ALFA International
THE GLOBAL LEGAL NETWORK

LAW & ORDER RETRO UNIT: THE ‘70S, ‘80S, & ‘90S

2026 HOSPITALITY & RETAIL PRACTICE GROUP SEMINAR

Peeking Behind the Beaded Curtain: Groovy Insights and Tips from the Insurance World

Panel Members

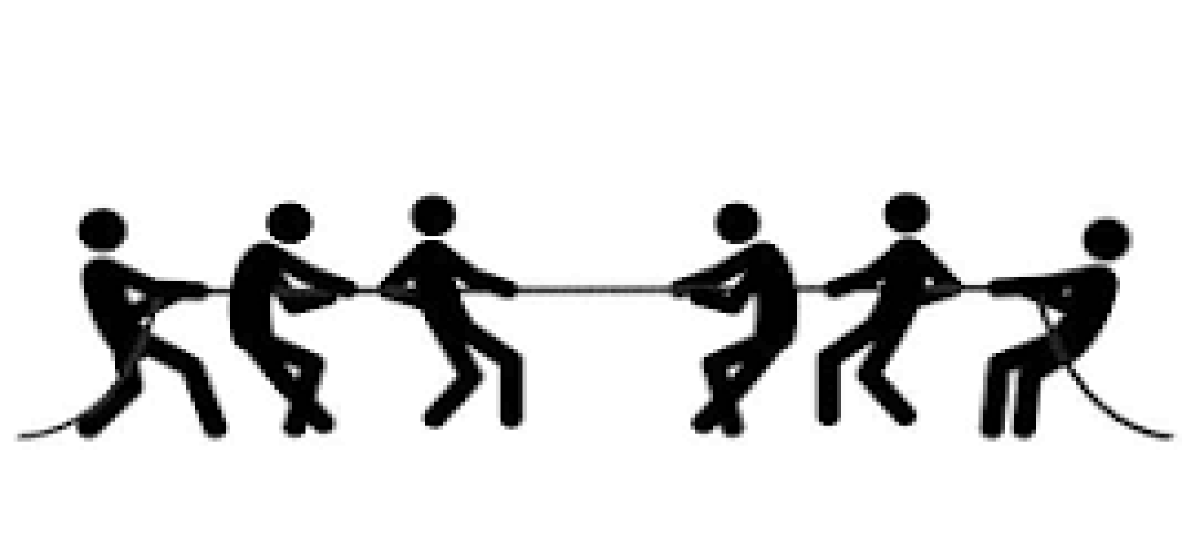
Madison Preston
Member
NHSL, PLLC
mpreston@namanhowell.com
512-807-2452

Monica Garcia
Shareholder
Butt Thornton & Baehr PC
mrgarcia@btblaw.com
505-872-7432

The Spectrum of Control around Insurance Claims

Insured

- Self-Insured Retention ("SIR")
- Self-adjudicates claims
- Choice of counsel
- Decides to settle or defend



Insurer

- "Guaranteed Cost" (or "fixed") premium
- Duty to Defend
- Insurer controls decision-making

Program Structure & Policy language around “control”

- Will excess insurers allow for a SIR rather than a deductible?
- Duties, such as…cooperation, good faith and fair dealing
- Responsibilities around erosion of a retention
- Is a retention “primary insurance” imposing duties as an insurer upon an insured
- Triggers for reporting to excess carriers
- Consent to settle provisions (hammer clauses ranging from “soft” to “hard”)

An illustration of SIR exhaustion

- $5MM General Liability policy
- $1M SIR
- Lawsuit alleging bodily injury resulting from a slip/fall allegedly the result of insured's negligence (covered claim)
- Insured's choice of counsel (not on excess carrier's panel)
- $500k spent in defense ($750/hour blended rate) at the point in time when…
- $600k settlement demand is presented

- Is $500k of the defense-eroding SIR exhausted (insurer pays panel counsel $250 vs $750)
- At what point in time is the insured obligated to consult with the excess carrier?
- Can the insured refuse to settle?
- Can the insurer replace counsel or otherwise participate in claim strategy decisions?

Practical implications of "control" for an insured

- Must "adjusters" be licensed to adjudicate claims under a SIR?
- Cost to staff, train, manage
- Use of a Third-party claim administrator ("TPA") in conjunction
- Does the Risk Management Information System ("RMIS") have a robust and useful claims application?
- Claim management guidelines and protocols for consistent claim handling

Insurers in “control” of claims adjudication

- Significant data around outcomes guides claim handling
- Predictive modeling
- Jurisdictional knowledge
- Sophisticated and experienced adjusters
- Litigation management tech tools
- Vetted panels of counsel by geography, claim type, etc.

Impact of Control to Defense counsel

- Carrier panel counsel rates vs. insured negotiated
- Bill review systems
- Communication protocols (for reporting, decisions, etc.)
- Coverage issues around SIR exhaustion, decision-making, etc.

Negotiating the "right" balance

- It is importation to understand an insured's preference around "control"
- Negotiate insurance program structure and policy terms and conditions accordingly
- Build communication protocols accordingly and ensure all involved parties are in sync (insured, insurer, TPA, defense counsel, etc.)

Breakout questions

- Does your organization want to:

- ❑ be in full control of claims decision-making
- ❑ defer to its insurers
- ❑ somewhere in between

- Do policy terms and conditions allow for above?

- What experiences (good or bad) impact this philosophy?

Section Goals

- Understanding why timely, accurate case valuation by outside counsel is critical in establishing reliable loss reserves
- Appreciating how unreliable loss reserves harm a carrier’s financial stability as viewed by shareholders, regulatory bodies, rating agencies, and reinsurers

Breakout Session Goal: Brainstorming best practices for firms and clients to be better partners in their shared financial destiny

What Are Case Reserves?*

- Case Reserves are funds set aside by insurers to pay for <u>known</u> claims
- Three primary types:
  - Loss Reserves (indemnity, settlements, verdict payments)
  - Defense and Cost Containment (attorney and expert fees)
  - Adjusting/Other Expenses (independent adjusters, certain salaries)
- When accurate reserves are not posted in the year the loss occurred, the unexpected and late strengthening of reserves has undesirable consequences

*Reserves are not “how much authority you’ll need for mediation”

What Are IBNR Reserves?

- IBNR = “Incurred But Not Reported”
- Inside and outside actuaries will review current case reserves and project additional amounts to be reserved for claims the carrier is not yet aware of—usually a percentage of existing case reserves
- When outside counsel is overly optimistic, low case reserves can form the basis for an IBNR factor that is also too low, compounding the problem

So, How Big Is This Problem?

- Reserves form a key basis of a company's financial results, which are scrutinized by:
  - Shareholders, policyholders, owners
  - Regulatory agencies (e.g., SEC, Departments of Insurance)
  - Rating agencies (e.g., AM Best)
  - Reinsurers

. . . Which can impact every success metric of a company

More on Rating Agencies . . .

- AM Best’s entire rating philosophy is built around balance-sheet strength, operating performance, and risk management, all of which are centered on reserves
- When reserves are late or inadequate, AM Best sees it as a sign of deeper structural weakness, and may downgrade a carrier’s AM Best rating
- Carriers with lower ratings are undesirable to certain insureds (e.g., a business will only buy insurance from an A+ rated company), leading to premium deficit

And What About Reinsurers?

- Reinsurers face many of the same risks carriers do from undervalued cases and reserve inadequacy:

  - Distorted views of ultimate losses
  - Greater capital requirements that lower their profitability
  - Reduced underwriting capacity
  - Lower return on equity
  - Rating agency scrutiny and pressure

- This volatility undermines trust and makes the carrier an undesirable client

So, Can You Just Over-Reserve?

- Over-reserving is an equally egregious sin
  - Ties up capital that could be invested in the market or in pursuit of the company's strategic plans
  - Artificially and unnecessarily inflates IBNR
  - Distorts financial results and brings about the same regulatory, reinsurance, ratings agency, and shareholder scrutiny as under reserving

Ah. Now I See. What Should Outside Counsel Do?

- Partner with the client to provide litigation insights that will assist the client in adequately and timely reserving the loss
  - Provide early, realistic assessments
  - Document assumptions and risks
  - Communicate proactively with claims teams
  - Understand the client’s reserving philosophy
  - Differentiate between settlement value and trial exposure
  - Understand the nuances of the venue and the players—plaintiff, opposing counsel, judge, and jury
  - Update evaluations as case evolves
  - Look for surprises

Roundtable Topic

How can outside counsel and clients better project a case's ultimate value?

Peeking Behind the Beaded Curtain — Groovy Insights and Tips from the Insurance World

- Does your organization want to:
  - be in full control of claims decision-making
  - defer to its insurers
  - somewhere in between

- Do policy terms and conditions allow for above?

- What experiences (good or bad) impact this philosophy?