POLSINELLI

Assignment of Insureds' Rights Against Liability Insurers

December 8, 2015

Common Circumstances Where Assignments of Insureds' Rights Occur

- A liability claimant alleges a cause of action against an insured under a liability policy; and

- There is a dispute – or a potential dispute – between the liability insurer and the insured regarding how the claim was handled under a liability policy.

Common Circumstances Where Assignments of Insureds' Rights Occur

- Disputes and Potential Disputes Between Liability Insurer and Insured
  - The insured wants to settle and the insurer does not.
  - A judgment has been entered exceeding the policy limits.
  - Damages under a pending claim clearly exceed the policy limits.
  - The insurer issues a defense under a reservation of rights.

Elements of an Agreement Assigning an Insured's Rights

- An assignment.

  (i) by an insured under a liability policy;

  (ii) to a claimant under a liability policy;

  (iii) of any cause of action possessed by the liability insured;

  (iv) against the liability insurer.

Elements of an Agreement Assigning an Insured's Rights

- An assignment.

  (i) by an insured under a liability policy;

  (ii) to a claimant under a liability policy;

  (iii) of any cause of action possessed by the liability insured;

  (iv) against the liability insurer.

- In exchange for

  (i) the liability claimant's covenant not to execute on a judgment against insured; and/or

  (ii) the liability claimant's covenant to execute only on the liability insurer.

Common Claims Assigned

- Claim for Wrongful Refusal to Settle, a/k/a
  - "Bad Faith Refusal to Settle"; or
  - "Negligent Refusal to Settle"
- Breach of Duty to Indemnify
- Breach of Duty to Defend

Procedure: When the Assignment Occurs *After* Trial of Liability Claim

- Amount of damages on liability claim is determined at trial

- Liability claimant files suit against liability insurer

Procedure: When the Assignment Occurs *Before* Trial of Liability Claim

- Amount of damages is determined by
  - Evidentiary hearing
  - "Arms-length agreement" between liability claimant and insured
- Claimant files suit against insurer

Procedure: When the Assignment Occurs Before Trial of Liability Claim

- Under these circumstances, courts have sought to protect liability insurers from collusion by the claimant and the insured.

- Liability insurers may challenge the legitimacy of the assignment in the subsequent action filed by the liability claimant against the insurer.

Procedure: When the Assignment Occurs Before Trial of Liability Claim

- The majority rule:
  - The settlement is presumptive evidence of the liability of the insured.
  - The entire burden of proof is on the liability insurer to show that the assignment was not reasonable.

Isaacson v. California Ins. Guarantee, Assn., 750 P.2d 297, 308 (Cal. 1988); *see also, Brinkman v. Western Automobile Indemnity Association*, 218 S.W. 944, 945-46 (Mo. App. 1920).

Procedure: When the Assignment Occurs Before Trial of Liability Claim

[I]f an insurer wrongfully fails to provide coverage or a defense, and the insured then settles the claim, the insured is given the benefit of an evidentiary presumption. In a later action against the insurer for reimbursement based on a breach of its contractual duty to defend the action, a reasonable settlement made by the insured to terminate the underlying claim against him may be used as presumptive evidence of the insured's liability on the underlying claim, and the amount of such liability.

Isaacson v. California Ins. Guarantee, Assn., 750 P.2d 297, 308 (Cal. 1988)

Procedure: When the Assignment Occurs Before Trial of Liability Claim

- The minority rule:
  - The initial burden is on the liability insured to make a *prima facie* case by producing evidence relating to
    - the good faith of the parties to the agreement; and
    - the reasonableness of the amount of the damages/settlement.
  - The ultimate burden of proving that the settlement was made in bad faith or that it was unreasonable would then rest with the liability insurer.

Procedure: When the Assignment Occurs Before Trial of Liability Claim

"This rule reasonably accommodates and compromises the competing interests of the parties and considerations of public policy. It will discourage collusive or overreaching impositions upon insurance carriers and, at the same time, will be conducive toward encouraging settlement and protecting an insured in its efforts amicably to resolve a claim against it after having been abandoned by its carrier."

Griggs v. Bertram, 443 A.2d 163, 174 (N.J. 1982); *see also, Glenn v. Fleming,* 799 P.2d 79, 92-93 (Kan. 1990).

Authority for Assignments of Insureds' Rights Against Liability Insurers

- Arizona: *Damron v. Sledge*, 460 P.2d 997, 999 (Ariz. 1969)
- California: *Isaacson v. California Ins. Guar., Assn.,* 750 P.2d 297, 308 (Cal. 1988); and *Kershaw v. Maryland Casualty Co*., 342 P.2d 72, 77 (Cal. App. 1959)
- Colorado: *Olmstead v. Allstate Ins. Co.*, 320 F. Supp. 1076, 1078 (D.C. Colo. 1971) (applying Colorado law)
- Illinois: *Scroggins v Allstate Ins. Co.*, 393 N.E. 2d 718, 720 (Ill.App. 1979)
- Kansas: *Glenn v. Fleming*, 247 Kan. 296, 799 P.2d 79 (Kan. 1990)
- Missouri: §537.065 R.S. Mo.; and *Truck Ins. Exchange v. Prairie Framing, LLC*, 162 S.W.3d 64, 94 (Mo.App.W.D. 2005)
- Texas: *Smith v Transit Casualty Co*., 281 F. Supp. 661, 668 (D.C. Tex. 1968) (applying Texas law)

Authority for Assignments of Insureds' Rights Against Liability Insurers

- Under Tennessee law, a cause of action against an insurer for alleged bad faith or negligence in refusing to settle an insurance claim within the policy limit is not assignable.

  Electric Ins. Co. v. Nationwide Mut. Ins. Co., 384 F. Supp. 2d 1190 (W.D. Tenn. 2005); *citing, Dillingham v. Tri-State Ins. Co*., 381 S.W.2d 914, 917-19 (Tenn. 1964)

Considerations for Defense Counsel

If you represent an insured under a duty to defend and the claimant's counsel seeks an assignment, the tripartite relationship presents possible conflict.

- The liability insured will have an incentive to assign the claims:
  - the agreement will resolve the claims against the insured
  - with a guarantee of no out-of-pocket costs to the insured

- The liability insurer has no such incentive, especially:
  - where there is a strong defense to the liability claim
  - because it raises the possibility of a contract suit filed by a motivated assignee

Missouri: Retained Defense Counsel's Duties of Loyalty

- Missouri Supreme Court: An attorney retained by an insurance company may have two clients, the insured and the insurer. *Helm v. Inter-Insurance Exchange*, 192 S.W.2d 417, 421 (Mo. 1946).

- Missouri Bar: An informal advisory opinion in Missouri suggests the possibility that the retained counsel may have two clients. *See* Missouri Bar Association Informal Advisory Opinion Number: 940006. "This dual representation can result in irreconcilable conflicts of interest requiring withdrawal from representation of both." *Id.*

Kansas: Retained Defense Counsel's Duties of Loyalty

- "Pursuant to established insurance law principles, insurance companies often hire independent counsel to represent an insured while reserving the right to later contest coverage. *See, Patrons Mut. Ins. Ass'n v. Harmon*, 240 Kan. 707, 712, 732 P.2d 741, 745 (1987). In such circumstances, retained counsel owe their duty of loyalty to the insured, not the insurance carrier."

  U.S. v. Daniels, 163 F. Supp. 2d 1288 (D. Kan. 2001)

Best Practice

- Defense counsel receives the informed consent of the liability insurer to advise the liability insured.