insureds to act in good faith when investigating, evaluating and paying claims in accordance with the policy contract.

### **C. Possible Consequences**

( **\*\*DAN/SCHUYLER- What are the Possible Consequences for not managing the conflict\*\***)

### **III. THE BEST WAY TO MANAGE CONFLICTS**

( **\*\*DAN/SCHUYLER TO ADDRESS**)