

INSURER'S DUTY REGARDING SETTLEMENT NEGOTIATIONS

Richard C.O. Rezie, Esq.
rrezie@gallaghersharp.com
Steven D. Strang, Esq.
strang@gallaghersharp.com

How do you settle a claim with multiple claimants and exposure in excess of policy limits? Are you prevented from settling any of the claims until you settle all of the claims?

Case law shows that you may have more discretion than you think as long as your decisions are justified. In *Captain v. United Ohio Ins. Co.*, 4th Dist. No. 09CA14, 2010-Ohio-2691, the insurer was accused of “bad faith” for filing an interpleader action instead of “negotiat[ing] a global settlement that distributed the insurance money among the claimants in exchange for releases that would have protected [the insured] from the excess judgments that two claimants ultimately obtained.” The court could find “no Ohio precedent that discusses the requirements for a successful bad faith action based on the unique allegations made in” that case. *Id.* at ¶ 22. The court found the controlling issue to be whether the insurer had “reasonable justification for its actions (or inaction) in handling the claims” against its insured. *Id.* at ¶ 24.

In *Captain*, the court noted that the insurer had properly engaged in negotiations with all the claimants but had been rebuffed. *Id.* at ¶ 41. In fact, one of the claimants “cursed him [the insurance claim handler] out over the phone.” *Id.* Nonetheless, the insured asserted that the insurer had “acted arbitrarily and capriciously by not obtaining releases for its insured, which would have legally prevented the claimants from suing[.]” *Id.* at ¶ 43. The court disagreed and held that the insurer had acted reasonably:

[F]aced with a claim involving: 1.) catastrophic injuries; 2.) woefully inadequate policy limits; 3.) a judgment proof insured; 4.) hostile claimants; and 5.) little risk of lawsuits against the insured so long as the claimants received a fair share of the insurance proceeds, [the insurer] had reasonable justification for filing an interpleader action. And the [insured’s] summary judgment evidence does not create a genuine issue of material fact about whether [the insurer] acted in an arbitrary or capricious manner by filing the action.

Id. Significantly, despite the interpleader action, the insurer defended its insured when suit was filed and, indeed, the court noted that “[w]e are not convinced that an insurance company can extinguish its duty to defend its insured by filing an interpleader action and depositing the policy limits into a court registry.” *Id.* at ¶ 46.

Thus, under Ohio law, an insurer may deposit the insurance policy limits with the Court and file an interpleader action so long as it has first attempted good faith negotiation with the claimants.

This material has been prepared by professionals and should not be utilized as a substitute for legal guidance. Readers should not act upon information contained in these materials without professional legal guidance.

Further, an insurer is not limited to this course of action, but may proceed along any reasonably justifiable course. Filing an interpleader action will likely not alleviate any duty to defend, though.

The following are some suggestions based on national case law:

- Keep the insured informed and involve the insured in the settlement negotiations and process; obtain approval by the insured when possible. *Peckham v. Continental Cas. Ins. Co.*, 895 F.2d 830, 835 (1st Cir. 1990);
- Investigate all claims and claimants before proceeding to attempt to negotiate settlement(s). *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475, 482-83 (5th Cir. 1969);
- The insurer should use its own professional judgment but the insurer's goal should be "to try to effect settlement of all or some of the multiple claims so as to relieve its insured of so much of his potential liability as is reasonably possible, considering the paucity of the policy limits." *Peckham v. Continental Cas. Ins. Co.*, 895 F.2d 830, 835 (1st Cir. 1990);
- "So long as it acts in good faith, the insurer is not held to standards of omniscience or perfection; it has leeway to use, and should consistently employ, its honest business judgment." *Id.*;
- An insurer may settle on the first come, first serve basis if that is a reasonable way in which to limit the insured's liability exposure. *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475, 479-81 (5th Cir. 1969);
- On the other hand, a pro rata settlement may be more appropriate if it can be negotiated to encompass more of the potential liability exposure. *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475, 479-81, 483-84 (5th Cir. 1969);
- An insurer may ultimately act reasonably in settling with less than all of the claimants even where this depletes the liability coverage limits to \$0 where doing so most effectively reduces the insured's liability exposure. *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475, 479-81 (5th Cir. 1969).