

# Your Policy Or Mine? Navigating the Shoals of Concurrent Insurance

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Let's say you prudently manage your company's risks: You buy insurance. Because you are concerned that you may become liable due to the negligence of your suppliers and contractors, you require them to add you to their policies as an additional insured and you follow up to make sure they met your requirements. You monitor your workplace and work sites for safety and other concerns, such as discrimination and sexual harassment.

Unfortunately, accidents happen, and regardless of how careful you are, your company very well may be sued. If so, you likely will rely on your insurers to defend those claims and provide indemnification for a settlement or judgment. Can you rest easily knowing that you have minimized your risk and established a coordinated insurance coverage program?

Obtaining the right coverage and additional-insured status is the first step. Facing the challenge of coordinating that coverage is the second. When you have multiple policies to choose from (known as concurrent coverage) policyholders must be aware of their options and choose carefully among them in order to avoid surprises when there is an opportunity to settle a claim or it is time to pay a judgment.

## Problem One: Who Is Responsible for Providing a Defense?

BuildCo is a commercial construction company that has been hired to build an office tower in a major metropolitan market. BuildCo has a primary general liability insurance policy with \$2 million in liability limits. BuildCo's primary policy also requires the insurer to defend any lawsuit brought against BuildCo if it is sued for a potentially covered claim. This "duty to defend" continues until the policy's limits are exhausted by the payment of settlements or judgments. BuildCo also maintains umbrella coverage with \$5 million in liability limits. BuildCo's premiums for this insurance are substantial, and it wants to avoid making claims because it is worried that its coverage either will not be renewed or its premiums will increase substantially.

BuildCo requires all subcontractors to name the company as an additional insured on their general liability insurance policies. One of these subcontractors is GlassCo, which is responsible for securing the curtain wall. GlassCo adds BuildCo as an additional insured on its general liability insurance policies, which include a primary policy with \$1 million in limits of liability, as well as a supplemental

duty to defend and an umbrella policy with \$5 million in limits of liability. A compressor that was being used by GlassCo falls on an employee of one of GlassCo's subcontractors, leaving him permanently disabled and unable to work. The injured employee sues BuildCo, alleging it failed to supervise GlassCo adequately and to make sure that the subcontractor's equipment was properly secured.

Which insurer is responsible for defending BuildCo? Unfortunately, the answer varies from state to state.

In Illinois and other states that have a "target-tender" or "selective-tender" rule, BuildCo can tender the defense solely to one of the available primary insurers. The effect of a targeted tender is to deactivate the insurance policy that is not selected, thus insulating it from equitable contribution claims for the sharing of defense (and indemnity) costs by the other "targeted" primary insurer. Because BuildCo wants to avoid making a claim under its policy, it can tender the defense of the bodily injury claim under GlassCo's primary insurance policy as an additional insured. If BuildCo wants to insulate its primary insurer from a contribution claim by GlassCo's insurer, it might consider making an express "deselection" of its insurer to deactivate coverage for the claim.

In some states it is necessary to try to reconcile the so-called "other insurance" clauses contained in the respective primary insurance policies. Quite often, both of these clauses will state that the policy is excess to all other available insurance, in which case the "other insurance" provisions typically cancel each other out. Sometimes, however, the "other insurance" clauses contain a formula for divvying up defense (and indemnity) obligations, often by some form of allocation based on the limits of the respective policies. In our example, BuildCo's primary insurer might be required to contribute \$2 for every \$1 contributed by GlassCo's primary insurance policy.

In other states, the defense will be divided between concurrent primary insurance policies without looking to "other insurance" clauses. The obligation to provide a defense may be apportioned on a simple equal-shares basis or may be allocated according to a formula based on the relative limits of coverage.

If BuildCo is in a state without a target-tender rule, it may have disputes with the insurers over the control and coordination of the defense. Remember: in this example, both primary insurers have a duty to provide (not just pay for) a defense. One insurer may acknowledge coverage and the other reserve its rights. Although insurers routinely coordinate with each other when it comes to the joint control of a defense, sometimes they do not. Therefore, it almost always is in a policyholder's best interest to maintain close supervision over its defense and to address such disputes as early as possible, especially if there are significant differences in policy terms. For example, one policy may require the insurer to defend while the other merely requires the insurer to reimburse the insured for defense costs.

## **Problem Two: Who Pays for Damages?**

Continuing BuildCo's story, on the eve of trial the plaintiff offers to settle the bodily injury lawsuit for \$3 million. BuildCo is eager to accept this settlement, because it had estimated that the lawsuit could not settle for less than \$4 million. Assume that we are in a target-tender state and that BuildCo selected GlassCo's primary insurer to provide a defense. GlassCo's primary insurer, with liability limits of \$1 million, already has spent more than \$700,000 for the defense of the lawsuit and has reserved its policy limits to provide indemnification. Because BuildCo has deactivated its primary insurer for this claim, GlassCo's primary insurer has no right to recover from BuildCo's primary insurer any portion of the amounts it has spent to defend BuildCo, nor can it force BuildCo's primary

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insurer to help fund the settlement.

How is the balance of the settlement going to be paid? The answer in Illinois has changed in the aftermath of the state Supreme Court's ruling in *Kajima Construction Services, Inc. v. St. Paul Fire and Marine Insurance Company*. Remember that in order to preserve its own coverage and reduce the risk of non-renewal or a premium increase, BuildCo expressly deselected its own insurer for this claim consistent with the targeted tender rule.

Applying the principle of "horizontal exhaustion" (which developed in the very different context of the allocation of insurance coverage for injuries continuing over an extended period of time), the Illinois Supreme Court held that although a policyholder can select a single primary insurer to respond to a claim when there is concurrent primary coverage, an insured is not permitted to collect from any excess insurer until all primary coverage, including the coverage issued by the deselected insurer, has been exhausted.

What does this mean for BuildCo?

Despite its target tender, to the extent that indemnity costs exceed the limits of the targeted primary insurer, the deselected primary insurer must cover the loss until its limits are exhausted. Only after the exhaustion of all available primary insurance (even primary insurance that was expressly not available for a particular claim) can excess policies be triggered. Thus, in our example, once GlassCo's primary policy is exhausted by payment of its \$1 million in limits, BuildCo must re-select its primary insurer to provide indemnification for the balance of the settlement up to the limit of that policy. Even though GlassCo has excess insurance that is triggered once its primary insurance is exhausted, BuildCo must first turn to its deselected primary insurer and exhaust that policy. BuildCo targeted GlassCo's primary insurer and deselected its primary insurer for practical business reasons: it wanted to conserve its coverage, maintain its relationship with its insurer and avoid the risk of non-renewal. But now, BuildCo is in the unenviable position of demanding that the primary insurer, which it had informed would not be asked to provide coverage for this claim, participate in a settlement that will exhaust its policy limits.

## Lessons Learned

In the complex area of concurrent insurance, what is a smart policyholder to do? One of the worst times to address these issues is after a primary insurer has been deselected and left out of the loop regarding ongoing litigation. If the policyholder then faces substantially higher liability than was initially anticipated, it will be difficult (if not impossible) to go back to that insurer and request coverage.

The proper strategy in selecting the insurers to respond to a claim depends on your particular situation, the nature and magnitude of your potential liability exposure, and the dynamics of your relationships with your insurers and contracting parties. There are, however, a few principles that are worth keeping in mind:

- Be honest and conservative in your internal assessments of your potential exposure. It does little good to be overly optimistic in assessing your liability risks.
- Selective tender should not mean selective information flow. If you deselect a particular primary insurer, preserve your rights by keeping the deselected insurer informed and up to date about litigation developments.
- Avoid surprises. Subject to appropriate confidentiality protections, invite a deselected insurer

to participate in settlement discussions or at least keep the deselected insurer apprised of settlement discussions.

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