Multiple Insureds With Insufficient Limits – The Law, Considerations and Recommendations

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of COVERAGE COUNSEL

2021 Annual Meeting

The Problem Illustrated

- Company leases land to, and enters into dealership agreement, with Individual.

- Individual obtains liability coverage from Insurer; names Company as additional insured.

- Claimants later assert serious personal injury claim against Company and Individual.

- Exposure significantly exceeds the policy limits of Individual's liability coverage.

- Insurer offers to pay the limit to Claimants in exchange for release of Individual and Company.

- Claimants refuse to release Company – AND – demand the limit to release Individual.

The Problem Illustrated

Insurer's options:

(1) Refuse individual settlement

    (bad faith claim by Company)

(2) Settle for individual

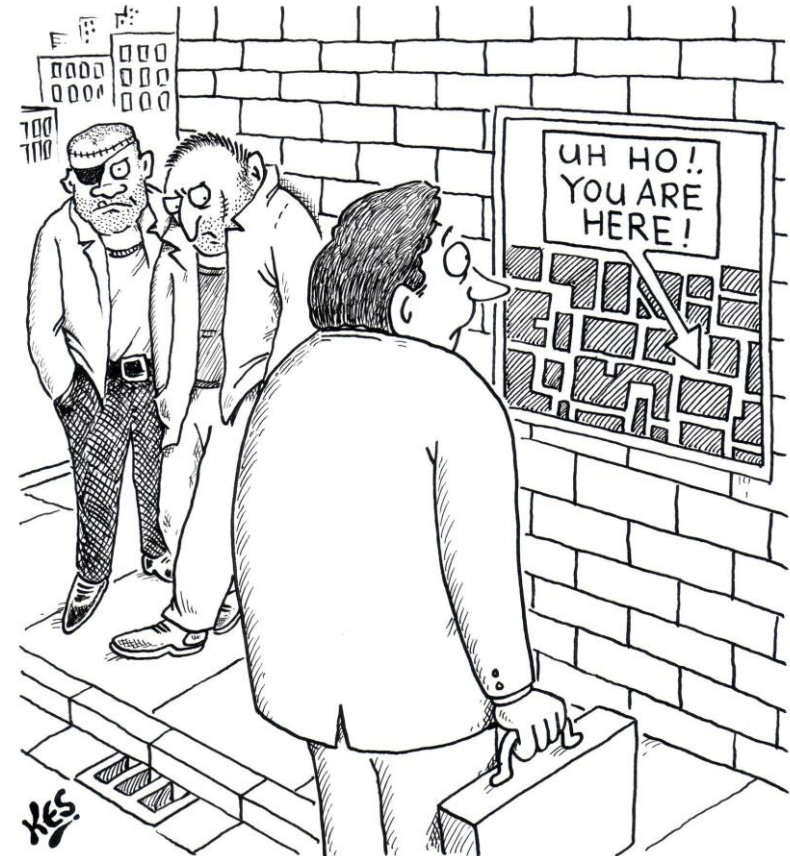   (bad faith claim by Company)
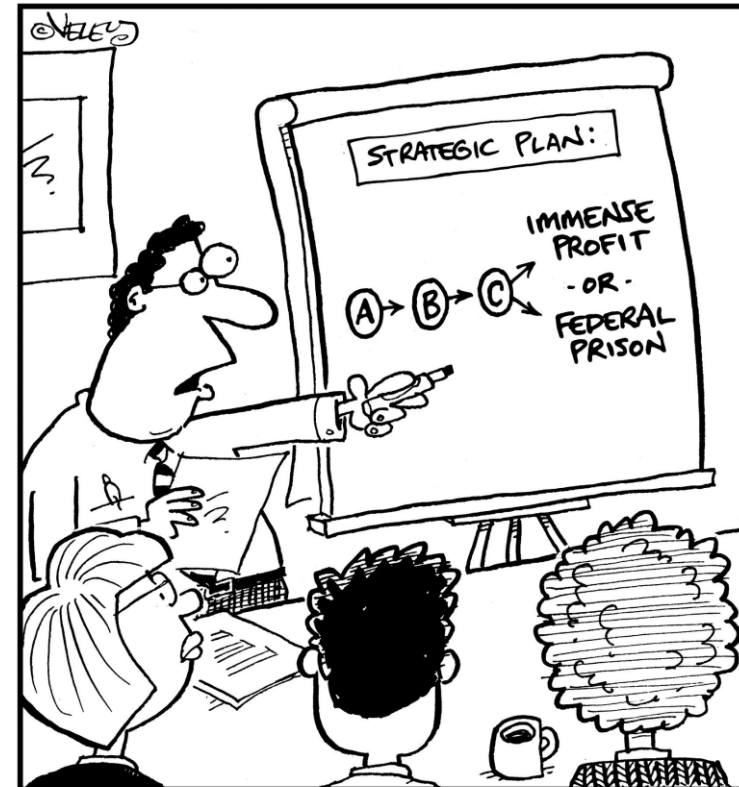
"Stay with me now, people, because in Step C, things get a bit delicate."

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The Problem Illustrated

The Answer

It depends on where you are . . .

The Problem Illustrated

- Vast majority of jurisdictions have no rule at all.

- The jurisdictions with a rule disagree both as to approach and policy.

- Courts describe it as a "Hobson's choice" and "Catch 22"

What We Will Cover

I. The Individual Settlement Approach.

II. The No Individual Settlement Approach.

III. Interpleader And Comparable Procedures.

IV. Policy Considerations And Recommendations.
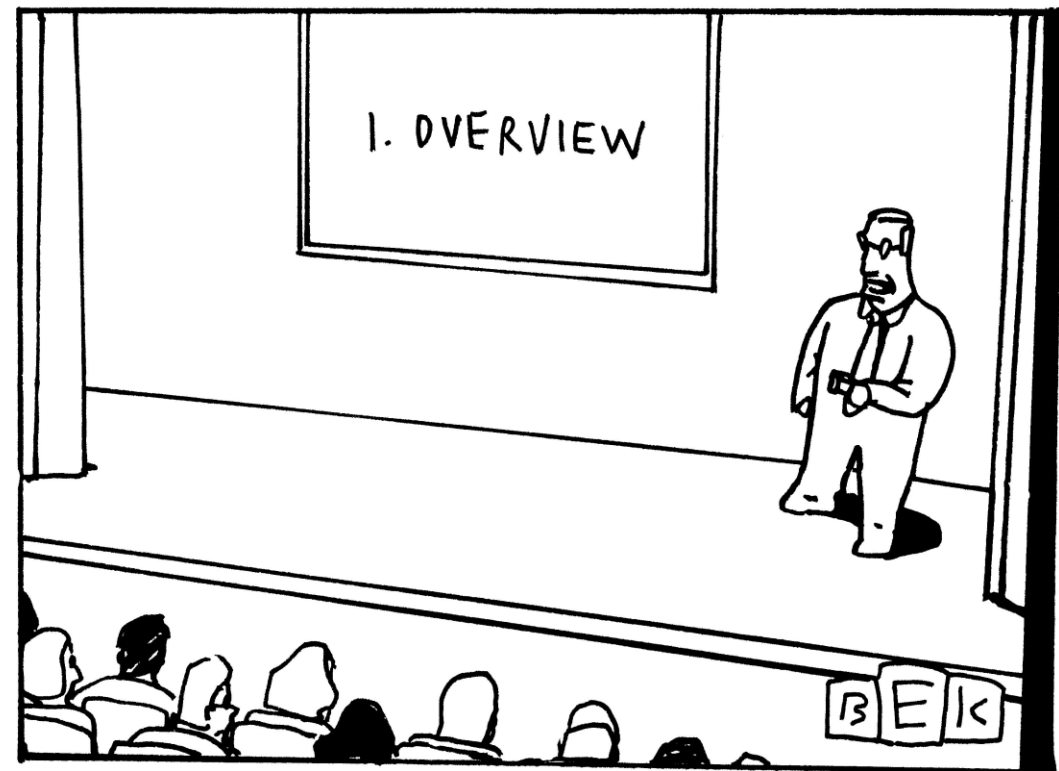
"First, I want to give you an overview of what I will tell you over and over again during the entire presentation."

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The Individual Settlement Approach

RULE #1

JUNK DRAWER

"The road ahead is filled with danger.
Take this lawyer for protection."

The Individual Settlement Approach

RULE #1

Insurer Always First Must Try to secure releases for all insureds.

JUNK DRAWER

"The road ahead is filled with danger. Take this lawyer for protection."

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The Individual Settlement Approach

RULE #1

Insurer Always First Must Try to secure releases for all insureds.

This is the first rule under all approaches.

JUNK DRAWER

"The road ahead is filled with danger. Take this lawyer for protection."

The Individual Settlement Approach

RULE #2

Insurer May (Possibly Must) enter REASONALBE settlement that releases fewer than all insureds.

"Here. I sold you on Ebay."

The Individual Settlement Approach

RULE #2

Insurer May (Possibly Must) enter REASONALBE settlement that releases fewer than all insureds.

Even if this leaves other insureds exposed AND with no defense.

"Here. I sold you on Ebay."

The Individual Settlement Approach

Example

- *Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co.*, 959 S.W.2d 864, 865 (Mo. Ct. App. 1997).

Millers Mutual

The Individual Settlement Approach

Example

- Facts used in the introduction
- 3 attempts at global releases
- Settled for individual only
- Ended Company's defense

Millers Mutual

The Individual Settlement Approach

Example

- Ct rejected ambiguity args
- HELD: no bad faith

Millers Mutual

The Individual Settlement Approach

Example

- Recognized split of authority
- "Dilemma for the insurer"
- Reasonable settlement should not be precluded
- Reasonable settlement benefits all insureds via credit/setoff

Millers Mutual

The Individual Settlement Approach

Example

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

Contreras

The Individual Settlement Approach

Example

- Drunk driver kills pedestrian

- Insureds = Car owner and driver

- Limit demand for owner release

Contreras

The Individual Settlement Approach

Example

- Insurer response (Rule #1):

- Insurer "must act in good faith to all of its insureds.

- Insurer tells claimant must get release for both insureds.

Contreras

The Individual Settlement Approach

Example

- Insurer refused to settle on behalf of the owner only.

- Bad faith . . . ?

Contreras

The Individual Settlement Approach

Example

HELD: Refusal to settle on behalf of fewer than all insureds CAN BE bad faith.

Contreras

The Individual Settlement Approach

Example

- Rejects view that demand to settle for less than all insureds is Hobson's choice.

- Rejects view that settlings for less than all exposes insurer to bad faith.

Contreras

The Individual Settlement Approach

Example

- Concurrence recognizes split.

- Concurrence - if insurer had reasonable time to settle on behalf of all insureds, no reason to reject individual settlement approach.

Contreras

The Individual Settlement Approach

Clarity From The Restatement?

"Now what?"

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The Individual Settlement Approach

Clarity From The Restatement?

Not so much . . .

"Now what?"

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The Individual Settlement Approach

Clarity From The Restatement?

Primarily addresses multiple *claimant* problems

"Now what?"

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The Individual Settlement Approach
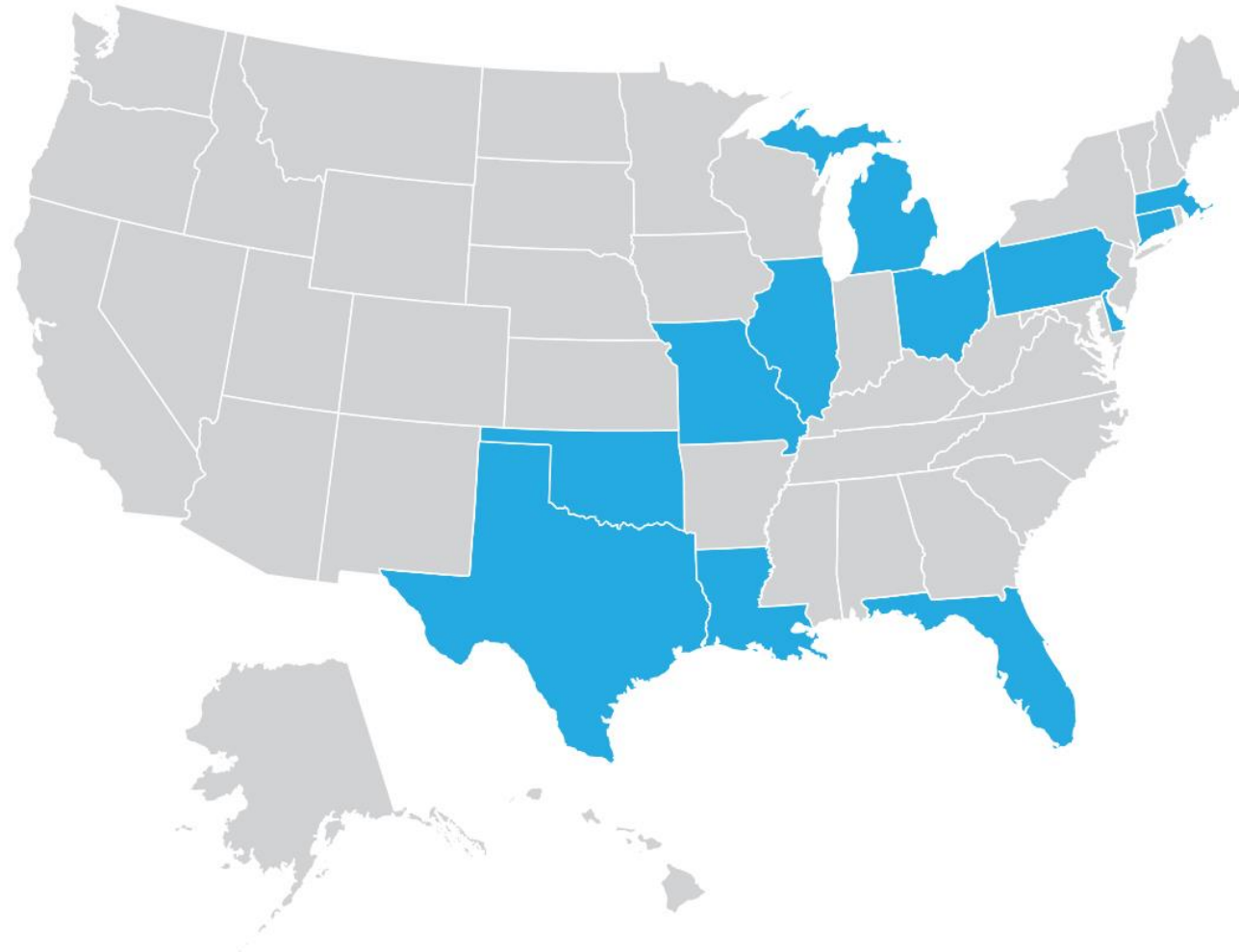
Clarity From The Restatement?

Observes in a note:

"some courts permit insurers to expend their limits to resolve as many of the claims that can be settled even if that leaves some insureds without coverage."

"Now what?"

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Majority - Individual Settlement Approach

The Individual Settlement Approach

<u>Policyholder Considerations</u>

- Insurer's duties generally
- Insurer's duties re multiple insureds
- Communication

The Individual Settlement Approach

Policyholder Ethical Considerations

- Representing multiple insureds

The Individual Settlement Approach

Insurer Considerations

- Know the jurisdiction
- Investigate early
- Communication

The Individual Settlement Approach

Ethical Considerations Insurance Coverage Counsel

- Avoid creating conflicts for defense counsel

The No Individual Settlement Approach

RULE #1

Insurer Always First Must Try to secure releases for all insureds

The No Individual Settlement Approach

RULE #1

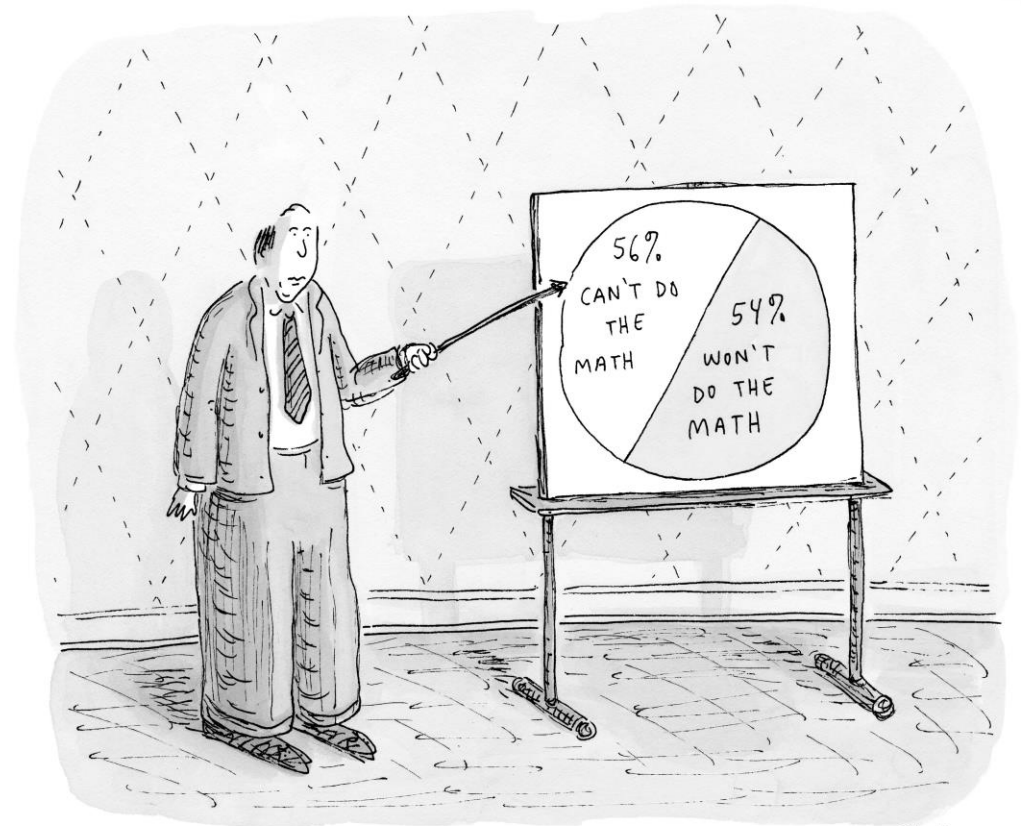Insurer Always First Must Try to secure releases for all insureds

(seem familiar?)

The No Individual Settlement Approach

RULE #2

Insurer never may enter a settlement that releases fewer than all insureds.
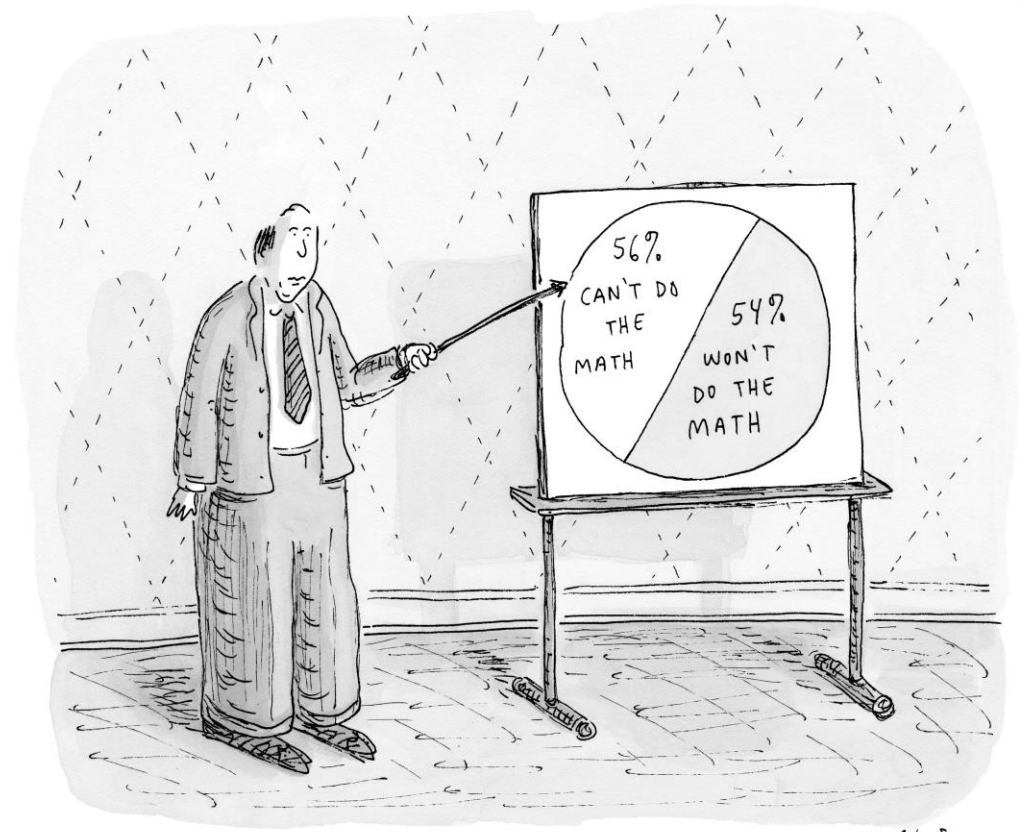
The No Individual Settlement Approach

RULE #2

Insurer never may enter a settlement that releases fewer than all insureds.

This is true even if the proposed less-than-all settlement is reasonable.

The No Individual Settlement Approach

Example

- *Strauss v. Farmers Ins. Exch.*, 26 Cal. App. 4th 1017, 1022, 31 Cal. Rptr. 2d 811, 814-15 (1994).

Strauss

The No Individual Settlement Approach

Example

- MVC where employee's vehicle strikes claimant's vehicle.

- Claimant demanded limits of company's insurance for release of employee only + employee's personal insurance limit.

Strauss

The No Individual Settlement Approach

Example

- As in *Contreras*, insurer rejected demand because not include both insureds.

- Insurer tendered limit for both (Rule #1).

- Bad faith . . . ?

Strauss

The No Individual Settlement Approach

Example

- HELD: Refusal to settle on behalf of fewer than all insureds CANNOT BE bad faith.

Strauss

The No Individual Settlement Approach

Example

- HELD: Refusal to settle on behalf of fewer than all insureds CANNOT BE bad faith.

"By God, for a minute there it suddenly all made sense!"

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The No Individual Settlement Approach

Example

- Court describes insurer's position as "Catch 22."

- "acceptance of an offer that left two of its insureds bereft of coverage" breaches "covenant of good faith and fair dealing."

"By God, for a minute there it suddenly all made sense!"

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The No Individual Settlement Approach

Example

- "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."

"By God, for a minute there it suddenly all made sense!"

CartoonStock.com

The No Individual Settlement Approach

Example

- *Williams v. GEICO Cas. Co.,* 301 P.3d 1220, 1222 (Alaska 2013).

Williams

The No Individual Settlement Approach

Example

- Intoxicated driver struck intoxicated decedent who was lying in the road.

- Estate sued driver and his (also intoxicated) passenger.

Williams

The No Individual Settlement Approach

Example

- Insurer tried "several times" to settle the case against both driver and passenger (Rule #1).

Williams

The No Individual Settlement Approach

Example

- Estate offered to settle with release only of insured (driver).

- Insurer refused to exhaust limit on behalf of only driver.

- Bad faith . . . ?

Williams

The No Individual Settlement Approach

Example

- HELD: No bad faith.
- Court recognized split of authority.
- "Other jurisdictions have utilized two different approaches."

Williams

The No Individual Settlement Approach

Example

- "The second approach requires an insurer to seek release of all insureds; where a settlement cannot be reached the insurer must file a declaratory action to determine what coverage is owed."
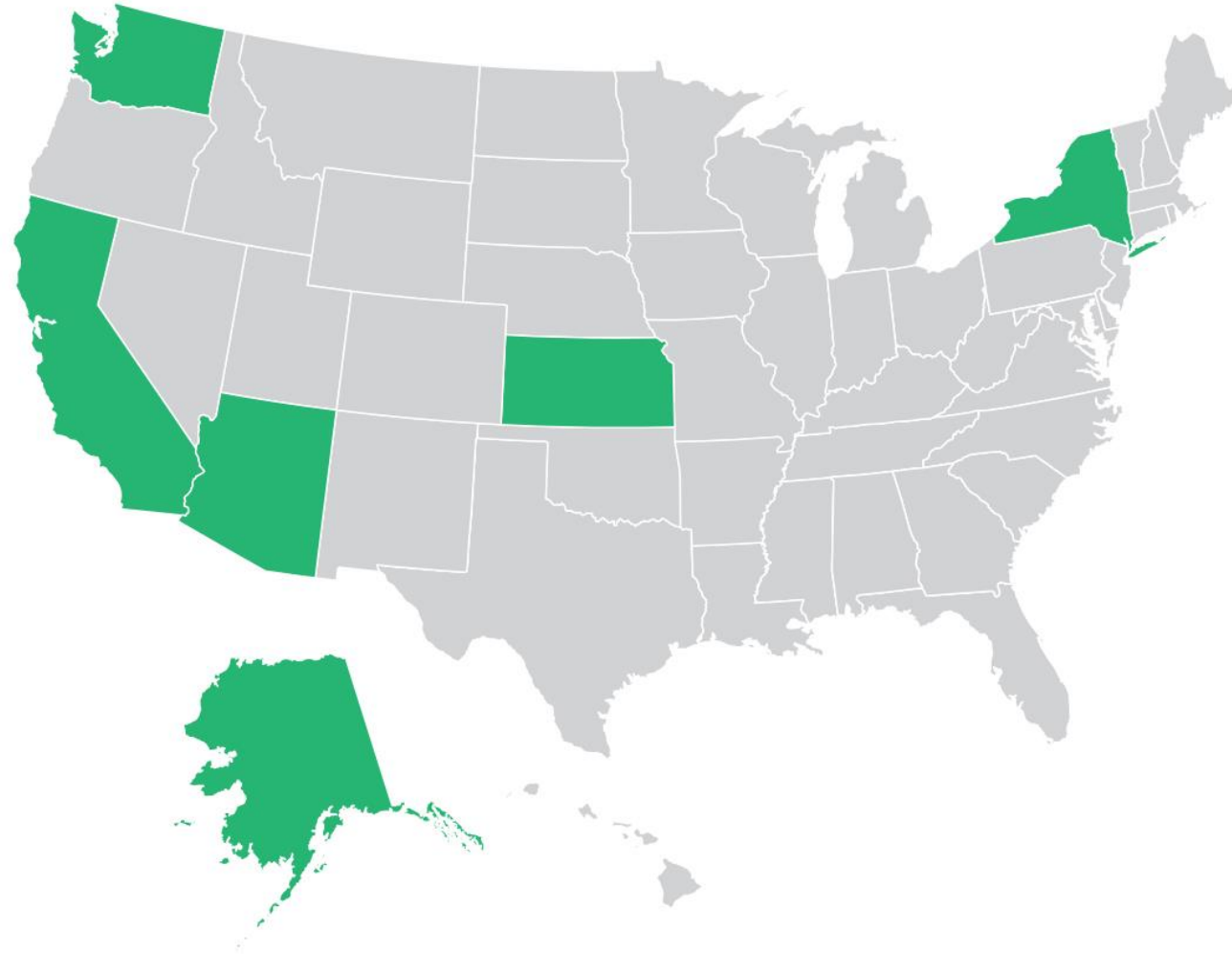
Williams

The No Individual Settlement Approach

Example

- Ct adopts the second approach.

- Settling for less than all insureds "could cause unfairness."

- No individual settlement approach avoids potential bad faith claims by other insured.

Williams

Minority - No Individual Settlement Approach

The No Individual Settlement Approach

Considerations
(Policyholders and Insurers)

- Focus on good faith duties
- Communication

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"He wasn't specific. His last message just said, play it safe – whatever that means."

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The No Individual Settlement Approach

Ethical Considerations
(Policyholders and Insurers)

- Aggregate settlement concerns
- Conflict questions

"He wasn't specific. His last message just said, play it safe – whatever that means."

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All The Jurisdictions With A Rule
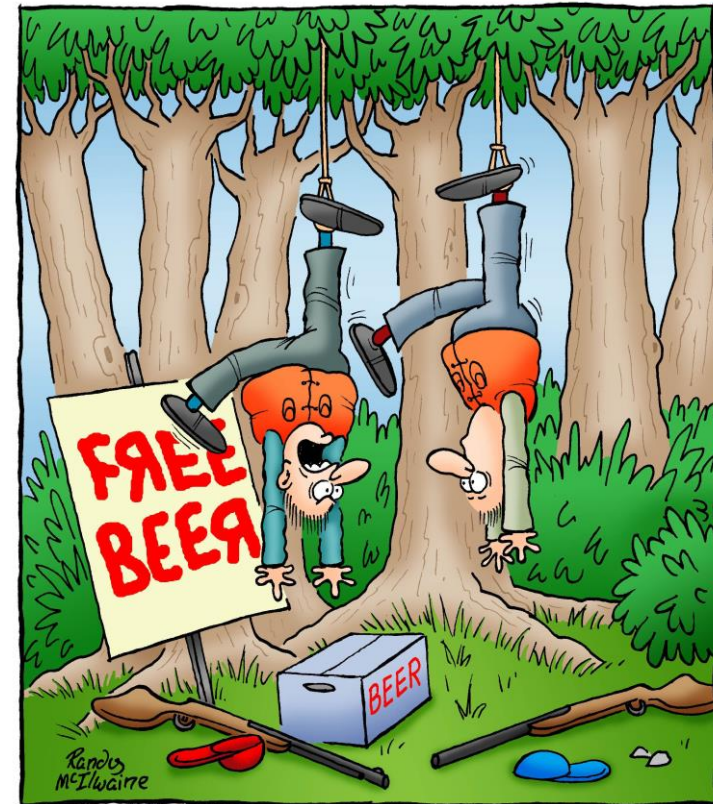
Interpleader And Similar Procedures

REMEMBER RULE #1

- Insurer always first must try to secure releases for all insureds.

- Also true when considering interpleader – in all jurisdictions but one . . . .

Interpleader And Similar Procedures

BEWARE OF THE PITFALLS

- Almost never excuses duty to defend.

- Seeking recovery against interpleaded stake creates potential insurer exposure.

- No effect on prior or contemporaneous bad faith.

"Are we getting dumber or are the deer getting smarter?"

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Interpleader And Similar Procedures
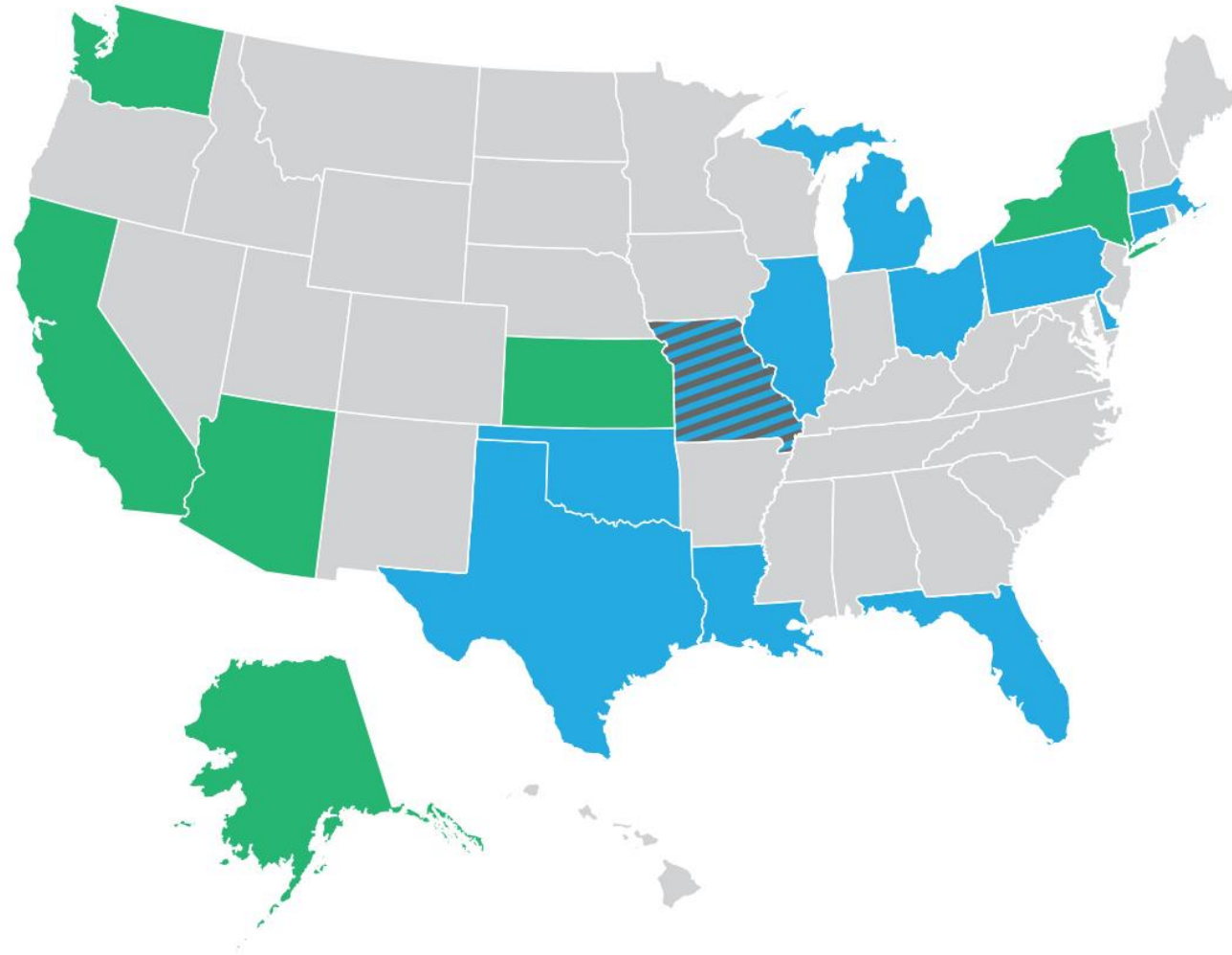
THE ONE EXCEPTION?

Interpleader And Similar Procedures

MISSOURI

- Interpleader statute protects complying insurer from later bad faith.

- Requires ongoing defense.

- Statute does not require initial attempt to settle on behalf of all insureds.

Rev. Mo. Stat. 507.060

Missouri's Interpleader Statute Addressed The Issue

Public Policies And Recommendations

- Simply no uniform public policy

- Treatise: "it is difficult to articulate any neutral principle for determining which of its two insureds the insurer should favor in settling the third party's claim."

" ' DAMNED IF YOU DO, DAMNED IF YOU DON'T,' ... TALK ABOUT 'WIN, WIN'. "

CartoonStock.com

Public Policies And Recommendations

- Policy FOR Individual Settlement: protects other insureds through credits, offsets, etc.

- Response: those protections relate to indemnity. The exposed insured also loses a defense.

"'DAMNED IF YOU DO, DAMNED IF YOU DON'T'... TALK ABOUT 'WIN, WIN'."

Public Policies And Recommendations

- Policy FOR Individual Settlement: fosters more settlements.

- Response: discourages settlement if one insured is liquid and exposure for all insureds is far in excess of limits.

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CartoonStock.com

Public Policies And Recommendations

- Policy FOR Individual Settlement: affords insurers flexibility to address case specific circumstances.

- Response: forces insurers to make decisions in the present the reasonableness of which will be addressed later, possibly years later, in a bad faith setting.

"'DAMNED IF YOU DO, DAMNED IF YOU DON'T,'... TALK ABOUT 'WIN, WIN'."

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Public Policies And Recommendations

- Policy FOR the No Individual Settlement: clear rule that protects all insureds.

- Response: denies insurer ability to accept manifestly reasonable settlement offer for less than all insureds.

"DAMNED IF YOU DO, DAMNED IF YOU DON'T, ... TALK ABOUT 'WIN, WIN'."

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Public Policies And Recommendations

- One Problem: cases presenting the multiple insured question are very fact specific.

- Second Problem: many public policy analyses amount to generalizations (e.g., ". . . is more likely to encourage settlement").

" 'DAMNED IF YOU DO, DAMNED IF YOU DON'T', ... TALK ABOUT 'WIN, WIN'. "

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Public Policies And Recommendations

Policyholders

- Maintain complete policy information
- Tender promptly to all insurers
- Know coverages and limits
- Know who is insured under the policies
- Participate in the defense

Public Policies And Recommendations

Policyholders

- Retain personal counsel
- Over-communicate with insurers
- Coordinate to leverage policy limits
- Perfect bad faith claim where appropriate
- Consider insured's options

Public Policies And Recommendations

Insurers and Coverage Counsel

- Know the rule in the relevant jurisdiction

- Remember Rule #1 – Always try to secure a global settlement

- Investigate promptly

- Get early exposure assessments

- Consider heightened engagements with insureds

Public Policies And Recommendations

Insurers and Coverage Counsel

- Where there is no rule – consider ongoing defense with interpleader.

- Where the jurisdiction has a rule: Don't be distinguished. CHECK THE CASES CLOSELY.

- Do not be fooled by multiple *claimant* authorities. The policy concerns are very different.

Questions – Please Ask Us

"I'm not technically a quote-unquote lawyer, but I do own a paper shredder and have visited several prisons."

Questions – Please Ask Us

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