In the intricate landscape of catastrophic trucking cases[1] and the interplay of multiple layers of liability, insurance can resemble a precarious game of Jenga.[2] Each move carries the potential to destabilize the structure, leading to complex legal ramifications for all parties involved. As attorneys navigating this terrain, understanding the dynamics at play becomes paramount to effectively advocating for our clients' interests.

Here, we delve into some of the intricacies of managing high-risk claims within the context of layered liability policies. Specifically, we delve into the nuanced balance required to respond to early, aggressive policy demands while mitigating the risk of bad faith/extra-contractual exposure. We aim to equip practitioners with knowledge and strategies to navigate effectively these challenges adeptly. We offer practical insights and provide actionable tips for minimizing exposure and maximizing outcomes in the face of complex insurance dynamics. This article will help you learn how to better advocate for clients while avoiding certain pitfalls inherent in the Jenga-like structure of policy limit demands and excess insurance layers.

## Insurance 101: Knowing the Basics

It's important to have a basic framework of knowledge of how liability insurance works. Particularly, an understanding of deductibles, SIRs, coverage towers, necessary communication, and reservation of rights letters (ROR's), is all essential for navigating insurance within litigation.

#### The "Primary Policy" with Either a Deductible or SIR

Insurance policies are often purchased in varying amounts and layers. The first "layer" is often a "primary policy" that will contain a "deductible" or "self-insured retention." Deductibles and self-insured retentions (SIRs) function differently within insurance policies. With a deductible, the insurance company typically covers the full amount of a claim, up to the policy limit, and then recoups the deductible from the policyholder after the insurer pays the third party. On the other hand, an SIR represents an upfront amount that the policyholder is responsible for paying before the insurance company assumes any obligation. In the case of a $1,000,000 policy with a $200,000 SIR, the policyholder must first satisfy the $200,000 requirement before the insurance coverage of $1,000,000 becomes effective. This principle is similar to the concept of "exhaustion."

#### Coverage Towers

Following the "primary policy," many companies purchase additional tiers of "excess insurance." Generally, the "first layer excess insurance" comes into play once the limits of the primary liability policy are exhausted. Subsequently, the "second layer excess insurance" activates once the limits of the first layer excess are reached, and so forth. These layers of insurance collectively form what is colloquially termed a "tower" – a structure comprising multiple layers of liability policies aimed at safeguarding the insured. Such "towers" often involve numerous insurance companies assuming varying degrees of risk. Moreover, sometimes more than one insurance company may share a particular layer. For instance, insurance companies A, B, and C might collectively assume the liability of a $1,000,000 to $5,000,000 layer, with A bearing 50 percent of the loss, while B and C each shoulder 25 percent of the loss within that layer. Also often seen is different policy-issuing insurers, operating under common ownership and control, appearing in different tower slots.

Of importance, primary insurers generally have the duty to defend their insured when triggered. When an insurer has the right, but not the duty, to defend the insured, the insurer's decision whether to exercise that right will be based in part on whether the insurer is providing primary or excess coverage. Excess insurers typically do not participate in the defense of insureds, whereas primary insurers usually do. It is important to understand whether a primary insurer's layer pays defense costs – or potentially independent counsel costs – as part of its liability limit or outside that limit. This issue is sometimes referred to as "eroding" or not eroding.

> *Practice Tips:*
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> *When there are multiple levels in the insurance tower, retained counsel defending the insured should ask the insurers for clear guidance as to at what dollar amount each excess policy is triggered to pay. This is something that should be understood by the insurers and insureds before settlement negotiations commence.*

#### Excess Policies vs. Umbrella Policies; Follow Form

When an excess insurance layer deviates in terms and conditions from the primary policy, it is commonly described as an "umbrella policy," often broader in scope. In instances where the umbrella policy extends coverage beyond underlying policies, it potentially can "drop down" to provide coverage. True excess policies generally "follow form," adopting provisions of the primary policy or other underlying policies, with potential, additional exceptions or terms.

#### Timely Notification to Insurers of All Accidents & Claims

Commercial insurance liability policies usually require timely disclosure of all accidents (losses) and claims or potential claims. The procedures for reporting accidents and claims are usually laid out in detail in the policy. Many policies require written notice and forwarding of all relevant documents from the insured. Policies also often contain specific contact information for reporting claims. Depending on the policy language, if the named insured or an additional insured fails to provide prompt notice of an accident or an additional insured fails to report a claim, the insured may forfeit all rights under the policy.

*Practice Tips:*

*The insured should use the contact information provided in the policy when reporting accidents or claims. If there is any uncertainty regarding the amount of the potential loss, report the accident and related claims to all potential insurance companies. Taking a "wait and see" approach can be dangerous and cause coverage problems down the road (pun) if the claim implicates excess coverage layers.*

**Insureds' Duties to Cooperate**

Most insurance policies have what are known as cooperation clauses that require the insured to cooperate with the insurer in the handling and defense of a claim. Requests for the insured's cooperation must be reasonable, a requirement that may be found in the language of the cooperation clause itself. What constitutes unreasonable requests for cooperation by an insurer will usually turn on the specific circumstances of the claim and the request, as does whether an insured was cooperative or not. Insureds are not in positions to instruct insurers in their proper investigations and adjustments of claims, meaning insureds who resist providing requested information can be at risk of breaching their duties to cooperate. That does not mean they are absolutely precluded from pushing back during the investigation phase. Generally, it is best if both insureds and insurers are reasonable and mindful of the potential of having their conduct analyzed later, under the microscope of litigation with lawyers, experts, judges, juries and arbitration panels closely evaluating past conduct.

*Practice Tips:*

*Retained defense counsel (DC) provided by the liability insurer to defend an insured must inform their insured client of all settlement demands and should keep the insured apprised of settlement negotiations. Retained DC (or at least the insured) should keep all insurers in the insurance tower aware of settlement negotiations and any potential settlement. Insurance policies often include voluntary payment exclusions that bar coverage for matters settled without insurer approval. In particular, this can come into play when the primary insurer settles with a "non-execution" agreement, which relieves the insured from any personal exposure from an excess judgment, but leaves other insurers, including possible excess insurers, on the hook.*

**Coverage Position Letters (CPLs) & Reservation of Rights Letters (RORs)**

Within a reasonable time of receiving notice of the loss, insurer(s) should respond to the claim with a written coverage position, commonly referred to in the industry as coverage position letters (CPLs). If an insurer believes that there is no coverage for the claim, it will issue a CPL as a denial letter. If the insurer believes that it may have a duty to defend the policyholder or must take some other affirmative act, the insurance company may issue a reservation of rights (ROR) letter. With an ROR letter, the insurer may agree to defend or take some other affirmative act but reserves the right to deny coverage, if the facts eventually establish that there is no coverage. In some situations, the insured will have personal counsel (sometimes referred to as independent counsel), Such personal counsel is separate from DC deployed by the insurer. Personal counsel should respond in writing, stating if they have disagreement with a denial or ROR letter when appropriate. In some jurisdictions and circumstances, the primary insurer may be obligated to pay fees of the insured's independent/personal counsel.

When an insurer is defending the policyholder under an ROR, the insured still has a duty to cooperate with the insurance company's defense of the claim – the same as in a situation where indemnity coverage was confirmed with no ROR. For the insured, this usually involves providing documents and participating in the litigation process. Even when an insurer is not defending, such as an excess insurer, the insured must cooperate with insurer's reasonable requests for information about the claim. To reiterate, failure to comply with insurer requests could result in no coverage, due to lack of cooperation and even cessation of representation by DC appointed by the insurer.

Generally, when the primary is providing the defense and investigation of the claim/lawsuit against the insured, it is incumbent for it to issue a CPL to the insured sooner than later. CPLs/RORs are not static, they can be updated as more information becomes available to the insurer. Under certain circumstances, in a second-generation lawsuit or arbitration, an excess insurer might be taken to task as to why it never issued a CPL of any kind to the insured, or why it did so well after it first could have. For such an excess insurer, standing on "there was no technical exhumation" to trigger any duty or practice to issue a CPL, such strategy is not guaranteed to work in all cases. A question that an excess insurer could ask itself in real time – in balancing its interests against the interests of the insured, would it be better if that excess insurer were to issue a CPL sooner rather than later? Depending on the facts and other considerations, in the derivative litigation, the optics could be much better if that insurer had sent a CPL once it knew its coverage position.

*Practice Tips:*

*In situations where there is a conflict between the insured and the insurer, it is recommended that the retained DC provided by the liability insurer fully disclose his relationship with the insurer to the insured, and advise the insured of the scope of the*

*defense provided – i.e., affirmative counterclaims or third-party claims may not be within insurer-appointed DC's scope. This disclosure should ideally be memorialized in writing. Retained DC should not offer any coverage opinions. Rather, retained DC should advise the insured it can hire independent "personal" counsel, possibly at its own expense, to advise the insured of the insured's rights vis-à-vis the insurer. These particulars are usually very jurisdictional-driven. Insurers are aware there is no one-size-fits-all magic solution.*

**Understanding the Tripartite Relationship**

The tripartite relationship refers to the unique relationship among an insurer, its insured, and DC retained by the insurer. This relationship is characterized by the insurer's duty to defend the insured. The insurer typically hires DC, who represents the interests of both the insurer and the insured. *Simonyan v. Nationwide Ins. Co. of America* , 78 Cal. App. 5th 889 (Cal. 2022). DC is paid by the insurer but represents the insured, potentially creating a potential conflict of interest.

This conflict can be particularly acute when the insurer defends under an ROR letter, as the insurer may be more focused on developing facts showing non-coverage than facts defeating liability. *Franco v. Reinhardt*, 153 Haw. 406. (Haw. 2023). In many states, a ROR letter is alone insufficient to give rise to the right of independent counsel. Additionally, an applicable judicial analysis might be something like the right arises in circumstances in which there is an increased risk of "foul play" due to divergences of interests. For example, theoretically and sometimes factually, insurer-appointed DC has an opportunity to steer the underlying litigation toward covered or uncovered claims. In such a case, the insured has a compelling argument that it is entitled to independent counsel.

In the tripartite relationship, DC has an attorney-client relationship with the insured. A minority of jurisdictions even hold that the insured is defense counsel's sole client, prohibiting DC from forming an attorney-client relationship with the insurer.[4] *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444 (Minn. 2002). However, DC may also have a relationship with the insurer, which is less than a traditional client-attorney relationship but differs from the relationship between a DC and a litigant client. This is because liability insurance policies typically include provisions that both obligate the insurer to provide the insured with a defense and entitle the insurer to control the defense. *Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512 (Mich. 1991).

Despite potential conflicts, the tripartite relationship structure can function smoothly when the interests of the insurer, the insured, and the DC align. The shared goal is usually to minimize or eliminate liability to a third party. *Simonyan*, 78 Cal. App. 5th 889. However, the opposite can be true . . . tension in the tripartite relationship or, worse, a conflict of interest can arise when everyone's interests do not align, creating complex ethical issues. When conflicts arise, DC's primary duty of loyalty lies with the insured, not the insurer. *Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512. DC's obligations to the insured are emphasized by ethics rules, which require the lawyer to exercise independent judgment in pursuit of the defendant client's interests. 6 New Appleman on Insurance Law Library Edition, § 63.12, The Tripartite Relationship Between Insurer, Insured, and Retained Defense Counsel.

The potential for an excess judgment does not by itself generally create an obligation for the insurer to retain or pay for independent counsel for the insured. See e.g., Cal. Civ. Code § 2860(b), a/k/a, "Cumis statute" – "No conflict of interest shall … be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits." However, the insurer should always advise its insured of the insured's right to retain independent counsel whenever there is a realistic possibility of excess exposure. 6 New Appleman on Insurance Law Library Edition § 63.12. DC must also make an independent assessment of the insured's exposure, the likelihood of a defense verdict, and the likely amount of the insured's exposure for both covered and non-covered claims. Id. That assessment should be presented to both the insurer and the insured. Id.

*Practice Tips:*

*In situations where there is the potential for a loss in excess of the available coverage limits, or the potential that part of a loss is not covered under the policy, such as punitive damages, in most jurisdictions, DC should promptly advise the insured accordingly. Separately, if the insurer issued an ROR letter and it split claim files into a liability/defense file and a coverage investigation file, with separate adjusters, underlying DC (whose primary client is the insured defendant) may wish to avoid feeding information to the coverage adjuster that might be used to deny coverage to defense counsel's insured client. Moreover, in most jurisdictions the insurer should be clear with DC as to roles of such adjusters. Certainly, broad industry standards would have such insurers clearly informing DC of the roles of split file adjusters.*

## Insurer's Bad Faith Failure to Settle

Most states allow an insured to bring an action for bad faith failure to settle an underlying claim against an insured for failing to settle a third party's liability claim within the policy limits. For example, an injured plaintiff files a lawsuit against the trucking company and its driver for damages arising from a truck accident that are covered by the policy. The insured trucking company submits the claim to its insurer for defense and indemnity coverage. The injured third-party plaintiff offers to settle with insured/insurer for the policy limits or below. The insurer is aware that the injured plaintiff's damages likely exceed the policy limits and liability and/or coverage may be less than certain. Now add – the insurer is aware that the third party is likely to succeed against the trucking company and its driver at a potential trial. Yet the insurer refuses to settle with the third party for the limits of the policy. The underlying lawsuit eventually results in a judgment against the trucking company and its driver, greater than the policy limits.

In such a case, the insurer is alleged to have acted in bad faith by putting its interests in not paying the policy limits above those of its insured. If bad faith is found, the insurer likely will be found liable for the full damages award, including any amounts in excess of the

policy limits, and even possibly attorney fees and punitive damages, depending on the jurisdiction and facts. Simply put, "bad faith law" can place the risk back on the insurer for failure to accept reasonable settlement offers on behalf of their insured. A minority of jurisdictions even suggest or impose that a liability insurer can have a duty to make offers or negotiate in the underlying matter.

Depending on the jurisdiction, bad faith claims have specific requirements. For example, to show that the insurer unreasonably failed to settle for the policy limits, the plaintiff must offer to settle for an amount within the limits with reasonable settlement terms and with a reasonable amount of time for the insurer to accept or reject. This usually involves underlying plaintiff's counsel making a written, in-limits demand on the insurer. Generally, a valid in-limits demand offers to release all claims against the policyholder in exchange for the policy limits and contains a clear time limit for acceptance, such as 30 days. Whether the third party can place other conditions on the offer to settle, such as making the offer contingent on all insurers agreeing to settle or partial release of all claims subject to additional insurance proceeds, varies from state to state and depends on the facts and circumstances.

Insurer bad faith law is a complex and constantly evolving area of the law. For additional guidance about bad faith, see e.g., Randy J. Maniloff, White and Williams LLP, and Jeffrey W. Stempel, *"Bad Faith: First- and Third-Party Standards State Law Survey,"* Jeffrey A. Goldwater and George J. Manos, *"Bad Faith Elements State Law Survey."*

*Practice Tips:*

*In-house counsel or other counsel advising a liability insurer should be aware of the general requirements for a valid in-limits offer to settle in the applicable jurisdiction. Do not assume that underlying plaintiff's counsel is aware of the requirements or will comply with them. It is recommended that insurers retain its own claims handling counsel to review any demand for any deficiencies and best guide the insurer as to its obligations in response. If the insurer determines an ask is not a bona fide demand and thus does not share the third-party's ask with the insured, that insurer could be at risk of not keeping the insured apprised.*

## Navigating the Treacherous Waters of Policy Limit Demands

For years "policy limit demands" have been used to settle liability claims in many types of cases with liability policies. These situations can be fraught with peril for insurers. Initially utilized for policy limit settlements, the emphasis has now transitioned to demands intentionally designed to be rejected or countered, enabling the claimant to argue insurer liability for judgments surpassing the policy limit. So-called "setup tactics" can become very creative and stealthy, with much risk to insurers who do not give full attention and sophisticated analyses to each such demand.

Today, insurers often receive demands where the time to respond is too short, the terms are unclear, not all who have a claim or derivate claim would provide releases, or there is insufficient information to make an informed settlement decision. But when the insurer asks for more information or additional time to investigate, the plaintiff asserts that the demand has been rejected, and years of litigation aimed at recovering more than the policy limit ensues.

There are many practical and legal considerations for insurers presented with a time-limited demand that they pay their policy limits (or some portion thereof) to settle a plaintiff's liability claim against the insured.

In most jurisdictions, an insurer defending a claim has an obligation to consider and respond on behalf of the insured to settlement offers from the plaintiff. In order to protect the insured's interests, the insurer must consider any reasonable offer by the plaintiff to settle the claim within the liability limits of the policy. Some decisional law has stated the insurer should evaluate and negotiate as though there was no policy limit – that all moneys, including a potential exposure north of the limit, are that insurer's moneys.

As noted above, serious consequences may flow from an insurer's failure to settle within policy limits. If the insurer refuses to settle with the third party for the limits of the policy and the underlying lawsuit results in a judgment against the insured(s) that is greater than the policy limits, the insurer might possibly be adjudicated to have acted in bad faith.

Some states have enacted laws regarding "time-limited demands" and codified an insurer's fair and reasonable opportunity to investigate and evaluate claims. Cal. Code of Civ. Proc. § 999(b)(2); Mo. Rev. Code §537.058; Mont. Ann. Code 33-18-2; Ga. Ann. Code § 9-11-67.1. If an insurer receives a demand exceeding the policy limits, it must generally advise the insured so that the insured may consider possible contribution to a settlement. The insurer must also do its best to negotiate a more favorable offer. See 2 Law of Liability Insurance, § 7.05 Prerequisites for Duty to Settle; 3 New Appleman on Insurance Law Library Edition § 23.02.

In some cases, the plaintiff's attorney may send a time-limited demand, demanding that the insurer tender its limit within a specific time period or forfeit its right to settle for policy limits. 1 New Appleman Insurance Law Practice Guide 6.08. The reasonableness of the amount of time allotted for the insurer to respond to such a demand will often depend on the circumstances and the law of a particular jurisdiction. For example, a time-limited demand during a trial with a very short time to respond may be deemed sufficient time for the insurer that should have been equipped with real-time knowledge enabling it to respond in a matter of hours, not days. Further, insurers have to be very careful not to create a situation wherein a counter-offer is rejected, positioning the plaintiff to never make another demand within the policy limits. An insurer which is not closely assessing each and every development of the underlying trial could be creating extra risk for itself.

*Practice Tips:*

*Never "just ignore" a policy demand, or any other demand for that matter, even if you believe it is unreasonable. Retained DC should immediately notify the insured and all insurers of a policy limit demand, including all excess insurers. Don't assume that someone is handling this.*

*In situations where retained DC believes there is a reasonable potential for a loss in excess of the available coverage limits, DC should promptly advise the insured(s) that it might want to consider retaining personal counsel to advise the insured of its rights vis-à-vis the insurer(s).*

*If insurer(s) is/are unable to accept the policy limit demand, careful attention should be made to responding to the policy limit demand in the required amount of time. For example, the response should explain why more time is needed to investigate and evaluate the claim detailing specific reasons. Or, if applicable, a response explaining a reasonable evaluation has the insured's exposure at less than an amount of the policy limit demand. Unfortunately, too often an insurer's lack of contemporaneous documentation becomes a problem in defending the insurer in the second-generation lawsuit for bad faith failure to settle.*

## Balancing the Layered Excess Tower

Balancing conflicts in the excess insurance tower involves understanding the rights and duties of both primary and excess insurers, as well as those of the insured. As noted above, primary insurers generally have the duty to defend their insured. When an insurer has the right, but not the duty, to defend the insured, the insurer's decision whether to exercise that right will be based in part on whether the insurer is providing primary or excess coverage. Excess insurers typically do not participate in the defense of insureds, whereas primary insurers typically do, although an excess insurer believing a judgment could go into its layer may insist that certain defense measures be deployed by defense counsel; however, sometimes excess liability insurers do become involved in or control the defense.

An excess insurer, however, usually has the same right as a primary insurer to consent to settlement and the same duty of good faith to not withhold consent unreasonably. However, tensions may arise when a primary insurer and an excess insurer have differing views on the merit of a claim and the appropriateness of a settlement.

In such situations, an excess insurer may send a "hammer letter" to a primary insurer and other underlying insurers below it when a claim can be settled within the underlying policy limits. The excess insurer demands that the underlying insurer(s) settle the claim within its/their limits to avoid exposure to the excess insurer. This letter is intended to assist the excess insurer in prosecuting a lawsuit for equitable subrogation against the underlying insurers if the underlying claim results in a judgment exceeding the underlying insurers' limits.

Not all hammer letters are created equal. A key to forensically analyzing hammer letter exchanges is whether the hammering excess insurer made points to the insurer below it, which appeared not to already know or not already included in the underlying insurer's analysis. Generally, responses to hammer letters should be considered and carefully crafted for both immediate purpose and later optics.

Take as an example, a primary insurer with a $5 million limit of liability that has accepted defense of an insured facing a potential $25 million claim (worst case and very unlikely). The insured and primary receive a settlement demand of $5 million. The primary insurer believes the reasonable value of the claim is less than $5 million, but the excess insurer believes the claim could potentially reach into its layer of coverage. In such cases, the excess insurer may pressure the primary insurer to settle the claim for $5 million by sending a "hammer letter."

If a primary insurer fails to settle a claim, an excess insurer may sue the primary insurer for failing to settle. This can be done either through equitable subrogation, where the excess insurer assumes the rights of the insured, or through a direct right of action, where the primary insurer owes the excess insurer the same duty of care as it owes the insured depending on the jurisdiction. All insurers in the tower issue policies to the same insured but have no privity of contract among them. Nevertheless, there may be duties and rights among insurers in the tower — any applicable state law would be instructive.[5]

*Practice Tips:*

*It is crucial to give notice of a claim to all pertinent excess insurers in the tower, even if it appears unlikely the claim will reach certain towers' thresholds. This is because it is possible that later an insurer's good faith belief as to the potential severity of a claim would not bet an excuse for failing to provide notice to an excess insurer.*

*When possible, retained DC should coordinate with the excess insurers before commencing settlement negotiations to ensure there is an agreed settlement strategy. DC should have clear authority from the excess insurers to negotiate on their behalf. If disagreements arise, then retained defense counsel should be careful to well document settlement negotiations and stay within the scope of retained defense counsel's express authority. Moreover, attorneys advising only the liability insurers often are in communications among themselves, which can result in peace and tranquility for the Jenga tower.*

## Conclusion

In conclusion, the intricate dynamics of catastrophic trucking cases and other losses/occurrences insured under other liability policies, akin to a game of Jenga, necessitate a nuanced and sophisticated approach from attorneys. Understanding the various insurance relationships, managing aggressive policy demands, and navigating excess insurance layers are vital. By employing strategic investigation, clear communication, and proactive negotiation, attorneys can mitigate risks while maximizing outcomes for their clients. With these practical insights and staying informed and adapting to evolving laws, attorneys can advocate for their clients, effectively managing high-risk claims in the complex realm of layered insurance policies.

By Patrick E. Foppe, Stephen Johnson, and Bryan Currie

Read the original article in most recent issue of DRI For The Defense magazine (pages 38-44).

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**Citations**

1. Earlier this year, we presented this this topic at the DRI Trucking Law Seminar in St. Louis. The legal principles, practice pointers and insights, however, apply across all industries with liability insurance coverages. The concepts discussed herein are for attorneys and claims professionals with beginner to mid-level experience in this area. Please enjoy your read – estimated at no more than 30 minutes for busy professionals.

2. https://en.wikipedia.org/wiki/Jenga

3. The International Risk Institute (IRMI) can be useful for practitioners looking for quick and accurate explanations of many insurance terms and terminology. https://www.irmi.com/

4. Beyond the scope of this article is a question – if there is no tripartite structure, then how can DC's communications with a non-client insurer be privileged and protected? There are answers and theories which a reader could find or postulate.

5. One author here asks insurers – following an excess judgment, why not consider taking your dispute(s) into private binding arbitrations? If you litigate publicly, are you prepared to make law for yourselves that could back to haunt you?

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