

# Sorting Out the Responsibilities of Primary and Excess Carriers in “Bet the Company” Litigation

2020 Annual Meeting

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[Speakers]



AMERICAN COLLEGE  
OF COVERAGE COUNSEL

2020 Annual Meeting

# Scenario

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- Multiple insureds
- Wrongful death
- Multiple layers of insurance
  - SIR \$1,000,000
  - Primary \$1,000,000
  - 3 excess layers--\$5m each
- Defense
  - Single defense lawyer for 2 affiliated companies
  - Counsel hired to defend
  - Defense evaluation
    - Policyholder: evaluation unreasonable
    - Excess carrier: concern about experience level of counsel
  - Primary refuses to do mock trial
  - Limited experts hired

**Enter the Excess Carrier**

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# Defense

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- Primary controls and pays
  - Limits are committed
  - Incentive to cut costs
- Excess can
    - Associate
    - Hired monitoring counsel
    - Take over the defense

# Defense Variations

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- Impact of right to independent counsel?
- SIR
- Primary picks the lawyer
- Primary uses captive counsel
- Compromises?
  - Cutting deals with excess
- Excess involvement
  - Monitoring counsel concerns
    - Client/privilege
    - Monitor plus coverage?
      - Preferences?
    - Disagreements re strategy
  - Association in the defense itself
- Is it time for the excess to reserve rights?

# Primary Defense Wanted Out or Changed

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- The truly inadequate or obstinate counsel
  - Seemingly unreasonable evaluation
  - Actual errors in the defense
  - Lack of experience
  - Captive counsel with conflict
- Tools for getting a change of counsel
  - Right to associate or monitor
  - Downward pressure re settlement
  - Finesse?
  - Mock trial
  - Second opinions
  - Verdict surveys
  - Lawyer experience

# Advantages of Team Work With All Counsel

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- Collective wisdom can assist with particular legal and litigation issues
- The same with strategy pre-trial and trial
- Examples
  - Excluding critical evidence—video of driver texting while headed directly at and hitting directly at plaintiff's car
  - Finding loss control evidence the carrier knew about and generated
  - Private investigation reveals more criminal offenses and possible perjury from key witness re criminal record
  - Determine estate is not suing properly in suit with huge conscious pain and suffering claim

# The Care and Feeding of the Excess Carrier

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- Information flow
- Obligations
  - Primary carrier
  - Defense counsel
  - Policyholder
  - Excess carrier
- Attempts to restrict information
  - Primary concerned about downward pressure re settlement
  - Adequacy of defense.
- Privilege issues



# Information Needed for a Late Arrival

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- Defense reports
- Email reports on depositions or otherwise
- History of settlement
  - Written offers and counters
    - Demand letters are a window to damaging evidence
  - Mediation
  - Mediation statements
- Key depositions
  - Video if possible
- Critical evidence

# Moving Towards Trial

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# Appellate Considerations

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- Bet the company case should have skilled appellate counsel
- Primary is responsible for paying
- Separate firm?
- The policyholder needs to know bonding process early
  - Cost
  - Collateral
  - Sharing
  - Where covered and uncovered claims
  - Financial impact even if bonded

# Settlement

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# Duty to Settle

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- How to make the offer where there are multiple layers of insurance.
- Duty of primary
  - An offer within its limits
  - Difficulty of package offers to multiple carriers
- Duty of excess
  - Does the duty to settle apply?
  - Is it different?
  - How best effectuate it?

# Settlement—Downward Pressure

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- Rights of excess versus primary
  - Direct duty
  - Duty of good faith
  - Equitable subrogation
- Equitable subrogation
  - Volunteer defense
  - Contributory negligence?
  - Other defenses?
  - Need to make a demand on primary?

# Special Problems—Downward Pressure

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- SIR/front
  - SIR is not insurance in some jurisdictions and thus no duty to settle may exist
  - Fronting—insured is running the show, but the carrier is still on the hook potentially
- Solutions to an impasse
  - Try to get offers or settlements to exhaust the problem SIR/fronting layer.
  - Use duty of good faith in jurisdictions recognizing a duty

# Questions?

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Slide Text