

## **ACC POP-UP WEBINAR**

### **HYPOTHETICALS**

**William McVisk, Tressler LLP  
Marion B. Adler, Adler Law Practice, LLC  
Seth D. Lamden, BlankRome**

#### **Issue that Arise from Eroding Limits Policies**

- Scenario 1 –
  - Insured has limits of \$2 million, but limits are eroded by defense costs, no excess coverage
  - Plaintiff makes settlement demand of policy limits as of date of demand
  - Defense counsel retained by insurer. No reservation of rights.
  - Case is in early stages of discovery, and initial analysis from defense counsel is that case is defensible. However, damages may exceed \$2 million.
  - What can insurer do to protect itself from bad faith?
  - What can insured do to avoid being responsible for an excess judgment?
  
- Scenario 2 –
  - Policy with eroding limits covers several insureds, with diverse interests (e.g., named insured and multiple additional insureds)
  - Due to conflicts among insureds and RORs, named insured is represented by panel counsel for insurer, but other insureds each have their own independent counsel.
  - Difference of opinion among insureds as to whether case should be settled. Additional insureds want case settled within named insured's policy limits for all insureds, or at least for additional insureds. Named insured does not believe it was negligent, and wants to defend. Plaintiff has expressed willingness to settle with the additional insureds only for the policy limits, without releasing its claims against the named insured
  - Damages exceed policy limits.
  
  - What are the insurer's duties in this situation? Does it have a duty to accept the policy-limits settlement on behalf of the additional insureds even though it would wipe out the funds available for the named insured's defense? Or, does it have a duty to preserve the limits for the named insured's defense even if it means passing up the opportunity to settle the claims against the additional insured?
  
  - What recourse does the named insured have to prevent the insurer from settling out the claims against the additional insureds and terminating payment of the named insured's defense? Alternately, what recourse do the additional insureds have to force the insurer to settle their claims even if it leaves the named insured with an unfunded defense?

- Scenario 3 –
  - Drug Company has \$30 million D&O policy with eroding limits.
  - Drug Company has been sued by thousands of plaintiffs for products liability claims arising out of false representations concerning one of its most profitable drugs, which company allegedly knew about but misrepresented research to FDA
  - Shareholders of Drug Company have brought derivative suit against the Drug Company, senior management of the Drug Company, and all members of the Board of Directors, individually.
  - Evidence indicates that some of the management team knew about the fraud in reporting the test results, and several senior managers have been indicted for defrauding investors.
  - Most of the outside directors were unaware of the fraud and did not commit intentional acts. However, the directors sit for staggered terms; the potential for culpability among the outside directors varies depending upon whether their term overlapped
  - Will the insurer be liable for the defense costs incurred by:
    - Senior management that was indicted?
    - Drug Company
    - Director's defense costs?
  - How should insurer determine whether to use its limits to settle claims (if any are covered) or use funds to defend individual directors and managers?
  - What can the outside directors do to maximize the policy limits available for their defense.