2023 Professional Liability Mini Seminar

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Ruminations on Steering Clear of "Fine Messes" in Professional Liability Coverage Disputes

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Old movies starring Stan Laurel and Oliver Hardy are now perhaps known only by some. But their classic comedy flick "Another Fine Mess" illustrates just how far off-kilter badly laid plans may go. In contrast, careful investigations and objective evaluations are surely two ideal predicates to making coverage decisions. But allegations of Petitions, limited available facts and insureds' needs and demands for a defense, along with potentially overlapping coverages, multiple insureds with potentially divergent interests and insurance towers for different policy types, are several examples of the myriad of competing factors and interests that insurers routinely face when making coverage determinations. Of course time is nearly always of the essence. This panel will offer its ruminations on steering clear of "fine messes" in complex circumstances.

Scene One: When Was the Claim "First Made and Reported" (15 Minutes)?

Professional Liability Policies Are Invariably "Claims Made and Reported" Policies. A claim must be "first made" against an Insured during the Policy Period and "reported" to the Insurer as required the terms of the policy in force when the claim was first made. Notice typically must be sent "as soon as practicable" but in no event later than 30-90 days after the Policy's expiration. Most states will not apply the notice prejudice rule if the notice requirement is defined as a condition precedent to coverage.

Does the Notice Identify Any Potential Coverage(s)? "Claims Made" policies typically require the insured to provide notice that describes the underlying claim, including any allegations, facts and/or relevant dates, as well as provide any suit papers or written demand received by the insured. The insurer's immediate task is to identify whether the notice and information received from the insured (1) potentially triggers any coverage for professional liability under the Insuring Clause or (2) involves any circumstances or conduct for which coverage may be limited and/or excluded. When should the insurer undertake such an initial evaluation itself, as opposed to retaining the assistance of outside coverage counsel?

Scene Two: Investigations and Making Decisions (15 Minutes)

Should the Claim Be Reserved or Disclaimed? Most states allow insurers a reasonable period to investigate a claim, whether by statute or case law. At a minimum, the best practice is for insurers to promptly send the insured a written acknowledgment of receipt of the notice that advises the insured that an investigation is underway and that the insurer is reserving its rights to disclaim, limit and/or confirm coverage for all or part of the claim. Many states strictly apply waiver and estoppel principles against insurers who fail to promptly disclose coverage positions or defenses to an insured.

What If a Request or Tender of Defense Has Been Made? If a defense has been requested, the insurer should promptly evaluate whether a defense should be furnished, including whether the defense should be made subject to the insurer's reservation of rights to disclaim or limit coverage. Are there circumstances when an insurer may delay making a decision about furnishing a defense to an insured(s)? What should the insurer do if the notice furnished by the insured strongly indicates that there is no coverage for the claim? What if the insurer discovers or believes that the insured has "other insurance" that is or may be available to the insured?

Should Additional Information Be Requested? Most Policies also require the insured furnish additional information and documents upon request and to cooperate with the insurer.

Should the insurer request additional information to fill in the gaps? If so, when should such requests be made and what may be done if the insured is not responsive. Most states make it difficult for insurers to successfully disclaim coverage based on an insurer's failure to cooperate, unless actual prejudice can be established.

Who should send the reservations or rights letter and/or the requests for information (the insurer or outside counsel)?

Scene Three: Filing or Defending Against Declaratory Judgment Actions (15 Minutes)?

Coverage Factors to Consider? The following are some coverage factors that insurers should consider when deciding whether to file a declaratory judgment action against an insured:

- Is the claim clearly outside of any Insuring Clause?
- Do any exclusions plainly bar coverage?
- Are there other limitations on coverage, such as "other insurance" or "co-insurance"?
- What is the amount of the SIR or Deductible?
- Has another insurer undertaken defending the insured?
- Have any demands been made by any additional insured(s)?
- Has any demand for contractual indemnitee been made on any insured?

Other Practical Factors to Consider? The following include some practical considerations for insurers:

- The venue or jurisdiction in which the underlying claim may be or has been filed?
- Is the insured a target or principal defendant?
- What is the potential exposure in the underlying lawsuit?
- Is there excess exposure and if so is there excess coverage?
- Is filing the declaratory judgment action in federal court an option?
- Is the insured likely to counterclaim for relief based on the insurer's alleged bad faith coverage position(s)?
- What relief is available to the insured for any bad faith claim?