It's a Recovery

Opportunities to Recover Advanced Deductibles, LAE and Unpaid Premiums

By Dean S. Rauchwerger, Jonathan M. Levy, and Diane Yamashita

Insurance industry professionals are ever cognizant that in the case of deductible recovery and the like, we are recovering from our policyholder customers. While most deductible recoveries can be achieved amicably using a quality customer service approach, there are times when an Insured refuses to pay and legal intervention is required.

Skilled representation is necessary to recover dollars owed to the carrier from the insured when a claim is paid. Arguments of breach of contract, unjust enrichment and, in some cases, successor liability, must be raised, and professionally and effectively executed to enforce original policy contract terms and pricing. When this is done, the core insurance model of spreading the risk is preserved for the benefit of all. Harvesting these potentially lost dollars is an art, and when done well can equate to millions of dollars.

Background

Recovery opportunities are often overlooked and unrealized, especially where insurance policies contain endorsements or provisions enabling insurers to be reimbursed for advanced deductibles, loss adjustment expenses, unpaid premiums, retrospective premium payments, and self-insured retentions. Potential recoveries arise in a variety of policy contexts, including commercial liability, professional malpractice, specialty-risk or high-risk insureds, and uniquely tailored policies. These policies are valuable products to insureds. The insured saves on premiums paid because claim payments are subject to partial reimbursement. The parties ultimately share the risk.

Recovery opportunities are also afforded under retrospective premium programs, where the policyholder's premiums are calculated retrospectively, based on the

loss history for the cost of claims actually paid by the insurer. For these types of accounts, the insured is obligated to pay the increase in its premiums, whether on a paid basis or on an accrued basis. Failure to pay the premium increase gives rise to recovery rights for unpaid premiums under retrospective premium payment programs.

In the deductible context, standard deductible reimbursement language provides that if the insurer pays for any part of the submitted claim, then the insured must reimburse up to the deductible amount. The policy may contain provisions like:

> *We [Insurer] may pay any part or all of the deductible amount to effect settlement of any claim or suit and upon notification of the action taken, you [Insured] shall promptly reimburse us for such part of the deduct ible amount as has been paid by us.*

or

> *To settle any claim or "suit" we will pay all or any part of any deductible shown in the schedule. You must reim burse us for the deductible or the part of the deductible we paid.*

The policy language can vary, but as long as the claim is settled and the insured's obligations are relatively clear, courts will interpret reimbursement rights broadly. Public policy considerations weigh in favor of the insurer's deductible reimbursement once the claimant is paid. Otherwise, the results would be "at substantial variance with actuarial reality and the premium paid for the policy." *Casualty Ins. v. Town & Country Pre-School Nursery*. Courts prefer that insurers pay reasonable claims and for insureds to hold up their end of the contract and reimburse the insurer for their policy obligations. After all, a promise is a promise.

Reimbursement opportunities fall under a subrogation purview with a twist on the classic model. Beyond stepping into their insured's shoes to pursue third party recoveries, insurers should be mindful of their contractually based reimbursement claims against their insureds. Insurers are treated like any contracting party and their rights are to be protected.

Legal Underpinnings

Reimbursement claims stem from basic contract principles. These recovery rights turn on the promises contained in the insurance policy that the law will enforce. After all, it is all about enforceable promises that give rise to contractual recovery from one's insured. Most courts uphold the validity of clauses or provisions in liability insurance policies requiring the insured, in stated circumstances, to reimburse the insurer for payments made under the policy. This is as long as these clauses or provisions do not contravene public policy nor violate any statute.

Courts apply basic contract principles to insurance provisions and typically uphold reimbursement clauses in a variety of policies and contexts. In commercial liability policies, courts enforce policy terms as written and presume that both parties are sophisticated with sufficiently equal bargaining power. "[B]usiness persons should recognize that when they accept a liability policy with a deductible they may be called on to pay it." *American Home Assume Co., Inc. v. Hermann's Warehouse Corp*.

Professional malpractice, workers' compensation, and automobile policies are treated similarly. Provided no specific language requiring the insured's consent to settle a claim exists, and the policy does not contravene public policy in the jurisdiction, then the contracts are enforced as written. *American Protection Ins. Co. v. Airborne, Inc.*

Maximizing Recovery Potential

Policy language is vital to the insurer's reimbursement rights. Assuming the language supports the insurer's recovery rights and the insured is financially viable, the reimbursement recovery opportunity should be seriously evaluated with cost-benefit considerations. Even where the insured is on shaky ground as a going concern, an attorney-driven demand letter will often enhance the leverage needed. If pre-suit recovery is not viable, the insurer should investigate the insured's financial status. If litigation is engaged, the insurer's contractual claims may be ripe for summary judgment. This is so as the interpretation of the insurance policy is a question of law and there may be no genuine issues of material fact in play.

Purported Defenses

Mismanagement — The insured may attempt to avoid the reimbursement claim by asserting that the insurer mishandled or otherwise abused the claims process. Courts view these types of claims cautiously, placing a high burden on the insured to prove that the insurer "recklessly ignored and disregarded important facts in adjusting the claim." *United Capitol Insurance Co. v. Bartolotta's Firework's Co., Inc*. The type of record required is akin to bad faith claims handling.

Bad faith – Insureds may also allege the insurer acted in bad faith. In cases involving the insurer's alleged bad faith, the insured must often make an extraordinary showing of dishonesty. *Safety Nat. Cas. Co. v. TIG Specialty Ins. Solutions*. Generally, the insurer cannot be charged with resolving claims allegedly in bad faith if the settlement was reasonably prudent, even if ultimately incorrect. In these instances, the insured would need to show that "no reasonable observer could view the situation differently" as the insurer did to prove bad faith. *Orion Insurance Co., Ltd. v. General Electric Company*.

Further, courts generally hesitate to find bad faith when the settlement was within the deductible, even if the investigation was lacking. *Marginian v, Allstate Insurance Co.* The general disfavor to impose bad faith liability is to encourage settlements in lieu of litigation costs, while also motivating insurers to pay claims. Provided that the terms of the insurance policy are clear and enforceable, the insurer is well within its rights to settle, even if the funds belong to the insured. *Stan Koch & Sons Trucking, Inc. v. Great West Cas. Co*.

Lack of Consent – The insured may also argue that the claim was settled without their consent, thus voiding their policy obligations. This usually happens when the insured does not believe it was liable for the claim, such as when an employee-driver disputes liability. Absent clear policy provisions requiring the insured's consent, courts have held that the insurer has the right to determine whether to settle a case within policy limits, even if the settlement would require the insured to pay a part or all of its deductible. In *Casualty Insurance v. Town & Country Pre-School Nursery, Inc.*, the insurer issued a liability insurance policy with a $2,000 deductible per claim. An $1,800 claim arose and the insurer settled, subsequently requesting reimbursement from its insured. The insured argued that because the claim was settled for no cost to the insurer, then there was a factual issue as to whether the insurer acted in a self-serving manner. The court held that because the terms of the policy were clear and that the insurer had the right to settle within the policy limits, then the insured was liable for the deductible.

A contrary ruling would encourage the insurer proposing a settlement to consult with its insured before agreeing to it. In practice there would be needless expenditures and a loss of potential settlements. Insureds subject to claims frequently consider their own actions to be faultless in situations where juries, judges, and professional claims handlers view them as being culpable. Thus, some insureds would object to seemingly prudent settlements that require contribution from them, especially in cases where the insured runs no risk that a failure to settle could result in a verdict in excess of policy limits. *United Capitol Ins. Co. v. Bartolotta's Fireworks Co, Inc.*

Policy provisions and wording are the keys that open the door to recovery dollars. Basic freedom to contract principles afford insurers the legal right to get the "benefit of the bargain" that was relied upon in issuing the policy. Like any other promise, a valid promise (contract) is enforceable. The insurance policy is similar to any other agreement. So long as the terms are clear and the insurer performs its side of the bargain, then courts will expect the insured to do the same. With these fundamental notions in mind, insurers should appreciate recovery of advanced deductibles, loss adjustment expenses, retrospective premiums and the like. In this vein, all policy-premised recovery opportunities should be explored, when based on policy endorsements and provisions entitling the insurer to seek reimbursement from their insureds for monies contractually owed to the insurer. LM

Diane Yamashita is a Recovery Manager for Nationwide Insurance Company. Dean S. Rauchwerger is a Partner with Butler Weihmuller Katz Craig LLP, Chicago office. Jonathan M. Levy is an Associate with Butler Weihmuller Katz Craig LLP, Chicago office.