MANAGING COMPLEX INSURANCE COVERAGE DISPUTES

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Complex insurance coverage disputes center on the interpretation of insurance policy language and the application of that language to an insured's underlying claims or losses. Substantial insurance claims can evolve into protracted, multiparty disputes, sometimes involving parallel actions in more than one forum, third-party practice, and motions most easily measured in linear feet. Because of the sheer number of parties that are often involved, the magnitude of the dollars at stake, and the complexity and novelty of the issues, many insurance coverage cases have seriously taxed the resources of the state and federal courts in which they have been litigated.[1] All concerned—lawyers, judges, insurance companies, and policyholders—have the responsibility to manage these cases intelligently so as to achieve the usual goal of "just, speedy, and [relatively] inexpensive"[2] resolution of the dispute and to assure that the supposed benefits of purchasing insurance are not undermined by the financial and emotional costs of processing insurance claims in the courts. This article identifies state-of-the-art techniques and offers suggestions on other tools and concepts for managing and concluding the processing of complex claims in court.[3]

1. While most coverage cases present issues of state law only, many have been litigated in the federal courts under their diversity jurisdiction. In addition, since some insurers are or claim to be agencies or instrumentalities of foreign sovereigns, *see* 28 U.S.C. § 1603(a), a few cases have fallen within the original jurisdiction of the federal courts. *See, e.g.*, Liberty Mut. Ins. Co. v. Insurance Corp. of Ireland, Ltd., 693 F. Supp. 340 (W.D. Pa. 1988).

2. FED. R. CIV. P. 1.

3. For additional ideas and observations, see Robert N. Sayler and Marc S. Mayerson, *The Mother of All Battles: Some Notes on Reducing the Cost and Acrimony of Coverage Wars, in* MANAGEMENT OF COMPLEX INSURANCE COVERAGE DISPUTES (1991).

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I. PARTIES AND RECURRING ISSUES[4]

A. *Parties*

Complex insurance coverage disputes typically involve an insured on the one hand and various insurance carriers on the other. In most of the larger coverage disputes to date, the insured has faced significant underlying third-party liability from environmental or products claims and has thus pursued coverage under its liability policies.

In general, there are three types of liability policies: primary; excess; and umbrella policies, the last being a hybrid with characteristics of the other two.[5] Primary insurers typically undertake a "duty to defend" the insured against claims that, if proven, could give rise to a "duty to indemnify," i.e., a duty to pay the claim against the insured. Excess or umbrella insurers supplement the dollar amount of coverage afforded by primary policies by providing coverage above the limits of the primary coverage. This additional coverage is typically in several successively higher layers of coverage.[6] Excess or umbrella insurers may have obligations to defend the insured or to pay defense costs, depending on the particular language in the policy and the governing case law.

Complex coverage disputes involving commercial policyholders often include insurance policies from the London insurance market and other foreign markets, in addition to those issued by American insurers. Other types of insurance that may be implicated in complex insurance coverage disputes include specialty policies written for particular risks (e.g., environmental impairment liability insurance), first-party coverages whose purpose is to indemnify the insured for its own losses (e.g., property loss and business interruption policies), and other discrete coverages (e.g., difference-in-condition policies or errors and omissions policies).

In these cases, an insured may be seeking coverage for its liability in connection

4. This article focuses on managing duty-to-indemnify disputes where the insured has already been held liable or incurred a loss. Where a coverage dispute involves only the duty to defend, the questions presented are different, and they can often be resolved through motion practice. Such litigation usually will involve fewer insurers than is the case with duty-to-indemnify litigation. For a comprehensive survey of defense-related issues, see Marc S. Mayerson, *Insurance Recovery of Litigation Costs: A Primer for Policyholders and Their Counsel*, 19 TORT & INS. L.J. 997 (1995), *reprinted in* 8 NAT'L INS. L. REV. 27 (1996).

5. "Umbrella" insurance, like excess insurance, provides additional policy limits over and above that afforded by primary coverage. It differs from simple excess insurance in that, for losses not covered by contemporaneous primary policies, it typically fills in with coverage similar to that provided by a primary insurer.

6. A "layer" of coverage refers to the dollar range (represented by one or more insurance contracts) below which and above which the particular insurance company or companies will pay the insured's loss. A layer can be filled out by a single insurer that issued one policy, multiple insurers with proportionate obligations that subscribed for a "quota share" of a single policy, or multiple insurers that issued multiple quota share policies (though these are often substantively identical because of similar terms or "following form" provisions that incorporate the terms of another policy). A $5 million layer of coverage in excess of the insured's $1 million primary coverage is typically referred to as "$5 million xs $1 million primary." An insurer's 20 percent participation in that layer of coverage is typically referred to as "$1 million part of $5 million xs $1 million."

with a single matter (such as Superfund liability arising from a landfill), multiple matters implicating the same issues (all Superfund sites across the country in which the insured faces liability), mass-tort situations (such as a defective medical device for which the insured faces multiple lawsuits including class actions), or some combination of such potential exposures. The insured may also claim coverage under policies issued to its corporate predecessors or to later-acquired subsidiaries, as well as those issued in its own name.

A typical environmental or product liability claim faced by an insured today is potentially covered at least in part by policies issued decades ago as well as by subsequent policies. As a result, in complex coverage disputes, the policyholder may seek coverage under insurance policies spanning thirty or more years. Older policies within that range may be missing or only partially documented. In addition, insurers that wrote policies at high levels of excess coverage may be named in the suit, on the premise that the insured's total liability or loss has exceeded or may exceed their underlying limits.

Consequently, coverage cases can comprise dozens of insurers, involving: (1) primary, umbrella, and excess layers of insurance in each policy period; (2) multiple policy periods spanning many years or decades; (3) insurers from the coverage programs of the insured's predecessor and subsidiary companies; (4) multiple types of underlying liabilities or losses; and (5) multiple types of coverage, including specialty coverages. In addition, some courts have consolidated separate coverage actions involving different parties but common issues into a single megaproceeding.[7] Indeed, in some cases, the resulting multitude of parties has required the construction of special courtrooms to accommodate their counsel, as well as the development of special electronic equipment and procedures to handle the parties' evidentiary objections at trial (including using game show-type buzzers).[8]

B. *Issues*

While each of the various insurance policies involved in a complex coverage case can present unique underwriting questions (e.g., whether a particular endorsement was issued) and may contain unique terms (e.g., an exclusion for a particular risk exposure that the insurer was unable or unwilling to underwrite), in most cases the key provisions in all policies will be more or less standard during any given period with changes slowly appearing over time. As a result, liability coverage disputes often center around a handful of recurring coverage issues. These issues include: (1) which policies apply to the long-term injury or damage for which the insured seeks coverage (in insurance parlance, which policies are "triggered"); (2)

7. *See, e.g., In re* Asbestos Ins. Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. S.F. Cty.); *In re* Envtl. Ins. Declaratory Judgment Actions, Docket No. L-96187-87 (N.J. Super., Law Div., Union Cty.)

8. *See, e.g., In re* Asbestos Ins. Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. S.F. Cty.); Shell Oil Co. v. Winterthur Swiss Ins. Co., No. 278953 (Cal. Super. San Mateo Cty.).

whether each triggered policy is obligated to pay its full policy limit or whether its obligation to pay is reduced because of other available coverage or the period of injury (in insurance parlance, the "scope" or allocation of coverage); (3) how the policy limits and deductibles in triggered policies apply to the loss, including how the underlying limits of excess policies are to be exhausted and when those policies are deemed to "drop or step down" to provide coverage in place of underlying coverage that has not paid; (4) whether the insured "expected or intended" the underlying injury or damage and is thereby precluded from coverage for the resulting liability; and (5) whether exclusions directed toward the type of liability apply (such as pollution exclusions for environmental claims or "business risk" exclusions for products claims).

Many of these issues have been resolved differently in different jurisdictions, so that the law in one state may favor one side on a particular set of facts, while the law in a neighboring state would favor the other side in the same situation. Consequently, complex coverage litigation frequently involves disputes over choice of forum, which the court must resolve before even addressing the choice of law and the substantive legal issues.

II. PRELIMINARY CASE MANAGEMENT CONFERENCES

As soon as practical after the complaint is filed, it is often helpful for the court to schedule one or more conferences for the purpose of defining the issues, designating liaison counsel for the parties, and ultimately entering case management and other directives laying out the course of the litigation.

A. *Statements of Issues*

Given the number of parties and issues involved, case management conferences are usually more productive when the parties are required to submit preliminary, nonbinding statements of what they perceive as the principal issues in the case. As an example, the insured could describe the underlying liabilities or losses for which it seeks coverage, its view of the principal legal issues, and anticipated discovery. The insurers could then respond by setting forth their preliminary view of such matters and the discovery they believe necessary to prove their coverage defenses. Because the insurers' interests may not be aligned entirely, individual insurers, or defined groups of insurers, may wish to submit separate statements.

It is also helpful to determine at the outset whether any party contemplates shift-of-forum motions. If so, such motions and associated discovery, if necessary, should normally be scheduled for prompt disposition.

B. *Organizing Counsel*

If the case involves numerous insurers or policyholders represented by separate law firms, liaison counsel should be appointed for each side to facilitate communications from the court and between the opposing camps. In these cases, the liaison

counsel position is normally understood to be administrative, not substantive, in nature.

Some courts have also appointed "lead counsel" to speak on substantive issues for groups of similarly situated parties, subject to the rights of individual parties to be heard on party-specific issues or positions. On occasion multiple "lead" counsel have appeared on the carrier side where the carriers have divided on substantive issues (such as "exposure" trigger carriers versus "manifestation" trigger carriers). In some cases, particularly those involving relatively few parties, insurers have opposed the lead-counsel concept, advocating instead that a defense steering committee decide which of their number will take the lead on particular tasks. In deciding which approach to adopt, the fundamental objectives of coordinating and preventing unnecessary duplication in discovery, briefing, motion practice, and in the presentation of evidence and argument at trial must be kept in mind. At different stages of the case, varying approaches to coordinating multiple parties may be appropriate.

Finally, many insurers and policyholders in complex coverage disputes retain national coverage counsel, who often apply to the court for admission *pro hac vice* in particular cases.[9] It is usually sensible to establish a streamlined procedure for such applications at the start of the case.

C. *Case Management and Other Preliminary Orders*

A principal objective of the early conferences is the adoption of an order or series of orders for case management. Experienced coverage counsel will often start exchanging proposals for case management orders before the first meeting with the court, seeking to narrow the areas of disagreement that must be judicially resolved.

An overall case management order (CMO) sets forth a schedule of major events in the litigation, including the cutoff dates for various phases of discovery, deadlines for joinder of parties and issues and for dispositive motions, and preliminary dates for pretrial conferences and trial. In addition to this overall road map to the litigation and the various other provisions common to case management orders for multiparty complex litigation,[10] the CMO or other preliminary orders in an insurance case may address the following more specialized issues:

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9. National counsel brings not only expertise on the substantive insurance issues, but also experience in managing, settling, and trying complex coverage disputes.

10. Excellent sources for these provisions are the MANUAL FOR COMPLEX LITIGATION (3d ed. 1995) published by the Federal Judicial Center and the MANUAL FOR COMPLEX INSURANCE COVERAGE LITIGATION (1993). The types of matters addressed in such case management orders include: (1) a declaration of complex litigation (where required in the particular jurisdiction for assignment to a single judge for all purposes); (2) regulation of pleadings and discovery requests so as to avoid duplication or undue burden from similarly situated parties; (3) provision for electronic filing, facsimile filing, and the like, depending on the court's technical capabilities; (4) streamlined procedures for issuing commissions, letters rogatory, or similar requests for discovery in jurisdictions beyond the court's subpoena power; (5) case-specific schedules and procedures governing discovery responses, discovery motions and summary judgment motions, as well as case-specific rules for filing and service of papers; (6) procedures for ex parte applications; (7) regulation of the volume of discovery; (8) consolidation of multiparty discovery;

(1) Disposition of cross-claims: Insurers often preserve their claims of equitable contribution or indemnification as against each other by filing cross-complaints, to which responsive pleadings would normally be filed. To avoid the volume of paper entailed by such protective pleadings among dozens of insurers, some CMOs have deemed all insurers to have filed and answered a "generic" cross-complaint seeking contribution, indemnity, or the like.

(2) Discovery and issue phasing: It is extremely helpful if the court addresses the sequence and phasing of discovery, either as part of the overall CMO or in a separate discovery order. Substantive phasing of discovery on particular issues may be coupled with schedules for corresponding dispositive motions. Such a substantive-issue phasing approach may be "exclusive," permitting only designated discovery during the period, or it may be "inclusive," requiring discovery on particular issues to be completed within the period but permitting other discovery to proceed concurrently. While the parties may not agree fully on substantive-issue phasing early in the case, a preliminary CMO should at least set a timetable for determining whether to accelerate consideration of those issues that will materially affect the scope of subsequent discovery or trial.

(3) Preliminary informal discovery: The parties in coverage cases commonly agree to exchange informally the information they possess about the existence and terms of policies (that is, the correspondence relating to the purchase, sale, and preparation of the policies) and the (acknowledged) nonprivileged portions of their respective claim files for the losses at issue. The CMO or discovery-management order may provide for early informal production of this information without need for formal discovery requests.

(4) The policy "tome" and coverage charts: The CMO may also set forth a timetable and procedure whereby the parties attempt to stipulate to the exact contents of each insurance policy, or at least the provisions that are at issue in the case.[11] The end product of such stipulations is a compendium of the key policy provisions in dispute, often called the "tome," which is made available for reference by the court and all parties. Similarly, the parties may seek to reach agreement on a coverage chart depicting graphically the policy periods, layers, dollar limits, and other pertinent features of all policies under which recovery is sought.

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(9) procedures for producing documents, including document identification methods, agreements on formats for optical imaging of documents, and use of document depositories; (10) provisions for the "pull back" of inadvertently produced privileged documents; (11) content and timing of privilege logs; (12) regulation of depositions, including conduct guidelines for counsel, multitracking procedures, scheduling, and agreement on a single court reporting service; (13) appointment of special masters and procedures for dispute resolution before special masters; and (14) provisions for amendment and supplementation of the CMO.

11. Such stipulations are often expressly deemed to be the equivalent of jury-found factual findings, thus rendering the stipulations binding in the future should another dispute arise (subject, of course, to the usual exceptions to collateral estoppel) and obviating the incentive for a party to litigate a question without genuine dispute simply to establish the matter once and for all.

(5) "Cooling-off" period: In some coverage cases, the courts have entered stipulated preliminary case management orders designed to provide an opportunity for early settlement of the dispute before both sides have invested large sums in conventional litigation proceedings. Such a procedure usually works best where the insured already has had substantive discussions, and sometimes reached settlement, with one or more of its insurers having relatively significant financial exposure. Such orders may include the following provisions: (a) a schedule for informal preliminary discovery; (b) provisions for confidentiality and nonwaiver of any applicable privileges; (c) a timetable for exchange of good-faith settlement proposals and for related meetings between or among the parties; (d) a schedule of periodic status conferences before the court or a settlement master; and (e) deferral of the deadline for responding to the complaint until after the end of this period of information exchange and attempts to reach early settlement. Although this "cooling-off period" approach carries the risk of delaying the progress of the case on the court's docket if the early settlement negotiations ultimately bear no fruit, it has resulted in global resolutions of some large cases, thereby saving the parties many years of litigation and millions of dollars in legal expenses.

(6) Confidentiality orders: As in other types of complex litigation, the parties may ask the court to enter a confidentiality order.[12] Such requests are especially common in liability-coverage cases, in which the parties on both sides tend to share an interest in maintaining the confidentiality of factual information vis-à-vis underlying claimants. Additionally, one side or the other may wish to control the dissemination of information produced in a particular coverage case with an eye toward similar coverage disputes that are pending or anticipated against other parties. Stipulated confidentiality orders can facilitate the flow of discovery in the case at hand by reducing the chance for unauthorized disclosure of sensitive information, and courts routinely enter them in liability-coverage cases. Nonetheless, it is important to ensure that such an order provide adequate mechanisms for challenging and reviewing inappropriate confidentiality designations. Further, attempts should be made to avoid imposing unreasonable barriers to legitimate discovery in other actions involving the producing parties.

III. DISCOVERY PLANNING ISSUES TYPICAL OF INSURANCE CASES

It may prove helpful for the parties to meet and confer after the initial conference to map out a more concrete discovery plan and schedule. A description of the discovery to be taken and from whom, as well as areas of dispute, may then be submitted to the court as a basis for discussion. Such a nonbinding discovery submission should identify the legal issues in the case and the relevant facts (including the means of obtaining those facts), thereby increasing the court's familiarity with the substantive issues and expediting rulings on any contested discovery matters.

12. *See* MANUAL FOR COMPLEX LITIGATION at 67-72, 453-60.

At a discovery-planning conference, the parties and the court are likely to give closer consideration to methods of phasing or tracking discovery. Complex insurance coverage disputes usually can be segmented into roughly five separate fields of coverage-related discovery.[13] These can be scheduled as a series of discovery phases or all at once, depending on the needs of the case.

The first common inquiry concerns the existence and terms of policies that are missing or whose contents are disputed. Proof of policy terms may require discovery from insurance brokers (both domestic and foreign) as well as from the parties themselves.[14]

A second discrete area of discovery concerns policy interpretation, which may involve document and deposition discovery from the insurers, the insured and insurance brokers, as well as from insurance industry trade associations. The scope of such discovery is a subject of recurring dispute. In most cases the parties can agree that their respective underwriting files—the correspondence surrounding the purchase, preparation or renewal of the policies at issue—are discoverable. Insureds may also request, for example, (1) training materials, claims-handling manuals, bulletins, and underwriting guidelines; (2) the insurer's promotional material relating to the specific coverages at issue; (3) the insurer's regulatory filings and its participation in the drafting of standard form policy language; (4) a sampling of claims files from each insurer concerning its handling of similar claims over time or, in environmental cases, from other insureds involved with the same site; (5) reinsurance information; (6) reserves established by the insurers for the claims at issue; (7) legislative activities by the insurer or its representatives; and (8) other materials that are not specific to the particular insured, but that insureds contend shed light on the standard form policy language at issue. For their part, insurers often seek discovery of (1) the insured's insurance-related correspondence regarding other similar claims against it; (2) the insured's underlying defense counsel's files concerning the claim at issue; (3) discussions of insurance issues by trade associations in which the insured is a member; and (4) any interpretative materials received by the insured from its insurance brokers. All these more generalized areas are commonly the subject of discovery disputes and are ripe for motion practice before the court, but good-faith compromises between the parties are possible and should be encouraged.

A third subject for discovery concerns the parties' handling of the particular coverage claim at issue, including the notice of the claim that the insured provided to its insurers and the manner in which they responded to the claim.

A common fourth field of discovery concerns the events leading to the underlying claim or loss for which coverage is sought. This discovery, which is usually quite

13. In addition, forum-related and choice of law issues may require discovery. Such discovery is commonly scheduled early in the case.

14. Where proof of the policies takes place early in discovery, the court may permit the parties to modify stipulations and the like in the event that subsequently discovered evidence shows the addition or alteration of a material term. Such modifications may be conditioned on a showing of good cause.

intensive, may explore the development of particular manufacturing processes, choices of technology by the insured, and the insured's knowledge or awareness of any risk associated with its activities. Insurers may also seek to expand this discovery beyond the particular site or product at issue to other similar sites or products with which the insured was involved in the past. Such discovery of "other losses" is a common source of motion practice. In some environmental coverage suits involving multiple waste sites scattered throughout the country, particular sites have been designated as "test sites" that will be discovered and tried before the remaining sites. Among other things, such an approach facilitates settlement and, at all events, tends to focus the subsequent discovery and trial of the remaining sites at issue.

Finally, a fifth field of discovery involves experts. In general, experts on insurance industry practices and custom may be designated to testify on policy-related interpretational issues. On policy application issues, experts on toxicology, medicine, "fate and transport" of chemicals, state of knowledge concerning risks of injury and safety procedures, landfill design, hydrogeology, and other disciplines may be designated to testify on factual issues underlying the questions of what injury occurred and when it took place, as well as whether the insured expected or intended the injury, and which amounts paid (or to be paid) by the insured are recoverable under the policies.

While each case requires individual consideration, one method of issue-based phasing would focus initial discovery efforts on determining the existence and terms of the policies, and the meaning of those terms, before proceeding with the more intensive discovery directed at the application of policy terms to the particular facts of the claim. Thus, a court might order initial discovery into the first two of the fields described above, while deferring discovery on the other fields until after resolution of contractual issues by motion.[15]

Other methods of substantively based discovery phasing include: (1) phasing based on selected coverage claims or losses, e.g., representative environmental sites; (2) phasing based on the insurers' layer of coverage, e.g., deferring discovery of high-level excess insurers until the level of exhaustion (if any) of underlying insurers can be more accurately gauged; and (3) phasing based on types of insurance policies, e.g., deferring discovery of general liability insurers until the obligations of insurers under specialty policies, such as environmental impairment liability polices, have been determined.

IV. CONDUCT OF DISCOVERY

As in other types of complex litigation, coverage disputes often involve large volumes of discoverable documents, and the litigants should work together to establish protocols concerning their actual production. In particular, the parties should be encouraged to give early consideration to the various reproduction technologies

15. *See* notes 23-26 *infra* and accompanying text.

currently available, ranging from conventional photocopying to microfilm to imaging. For example, if the parties mutually agree to reproduce all documents as images electronically stored on compact discs, they will necessarily have to agree on issues of format (including document definition, e.g., identifying what was attached to what in the original) and sometimes even software before document production begins. They also may wish to hire a common vendor for the imaging and objective coding process. If documents are to be produced as conventional hard copies, the parties may decide to establish a document depository for use by all parties, or a joint depository to be used solely by the insurer parties.

The following specific discovery-related issues are common to insurance disputes.

A. *Prior Discovery*

Because of the standardized nature of many insurance policies and the similarity of the underlying claims against many insurers, similar coverage disputes may have been the subject of extensive discovery in prior litigation. Therefore, the parties and the court should consider making available document productions from prior insurance coverage cases in which an insurer has been involved. In addition, deposition transcripts and exhibits from prior coverage cases[16] generally should be made available. Similarly, deposition transcripts and documents that have been previously produced by the insured in the underlying liability actions against it may be made available to the insurers (though the relevance of that material in the coverage case may be limited as, for example, where only the duty to defend is at issue, or where the factual issues raised in prior cases are dissimilar). Where the insured faces ongoing liability actions, the requirement and timing of any such disclosure must be carefully weighed against the possibility of prejudicing the defense of the underlying claim for which coverage is at issue.

B. *Discoverability of Counsel's Work Product*

In liability coverage disputes, one issue that sometimes arises in the course of discovery concerning the underlying case is whether or to what extent insurers are entitled to obtain communications between the insured and its liability defense counsel. The resolution of this issue varies by jurisdiction,[17] and in disputed cases

16. One category of prior depositions deserves special comment. Because of the way the American insurance industry operates, an association (or associations) of insurers has in the past prepared standardized policy forms for use nationwide. A similar process holds true in the London market. The associations have left behind a significant "drafting history" of the form policy language. The principal drafters and key employees of those trade associations have been deposed or have testified at trial on numerous occasions. Some of the testimony is substantive and some addresses the evidentiary foundations of key documents. Although the evidentiary status of such drafting history varies from state to state, significant savings and efficiencies will accrue if all parties agree to make use of the already existing testimony in these prior actions, without, of course, precluding a party from supplementing this testimony through additional discovery as required.

17. *Compare, e.g.*, Waste Management, Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322 (1991), *with* Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408 (D. Del. 1992). Where discoverable, such documents are invariably produced subject to a stringent protective order.

an early ruling on the scope of the insured's obligation to produce such documents may be appropriate.

C. *Written Discovery Requests*

Written interrogatories and requests for admission may narrow and clarify the issues for trial. To focus a discovery process often subject to abuse, it is often helpful if the court requires that the parties on each side propound either a master set of interrogatories that may be supplemented by individual parties, or require a certification that written discovery propounded by a particular party does not duplicate already existing discovery, or both. Careful thought should be given to the timing of "contention" interrogatories. Because motion practice as to their propriety is common, the court and the parties should determine the stage of the proceedings when such interrogatories will prove most useful.

D. *Deposition Discovery*

Some complex insurance coverage cases have involved over a thousand depositions, and it is not uncommon for depositions in such litigation to number a hundred or more. To coordinate and expedite deposition practice, many courts have established separate tracks for use by the insurers and the insureds, and sometimes even separate tracks devoted exclusively to third-party witnesses.[18] In addition, courts may establish cutoff dates by which certain witnesses must be deposed and permit new deponents to be identified after preliminary document and deposition discovery.

Depositions in complex coverage cases frequently are attended by counsel for all parties. While some depositions may require the presence of all parties, the court and the parties should consider alternative mechanisms whereby parties can avoid the significant cost of attending depositions that appear unlikely to involve their interests. To protect against surprises, however, the parties should consider adopting a mechanism by which nonattending lawyers have an opportunity to resume a "completed" deposition within a fixed period from the receipt of the transcript. Such a deposition could be resumed using less expensive methods such as depositions by written question[19] or by telephone or tape recording instead of stenography[20] or even by video conference. To guard against abuse, the court may require a showing of good cause for resuming such a deposition.[21]

18. The court may wish to adopt expedited procedures for the issuance of commissions to third-party witnesses and of letters rogatory. For example, the court may order that, unless written objection is received within five business days from the filing of such a request, all commissions and letters rogatory automatically will be approved.

19. FED. R. CIV. P. 31.

20. FED. R. CIV. P. 30(b)(7).

21. Similarly, a court can order that all depositions may be used against parties subsequently added to the litigation unless they timely assert good cause for resuming or reopening a particular deposition to protect their special interests.

More generally, the parties should be encouraged to use alternative methods of eliciting witness testimony to reduce cost and to reduce the burden on witnesses.

E. *Unilateral Investigations*

Disputes have arisen in insurance cases over the propriety of conducting ex parte interviews of former employees of the adverse party. This issue is usually governed by the rules of professional responsibility applicable to counsel, as well as by case law in some states, and has not been resolved uniformly in all jurisdictions.[22] Before such interviews are undertaken, the parties should attempt to resolve whether they are permissible under applicable law, and if so, under what conditions and safeguards.

V. SUBSTANTIVE MOTION PRACTICE

Substantive motion practice in complex coverage disputes can serve effective case management goals in addition to eliminating claims from the case. Because application of the policy to a specific set of facts almost always turns on the interpretation of standard form policy language, a court may conclude that it is most efficient to schedule motions that will resolve the general meaning of policy terms before conducting full-blown discovery on the particulars of the underlying claim.[23] Because the meaning of the policy limits the scope of relevant evidence, early motions with that narrow focus may truncate discovery substantially.

For example, a major inquiry commonly pursued by insurers is whether the policyholder "expected or intended" the injury. The resolution of two interpretative issues nestled in that inquiry can significantly limit or expand discovery. The first is whether the test for expected or intended injury turns on what the insured in fact subjectively knew and intended; most courts have adopted such a test, while others have adopted an objective standard of expectation or intent. Where an objective test governs, not only is the insured's actual knowledge relevant, but the insurers may also seek to offer evidence of industry custom, practice, and state of knowledge in an effort to show that a reasonable person in the insured's business would have or should have known of the risk of harm. Such industrywide discovery may involve the activities of trade associations and the scientific community at large, even if the insured had no actual relationship with or access to those sources of knowledge. In contrast, under the majority rule, the focus of the inquiry is simply on what the insured actually knew, thus substantially limiting the scope of discovery.

22. *Compare, e.g.*, Public Serv. Elec. & Gas Co. v. AEGIS, 745 F. Supp. 1037 (D.N.J. 1990) (absolute bar on ex parte contacts with former employees) *with* Monsanto Co. v. Aetna Casualty & Sur. Co., CA No. 88C-JA-118, 1990 Del. Super. LEXIS 421 (Del. Super. Ct. Dec. 4, 1990) (permitting such contacts, but subject to specific guidelines).

23. *See generally* Francis E. McGovern, *Five Models for Judicial Case Management*, 22 BRIEF 2, at 54 (a "workable model for case management of insurance coverage cases involves three tracks: (1) policy identification, (2) policy meaning, and (3) policy applicability; discovery of the third track should be deferred until resolution of the first two; and should be narrowly focused rather than scattered").

The second related legal issue arises in cases in which the insured is a corporation; depending on how the court resolves the question of which individuals must have expected injury the scope of discovery will be significantly affected. If the relevant corporate "intent" is determined by managerial personnel, their knowledge and understanding at the time of the corporate activity leading to the liability claim will be the focus. On the other hand, if the knowledge of each employee of a corporation, whether or not communicated to his or her superiors, is imputed to the insured for purposes of establishing intent, then the scope of discovery is likely to broaden substantially.

Resolution of substantive coverage issues may also affect the scope of discovery by reducing the number of parties, claims, or defenses in the case. For example, certain resolutions of the "trigger" and "scope" of coverage may eliminate insurers' potential exposure for some policy periods. In any event, the resolution of such matters can help the parties quantify ranges of potential exposure for particular insurers, thereby facilitating dismissals or settlements. Similarly, how policy and deductible limits are applied will determine how many insurers in excess layers of insurance remain on the risk. The legal construction of policy limitations such as certain pollution exclusions may also effectively eliminate certain policies from the case. At the same time, some insurers may be held to be precluded from asserting certain policy defenses under doctrines of waiver or estoppel. Thus, depending on the issues presented in the particular case, early resolution of key substantive legal issues may permit the elimination of parties, claims, and defenses from the case, thereby avoiding much unnecessary discovery.

The parties and the court should work together to identify those legal issues whose resolution may significantly shape factual discovery. Once identified, discovery can be focused to enable the court to resolve those legal issues and pare down the case at the earliest practicable time.[24] But the parties should be aware that devoting their resources to a discrete set of issues for early substantive resolution carries potential costs. For example, there may be needless delay in discovery of other matters if motion practice ultimately establishes only that disputed facts preclude summary adjudication of the designated issues. The balance of costs and benefits can vary with each case, and phasing decisions need to be tailored accordingly.

When the court sets a hearing on a motion for partial summary judgment applying the law to the facts, the court should consider requiring the parties to stipulate in advance as to those facts that are undisputed. The court also may conduct an evidentiary hearing under Federal Rule of Civil Procedure 43(e) and

24. The exact type of motion that can be used for purposes of construing an insurance policy varies. For example, a motion for partial summary judgment of a claim or defense may lie. Alternatively, the motion can be styled as a motion in limine since the interpretation of the insurance provision will delimit the scope of relevant evidence. *See generally* County of Oakland v. City of Berkeley, 742 F.2d 289, 297-98 (6th Cir. 1984); *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 259-60 (3d Cir. 1983). A motion can also be styled as a motion in support of a jury instruction on the particular provision at issue.

Federal Rule of Evidence 104 (or their state cognate rules) to establish which facts are undisputed or supported by competent evidence, or both. Whether or not such a preliminary evidentiary hearing is conducted, after the court hears a motion for partial summary judgment, the court will be in a position to exercise its authority under Federal Rule of Civil Procedure 56(d) (or its state cognate) to identify which material facts are without substantial controversy and which are actually and in good faith controverted, regardless whether the motion is granted.[25]

Because the interpretation of insurance contracts is a matter of state law, for complex coverage disputes litigated in the federal courts, the court and the parties should consider whether the litigation would benefit from certification of specified legal questions to the appropriate state courts for resolution, if such a procedure is available. Similarly, it will often be necessary for the trial court hearing the coverage case to decide whether to certify for interlocutory appellate review the legal determinations that will shape the trial. Against the benefits of greater certainty that can accrue from certification to state or appellate courts (and also the promotion of settlement by narrowing the controversy), the parties and the court must weigh the attendant cost of deferring trial and whether appellate review will be improved if the appellate court has the complete factual record of the trial.[26]

VI. TRIAL MANAGEMENT

Trial management is critical to the efficient resolution of complex coverage disputes. Because such cases involve multiple parties and often multiple claims for coverage, the trial management approaches and techniques discussed in the *Manual for Complex Litigation* and other such sources provide valuable guidance for structuring the trial. Usually, lead counsel should be designated for each side, and, to the extent possible, one lawyer from each side should examine each witness.[27] As in any multiparty trial, significant challenges are presented by the introduction of evidence that may not be admissible against all parties.

The first matter to be determined by the court at trial, if the parties have not consensually resolved the issue, is what documents constitute the governing insurance policies. Proof of policy terms is often a separate, preliminary phase of

25. Under Rule 56(d), the court is empowered to issue "an order specifying the facts that appear without substantial controversy," which are thereafter deemed established for purposes of trial. Alternatively, the court and the parties may choose to proceed under Fed. R. Civ. P. 16(c) (or a state cognate), providing for "the formulation and simplification of the issues, including the elimination of frivolous claims or defenses."

26. When a preliminary ruling is certified for appeal, the parties and the appellate court may consider whether the panel hearing that appeal should also be designated as the panel to review the final judgment. As is true at the trial level, the appellate court should actively become involved in resolving the litigation. Note in particular that federal appellate courts have the authority to conduct a status conference where these issues can be addressed. FED. R. APP. P. 33.

27. On the other hand, where the insurers divide into separate camps ("exposure" and "manifestation" carriers, for example), lead counsel on behalf of each may need to be appointed.

the proceedings and can take place even before the completion of discovery relating to the meaning of the policies and their application to the claim at issue.

Depending on the jurisdiction, a trial phase may also be devoted to the resolution of disputed facts on which the interpretation of particular policy provisions turn. The trial of such contested matters may be to the court or to a jury, depending on the particular issue to be tried and the governing law. Trial of policy-interpretation issues has often been conducted as a separate phase, although such issues may be so interwoven with the underlying facts (or so minor) that they are more efficiently tried with policy application issues.

Proof surrounding the particular loss for which coverage is sought is typically at the heart of insurance coverage trials, and it can be quite complex and extensive, involving large numbers of exhibits and lay and expert witnesses. To facilitate the presentation of evidence and to ascertain its admissibility, the parties should be required to identify in advance each exhibit that will be introduced and each witness who will be called, so that evidentiary objections can be raised and resolved to the extent possible without interrupting the flow of trial. It is not always feasible or advisable to require the parties to predesignate all documents before trial, because this procedure can result in designation of excessive numbers of documents and corresponding "boiler plate" objections. One viable approach may be to require pretrial document designation followed by a procedure during trial under which intended trial exhibits are designated and objections are vetted on a rolling basis a fixed number of days before the document is to be offered into evidence.

When multiple claims for multiple underlying losses are joined in a single case, the parties and the court must address whether a separate phase will be devoted to each claim and whether a single jury will hear the evidence for all the claims. Similarly, where different types of policies are involved that require different factual proof, phasing of the trial by type of policy may be efficient.

In view of the complexity of coverage trials, the parties and the court should be encouraged to adopt creative techniques to aid jury comprehension. For example, jury notebooks, including key exhibits and glossaries of terms, may be provided. Visual aids, including video monitors, may serve to streamline the presentation of evidence. The use of "rolling arguments," within sensible limits, where counsel at various times summarize and argue chunks of testimony and evidence, may also prove helpful in enhancing jury comprehension.

In complex coverage cases, special attention must be paid to the preparation and wording of jury instructions. Usually, there is no standard set of insurance coverage instructions in a particular jurisdiction, though instructions used in past cases nationwide are available or have been published in insurance reporters, conference materials, or from many of the law firms with national practices in this specialized area. Detailed special interrogatories for the jury to resolve are fairly common because they help structure the analysis. It may also prove helpful to provide the jurors with the interrogatories before the close of evidence to help them focus on the factual disputes before them. More generally, the use

of any technique that helps the jury understand the case and the questions they are to resolve should be encouraged.

VII. CONCLUSION

The litigation management challenges presented by complex litigation are daunting. The parties must be prepared to be creative in seeking mechanisms to achieve their objectives while permitting the opposing sides a reasonable opportunity to argue their case as well. Each case presents the opportunity to add to the ongoing dialogue in discerning the best way (or at least better ways) to process complex insurance claims. While it is often difficult to reach agreement on sophisticated, creative case management techniques, the alternative of permitting a relatively unsupervised free-for-all is an unacceptable result for insurance companies, insureds, and the taxpaying public, and it is incumbent on members of the bar, themselves officers of the courts, to apply their training and experience to facilitate the "just, speedy and inexpensive determination of every action,"[28] including complex insurance coverage disputes.

28. FED. R. CIV. P. 1.