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"How Coverage Counsel Can Drive Successful Settlements"

Mediations and settlement conferences often begin with a focus on liability and damage, but they rarely end there. In complex cases, discussions quickly shift to insurance coverage: Who is funding the settlement? Which policies apply? And do the insured and insurers truly share the same strategy and risk assessment? In complex matters involving multiple insurers, policy periods, or coverage layers, these questions can stall progress at the very moment resolution should be within reach.

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Joseph K. Cole

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

Too often, coverage counsel is brought in only after a claim is denied or a settlement effort falls apart due to insurer disagreement. By that point, leverage may be lost, costs are likely to increase, and opportunities for efficient resolution may have passed. Involving coverage counsel earlier— before mediation or settlement negotiations—can help identify and resolve insurance-related obstacles in advance, allowing the parties to focus on what mediation is meant to achieve: resolving the case.

Below are some common coverage issues that can derail settlements negotiations.

"Other Insurance" Provisions: Who Pays First?

"Other insurance" clauses are a frequent source of friction in multi-insurer cases. These provisions govern how coverage is allocated when more than one policy applies to the same loss and are commonly found in liability policies at both the primary and excess levels. Although policy language varies, most "other insurance" provisions fall into three general categories:

- **Pro rata clauses**, which allocate the loss proportionally among insurers;
- **Excess clauses**, which attempt to make coverage excess to other available insurance; and
- **Escape clauses**, which seek to eliminate coverage entirely if other insurance exists.

When these provisions conflict, many jurisdictions apply a practical hierarchy to resolve disputes. Pro rata policies typically pay first, excess policies pay next, and escape clauses are disfavored or applied last. When similar clauses conflict—such as excess versus excess—courts often prorate the loss. Importantly, this

hierarchy generally applies only among insurers at the same coverage level (primary versus primary or umbrella versus umbrella).

"Other insurance" provisions govern the obligations between and among the insurers and do not diminish any particular insurer's obligations to its insured. In practice, however, unresolved allocation disputes can delay or derail settlement by creating uncertainty over funding and authority. Identifying and addressing these issues before mediation helps prevent insurer finger-pointing from undermining meaningful negotiations.

Additional Insured Status: Coverage Under Someone Else's Policy.

Additional insured coverage is another common source of misunderstanding in settlement discussions. Many commercial contracts, particularly in construction, franchising, and vendor agreements, require one party to add another as an "additional insured" on their insurance policy. For example, a franchisor typically requires a franchisee to name the franchisor as an additional insured on the franchisee's policy.

Being an additional insured can provide valuable protection—direct coverage under someone else's policy if you are sued. However, it is not a free pass. Many policyholders mistakenly believe that being an additional insured means they never have to use their own insurance. That is not necessarily true. In reality, the scope and priority of additional insured coverage depend on both the underlying contract and the specific policy language.

From a settlement perspective, disputes often arise over whether the additional insured coverage is primary or whether the additional insured's own policy must contribute. Coverage counsel can analyze these issues early to determine how coverage is likely to apply and to manage expectations regarding settlement funding. Addressing these questions in advance reduces the risk of last-minute disputes that can stall settlement progress.

Indemnity and Insurance Provisions: What Does the Contract Say?

Insurance coverage disputes do not exist in a vacuum. Commercial contracts frequently include indemnity and insurance provisions that significantly affect how losses should be allocated. These provisions may require one party to indemnify another, obtain specific types of insurance, or ensure that coverage applies on a primary and non-contributory basis.

Moreover, indemnity agreements may help short circuit the "other insurance" finger pointing. Courts increasingly recognize that indemnity agreements between insureds may control allocation of a loss, even when insurance policies contain conflicting "other insurance" provisions.[1]

In settlement negotiations, indemnity obligations can streamline allocation disputes by clarifying which party— and which insurer— should ultimately bear the loss. Coverage counsel plays a critical role in analyzing how contractual indemnity provisions intersect with policy language.

What Coverage Counsel Brings to the Settlement Process.

Coverage issues are fact-specific and depend on multiple variables, including policy language, coverage layers, contractual obligations, and the nature of the underlying claims. These complexities make coverage disputes difficult to resolve on the fly during mediation, when time, information, and leverage are limited.

This is where coverage counsel can make a real difference. By getting involved early, coverage counsel can:

1. Analyze applicable policies and identify potential coverage disputes;
2. Assess how "other insurance" clauses interact across coverage layers;
3. Evaluate how underlying indemnity agreements may affect the priority of coverage;
4. Work with insurers to resolve coverage issues before they disrupt settlement negotiations; and
5. Ensure that the policyholder's interests are protected throughout the process.

Do not wait until a coverage dispute blows up your settlement to bring in legal counsel. When engaged proactively, coverage counsel can be a powerful tool for driving efficient, informed, and effective resolutions.

For questions or assistance with insurance coverage, please contact Joe Cole or a member of the Shumaker Insurance Recovery Team.

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[1] *See, e.g.*, *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583 (8th Cir. 2002) (explaining that "to make Wal-Mart or National Union liable to RLI would simply be the first step in a circular chain of litigation that ultimately would end with RLI still having to pay the settlement."); *Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429 (5th Cir. 2003) (finding that "an indemnity agreement between the insureds or a contract with an indemnification clause, such as is commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an 'other insurance' clause in its policy."); *Century Sur. Co. v. Metro. Transit Auth.*, No. 20-1474-CV, 2021 WL 4538633, at *5 (2d Cir. Oct. 5, 2021) (concluding the indemnity agreement in the underlying contract between the parties controlled and not the "other insurance" provision of the policy that purports to qualify the policy as a "true excess policy".)

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