

**THE INSURER’S ROLE IN COMPETING RIGHTS CASES:
THE INSURER’S PERSPECTIVE¹**

**Patricia St. Peter
Dawn Midkiff
ZELLE, HOFMANN, VOELBEL & GETTE LLP**

INTRODUCTION

Increasingly, situations arise where an insurance policy is the subject of conflicting claims or the policy’s limits of liability previously selected by the named insured are insufficient to cover existing claims asserted against multiple insureds or policy beneficiaries. These problems arise where (a) a suit names as defendants the named insured and additional insureds or the former subsidiary and the parent or (b) separate unrelated suits are pending against different insureds or policy beneficiaries. There is scant case law to provide guidance to insurers as to what its duties and obligations are in these situations and those cases that exist tend to be fact-specific. Not only is there a lack of clear guidance in the case law, but it is also impossible to develop “hard and fast” rules with respect to the handling of these “competing rights” claim situations in light of the number of variables involved. A number of questions may need to be answered before a decision can be made with respect to how to

¹ The opinions and characterizations expressed herein are those of the authors and not those of the clients of Zelle, Hofmann, Voelbel & Gette nor of the firm.

Patricia St. Peter is the managing partner of the Minneapolis office of Zelle, Hofmann, Voelbel & Gette. Her nationwide practice focuses on complex insurance coverage and bad faith litigation involving a wide range of first- and third-party insurance policies. Ms. St. Peter is a member of the American Bar Association and the Defense Research Institute. She has authored numerous articles and is a frequent speaker on insurance and bad faith issues.

Dawn Midkiff is a senior associate at the Minneapolis office of Zelle, Hofmann, Voelbel & Gette. Her practice includes complex insurance coverage and bad faith issues involving a wide range of first- and third-party insurance policies. Ms. Midkiff is a member of the American Bar Association and the Defense Research Institute. She has authored several articles and is a frequent speaker on insurance coverage issues.

handle the situation. These may include: What was the nature of the relationship between the named and additional insured or the nature of the acquisition in the predecessor/successor liability situation? What is the insurance program of each entity? Are there other insurance policies or programs implicated? If so, do they have express “other insurance” provisions? Is the policy at issue “occurrence-based” or “claims made”? Is there a retrospective premium agreement or a similar provision in which the amount of the premium may be directly impacted by any payments? Is the insurer providing a defense to both insureds? If so, who retained defense counsel and who is “controlling” the defense? Are defense costs within limits? What jurisdiction’s law governs? What is the primary carrier’s duty, if any, to the excess carrier to advise it of the status of its policy limits and the “competing rights” claim situations?

Some insurers may assume that these issues never need to be addressed because, when faced with competing claims from insureds, they believe they have the option of filing an interpleader action and depositing the policy limits into the court, which will then entitle them to walk away from the dispute without further obligation or potential liability. Although such stakeholder actions are well recognized in first party situations, their application to liability insurance disputes may be much more limited.

I. What Should an Insurer Do When Faced with Claims by Competing Insureds?

The dispute as to which entity has the rights to the available insurance proceeds is essentially a dispute between the two entities claiming entitlement to those proceeds. Thus, the insurer may have no legal duty, contractual or otherwise, to affirmatively take steps to assist the two entities in resolving their dispute. Even so, it ultimately may be in everyone’s best interest -- *i.e.* both the insurer and the insureds -- to attempt to resolve the dispute without litigation. One option would be

to request a meeting with the competing insureds to attempt to resolve the dispute. The insurer should communicate clearly to the insureds its position in the matter. In many cases, that position will be that the insurer has no opinion as to how the insured entities divide the policy proceeds between them, but that in the event they cannot resolve their dispute, it may be necessary to commence an interpleader action and have a court decide how the policy proceeds should be distributed.

A. A Stakeholder May Join Competing Claimants in a Single Interpleader Action Which will Discharge the Stakeholder from further Liability and Determine The Claimants' Rights to the Money or Property

Courts have recognized the need to efficiently and fairly adjudicate competing claims to money or property. Through an interpleader action, an insurer can join the competing claimants in a single action, which will protect the insurer from inconsistent verdicts that might exceed the overall amount of the policy limits. Insurers must realize, however, that the type of policy at issue may dictate whether an interpleader action will resolve all of the insurer's obligations to the competing insureds.

1. Federal Interpleader Rule and Statute

Most jurisdictions provide for interpleader by rule or statute. Both are available for actions filed in federal court. Rule 22 of the Federal Rules of Civil Procedure provides:

Rule 22. Interpleader.

- (1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of

cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

- (2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

Fed. R. Civ. P. 22.

The federal interpleader statute provides:

§ 1335. Interpleader.

- (a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of \$500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of \$500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of \$500 or more, if
 - (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if
 - (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.
- (b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

28 U.S.C. § 1335.

Both the rule and the statute permit a stakeholder, such as an insurer, to deposit the amount subject to the competing claims with the court and then be discharged from further action by the defendant-claimants for that amount.

2. Differences Between the Federal Interpleader Rule and Statute

Federal Rule 22(2) states that the interpleader rule “in no way supersedes or limits” the remedy available under the interpleader statute. Although the two provisions have many similarities, there are some significant differences, which primarily relate to diversity jurisdiction, venue and service of process.

First, subject matter jurisdiction for a Rule 22 interpleader action is based on diversity of citizenship and the general federal question grant provided in 28 U.S.C. §§ 1331-32. Therefore, in diversity of citizenship cases, the plaintiff-stakeholder’s citizenship must be diverse from that of all the defendants-claimants and the amount in controversy must exceed \$75,000, exclusive of interest and costs. By contrast, under the interpleader statute, the citizenship of the stakeholder is irrelevant, and the diversity of citizenship must be between two or more of the adverse claimants. In addition, under the statute, the amount in controversy need only be \$500.

Second, the venue and service of process provisions also differ. Rule 22 is subject to the general venue provision, 28 U.S.C. § 1391. In a Rule 22 interpleader action based on diversity of citizenship, venue is proper in a district where the stakeholder resides, or in which all claimants reside, or in which the claim arose. Statutory interpleader, by contrast, is governed by a special venue statute, 28 U.S.C. § 1397, which provides that venue is proper in any district where one or more

claimants reside.² In addition, service of process is easier under the statute, which authorizes nationwide service as opposed to Rule 22, which requires compliance with Rule 4 of the Federal Rules of Civil Procedure.

The next significant difference is that the interpleader statute requires that the stake be deposited with the court or a bond be posted. Rule 22 does not impose such a requirement, although a deposit is permitted under Rule 67.

Another potential difference is that statutory interpleader expressly permits a district court to enjoin state court proceedings whereas actions brought under Rule 22 are governed by the general antitrust injunction under 28 U.S.C. § 2283. While the provisions of § 2283 are more narrowly drawn than the interpleader statute, in practice, they may be applied in the same manner.

3. Attorneys' Fees May Be Recoverable

Neither the federal interpleader statute nor Rule 22 expressly provides for the recovery of costs and attorneys' fees. However, in an interpleader action, courts have the discretion to award costs and attorneys' fees "whenever it is fair and equitable to do so." 7 C. Wright, A. Miller & M. Kane Federal Practice and Procedure § 1719 at p. 630 (1986). Attorneys' fees may be recovered when the party initiating the proceeding is acting as a mere stakeholder, seeking only to deposit the stake with the court and asking only that the claimants not be allowed to pursue the stakeholder for the stake any further. Where the stakeholder is also seeking to avoid other obligations, such as an insurer requesting to be relieved of the duty to defend the insured, attorneys' fees have not been awarded. *Emcasco Ins. Co. v. Davis*, 753 F. Supp. 1458 (W.D. Ark. 1990). In addition, an award

² An insurer may opt to file the interpleader action under Rule 22 because venue would always be proper in the insurer's district.

of attorneys' fees may not be appropriate where the stakeholder has asked the court to aid in an ordinary business decision, as this would constitute a shifting of some of the stakeholder's ordinary business expenses. *Id.* at 1465; *SunLife Assurance Co. v. Thomas*, 735 F. Supp. 730 (W.D. Mich. 1990). *But see, Farmers Ins. Co. v. Mitchell*, 755 F. Supp. 255 (W.D. Ark. 1989) (insurer permitted to recover its attorneys' fees).

4. Equitable Considerations

There is no express provision in either the federal interpleader statute or Rule 22 authorizing the courts to refuse to permit an interpleader action based upon a lack of equity. Nevertheless, courts, perhaps relying upon the equitable nature and history of interpleaders, have not allowed such an action when the stakeholder has acted in an inequitable or improper manner. Thus, an interpleader action could be dismissed for laches. *Mendez v. Teachers Ins. & Annuity Ass'n & College Retirement Equities Fund*, 982 F.2d 783 (2nd Cir. 1992) (stakeholder's request to be discharged from further liability to the claimants was denied on the basis that the stakeholder unreasonably delayed action to determine competing claims between beneficiary's surviving spouse and beneficiary's estate); *Illinois Employers Ins. of Wausau v. Mihalcik*, 801 F.2d 949 (7th Cir. 1986) (laches did not bar insurers from obtaining an injunction barring claimant from attempting to collect a default judgment against the insurer except in the interpleader action, where insurer sought injunction less than two months after being notified by claimant's counsel of the default judgment, and the claimant did not suffer any damage due to passage of time). Courts will also deny interpleader relief to one who has caused or contributed to the development of the adverse claims. *Farmers Irrigating Ditch & Reservoir Co. v. Kane*, 845 F.2d 229 (10th Cir. 1988) (although its liability insurers were permitted interpleader relief, an admitted tortfeasor which caused considerable damage to a number of persons cannot file an

interpleader, tender a minimal amount which purportedly represents its assets and then seek to be discharged from all further liability). Some courts have found other equitable reasons for denying interpleader as well. *See, e.g., Kent v. No. California Regional Office of the Am. Friends Serv. Comm.*, 497 F.2d 1325 (9th Cir. 1974) (interpleader not available to one who voluntarily accepted funds knowing they were subject to competing claims); and *Great Am. Ins. Co. v. Bank of Bellevue*, 366 F.2d 289 (8th Cir. 1966) (interpleader denied because of stakeholder's nondisclosure of the full amount of its surety bond).

B. For First Party Insurers, An Interpleader Action is an Effective and Fair Means to Sort Out Competing Claims

First party insurers, such as those which issue life and fire policies, may regularly find themselves subject to competing claims for the policy proceeds. Where coverage for the claim is otherwise not disputed by the insurer, interpleader provides a fair and effective means to protect the insurer from inconsistent verdicts and to adjudicate which claimant is, in fact, entitled to the policy proceeds. *See, e.g., Aetna Life & Cas. Co. v. Wise*, 184 F.3d 660 (7th Cir. 1999); *Prudential Ins. Co. v. Boyd*, 781 F.2d 1494 (11th Cir. 1986); *State of Missouri ex rel. Cresswell v. Scott*, 491 S.W.2d 343 (Mo. App. 1973). Promptly bringing an interpleader action may also shield an insurer from claims for breach of contract, bad faith, and fraud brought by a disgruntled insured. *Maddux v. Philadelphia Life Ins. Co.*, 77 F.Supp.2d 1123 (S.D. Cal. 1999).

C. For Liability Insurers, An Interpleader Action May Not Completely Resolve the Liability Insurer's Obligations Under the Policy.

Where a liability, rather than a first party policy is at issue, the insurer may not have only the duty to pay a judgment or settlement up to the liability limits. Rather, the insurer also often has the duty to defend the insured in the suit brought by the third party. In that situation, an interpleader

action may not completely discharge the insurer from further obligations under the policy, if the defense obligation is unaffected by paying the policy limits into court, or if an insurer is otherwise precluded from paying out its limits. The filing of an interpleader action and depositing the limits into court will not necessarily cut off the insurer's defense obligation if the suit against the insured is ongoing.

1. Most Policy Forms in Use Today Specify When the Insurer's Duty to Defend Ends

Many of the general liability policy forms in use before 1966 did not expressly state when an insurer's duty to defend could be extinguished, giving rise to some debate as to whether the exhaustion of the limits of liability would terminate that duty. Some of the cases held that the duty to defend provision in the pre-1966 policy form ("the company shall ... defend any suit ...even if such suit is groundless, false or fraudulent") did not permit an insurer to withdraw from the defense after exhaustion of the limits of liability. Those cases, however, tended to involve bad faith by an insurer which attempted to limit its contractual obligation by prematurely tendering its policy limits into the court rather than exhausting them through the payment of claims or judgments. *See, e.g., Anchor Casualty v. McCaleb*, 178 F.2d 322 (5th Cir. 1949) (insurer attempted to tender policy limits into the court); *Simmons v. Jeffords*, 260 F. Supp. 641 (E.D. Pa. 1966) (premature tender of policy limits); *Palmer v. Pacific Indem. Co.*, 74 Mich. App. 269, 254 N.W.2d 52 (1977) (primary insurer had duty to prosecute appeal even though limits of liability were "substantially below" the amount of the judgment); *Travelers Indem. Co. v. East*, 240 So. 2d 277 (Miss. 1970) (primary insurer obligated to prosecute appeal even though it had already paid the balance of its policy limits, which were well below the amount of the judgment); *Kocse v. Liberty Mut. Ins. Co.*, 159 N.J. Super. 340, 387 A.2d

1259 (Law Div. 1978) (court imposed continuing defense duty without reference to insurer's conduct; but prior decision at 152 N.J. Super. 371, 377 A.2d 1234 (Law Div. 1977), noted that insurer had tendered its limits to the claimants, which apparently was not a settlement since the claim continued to be prosecuted); *American Employers Ins. Co. v. Globe Aircraft Specialties, Inc.*, 205 Misc. 1066, 131 N.Y.S. 2d 393 (1954) (duty to defend continued after exhaustion of limits; court questioned good faith of the insurer).

In any event, that policy language is infrequently, if ever, used today. Most post-1966 primary general liability policies expressly provide that the insurer has no duty to defend any suit or pay any judgment after the limit of liability has been exhausted by the payment of judgments or settlements. Most courts have agreed that the insurer's duty to defend ends upon the exhaustion of the policy limits. *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, 789 F.2d 214 (3rd Cir. 1986); *Zurich Ins. Co. v. Raymark Industries*, 118 Ill.2d 23, 514 N.E.2d 150 (1987); *Aetna Casualty & Surety Co., v. Certain Underwriters at Lloyds*, 56 Cal.App.3d 791, 129 Cal.Rptr. 47 (1976); *Liberty Mutual Ins. Co. v. Mead Corp.*, 219 Ga. 131 S.E.2d 534 (1963); *Champagne v. State Farm Mut. Auto. Ins. Co.*, 185 A.D.2d 835, 586 N.Y.S.2d 813 (1992).

2. Most Courts Hold that the Duty to Defend Does Not Automatically Terminate by Tendering the Policy Limits to the Court

Some older cases, interpreting the pre-1966 general liability policy form, held that an insurer could terminate its defense obligation by tendering its policy limits to the insured or to the court. *See, General Casualty Co. v. Whipple*, 328 F.2d 353 (7th Cir. 1964); and *Commercial Union Ins. Co. v. Adams*, 231 F.Supp. 860 (S.D.Ind. 1964). However, courts interpreting the post-1966 policy form, which stated that the insurer had no duty to defend after the limit of liability was exhausted by

payment of settlement or judgments, have refused to permit such a practice. *See, Keene Corp. v. Ins. Co. of North America*, 597 F.Supp. 946, 953 fn.7 (D.D.C. 1984); *vacated* 631 F.Supp. 34 (D.D.C. 1985); and *Conway v. Country Casualty Ins. Co.*, 92 Ill.2d 38, 442 N.E.2d 245, 247-49 (1982); *Samplly v. Integrity Ins. Co.*, 476 So.2d 79 (Ala. 1985); *Emcasco Ins. Co. v. Davis*, 753 F. Supp. 1458 (W.D. Ark. 1990). In addition, it is not sufficient merely to pay the policy limits to the party suing the insured; the insured must also be released from liability. *Conway*, 442 N.E.2d at 247-49; and *Aetna Cas. & Sur. Co. v. Sullivan*, 33 Mass.App. 54, 597 N.E.2d 62 (1992).

Where the policy expressly states that the duty to defend ends when the policy limits have been “tendered or exhausted”, tendering the limits to the court has been found to be sufficient. *Economy Preferred Ins. v. Wright*, No. 88-2078 (W.D. Ark. 1988) (1988 WL 220990). Relying upon *Wright*, the court in *Farmers Ins. Co., Inc. v. Mitchell*, 755 F. Supp. 255 (W.D. Ark. 1989), held that the insurer’s duty to defend was exhausted upon tendering the policy limits even though the policy at issue stated that the duty to defend ended after the insurer “paid the limit of liability for coverage.” The *Mitchell* court concluded that the language was similar to that in *Wright*. However, the *Emcasco* court, noting that these cases are limited to their facts, held that an insurer whose policy provided that its duty to defend ends when its “limit of liability for this coverage has been exhausted” cannot “walk away” from its obligations by paying the policy limits into the court. 753 F. Supp. at 1460, 1464.

3. The Federal Interpleader Statute Will not Enjoin Proceedings Against the Tortfeasor Insured

One of the tools available to a court in an interpleader action is the ability to enjoin other proceedings involving the stake. This safeguards against inconsistent verdicts. The authority to

enjoin other proceedings, however, is only as to those proceedings involving the interpleaded stake itself. The interpleader court cannot enjoin proceedings against the tortfeasor-insured, as the scope of that litigation, “in terms of parties and claims, was vastly more extensive than the confines of the ‘fund,’ the deposited proceeds of the insurance policy.” *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 87 S. Ct. 1199, 1205, 18 L. Ed. 2d 270, 277 (1967). The interpleader court, however, can enjoin underlying claimants from seeking to enforce any judgment against the tortfeasor insured except in the interpleader action itself. *Id.* at 535, 87 S. Ct. at 1206, 18 L. Ed. 2d 238. Thus, the insurer can prevent the policy limits from being subject to collection proceedings in various jurisdictions, but it cannot use an interpleader action to prevent the plaintiffs in those cases from adjudicating their claims against the insured. *See also, Carolina Cas. Ins. Co. v. Mares*, 826 F. Supp. 149 (E.D. Va. 1993); *Mid-American Indemnity Co. v. McMahan*, 666 F. Supp. 926 (S.D. Miss. 1987); *Maryland Cas. Co. v. Sauter*, 344 F. Supp. 433 (W.D. Miss. 1972); *Oak Cas. Ins. Co. v. Lechliter*, No. 26208 (W. Va. Dec. 3, 1999) (1999 WL 11011356).

4. Approaches for Litigating Competing Insureds’ Claims

There is a dearth of reported case law addressing how insurers should approach claims for coverage involving competing insureds, where there are insufficient policy limits to satisfy all of the settlements or judgments. Some guidance may be found in how courts have dealt with multiple claims against a single insured where the amount of available insurance was insufficient to pay all of the claims in full.

Most courts hold that the rule is “first in time, first in right”, and liability insurers may distribute the insurance proceeds on the basis of priority of judgment. *Sampson v. Cape Industries*, 185 Ill.App.3d 83, 540 N.E.2d 1143 (1989); *Goad v. Fisher*, 255 Md. 131, 257 A.2d 433 (1969);

Boris v. Flaherty, 242 A.D.9, 672 N.Y.S.2d 177 (1998). A few courts have permitted all of the claimants to be joined in a single suit, akin to a stakeholder action. In that situation, the court distributed the policy proceeds on a *pro rata* basis in accordance with the amount of damage suffered by each claimant. See, e.g., *Johnson v. State*, 450 So.2d 1311 (La. 1984); *Allstate Ins. Co. v. Ostenson*, 105 Wash. 2d 244, 713 P.2d 733 (1986); *Sheehan v. Liberty Mut. Fire Ins. Co.*, 288 Ala. 137, 258 So.2d 719 (1972); *State Farm Mutual Auto. Ins. Co. v. Sampson*, 324 So.2d 739 (Miss. 1975).

Both of these approaches have their strengths and drawbacks. The *pro rata* approach guarantees that all of the injured parties will collect something. This method, however, seems most applicable in fairly simple cases, such as an automobile accident, where the culpable and injured parties are readily identifiable and usually subject to the jurisdiction of a single court. The procedure is far more cumbersome where a number of claimants have each suffered a progressive injury, such as exposure to a toxic product. In addition, under this approach, the distribution of the policy proceeds must await identification of all of the potential claimants, which may be a difficult task.

The “first in time, first in right” method provides a certain method of distribution. It also, however, means that some claimants are left without any compensation at all. This approach fails to take into consideration that the vast majority of claims are settled, many before the matter reaches the courthouse steps. Public policy encourages settlements, yet the manner in which a multiple-claimant matter is settled may open the insurer to allegations that it was acting unfairly and in bad faith.

5. Insurers May be Obligated to Settle Claims Against their Insureds

Not only are the vast majority of claims settled before trial, insurers are under pressure to do so. An insurer which either negligently or in bad faith fails to effect a settlement within the policy limits may have violated a legal duty to the insured, and thereby be liable for the excess verdict. *See, generally, Duty of Liability Insurer to Settle or Compromise*, 40 A.L.R.2d 168 (1955); and *Insured's Payment of Excess Judgment, or a Portion Thereof, as Prerequisite of Recovery Against Liability Insurer for Wrongful Failure to Settle Claim Against Insured*, 63 A.L.R.3d 627 (1975). Courts have imposed upon insurers the duty to protect insureds who contractually relinquish control of the defense and settlement of lawsuits brought against them. *See, e.g., Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 328 P.2d 198 (1958); *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. 1929). Thus, an insurer facing multiple claims which exceed its policy limits may not be well protected by a "first in time, first in right" approach. If some of the claims could have been settled within the policy limits, then those insureds who might have been released by those settlements are likely to assert that the insurer had a duty to enter into them, regardless of whether the insurer faced competing claims for the policy proceeds.

6. Issues for Settling Claims Where Multiple Insureds Are Involved

Most courts which have considered the issue have held that an insurer may settle a claim in good faith even though the settlement exhausts the policy limits, leaving no money available to other insureds. In such a situation, the insurer should be prepared to demonstrate that the settlement on behalf of one insured was fair, reasonable and in good faith. Because litigation with the "competing insured" may not be able to be avoided, the insurer needs to show that it acted fairly, that the

settlement was not an inequitable preference, and that it paid out the full amount of its policy limits to settle the claim. Where an insurer can do so, courts will agree that it acted properly.

For example, in *Millers Mutual Ins. Ass'n of Illinois v. Shell Oil Co.*, 959 S.W.2d 864 (Mo.App. 1997), the named insured leased and operated a service station from the additional insured, a petroleum company. Both were sued when a patron was abducted at gunpoint from the service station. The plaintiffs made a demand for the full policy limits but would agree only to release the service station operator, not the petroleum company. The service station, facing a potential verdict in excess of the policy limits, demanded that the insurer settle. The insurer then filed a declaratory judgment action to seek a declaration that it no longer had a duty to defend the petroleum company. The petroleum company did not dispute that the settlement was reasonable, but did assert that the insurer still had a duty to defend it in the litigation. The court disagreed. It held that since the settlement was reasonable and the insurer acted in good faith, the exhaustion of the policy through the payment of a settlement that released one of the insureds discharged the insurer's duty to defend, even though the action continued against the other insured. *See also, Country Mutual Ins. Co. v. Anderson*, 257 Ill.App.3d 73, 628 N.E.2d 499 (1993); *Bohn v. Sentry Ins. Co.*, 681 F. Supp. 357 (E.D. La. 1988), *aff'd*, 868 F.2d 1269 (5th Cir. 1989); *Anglo-American Ins. Co. v. Molin*, 670 A.2d 194 (Pa. Comm. Ct. 1995). *But see, Smoral v. Hanover Ins. Co.*, 37 A.D.2d 23, 322 N.Y.S.2d 12 (1971).

II. Should Insurers Seek to Minimize Claims By Competing Insureds?

In many situations, it is the policyholder and not the insurer which is in the best position to protect itself from this "competing rights" claim situation. Indeed, it is the policyholder that made the decision to change its corporate status, sell a portion of its business or add other entities as

additional insureds. A qualified risk manager should anticipate the “competing” claim situation and the issue should be raised with the policyholder’s broker as to how to minimize or avoid this problem. It may be advisable for the broker to propose an endorsement that would specify “first claim in/first dollar out” or, alternatively, that sets forth the named insured’s preference for priority of payment of the policy limits. Such a priority of payment endorsement could read as follows:

This endorsement is made part of the section of the Policy:

PRIORITY OF PAYMENTS OF LIMITS OF INSURANCE

In the event a claim is made or “suit” is brought against more than one insured, due to “bodily injury,” “property damage,” “personal injury,” or “advertising injury,” we will apply the Limits of Insurance in the following order:

- a. The Named Insured shown in the Declarations;
- b. Any other person or organization qualifying as a Named Insured under this Policy;
- c. The Named Insured’s “executive officers,” directors, stockholders or “employees”; and
- d. Any other insureds in any order that the Named Insured chooses.³

The insurer will likely be receptive to any policy language suggested by the broker or the policyholder that attempts to avoid or minimize any potential problems created by the competing insureds situation. Since, however, the policyholder is the entity which has created the competing claim situation, it may be in the better position to suggest how it wants any resulting problems addressed.

³ Alternatively, if the insurer wanted to retain control, subparagraph (d) could read:

- d. Any other insureds in any order that the Company chooses.

Zelle, Hofmann, Voelbel & Gette LLP

33 South Sixth Street

City Center, Suite 4400

Minneapolis, MN 55402

612/339-2020

www.zelle.com