Federation of Defense and Corporate Counsel

Insurance Industry Institute (I-3)
November 5–7, 2025
New York, NY
Rethinking Strategies When the Disagreement Is Between Insurers

Presenters:

William J. Kobokovich, Jr., Vice President & Associate Group General Counsel, Claim Legal, Extra Contractual, The Travelers Companies, Inc.

Evan Stephenson, Partner, Spencer Fane LLP.

Sharon D. Stuart, Partner, Christian & Small LLP; President and Claims Counsel, Attorneys Insurance Mutual of the South, Inc.

Any company that frequently litigates knows not to sacrifice its larger interests for the sake of one case. Too often, however, insurance companies lose sight of this principle and not only file public lawsuits against other insurers but also take positions capable of harming the entire industry. A legal rule harmful to the industry has a greater chance of being adopted in some venues when an insurance company advocates for it. Negative rulings in public lawsuits may subsequently influence other jurisdictions. In addition to generating bad law, the spectacle of insurance companies accusing their peers of misinterpreting standard policy language, bad faith, fraud, and other blameworthy conduct lowers the entire industry's reputation in the eyes of the public. It also tempts policyholders who might not otherwise bring an extra-contractual suit to do so. This paper shares some cautionary tales of insurers who single-mindedly pursued a win against another insurer in a public lawsuit and, in so doing, harmed the industry broadly. This paper then explores alternatives to public lawsuits that can provide insurers the same or better outcomes at a lower cost, without risking these larger interests.

The Problem

Insurer lawsuits against other insurers typically arise from disagreements about who should cover a judgment exceeding an underlying carrier's limit of liability insurance, or about which of the insurers should cover an aspect of a loss.

Some rulings harmful to the insurance industry have resulted when excess and primary liability insurers disagree over who must cover a judgment exceeding the primary insurer's limit of liability insurance. Such a judgment is known as an "excess judgment." In these excess-judgment cases, the excess insurer normally has paid the excess portion of the judgment and is chasing the primary insurer to recover the amounts above the primary insurer's policy limit. The excess carrier in such cases advances a theory that the primary insurer failed to settle the case within its limit of liability insurance. In effect, in such cases, the excess insurer occupies the same position as a policyholder alleging a bad faith failure to settle within the primary policy's limit of liability insurance. Although many examples of such disputes generating unfavorable

outcomes could be cited, one of the clearest occurred in 2014 in the Missouri Supreme Court's decision in *Scottsdale Insurance Co. v. Addison Insurance Co.*, 448 S.W.3d 818 (Mo. 2014). Until *Scottsdale*, the Missouri Court of Appeals had repeatedly held for decades that a liability insurer cannot be liable for an excess judgment unless the policyholder demanded the insurer settle. In three decisions spanning two decades, the Court of Appeals had so ruled. *See Bonner v. Automobile Club Inter–Insurance Exchange*, 899 S.W.2d 925, 928 (Mo. App. 1995) (stating that a demand for settlement by the insured is an essential element of a bad faith refusal to settle claim); *State Farm Fire & Cas. Co. v. Metcalf*, 861 S.W.2d 751, 756 (Mo. App. 1993); *Dyer v. Gen. Am. Life Ins. Co.*, 541 S.W.2d 702, 704 (Mo. App. 1976).

That all changed in *Scottsdale*. There, an excess insurer that had settled a case for an amount above the primary liability insurer's policy limit, along with the insured, sued the primary insurer to recover the excess under a theory of bad faith refusal to settle. 448 S.W.3d at 821. The excess insurer had failed to timely respond to the primary carrier's motion for summary judgment, causing the trial court to take the motion's facts as true and to enter judgment as a matter of law based solely on the motion's facial sufficiency. *Id.* at 821–25. Because of the lack of a timely response, *Scottsdale* focused its review on whether the motion properly negated the basic elements of the excess insurer's assigned claim for bad faith refusal to settle. *Id.* at 826–29. Along the way, the primary carrier asked the Missouri Supreme Court to adopt and reaffirm the decades-old rule from the Court of Appeals that the elements of the claim included proof the insurer demanded settlement. *Id.* at 827 n.5. It was not necessary to bring up this issue at all, because a demand had been made. *Id.*

Nevertheless, the primary carrier raised the issue and asked the Missouri Supreme Court to address it. As a result, *Scottsdale* disapproved of the decades of case law, which had been beneficial to insurers defending failure-to-settle claims, requiring the insured to demand a settlement. It said: "This Court has never required the insured to make a demand for settlement and declines [the primary liability insurer's] invitation to do so." *Id.* After *Scottsdale*, it is now easier in Missouri to sue liability insurers for bad faith failure to settle. An entire element that had been taken for granted for decades disappeared. And the salutary benefit of entitling liability insurers to the notice and chance to settle that had long been provided by the demand requirement was lost. *Scottsdale* is now one of the most cited cases in Missouri for determining the elements of a claim for bad faith refusal to settle. It has also been widely cited outside Missouri.

The problem of insurer-versus-insurer litigation generating unfavorable rulings arises in other settings, beyond litigation over excess judgments. It occurs when insurers bring subrogation litigation following another insurer's denial of coverage. In such disputes, the plaintiff-insurer stands in the shoes of the insured as its subrogee and makes coverage arguments based on the coverage-denying insurer's policy language. It is not uncommon for such subrogating insurers to make every available argument to win. These arguments sometimes include potentially far-reaching arguments that seek to have common policy language held ambiguous or a judgment imposing breach-estoppel and forfeiture of coverage defenses.

The case of *National American Insurance Co. v. Artisan & Truckers Casualty Co.*, 796 F.3d 717 (7th Cir. 2015), illustrates how this can happen. There, the Seventh Circuit began

its opinion ominously: "This case provides a warning for insurance companies who refuse to defend their insureds." *Id.* at 719. The liability insurer of another entity involved in a car accident had defended and chose to sue in federal court the liability insurer that had denied a duty to defend. The court affirmed a judgment against a liability insurer that had denied a defense to its insured based on an endorsement, interpreting the endorsement more broadly than the insurer had. But the Seventh Circuit went further by estopping the liability insurer from asserting any of its coverage defenses that may have otherwise existed, because it did not defend. *Id.* at 721–26. This was accomplished not by a policyholder attorney but by another liability insurer and its own lawyers. That opinion has been cited over 200 times, often to the disadvantage of other insurers who questioned their duty to defend.

Insurers suing other insurers in public lawsuits for coverage have also frequently urged courts to find policy language ambiguous, often with success. Each time this happens, the range of disputes where insurers can win summary judgment narrows or grows more elusive. There are many examples of insurers urging courts to take an expansive view of ambiguity and of courts agreeing to do so. *See, e.g.*, *Great W. Cas. Co. v. Nat'l Cas. Co.*, 807 F.3d 952, 958–61 (8th Cir. 2015). In *Great West*, both of the insurers argued the other's policy was ambiguous. *Id.* One of them succeeded. *See id.* The fact that both of them claimed the other's policy was ambiguous to win the case encouraged the court to see the various provisions that way. As another example, the Southern District of New York found the word "vehicle" in a policy to be ambiguous when urged to do so by one of the insurer-litigants. *GEICO Marine Ins. Co. v. Great N. Ins. Co.*, No. 16CV1788-GHW-RLE, 2017 WL 4286394, at *3–7 (S.D.N.Y. Sept. 11, 2017). In another case, an insurer succeeded in convincing a court to find an insurer's self-insured retention ambiguous and to apply California's version of the objective-reasonable-expectations doctrine. *Clarendon Am. Ins. Co. v. N. Am. Capacity Ins. Co.*, 112 Cal. Rptr. 3d 339, 352 (Cal. Ct. App. 2010).

One insurer in a coverage dispute even argued, albeit unsuccessfully, that the opponent-insurer's pertinent policy provision was not sufficiently conspicuous. *See Mesa Underwriters Specialty Ins. Co. v. First Mercury Ins. Co.*, 411 F. Supp. 3d 607, 615 (N.D. Cal. 2019).

Potential Solutions

Insurers cannot readily avoid the risk of unfavorable public rulings when policyholders choose to sue them in public courts. But they can and should do so when they choose to litigate their disagreements among themselves. In insurer-versus-insurer cases, disagreeing insurers have an incentive to resolve their dispute in a manner that minimizes the chance of a wide-ranging public ruling that harms the industry and even has the potential to reduce costs, speed up dispute resolution, and promote more accurate decision-making.

Insurers disputing responsibility for a loss should consider alternatives to lawsuits in the public courts. Justice Corcoran of the Arizona Supreme Court has described the advantages of insurers resolving their disagreements among themselves through arbitration or other alternatives to lawsuits. He did so in a concurrence he wrote in a decision permitting excess carriers to be subrogated to their insureds' claims against primary carriers for bad faith failure to settle. Justice Corcoran cited Lord Bramwell's reaction to a case in which a fishmonger and a fish carrier asked his court to decide whether their agreement was "just and reasonable": "For here is a contract

made by a fishmonger and a carrier of fish who know their business, and whether it is just and reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business." *Hartford Acc. & Indem. Co. v. Aetna Cas. & Sur. Co.*, 792 P.2d 749, 757 (Ariz. 1990) (Corcoran, J., concurring) (quoting *Manchester, Sheffield & Lincolnshire Ry. Co. v. Brown*, 8 App. Cas. 703, 716 (H.L.1883)). In the same way, Justice Cororan's concurrence noted, public courts and jury trials are ill-equipped to decide specialized insurance issues:

> This area of dispute is peculiarly factual in nature and is most suitable for mediation, arbitration, or other methods of alternative dispute resolution between contending insurance companies. This is an area of law where a trier of fact familiar with applicable law and the businesses of primary insurers and excess insurers could resolve the dispute in a fraction of the time and expense involved in exhaustive discovery and trial to a jury.

Id. His concurrence highlighted the inadvisable nature of tasking juries with deciding such questions, noting as follows: "I do foresee that jurors asked to decide these issues between battling insurance companies will be selected, not because of their knowledge or experience in resolving issues regarding automobile accidents, bad faith conduct by insurance companies, etc., but that they will be 'selected' (or be the result of the selection process) because of their lack of knowledge and experience." *Id.*

Justice Corcoran's observations contain real wisdom. Insurers can avoid industry-harming public rulings by resolving their disputes without resorting to lawsuits. And they can also likely do so more cost-efficiently and with more accurate results if they employ other means of dispute resolution.

One option for doing so is binding arbitration by mutual agreement. A mutually-agreed binding arbitration offers many advantages to disagreeing insurers over a public lawsuit. These include the following:

- Arbitrators with Industry-Specific Expertise. The participants can choose the arbitrator. In most public courts, the decision-makers are judges or jurors, who usually have little or no specialized knowledge of insurance matters. Lawyers frequently strike jurors if they disclose such specialized knowledge during jury selection. This makes jurors highly likely to have no relevant expertise. The vast majority of judges, also, do not have insurance backgrounds. A mutually-agreed-upon arbitration offers disagreeing insurers the chance to select an arbitrator or panel of arbitrators with insurance expertise who are therefore more likely to decide the dispute efficiently and with less need for discovery or lawyering. Moreover, an expert arbitrator may be less likely than some decision-makers in public courts to make errors necessitating review of the outcome, further prolonging the matter and increasing its cost.

- Confidentiality. The participants can choose to keep their proceeding private and confidential. This prevents any potential negative ruling from affecting the industry overall or the parties in other matters. It also offers the participants

greater freedom to pursue the matter before them, without worrying about balancing the cost of public optics against their matter-specific goals.

Confidentiality also makes it easier for the participants to keep sensitive business information and trade secrets out of circulation.

- Speed and Timing. Participants have greater control over the timing and pace of adjudicating an arbitration than they do over litigation in a public court. Participants can speed up the process and avoid waiting in the queue of a public court with scarce time and judicial resources that decides criminal and other civil matters that may be given priority. The participants can also ensure that an arbitration hearing schedules a large enough number of trial days to ensure the matter is appropriately adjudicated. Some courts simply will not give insurance disputes sufficient trial days, due to their own backlogs and overcrowded dockets. In some instances, the insurers may want to avoid the opposite problem- a rocket docket or denial of a stay that is truly needed because of a pending appellate proceeding that is likely to decide a controlling issue of law. Some courts adopt a process that proceeds too quickly and rushes the parties' preparation and case development. An agreed-to arbitration gives the parties greater control over scheduling and timing to avoid any such problems.

- Efficiency. Parties have control over the procedural complexity of their proceeding and the scope of discovery. At their option, they can reduce the overall litigation costs by agreeing to a streamlined process with less discovery and motions practice than is required under ordinary rules of civil procedure.

- Certainty of Hearing Dates. Participants can count on their arbitration hearing going forward on the scheduled date. By contrast, public courts frequently triple, quadruple, or even more heavily book their trial dates, making it inevitable that in many cases trial dates will be rescheduled, sometimes repeatedly, which creates delay and increases expense.

- Finality. Arbitrations reduce overall costs by restricting the avenues for keeping the dispute going after its initial adjudication, unlike public courts, which permit years of appeals and potential further proceedings.

To be sure, there can be downsides to arbitrations as well. For instance, the arbitrator must be paid. And some arbitrators charge high hourly rates, particularly those with a high degree of specialization. Also, a confidential arbitration generally will not include any discovery from third parties not entitled to know about the existence and content of the arbitration. For cases that require third-party discovery, a non-confidential arbitration may be an option. But if the arbitrator lacks the power to compel discovery from third parties, and the case requires third-party discovery, an arbitration may not be the ideal option.

Mediation can be another especially helpful solution in insurer-versus-insurer disputes. In particular, insurers may wish to consider binding mediation, otherwise known as "med-arb" or

mediation-arbitration. In this process, the parties first attend an ordinary mediation and attempt to resolve their dispute there. If they cannot resolve the dispute, however, the mediator has power from a prior agreement of the parties to render a decision on any issues that remain unresolved, similar to an arbitrator. This hybrid approach must be agreed to in advance by the parties. This type of dispute resolution has many of the advantages of arbitration and lends itself well to disputes that focus primarily on the amount of damages to be awarded, as opposed to disputes over basic facts determining liability. The "med-arb" approach is more collaborative and potentially even more cost-efficient than arbitration. It also resolves more quickly, given that it generally does not involve discovery or motions practice. It is ideal for disputes that are less adversarial than most.

Conclusion

Insurers that pursue public lawsuits against one another often risk harming the broader industry by creating unfavorable legal precedents, exposing sensitive business practices, and casting the industry in a negative light. High-profile disputes can lead to legal rules that undermine long-standing protections for insurers and encourage policyholders to bring more aggressive claims. Such litigation has resulted in negative rulings that ripple across jurisdictions, narrowing defenses and increasing liabilities for all insurers. To safeguard industry interests, insurers should avoid public court battles with each other. Instead, they should seek out and explore alternatives to public litigation that offer confidentiality, expert decision-makers, greater efficiency, and more predictable outcomes.