

# INSURANCE RECOVERY ADVISOR

## INTRODUCTORY REMARKS

BY: THEODORE OFFIT

Offit Kurman is proud to announce the addition of the Insurance Recovery Group to our firm. We are excited to have this additional service area as it further broadens the scope of legal services that we can offer to our clients.

With the addition of our Insurance Recovery Group, we have created the "Insurance Recovery Advisor," a quarterly newsletter written to inform our clients and contacts on issues related to insurance recovery. I hope you will find the Insurance Recovery Advisor an informative source of information on insurance issues that may impact your business.

Should you have any questions regarding the information that you read here, please contact: Michael Conley at 267.338.1317, or [mconley@offitkurman.com](mailto:mconley@offitkurman.com), or any other attorney at Offit Kurman. ■

## 2009: The Year in Review

BY: MICHAEL CONLEY

I am very pleased to help launch the new Offit Kurman *Insurance Recovery Advisor*. Our insurance recovery practice is dedicated to assisting businesses and individuals in identifying insurance available to pay a claim and recovering what they are owed from their insurance companies. Our hope is that this publication will help our clients stay informed on the current and developing law related to insurance recovery issues and provide practical advice on how to collect what you are rightfully owed by your insurance company.

Looking back on 2009, the attorneys in the Insurance Recovery Group had a number of significant policyholder victories, a couple of which are particularly noteworthy. In the matter *Auto-Owners Insurance Company et al. v. Waters, et al.*, Judge Henry E. Hudson, of the United States District Court for the Eastern District of Virginia, granted our client's motion to stay a declaratory judgment action as to coverage pending the outcome of an underlying tort/negligence action. Despite acknowledging their defense obligations in reservation of rights letters, Auto-Owners Insurance Company and Owners Insurance Company filed a declaratory judgment action asking the court to terminate their defense obligations and sought a ruling that they would not be liable for any settlement or judgment obligation in the underlying personal injury action. In granting our motion for a stay, the Court noted that there is "a clear potential for entanglement between the immediate declaratory judgment action and the underlying tort/negligence case."

The Auto-Owners case is part of a growing effort by the insurance industry to initiate litigation against policyholders by filing declaratory judgment actions. By way of example, between December 2008 and August 2009, State National Insurance Company filed six declaratory judgment actions just in the state of New Jersey and just against municipalities. This practice is often in direct violation of the insurance company's fiduciary obligations to its policyholder since it forces the policyholder to litigate simultaneously on two fronts – both in the underlying litigations and also in the separate insurance company initiated coverage action. Apart from the financial difficulties this may present, as noted by the Court in the *Auto-Owner's* matter, the separate coverage action can also involve factual issues that are relevant to the underlying action.

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In another policyholder victory, attorneys in the Insurance Recovery Group participated in an appeal in the United States Court of Appeals for the Third Circuit, in which the Court largely reversed a trial court's ruling against the policyholder. In *AstenJohnson, Inc. v. Columbia Casualty Company and Fireman's Fund Insurance Company*, the policyholder sought in excess of \$52 million in insurance coverage for asbestos-related claims. After striking the policyholder's demand for a jury trial, the trial judge ruled against the policyholder as to the interpretation of certain provisions of the insurance policies. On appeal, the Third Circuit reversed the trial court and ruled that the policyholder was entitled to a jury trial, vacating the trial court's interpretation of the policy provisions. The ruling was a significant vindication of a policyholder's right to a jury trial.

We hope that the *Insurance Recovery Advisor* will provide valuable information to our readers. To make the publication as informative as possible, please let us know if you have a topic you would like us to address. On behalf of everyone in the Insurance Recovery Group at Offit Kurman, I would like to wish everyone a safe and prosperous 2010. ■

*Michael Conley is a Principal at Offit Kurman and Chair of the firm's Insurance Recovery Group and can be reached at 267.338.1317 or mconley@offitkurman.com.*

# Make Your Insurance Company Pay:

## How to Evaluate and Settle an Insurance Claim

BY: FREDERICK A. PETTIT & WILLIAM H. PILLSBURY

**I**nurance companies do not like to pay claims. They especially do not like to pay large claims, and will use every proverbial tool in their toolbox to delay or avoid paying their policyholders' claim. Dealing with insurance companies is neither easy nor enjoyable, especially when "disaster" strikes. For you and your business, disaster can take the form of a lawsuit, property loss, or some other expensive challenge to your business. When that time comes, you need to be prepared from the outset to take the steps necessary to make your insurance company pay.

All too often, a primary objective of insurance companies when presented with a claim is to delay in any way – and for as long as – possible. This strategy creates many difficulties for policyholders, including: (1) the insurance company benefits from holding the money that it has not paid to the policyholder, while the policyholder often struggles in the wake of its loss without the insurance proceeds needed to deal with or recover from the loss; (2) the policyholder may incur legal fees to fight for payment of the insurance proceeds that it needs to deal with or recover from its loss; and (3) mounting business pressures to settle before trial often become overwhelming, forcing the policyholder to settle for a discount on the claim amount. This routine practice benefits the insurance company to the detriment of its policyholder. (Warren Buffett, billionaire

CEO of Berkshire Hathaway, Inc., explained one of these benefits in a letter to shareholders of Berkshire Hathaway in 2007, where he wrote "Simply put, float is money we hold that is not ours, but which we get to invest.") While insurance companies' delay tactics can be difficult and frustrating, policyholders can and should fight back.

To maximize recovery on a claim, policyholders should plan for settlement – while preparing for trial – from the very beginning of the claim process. In the face of insurance company delay tactics, formulating a comprehensive settlement strategy can be the best way to resolve an insurance claim as quickly, inexpensively, and favorably to the policyholder as possible. Consider the following suggestions.

### Organize the Right Team

Your team should consist of people familiar with your liabilities (past and future), your insurance coverage (past and present), and the issues common to insurance coverage disputes. These people can be limited to company personnel or can include outside consultants. Depending on the loss, outside consultants can include lawyers, accountants, loss adjusters, insurance brokers, environmental consultants, insurance archaeologists, and others.

### Control the Lawyers (and Other Non-Principals)

The most certain way to halt settlement negotiations is to allow outside lawyers –

especially insurance company lawyers – to control the process. Insurance company lawyers have an interest in delaying settlement. They often create, and cause the claim to become tangled in, unproductive arguments that retard progress and delay resolution. While your team can provide advice behind the scenes, keep the business people involved in all aspects, and try to maintain a principal-to-principal line of communication.

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### **Avoid Open-Ended “Standstill Agreements”**

Parties sometimes agree to delay or suspend litigation to allow time for settlement negotiations. While a “standstill agreement” can be a useful tool to resolve a claim and control litigation expenses, it is important to realize, however, that a standstill can reduce the policyholder's settlement leverage. A standstill must have a clearly defined deadline that provides a realistic period for the policyholder to provide necessary information, for the insurance company to review the information and respond, and for negotiations to proceed. Any period longer than reasonably necessary to complete this process simply results in more time that the policyholder does not get paid.

**Be Prepared, Cooperative, and Persistent**  
Prepare thoroughly. A good starting point is to collect and organize some

basic information, such as all potentially applicable insurance policies and related documents, and evidence of all relevant costs and expenses. Having this information in hand helps to realistically understand and evaluate the value of the claim, and have the proof necessary to substantiate the claim.

Policyholders also need this information to satisfy certain obligations to the insurance company. Insurance policies typically include a “duty to cooperate” provision, which requires that the policyholder cooperate with the insurance company's investigation and evaluation of the claim. While it can be very frustrating to respond to an insurance company's repeated requests for documentation and other information, the policyholder must satisfy its cooperation responsibilities.

Do not give the insurance company a reason to not pay your claim. Promptly respond to the insurance company's reasonable requests for information, ask for clarification if you do not understand a request, follow-up on requests to which the insurance company has not responded, document all of your communications with the insurance company, maintain a professional and courteous demeanor, and be persistent. The last letter should be from the policyholder.

### **Try to Accommodate Reinsurance Companies**

Insurance companies are often concerned about whether their reinsurance companies will cover amounts that they pay a policyholder. Whenever possible, honor requests that assist your insurance companies in getting reimbursed from their reinsurance companies. Being cooperative in this respect maximizes the amount of money that you may be able to recover.

### **Calculate Each Insurance Company's Exposure**

When a large claim involves multiple insurance companies, as most do, each insurance company's exposure should be calculated separately. For “long-tail claims,” e.g., those involving multiple years of coverage such as environmental and asbestos claims, the calculation methods can be infinite. Evaluate each insurance company's potential liability.

### **Negotiate With One Company at a Time**

Generally, negotiations that bring all of the insurance companies together at the same time may not result in prompt settlements. Because the issues in these negotiations are numerous and complex, settlements often take place separately with each insurance company. There are certainly exceptions to this rule, particularly where the claim involves a single year of coverage.

### **Properly Document Settlement**

As you progress through negotiations and near a resolution to the claim, make sure that you consider a few additional issues and properly document the settlement:

- Focus on the Scope of the Release
- Beware of Indemnification Provisions
- Examine Allocation Issues
- Do Not Bind Future Acquisitions

While each policyholder's claim is unique, it is important to be mindful of some general issues that can be helpful when facing a dispute with your insurance company. Above all else, obtain and organize the facts, evaluate the strength and value of the claim, develop and pursue a strategy, and don't give up. ■

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# INSURANCE LAW UPDATE

BY MEGHAN K. FINNERTY

No anticipated discount on premium is worth \$20 million in coverage. In *Executive Risk Indemnity v. Pepper Hamilton*, the New York Court of Appeals held that two insurance companies are off the hook for claims against law firm Pepper Hamilton resulting from a client's fraud. The policies, which would have provided twenty million dollars in excess coverage for the claims, contained a "prior knowledge" exclusion that barred coverage because the fraud, known to Pepper Hamilton when the policies were issued, was not disclosed in advance to the firm's insurance companies.

Solicitation does not constitute "advertising." Despite a multi-jurisdictional trend that trademark infringement is a covered claim under the advertising injury provision of a CGL policy, the Eastern District of Virginia recently concluded that these allegations do not always trigger a "duty to defend." In *Premier Pet Products, LLC v. Travelers Property Casualty Company of America*, the court found that the alleged trademark infringement of a policyholder who sold dog collars designed to train dogs to stop barking, did not constitute "advertising injury" entitling the policyholder to defense costs. The court differentiated between allegations centering on the "use" or "sale" of products bearing the infringing mark, and allegations of "advertising" these same products. ■

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The *Insurance Recovery Advisor* is a quarterly newsletter at Offit Kurman. This newsletter is provided to inform its readers of insurance coverage issues that may affect them or their business. The articles in the *Insurance Recovery Advisor* do not constitute legal advice or opinion. If you require more information, legal advice or an opinion regarding a specific situation, please do not hesitate to contact Michael Conley at 267.338.1317, the authors, or the editorial board.

Our insurance coverage attorneys assist businesses and individuals in identifying insurance available to pay a claim and recovering what they are owed from their insurance companies. Offit Kurman attorneys provide a realistic claim analysis, then work to develop a cost effective recovery strategy and beneficial resolution. Should negotiations break down, our team of seasoned litigators has the experience and expertise necessary to successfully see the matter through trial.

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