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ALERT

Insured Bears the Burden to Allocate Settlement Between Covered Losses and Excluded Contract Damages

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The Superior Court of Pennsylvania has affirmed a trial court's ruling that the insured bears the burden of allocating between covered and uncovered settlement amounts. *Executive Risk Indemnity, Inc. v. CIGNA Corp.*, 2013 WL 3756763, (Pa. Super. Ct. July 18, 2013). The court held that the insured had not met its burden to allocate between amounts attributable to covered Racketeer Influenced and Corrupt Organizations Act (RICO) allegations and those attributable to breach of contract allegations, which were excluded from coverage under the professional liability policy at issue.

The underlying claim against the policyholder—a health insurer—consisted of class action litigation alleging that the policyholder and other HMOs had systematically underpaid claims. The insured settled the litigation, which included allegations of both breach of contract and violations of RICO, and sought coverage from its excess professional liability insurer. The insurer denied coverage on the basis that breach of contract claims were excluded under the professional liability policy, and the insured had not proven the allocation of its settlement between excluded and covered amounts. The policyholder argued that the insurer should bear the burden to prove the portion of the settlement allocated to excluded matters.

The court rejected the policyholder's argument that the insurer bore the burden to prove the allocation of excluded amounts once a *prima facie* case of coverage was established. The court concluded that "proof of a policy exclusion and proof of allocation of excluded policy claims are distinctly different inquiries." According to the court, "apportionment is not a straightforward process in the context of a

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settlement agreement." The determination is "vital to the insurer for purposes of indemnification," held the court, "and best proven by the insured, the party that has access to the evidence and the parties' intent behind the settlement process." Because the insured has better access to information and the intentions of the parties to the underlying settlement, the court determined it is "not only reasonable, but logical, that the insured bears the burden to allocate."

Accordingly, the court affirmed the trial court's determination that the insured did not present sufficient evidence to show that the portion of the settlement attributable to covered RICO allegations would reach the excess insurer's attachment point. The trial court had found that: 1. the insured's counsel stated at the time of the settlement that the RICO allegations were weak; 2. the insured failed to meaningfully assess the RICO exposure in memoranda or correspondence; 3. the insured analyzed only the contract exposure and represented to the underlying court that this was the heart of the underlying case; and 4. the underlying settlement was contract-focused. The appellate court found no abuse of discretion in these findings and therefore affirmed the trial court's rejection of the insured's proffered allocation weighted toward RICO exposure.