

Policyholder Playbook Episode 38: Has an Insurer ‘On the Fence’ Waived Rights Under a Consent-to-Settle Clause?

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PRACTICES Insurance Recovery, Litigation

Quick Overview of the Play – When an insurer is “on the fence” and noncommittal with respect to an underlying settlement, consider whether the insurer has constructively denied coverage and therefore waived its rights under a consent-to-settle clause. In such a scenario, the policyholder may have latitude to settle the underlying claim on its own accord.

All too often, a policyholder-defendant approaches mediation in an underlying claim, and one or more of its insurers is noncommittal. The noncommittal insurers know of the mediation and have all the information that is relevant to the claim—defense counsel evaluations, underlying filings, etc.—but they refuse to engage in settlement-related discussions and the bid-and-ask. Perhaps the insurers even decline to participate in or attend the mediation.

Such a scenario can be challenging for the policyholder-defendant, who may want to eliminate their exposure by settling, but without jeopardizing their rights to insurance coverage by breaching the consent-to-settle clause in their policies. Fortunately, courts have considered this fact pattern and have held that insurers cannot “hover in the background of critical settlement negotiations and thereafter resist all responsibility on the basis of the lack of consent.”¹

In *Fuller-Austin*, the policyholder notified its excess insurers of its efforts to settle underlying claims, but the insurers did not participate because they refused to sign a confidentiality agreement that the policyholder insisted upon as a prerequisite to such participation.² The policyholder and underlying claimants then settled without the consent or participation of the insurers.³ When the policyholder sought coverage for the settlement, the insurers refused, citing consent to settle provisions that they argued applied because they never formally denied coverage.⁴ A California appellate court rejected those arguments, stating: “[T]he policies can[not] be read to permit an excess insurer to hover in the background of critical settlement negotiations and thereafter resist all responsibility on the lack of consent.”⁵

Other courts have reached similar conclusions.⁶

The bottom line? Assess whether an “on-the-fence,” noncommittal insurer has constructively denied coverage and therefore waived its rights under a consent-to-settle clause. In such a scenario, the policyholder may have the right to settle a claim on its own, without its insurer’s consent.

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¹ *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 135 Cal. App. 4th 958, 990 (Cal. Ct. App. 2006).

² *Id.* at 982, 989.

³ *Id.* at 984.

⁴ *Id.* at 982.

⁵ *Id.* at 990.

⁶ *See, e.g., J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 58 N.Y.S.3d 38, 39 (1st Dep't 2017) (affirming dismissal of insurer's consent defense when insurer refused to meaningfully engage in settlement discussions because of their insistence, under a reservation of rights, that certain payments would not be covered); *Schwartz v. Twin City Fire Ins.*, 539 F.3d 135, 145–47 (2d Cir. 2008) (rejecting insurers' consent defense, despite policyholder giving insurer just eleven hours to consider the final settlement, when policyholder plugged insurer into earlier discussions); *see also* RESTATEMENT OF THE LAW OF LIABILITY INS. § 25 (2019) ("Since an insurer, by reserving its right to deny coverage, loses its right to control the litigation, an insured does not breach a policy's [consent provision] by entering into an unauthorized settlement . . . , so long as such agreements are made fairly, with notice to the insurer, and without fraud or collusion . . . , and the settlement is reasonable.")