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NEW INNOVATIONS >> NEW ENCOUNTERS >> NEW KNOWLEDGE

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THE CARE AND FEEDING OF EXCESS INSURERS

CLM022

Speakers:
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Learning Objectives

By the end of this session, you will:

• Understand how an insured can best approach and meet its duty to cooperate with excess insurers

• Learn about insurers’ good faith obligations, including those relating to reasonable defense and settlement of claims

• Analyze the circumstances that may impact, and complicate, transition from a primary insurer to excess insurer, and transition among excess insurers
Agenda

I. Cooperation
   A. Notice of potential for excess exposure
   B. Reporting

II. Good faith handling of claim
   A. Reasonable of defense
   B. Reasonableness of settlements

III. Transition from Primary to Excess, and among Excess
   A. Reasonableness of settlements
   B. Trigger & Drop Down
   C. Allocation, exhaustion, and proof of exhaustion
   D. Actual pay provisions
   E. Following form; following fortunes
   F. Consistency in layering
COOPERATION
Partnering with Excess Insurers

• Set expectations at placement by negotiating appropriate terms, conditions, and exclusions

• Consider, for example:
  – Follow Form provisions and exceptions
  – Maintenance of Underlying Insurance Conditions (“any” versus “important events," like exhaustion of underlying limits or cancellation of the underlying policy)
  – Additional Insured Status (additional premium versus express waiver of additional premium)
Partnering with Excess Insurers

Understand the insured’s and insurers’ obligations when a claim presents:

• Adhere to notice provisions
• Attend to reporting requirements
• Be mindful of cooperation provisions
GOOD FAITH CLAIM HANDLING
Good Faith Claims Handling - Defense

What’s your insurer’s defense obligation?

Consider the policy language. Some excess policies:

- Provide that the insurer has “the right and duty to defend”
- Disclaim the duty to defend (excluding “the obligation to investigate and defend and costs incurred incident to the same” from the definition of “loss” or “ultimate net loss”)
- Do not expressly address the duty to defend
- Simply “follow form”

Consider applicable law. Some courts have held:

- The excess policy incorporates the underlying primary policy’s duty to defend absent express language disclaiming any defense obligation
- Absent an express promise to defend, an excess policy does not include a duty to defend
Settlement of Claims

- In settling claims, an insurer controlling the defense may not place its pecuniary interests ahead of its insured’s
  - An insurer may be liable for a judgment in excess of limits if it is caused by the insurer’s unreasonable failure to settle within limits
- Excess insurers must respond to settlement offers with the same good faith required of primary carriers
- Excess insurers are required to alert their insured if they perceive the primary insurer’s defense to be inadequate
CONSIDERATIONS WHEN TRANSITIONING TO & AMONG EXCESS INSURANCE
Reasonableness of Settlements

Whether and when an excess policy is triggered may depend on whether settlements should be reached at lower layers of coverage

- Many primary policies provide that insurer "may in [its] discretion . . . settle any claim or suit," and prohibit "voluntary payments" to settle
- An insurer cannot arbitrarily withhold consent to settle a covered claim where it receives a demand, or can negotiate a reasonable settlement within limits
- An insurer that breaches its duties to the insured and/or excess insurers may be liable for a judgment in excess of its policy limits
Who’s Turn Is It?

- Excess coverage generally is not triggered until the underlying limits are exhausted.
- Umbrella policies insure -- and drop down to provide first dollar coverage -- against certain risks that the primary policy does not cover.
- Issues may arise when an underlying insurer becomes insolvent as to whether an excess insurer may be required to “drop down” to provide coverage.
What happens when there are continuous or progressive injuries or losses spanning several policy periods?

Courts apply varying triggers and allocation methods depending on the applicable law

- “Continuous trigger” or “triple trigger”
- “All sums” or “pro rata” or “pro rata by years and limits” allocation
- “Vertical” or “horizontal” exhaustion
Actual Pay Provisions

Can an insured forfeit coverage if the underlying insurer does not pay **ALL** its underlying limits?

What does the policy say?

- “The Company will pay on behalf of its insured those sums in excess of the “Retained Limit” that the insured becomes legally obligated to pay.”
- “In the event of... exhaustion of the ... “underlying insurance” solely by reason of payments of a combination of covered [settlements or judgments] paid thereunder.
- The Insurer shall only be liable to make payment under this policy after the total amount of the Underlying Limit of Liability has been paid in legal currency by the insurers of the Underlying Insurance as covered loss thereunder.
- Coverage attaches only after any Insurer subscribing to any Underlying Policy shall have agreed to pay or have been held liable to pay the full amount of its respective limits of liability.
Actual Pay Provisions

What law controls?

Some courts deem underlying limits exhausted where an insured and insurer settle a claim, and the excess insurer is not being asked to drop below its attachment point. Others have found insureds forfeited excess coverage because their underlying coverage did not “exhaust.”

- Zeig v. Massachusetts Bonding & Ins. Co., 23 F.2d 665 (2nd Cir. 1928)
- Mehdi Ali v. Federal Insurance Co., 719 F.3d 83 (2d Cir. 2013)
- Qualcomm, Inc. v. Certain Underwriters at Lloyd’s, London, 73 Cal. Rptr. 3d 770 (2008)
- In Yaffe Companies, Inc. v. Great American Ins. Co., Inc., 499 F.3d 1182 (10th Cir. 2007)
Actual Pay Provisions

What about when multiple years are triggered by progressive injury or losses?
Excess insurers may debate whether exhaustion of “underlying insurance” means all lower layers in all triggered years, or just the policies listed in the “Schedule of Underlying Insurance” E.g., Federal-Mogul U.S. Asbestos Personal Injury Trust v. Continental Cas. Co., 2011 WL 2652232 (6th Cir. July 8, 2011).
Excess policies may be written on a “stand alone” or “following form” basis:

• A stand-alone policy relies on its own insuring agreement, conditions, definitions and exclusions to grant and limit coverage

• A following form policy incorporates by reference the terms, conditions and exclusions of an underlying policy

• Some excess policies do both, following the form of an underlying policy except as otherwise expressly provided
Consistency in Layering

- Plug gaps and avoid (unintentionally) exacerbating inconsistencies
- Clearly identify the “followed” policy
  - Consider referencing the “immediately underlying policy” or the umbrella excess policy by number (as opposed to using a general reference to all underlying policies)
  - Be sure that the excess follows form to the umbrella’s more expansive coverage, not the exclusions in the primary
  - Where a layer contains "additional terms" or is a stand-alone policy, be sure it is not followed unless intended
Consistency in Layering

• Be mindful of varying dispute resolution, choice-of-law, and forum provisions
  – Having to litigate with some insurers, while later and separately arbitrating with others (in Bermuda or London) can be expensive and time consuming
• Be aware of conflicting duty to defend provisions
Care & Feeding of Excess Insurers
Craig Hoffman is the Risk Manager of Wakefern Food Corp., a retailer-owned cooperative, in which members individually own and operate over 300 supermarkets under the ShopRite, PriceRite and Fresh Grocer banners in New Jersey, New York, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, Rhode Island and Massachusetts. Craig transformed the Insurance Division into a best in class Risk Management Division, which encompasses risk evaluation, risk retention, insurance procurement, claims management and loss prevention. He is responsible for the procurement of all lines of coverage, including Property, Casualty and Executive Risk lines. Craig also manages Wakefern’s captive, recently redomesticating it from Bermuda to New Jersey.
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Sheri Pastor has recovered hundreds of millions of dollars for a wide range of companies, including those in the food, retail, manufacturing and pharmaceutical industries. Recognized as a Tier 1 leader in her field by Chambers USA and as one of New Jersey's “Best 50 Women in Business” by NJBIZ, Sheri litigates complex coverage matters throughout the country, and provides insurance advice to clients assessing their potential risks, analyzing new insurance products, and considering the adequacy of their programs. Sheri serves on the Editorial Boards of the Insurance Coverage Law Bulletin and Law360 Insurance, and is the Co-Chair of the ABA’s Insurance Coverage Litigation Committee. She is a founding member of the American College of Coverage and Extra-Contractual Counsel, and is recognized in The International Who's Who of Insurance & Reinsurance and by Best Lawyers. Sheri has been honored as a New Jersey Super Lawyer since 2005.