When Losses Exceed Policy Limits: What's A Client To Do?

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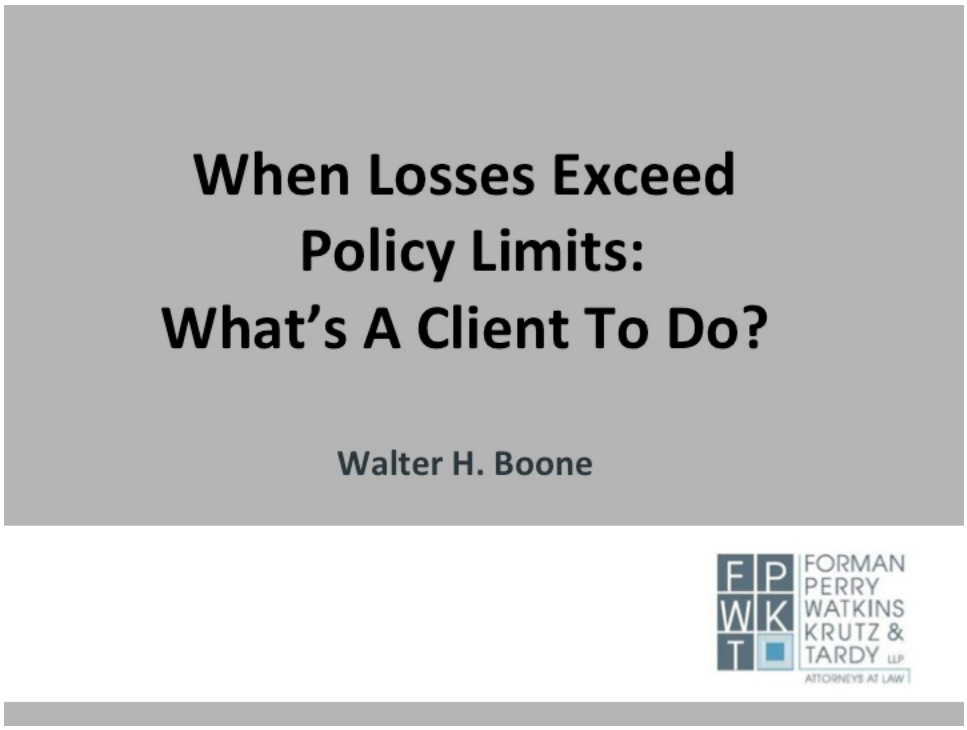


ALL DAY.
EXTRA BEER

Multiple Claimants

Tricky Problem for Everyone

Insured

- Excess Exposure
- No Defense Once Limits Exhausted

Insurer

- Bad Faith Liability
- Difficulty of Global Settlement vs. Piecemeal

Two Approaches:

- First-come, First-served
- Pro Rata Method

Majority View

"[a] liability insurer may, in good faith . . . settle part of multiple claims against its insured even though such settlements deplete or exhaust the policy limits so that remaining claimants have no recourse against [the] insurer."

Allstate Ins. Co. v. Evans, 409 S .E. 2d 273 (Ga. App. 1991)

First Come Must Be Served

"Had State Farm waited until it was presented with a satisfactory proof of loss by Combetta to make any tenders of payment to the other claimants, State Farm would have violated its duty to Wilson and Foster under LSA-R.S. 22:658 and would have further violated its affirmative duty to adjust claims fairly and promptly under LSA-R.S. 22:1220(A)."

Combetta v. Ordoyne, 934 So. 2d 836, 844 (La. Ct. App. 1st Cir. 2006).

Higher (Or No) Standards

It is "a question for jury decision whether the insurer had not acted too much for its own protection and with too little regard for the rights of the insured in refusing to settle within the policy limits".

- **Florida**
- **California**

Springer v. Citizens Casualty Co., 246 F.2d 123, 128-29 (5th Cir. 1957).

First-Come, First-Served Method:

- Louisiana
- Georgia
- Maryland
- South Carolina
- Illinois
- Kansas
- New Jersey
- Massachusetts
- Rhode Island
- Ohio
- Delaware
- New York
- Pennsylvania
- Florida
- Texas

Pro Rata Method

- Claims Have Been Reduced to Judgments
- Judgments Applied *Pro Rata* to Limits

"**. . . equity and fairness [do not require that] Harris be permitted to take the first grab out of the common grab bag, . . . , to the detriment of all other common judgment creditors, merely because by fortuitous circumstances his case was first called up for entry of judgment . . .**"

***Burchfield v. Bevans*, 242 F. 2d 239, 242 (10th Cir. 1957)**

Pro Rata Method Applied By:

- **Alabama**
- **Mississippi**
- **Missouri**
- **New York**
- **Wisconsin**
- **Oklahoma**
- **South Carolina**
- **Connecticut**
- **Kentucky**

Multiple Insureds

Same Tricky Problems for Everyone

Insured

- Excess Exposure
- No Defense Once Limits Exhausted

Insurer

- Bad Faith Liability
- May You Favor One Insured Over Another
- Difficulty of Global Settlement vs. Piecemeal

Majority View

Most courts will require, "that an insurer settle on behalf of one of several insureds even when doing so exhausts policy limits, thus leaving other insureds exposed."

Pride Transportation v. Continental Cas. Co., 804 F. Supp. 2d 520, 525-26 (N.D. Tex. 2011)

Some Require Higher Standards

Many still require attempt at global settlement.

Once it became clear [the claimant] was unwilling to settle with [one insured], . . . U.S. Security had . . . fulfilled its obligation to [that insured], U.S. Security thereafter was obligated to take the necessary steps . . . to protect [the other insured] from what was certain to be a judgment far in excess of her policy limits.

***Contreras v. U.S. Sec. Ins. Co.*, 927 So. 2d 16 (Fla. Dist. Ct. App. 2006)**

Interpleader Actions

Interpleader: "insurance coverage [is distributed] in an equitable manner, rather than simply paying judgment creditors in the order that the judgments are entered until coverage is exhausted."

Boris v. Flaherty, 672 N.Y.S. 2d 177, 181 (N.Y. Sup. Ct. 1998)).

For the Insurer:

1) Attempt To Obtain A Global Settlement Within Policy Limits

2) Interpleader

3) Transparent Settlement Discussions

For the Insured:

1) Herd the Cats for Global Settlement

2) Interpleader (With Continued Defense)

3) Participate in Settlement

I. **INTRODUCTION**

It is a general principle of law that every insurance policy contains an implied duty of good faith and fair dealing. This means an insurer should accept reasonable settlement demands within policy limits to avoid exposing their insured to judgments in excess of those limits.[1] However, when an insurer's failure exposes its insured to damages in excess of the policy limits, the insured may sue the insurer for bad faith in the handling of the settlement or lawsuit. Making things worse, many times insurance companies and their insureds face the difficult task of deciding how to handle claims either (1) with multiple claimants, whose combined claims would exhaust the policy limits; or (2) a single claim against multiple insureds where the claims against each insured could exhaust such limits. These situations raise questions regarding the extent of an insurer's duties to their insureds under such circumstances.

One author has noted the general proposition that an insurer can only equally weigh its own interests with that of its insured, concluding that, "[a]n insurance company is therefore guilty of bad faith if it subordinates an insured's financial interests to its own in handling a claim or suit."[2] Another author surmised that an insurer could open itself up to bad faith claims by settling with less than all claimants, "with the clear purpose of discontinuing the provision of defense by paying more than necessary in order to exhaust limits of liability . . . ."[3] Further, each jurisdiction utilizes different methods to determine when an insurer's duty to defend ends.[4] So how can an insurer fulfill its duties to protect the insured without taking action that might later subject it to a claim of bad faith in the handling of the defense or payment of settlement proceeds? What can an insured do to make sure it is as fully protected as possible when it is faced with claims in excess of its policy limits?

II. **FACING MULTIPLE CLAIMANTS AGAINST ONE INSURED**

Many times, there may be multiple claimants against one insured arising from the same occurrence - such as multiple victims of one car accident. It appears that in most jurisdictions, an "insurer may settle fewer than all of the claims regardless of the fact that claims will remain when the insurance proceeds are exhausted."[5] These cases usually fall under the two methods discussed below; the "first-come, first-served" rule or the *pro rata* rule.

A. The "First-Come, First-Served" Method

1. The Literal Approach

Some courts apply the "first-come, first-served" method literally. For instance, Louisiana has approved this method because it has a statute requiring an insurer to pay claims within 30 days of receiving "proof of loss." In *Combetta v. Ordoyne*, the court found the insurer did not act in bad faith by settling with two claimants even where it knew a third claimant suffered more serious injuries.[6] The third had not submitted "proof of loss" because he did not know the extent of his claim until after a surgery. The insurer paid the first two claimants, and tendered its remaining insufficient limits to the third. The court found that the insurer could not have withheld tender to the original two claimants without violating the statute.[7] Thus, the insurer was literally required to pay the first two claimants, even though it was aware of the third claimant whose claims would subject the insured to excess exposure.

2. **Some Courts Apply the Rule to Allow Insurers to Choose What Claims will be Settled, Assuming they are Reasonable.**

Many other courts allow insurers to settle claims as long as they do so reasonably. Despite the name of the rule, it does not always refer to the first claimant.

The First to Settle Rule does not require the insurer to settle with the first claimant who presents an offer to settle within the policy limits. Instead, the Rule

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1 Rocky K. Copley, Insurer's Duties When Policy Limits Demands Involve Multiple Claimants, 35 Trial Bar News 15 at ¶ 6 (2012), available at http://www.copleylaw.com/insurer-s-duties-when-policy-limits-demands-involve-multiple-claimants.

2 Douglas R. Richmond, Too Many Claimants or Insureds and Too Little Money: Insurer's Good Faith Dilemmas, Tort Trial & Ins. Prac. L. J., Mar. 22, 2009, at ¶ 4 available at http://business.highbeam.com/437383/article-1G1-206173458/too-many-claimants-insureds-and-too-little-money-insurers.

3 Jonathan M. Stern, What's an Insurer to Do? For The Defense, Sept. 2009, at 19.

4 See Brown v. Lumbermens Mut. Cas. Co., 326 N.C. 387 (N.C. 1990) (tendering policy limit to settle did not end duty to defend where policy was ambiguous); Millers Mut. Ins. Ass'n v. Shell Oil Co., 959 S.W. 2d 864 (Mo. E. D. 1997) (settling for policy limits did terminate duty to defend an additional insured); Brush Wellman, Inc. v. Certain Underwriters at Lloyds, London, 2006 Ohio Misc. LEXIS 387 (Ohio C.P. Aug. 30, 2006) (in the absence of policy language, the duty to defend survived exhaustion of policy limits).

5 Stern, supra, at 19 (citing 4-21 The Law of Liability Ins § 21.02 (Matthew Bender & Co. 2009)).

6 Combetta v. Ordoyne, 934 So. 2d 836 (La. Ct. App. 1st Cir. 2006).

7 Id. at 839 (citing La. Rev. Stat. Ann. § 22:1220(A)).

recognizes that insurers should be able to settle with any one or several of multiple claimants, even though such settlement(s) may deplete or exhaust the policy limits, without incurring bad faith liability in connection with any of the remaining claims.[8]

The following jurisdictions have adopted this approach, in one form or another: Maryland, South Carolina, Illinois, Kansas, Louisiana, New Jersey, Massachusetts, Rhode Island, Ohio, Delaware, New York, Pennsylvania, Florida, and Texas.[9] However, several of these jurisdictions require other factors to be met before the method may be applied.

For instance, one author noted the New York decision in *Brown v. U.S. Fidelity & Guaranty Co.* "makes it clear that an insurer cannot be insulated from bad faith liability by simply settling claims on a 'first-come-first-serve' basis."[10] In *Brown,* the court found there was sufficient evidence of bad faith in the settlement where an insurer settled with two of the five claimants where the insurer: (1) failed to seek a global settlement which would have protected the insured from excess liability; (2) settled without informing the other claimants; (3) misrepresented to the insured that the additional claimants did intend to seek the insured's personal assets; (4) failed to inform the insured of settlement negotiations, and (5) failed to conduct adequate analysis of contributory negligence of one of those claimants with whom it had settled.[11] Thus, although New York would allow piecemeal settlements to deplete policy limits, such a settlement must still be reasonable under the circumstances.

In *Allstate Insurance Company v. Evans*, the Georgia Supreme Court found there was no bad faith where the insurer had rejected a global settlement offer within limits, and then eventually settled with two of the multiple claimants.[12] The remaining proceeds were insufficient to pay judgments obtained by the other claimants.[13] The court found the insurer could, in good faith, settle with some claimants without informing others – even when it exhausted the policy's limits, noting:

> the courts of other jurisdictions which have confronted the issue appear to have held uniformly that "[a] liability insurer may, in good faith and without notification to others, settle part of multiple claims against its insured even though such settlements deplete or exhaust the policy limits so that remaining claimants have no recourse against [the] insurer." . . . .Were the rule otherwise, an insurer would be precluded from settling any claims against its insured [5] in such a situation and would instead be required to await the reduction of all claims to judgment before paying any of them, no matter how favorable to its insured the terms of a proposed settlement might be. Such a policy would obviously promote litigation and would also increase the likelihood, in many cases, that the insured would be left with a total adjudicated liability in excess of his policy limits.[14]

3. **Some Courts Hold Insurers to an Even Higher Standard.**

After explaining how most jurisdictions rule, one author noted that "[o]thers hold the insurer to a higher standard, requiring it to seek to maximize the benefit to the insured for each dollar of insurance money expended in settlement."[15] For instance, Florida looks at whether the insurer's failure to seek global resolution

8 Multiple Claimants and Insufficient Limits – Can Insurers Lessen Their Exposure to Bad Faith Claims?, Federation of Defense And Corporate Counsel (March 2012), http://www.thefederation.org/documents/11.2012%20W%20CLE-Weihmuller.pdf. at 3. (citing cases from Massachusetts, Rhode Island, N.D. Ohio, Connecticut, Delaware, New York, Ohio, Pennsylvania, Florida, Texas, Illinois, and New Jersey).

9 John W. Weihmuller, Multiple Claims Exceeding the Policy Limits, 13 Mealey's Litig. Rep. 22 (1999), at 1, available at http://www.butlerpappas.com/526 (listing Hartford Cas. Ins. Co. v. Dodd, 416 F. Supp. 1216 (D. Md. 1976); State Farm Mut. Auto. Ins. Co. v. Hamilton, 326 F. Supp. 931 (S.C. 1971) (pro rating the remaining proceeds after some claims were settled); State Farm Mut. Ins. Co. v. Murphy, 348 N.E. 2d 491 (Ill. App. Ct. 1976); Castoreno v. Western Indem. Co., 515 P. 2d 789 (Kan. 1973); Lowe v. Continental Ins. Co., 437 So. 2d 925 (La. Ct. App. 1983); Liquori v. Allstate Ins. Co., 184 A. 2d 12 (N.J. 1962); Pat Margarick, Excess Liability, § 8.09, at 8-28n 15 (3d ed. 1997)) and Multiple Claimants, supra, at 3 (listing Cont'l Cas. Ins. Co. v. Peckham, 895 F. 2d 830, 835 (1st Cir. 1990)(Massachusetts law); Voccio v. Reliance Ins. Co., 703 F. 2d 1, 2-4 (1st Cir. 1983) (Rhode Island law); Elliot Co. v. Liberty Mut. Ins. Co., 434 F. Supp. 2d 483, 4899 (N.D. Ohio 2006) (interpreting Connecticut, Delaware, New York, Ohio, and Pennsylvania law) (rev'd on other grounds); Gen. Sec. Nat'l Ins. Co. v. Marsh, 303 F. Supp. 2d 1321, 1325-26 (M.D. Fla. 2004); Tex. Farmers Ins. Co. v. Soriano, 881 S. W. 2d 312, 315 (Tex. 1994); Murphy, 348 N.E. 2d at 491; and Liquori, 184 A. 2d at 12).

10 Multiple Claimants, supra, at 8. (citing Brown v. U.S. Fid. & Guar. Co., 314 F. 2d 675 (2d Cir. 1963)(applying New York Law)).

11 Id. (citing Brown, supra).

12 Weihmuller, supra, at 4-5 (citing Allstate Ins. Co. v. Evans, 409 S.E. 2d 273 (Ga. 1991)).

13 Allstate, 409 S.E. 2d at 273.

14 Id. (citing 7C Appleman, Ins. Law & Practice, § 4711, 409 (Rev. ed.)). See also 15A Couch On Ins. 2d, § 56.35, at. 48-49; Anno: Basis and manner of distribution among multiple claimants of proceeds of liability insurance policy inadequate to pay all claims in full, 70 ALR2d 416, at 423-425, § 5.).

15 Stern, supra, at 19.

was reasonable, whether the insurer investigated the facts of each claim, and whether settling with only a few of multiple claimants was actually in the insured's best interest.[16]

The Fifth Circuit utilized a similar test in another case relying on Florida law.[17] In *Liberty Mutual v. Davis*, the insurer rejected a settlement offer seeking policy limits for multiple claimants because it would still leave the insured exposed to additional claims. In the claim for bad faith against the insurer, the Fifth Circuit found the jury could have concluded the insurer was liable for the excess amount. The court noted that when multiple claimants seek more than policy limits, the proceeds should not be exhausted without trying to settle as many claims as possible. But at the same time, if the totality of the claims is too large to "preclude any chance of a comprehensive settlement, the insured does not benefit by the insurer's insistence upon a global or comprehensive settlement."[18] This leaves insurers in such jurisdictions wondering where to draw this line. At what point should they cease seeking a global settlement and begin actively seeking a settlement with less than all claimants?

California seems to subject insurers to the highest standards. In *Kinder v. Western Pioneer Ins. Co.*, the court explained an insurer had multiple duties, including:

- to give at least as much consideration to the interests of its insured as it gives to its own;
- to recognize the fact that its insured had limited financial ability;
- to consult qualified persons on the matter of settlement;
- to keep the insured informed of the possibility of excess claims as well as any settlement demands; and
- for its attorney to represent the interests of the insured, not relying on the claims manager to do so.[19]

Another California court found an insurer's duty to defend did not necessarily end at judgment, but also included filing an appeal if reasonably warranted.[20]

B. *Pro Rata* Payment of Proceeds

Many jurisdictions apply a *pro rata* approach to distribution of policy limits.[21] However, in order to divide the proceeds on a *pro rata* basis, there must be either judgments or stipulations setting the amount of damages for each claimant. In such cases, each claimant usually receives a percentage of his proven damages, based on the total amount of damages of all claimants and the policy limits. Some jurisdictions that have used the *pro rata* method include Alabama, Mississippi, Missouri, New York, Wisconsin, Oklahoma, South Carolina, Connecticut, and Kentucky.[22]

For example, in *Countryman v. Seymour*, a plaintiff received separate judgments against an insured school district and its bus driver.[23] The district's insurance company paid the policy limits to the court, but informed the court that the entire school district's judgment would be paid, and the remaining insufficient proceeds should be applied towards the bus driver's judgment. The Missouri Court of Appeals held that the insurer could not make such a designation, and the entire proceeds would be prorated as to partially pay the judgments against each insured.[24]

Kentucky applies a similar approach.[25] In one case where the first of multiple claimants received a jury award in excess of limits, the insurer paid its limits into the court, asking it to distribute the funds as it saw fit.

16 Id. (citing Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555 (Fla. Dist. Ct. App. 4th Dist. 2003) (citing an 11th Circuit opinion for support)).

17 Id. (citing Liberty Mut. Ins. Co. v. Davis, 412 F. 2d 475 (5th Cir. 1969)).

18 Multiple Claimants, supra, at 9 (citing Liberty Mut. Ins. Co. v. Davis, 412 F. 2d 475 (5th Cir. 1969)).

19 Kinder v. Western Pioneer Ins. Co., 231 Cal. App. 2d 894, 901-902 (Cal. App. 1965); and Copley, supra, at ¶ 15.

20 Jenkins v. Ins. Co. of N. Am., 272 Cal. Rptr. 7, 11-12 (Cal. Ct. App. 1990).

21 Multiple Claimants, supra, at 2.

22 Weihmuller, supra, at 2 (citing cases involving multiple claims in one suit: Sheehan v. Liberty Mut. Fire Ins. Co., 258 So. 2d 719 (Ala. 1972); State Farm Mut. Auto. Ins. Co. v. Sampson, 324 So. 2d 739 (Miss. 1975); Christlleb v. Luten, 633 S.W. 2d 139 (Mo. App. 1982); Wasserman v. Glen Falls Ins. Co., 240 N.Y.S. 2d 917 (N.Y. App. Div. 1963); and Wondrowitz v. Swenson, 392 N.W. 2d 449 (Wis. Ct. App. 1986)); (and citing claims brought in multiple suits against the same insured: Burchfield v. Bevans, 242 F. 2d 239 (10th Cir. 1957)(applying Oklahoma law); State Farm Mut. Auto. Ins. Co. v. Hamilton, 326 F. Supp. 931 (D.S.C. 1971)(pro-rating between judgment creditors what policy limits remained after settlement with two claimants); Century Indemn. Co. v. Kofsky, 161 A. 101 (Conn. 1932); Underwriters for Lloyds of London v. Jones, 261 S.W. 2d 686 (Ky. 1953)).

23 Countryman v. Semour R-II School Dist., 823 S.W. 2d 515 (Mo. Ct. App. 1992).

24 Id. at 523.

25 Jones, 261 S.W. 2d at 687-88.

The Kentucky Supreme Court found that the money should "be distributed on a pro rata basis after all four cases have reached final judgment."[26]

The Mississippi Supreme Court explained where the claims arose "from one accident . . . the amount available . . . should be distributed among the judgment creditors pro rata. This is equitable because none of the claimants will recover fully at the expense of the others, . . ."[27] Similarly, another court found that it was not equitable to allow one judgment creditor to "take the first grab out of the common grab bag" for all seven claimants simply because "by fortuitous circumstances his case was first called up for entry of judgment."[28]

However, some have only used the *pro rata* approach with reservations. For example, the Supreme Court of Alabama upheld a *pro rata* distribution, but with the caveat that:

the holding of this case is limited to the facts of this case. We do not intend, by virtue of this decision, to adopt the method of proration in this case as an approved formula or standard to be used in any and all cases arising from a proration of an insurance fund.[29]

II. CLAIMS AGAINST MULTIPLE INSUREDS

Another issue an insurer faces in fulfilling its duties to its insureds arises when there are claims against multiple insureds at the same time – such as a claim against both a company and its employed driver arising from one automobile accident. In such a case, may the insurer pay policy limits to settle and obtain a release of claims against one insured, knowing it would leave its other insured completely exposed? May an insured employer paying the policy premiums demand the insurer obtain its release while leaving its employee subject to excess claims?

A. An Insurer May Settle Claims Against One Insured Even in Cases in Which it Cannot Obtain a Release of All Insureds.

In many jurisdictions, the courts allow an insurer to resolve the liability against one insured, even while leaving another exposed, if it is done in good faith.[30] One court noted the test was whether "an ordinary and prudent person would have accepted the [claimant's] demand."[31] Such courts hold an insurer should be able to settle claims against less than all insureds, because such settlements are still in the best interest of the remaining insureds – as it reduces the total amounts owed.[32] Thus, even the majority finds, an insurer cannot show – and an insured may not demand - preference for one insured over another.

B. Some Jurisdictions Have Higher Standards for Settling Claims Against One Insured While Leaving Another Exposed.

In some jurisdictions, courts will allow an insurer to settle on behalf of one policyholder, leaving the others exposed, only under heightened standards. One author states that these include instances where the insurer has at least attempted to reach a global settlement against all its insureds, and the overall settlement is reasonable from the standpoint of all insureds.[33] Still other jurisdictions require such settlements to be in good faith, with all parties represented, and where the settlement of the claims against one policyholder will provide benefit to the other insureds (such as lowering the overall damage amount claimed).[34]

In a Florida case, an automobile policy covered a vehicle, as well as the intoxicated driver that was operating the vehicle with the owner's consent.[35] The driver struck and killed a pedestrian before fleeing the scene. The insurer offered policy limits for a release of both the insured owner and driver. The personal representative refused to release the driver due to his

26 Id. at 688.

27 Sampson,324 So. 2d at 742.

28 Burchfield, 242 F. 2d at 242.

29 Sheehan, 258 So. 2d at 145.

30 Grage, supra, at ¶¶18 and 21 (citing Pride Transportation v. Continental Cas. Co., 804 F. Supp. 2d 520 (N.D. Tex. 2011) (finding the insurer acted reasonably, even if it left one insured without defense or indemnity); Millers Mut. Ins. Assoc. of Ill. v. Shell Oil Co., 959 S.W. 2d 864 (Mo. Ct. App. 1997) (policy allowed insurer to end duty to defend after exhausting limits on behalf of one insured even when leaving another insured with no defese).

31 Pride, 804 F. Supp. 2d at 530.

32 Grage, supra, at ¶ 24 (citing Anglo-American Ins. Co. v. Molin, 670 A. 2d 194, 199 (Pa. Commw. Ct. 1995)).

33 Christopher H. Yetka, Too Many Mouths to Feed: The Insurer's Obligation When Multiple Policyholders Are Covered by the Same Policy, Riskvue (Apr. 2006), http://www.riskvue.com/articles/fs/fs0604.htm at ¶ 6.

34 Id. at ¶ 8.

35 Contreras v. U.S. Sec. Ins. Co., 927 So. 2d 16 (Fla. Dist. Ct. App. 2006).

horrific behavior. The insurer informed the claimant that under Florida law, it could not settle for a release of only one insured without subjecting itself to a bad faith claim. The judge in the resulting bad faith claim explained the insurer's dilemma, noting that if the insurer settled for limits without a release of the driver, then driver would have a bad faith claim for the insurer's failure to defend. However, if the insurer refused to settle without a release of both insureds, then it could be subject to a bad faith claim for refusing to obtain a release of the owner when possible.[36] He concluded, "[i]t creates an automatic bad faith."[37] On appeal, the court found that by making a good faith attempt to get the driver released, the insurer had met its duty to that insured, and was then "obligated" to take steps to settle the claims against the car's owner within policy limits if possible.[38]

However, courts in some jurisdictions may find bad faith where an insurer does fail to obtain a global settlement, finding this would violate the duty of good faith implicit in each policy.[39] One court explained, "an insurer's duty extends to *all* of its insureds. Therefore, an insurer may, within the boundaries of good faith, reject a settlement offer that does not include a complete release of all of its insureds."[40]

III. **THE QUESTION OF INTERPLEADER**

When an insurer becomes aware that its insured will be liable for excess of the policy limits, the question arises as to whether that insurer may simply interplead the funds into the court registry to be divided among the multiple claimants by the court, thus removing itself from the litigation entirely. Like the treatment of multiple claimants or multiple insureds, the jurisdictions have numerous approaches to such action by insurance companies.

One author noted that interpleading funds could be viewed as bad faith: both because it can appear the insurer is shirking its duty to defend its own insured, and because it prevents disbursement of the funds until after a judgment, preventing an insured from being able to settle without going to trial.[41]

Indeed, although a Massachusetts court found an insurer has met its duty to defend by settling less than all claims leaving some excess exposure, the court noted that simply tendering the limits to the court would not end that duty to defend.[42] Instead, the duty to defend would only be met once the insurer either (1) paid limits to satisfy a judgment, or (2) obtained a release of at least one insured. However, merely paying the policy proceeds to a claimant without obtaining a release for any insured did not end the insurer's duty to defend the suit.[43]

One California court held that while an interpleader action could be proper, the insurer should not "merely pay its policy limits into the court and abandon the insured."[44] Instead, one author concludes interpleading the funds to walk away would probably subject an insurer to a bad faith claim for failing to get a release of its own insured.[45]

Interestingly, some jurisdictions hold that a properly filed interpleader action can completely insulate an insurer from bad faith claims.[46] For example, as a matter of Arizona law:

(1) the prompt, good faith filing of an interpleader as to all known claimants with (2) payment of the policy limits into the court and (3) the continued provision of a defense for the insured as to each pending claim, acts as a safe harbor for an insurer against a bad faith claim for failure to properly manage the policy limits (or give equal consideration to settlement offers) when multiple claimants are involved . . . .[47]

Based on this principle, the Arizona court found the

36 Id. at 20.

37 Id.

38 Id. at 21 (see also In re GunnAllen Financial Inc., 443 B.R. 908 (N.D. Fla. 2011) (once it was obvious to an insurer that it could not get a realease of claims against all insureds, it was under a duty to settle and get releases for as many insureds as possible)).

39 Grage, supra, at ¶¶ 18 and 25 (citing Strauss v. Farmers Ins. Exch., 26 Cal. App. 4th 1017 (Cal. Ct. App. 1994); Smoral v. Hannover Ins. Co., 37 A.D. 2d 23 (N.Y. Ct. App. 1971).

40 Strauss, 26 Cal. App. 4th at 1020 (italics in original).

41 Stern, supra, at 20 (citations omitted).

42 Aetna Cas. & Surety Co. v. Sullivan, 597 N.E. 2d 62, 65 (Mass. App. Ct. 1992)).

43 Id. at 63.

44 Grage, *supra*, at ¶ 14 (citing *Jenkins*, 272 Cal. Rptr. at 12).

45 Copley, supra, at ¶ 17.

46 Multiple Claimants, supra, at 17 (citing McReynolds v. Am. Commerce Ins. Co., 235 P. 3d 278 (Ariz. Ct. App. 2010)).

47 Id. (quoting McReynolds, 235 P. 3d at 284).

insurer that had filed the interpleader action was entitled to summary judgment in the later claim filed against it for bad faith.[48]

A New York court agreed that such interpleader actions are to be encouraged to avoid bad faith claims, "'rather than simply paying judgment creditors in the order that the judgments are entered until coverage is exhausted.'"[49] That court explained:

Interpleader actions, while not required in situations such as this, are to be encouraged as part of the duty of good faith of an insurer in defending and settling claims over which it exercises exclusive control on behalf of its insured . . . . We commend New York Central for its effort to distribute its insurance coverage [9] in an equitable manner, rather than simply paying judgment creditors in the order that the [181] judgments are entered until coverage is exhausted. All claimants are treated fairly in the interpleader action and the rights of the insured are fully protected.[50]

IV. WHAT CAN AN INSURER OR INSURED DO TO PROTECT ITSELF?

A. Steps an Insurer Should Take

The most important thing an insurer can do when facing claims in excess of its limits, is to retain counsel to research what standards apply in that jurisdiction. Learning what is considered reasonable in a particular jurisdiction will guide the insurer from an early stage as to what actions could expose it to bad faith claims and how to avoid them. As general guidelines, the following are several steps which commentators on the subject have suggested to guide insurers facing such situations.[51]

(1) Inform insureds, in writing, about claims exceeding policy limits and the insurer's efforts to settle, as failure to keep the insureds informed can constitute bad faith.

(2) Notify any excess carriers, and keep them informed of efforts in writing.

(3) Document efforts to gather all information necessary to show that all conclusions an insurer made were informed decisions.

(4) No matter how futile it may seem, at least attempt to make a global settlement.

(5) Listen to the insured's advice on how to settle and be able to articulate any reason you did not follow it (without regard to financial interests of the insurer).

(6) Obtain separate counsel to help guide the insurer's actions, so if a bad faith claim is later filed, the insurer can rely to a point on an "advice of counsel" defense.

(7) Have counsel research whether the jurisdiction allows or encourages interpleader actions. If encouraged, interplead the funds, but be sure to research the extent of an insurer's duty to continue providing a defense under such circumstances

(8) Do not overpay an early claim to try to exhaust limits and "get out."

B. Steps an Insured Should Take

Likewise, an insured client facing claims in excess of policy limits will also need to take prompt action. Some steps an insured should take include:

(1) Consult independent counsel to research the insurer's duties in the applicable jurisdiction to protect your interests.

(2) Immediately notify primary and excess insurers of the occurrence.

(3) Thoroughly investigate the occurrence, and share the results with your insurer so it is fully informed. This includes interviewing witnesses, gathering any police reports or other documentation of the incident, etc.

(4) Identify all possible claimants there may be from an occurrence. If you reside in a "first come, first served" jurisdiction, encourage all claimants to make a claim.

(5) Request regular progress reports from your insurer to you and your independent counsel to

48 McReynolds, 235 P. 3d at 284.

49 Grage, supra, at ¶ 10 (quoting Boris v. Flaherty, 672 N.Y.S. 2d 177, 181 (N.Y. Sup. Ct. 1998)).

50 Boris, 672 N.Y.S. 2d at 180-81.

51 Stern, supra, at 22; Grage, supra, at ¶ 27.

keep you informed of all actions taken by the insurer.

(6) Demand that both you and your independent counsel be involved in any settlement negotiations and planning of trial strategy for your defense.

By understanding what actions are expected of an insured and insurer in any given jurisdiction regarding how to handle claims in excess of policy limits, both insurers and insureds can more safely navigate these treacherous waters.

V. CONCLUSION

There are no set rules for handling claims exceeding policy limits. Each jurisdiction handles the duties of the insurer with different approaches. These examples are only illustrative of the numerous methods courts will use, but all magnify the early need for an insurer and insured to familiarize themselves with the laws of any particular jurisdiction at the first hint that there may be claims brought exceeding the limits of any liability policy protecting the insured.

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Important Litigation Involvement

- Directed verdict dismissing bad faith claims against property insurer, and jury verdict for compensatory damage less than settlement demand
- Motion to dismiss granted on behalf of private law school dismissing claim for wrongful expulsion. Decision available.
- Summary judgment for property insurer based on statute of limitations after insured attempted to utilize appraisal to resurrect time-barred claim. Decision available.
- During jury trial representing minority shareholders in a breach of fiduciary duty and fraud claim seeking in excess of $5.8 million, favorable settlement involving, among other terms, change in majority ownership
- Nominal settlement of products liability claim brought by double amputee against aerial lift manufacturer with seven figure special damages after aggressive fact investigation demonstrated aerial lift had no causal connection to accident
- Successful arbitration of multi-million dollar environmental indemnity claim arising out of the sale of an asphalt refinery
- Defense verdict rejecting $6 million breach of contract claim based on waiver in two week jury trial between poultry renderer and two of its shareholders
- Jury verdict rejecting future lost wages claim by plaintiff with alleged spinal cord injury in a personal injury case where liability was admitted
- Voluntary dismissal with prejudice of products liability claim of paraplegic plaintiff against aerial lift manufacturer after aggressive fact investigation and early discovery
- Arbitration award dismissing indemnity claim in excess of $1 million arising out of an oilfield accident
- Defense verdict in favor of luxury motor home manufacturer in breach of warranty claim for failure to warn
- Defense verdict in favor of mildewcide manufacturer in a chemical exposure personal injury lawsuit
- Dismissal of malpractice claim against patent law firm based on lack of personal jurisdiction
- Dismissal of class action claims against lender arising out of Hurricane Katrina for failure to meet class action criteria.

Specific Areas of Practice / Main Focus

- Appellate
- Chemical and Mold Exposure
- Commercial Litigation
- Drugs and Medical Devices
- Environmental Litigation
- Financial Services
- Insurance
- Personal Injury
- Product Liability
- Professional Liability

Education

- University of Mississippi School of Law, J.D. (cum laude)
- Georgetown University, B.A. (cum laude)