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How to prevent waiver of an insurance carrier's coverage position

Dear Ladies and Gentlemen:

The purpose of this correspondence is to bring to your attention a significant coverage issue that insurance carriers should be aware of when providing a defense to an insured under reservation of rights ("ROR"). Unless the precautions outlined below are taken, carriers **may lose their rights to assert defenses** to coverage with regard to damages awarded against an insured in an underlying matter, even if a portion of the damages awarded are excluded from coverage under the terms of the policy or the prevailing case law. As explained below, in order to prevent being forced to indemnify an insured for damages that are not covered, in certain circumstances an insurance carrier should **retain coverage counsel to seek intervention into the underlying matter** for the limited purpose of preparing jury instructions and a special interrogatory verdict form that addresses factual issues that are relevant to coverage.

The Third District Court of Appeals has held that where a general verdict was entered against an insured, and the insured's carrier failed to move to intervene in that action in order to submit special jury instructions and a special verdict, the carrier waived its rights to assert that a portion of the damages awarded were excluded from coverage. *Herrera v. C.A. Seguros Catatumbo*, 844 So. 2d 664 (Fla. 3d DCA 2003). A copy of the *Herrera* decision is attached for your convenience.

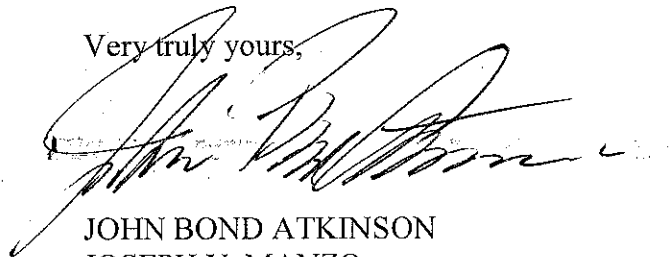
In *Herrera*, a carrier provided a defense to its insured under a ROR. *Id.* The jury awarded the plaintiffs \$170,000 in compensatory damages and \$1,000,000 in punitive damages. *Id.* at 665. The carrier then sought a declaratory judgment asserting that punitive damages were not recoverable under the carrier's policy because the policy excluded coverage for malicious acts. *Id.* The trial court entered judgment in favor of the carrier, but the appellate court reversed. *Id.* The appellate court held that the burden fell on the insurer to, in the underlying tort action, obtain or attempt to obtain a verdict from which it could be determined how the damages were allocated and therefore which portions of it may be excluded from coverage. *Id.* at 668; citing *Concrete Pipe Co. v. Bould*, 437 So. 2d 1061 (Fla. 1983). (Since the carrier had not attempted to intervene in the underlying case to submit special jury instructions and verdict forms, and since there was a possibility that the damages awarded to the plaintiffs were not excluded from coverage, the carrier was required to pay the entire unsegregated damages award.)

The district court's holding in *Herrera* is contrary to the holdings of the other appellate courts in Florida. For example, the Fourth and Fifth District Courts of Appeal have held that a liability insurer whose interests are adverse to those of its insured on the issue of coverage is not bound by factual findings in the initial tort adjudication. *Ins. Co. of North America v. Whatley*, 558 So. 2d 120 (Fla. 5th DCA 1998); *Britamco v. Central Jersey Investments*, 632 So. 2d 138, 140 (Fla. 4th DCA 1994). Federal courts in Florida have issued similar opinions. See *State Farm Mut. Auto Ins. Co. v. Brown*, 767 F. Supp. 1151 (S.D. Fla. 1991), *aff'd without opinion*, 990 F. 2d 1268 (11th Cir. 1991). However, to date the Florida Supreme Court has not resolved the divergent holdings of the district courts, and in light of the fact that *Herrera* is based on the Florida Supreme Court's holding in *Bould*, there is no way to know how the Florida Supreme Court will ultimately rule on this issue.

Fortunately for carriers, there is a practical solution to insure that the carrier's rights to assert coverage defenses are preserved. **When an underlying action for which the carrier is providing a defense moves past the mediation stage without settling, the carrier should (1) obtain coverage counsel if it has not already done so, and (2) have coverage counsel move to intervene in the underlying action for the limited purpose of submitting special jury instructions and a special interrogatory verdict form addressing the issues that are relevant to coverage.** Such intervention has been endorsed by the Third District Court of Appeal not only to protect an insurance carrier's rights, but as a means to reduce litigation. See *Employers Ins. Co. of Wausau v. Lavender*, 506 So. 2d 1166 (Fla. 3d DCA 1987). If intervention is granted, the carrier may resolve factual issues regarding coverage by submitting special jury instructions and a special verdict form addressing those factual issues; reducing the need for litigation following the resolution of the underlying suit. If intervention is denied, the court cannot later find that the carrier waived its rights with regard to segregating the uncovered damages awarded by the jury in the underlying matter. Regardless of how the court rules on the carrier's motion for intervention, the carrier's coverage position will be protected.

We hope you find this letter helpful. Should you have any questions with respect to the foregoing, please feel free to contact us at our Miami office.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Bond Atkinson", written over a horizontal line.

JOHN BOND ATKINSON
JOSEPH V. MANZO

Enclosure