MILLER FRIEL

Simpson Thacher PLI Presentation

June 7, 2018

TOPICS







- **1.** Pre-Litigation what goes on prior to filing suit;
- 2. Filing a Complaint what drives the decision;
- 3. Motions to Dismiss valuable to both sides;
- **4.** Discovery using it effectively;
- **5.** Summary Judgment often a critical juncture;
- **6.** Trial best practices and perspectives.

1. PRE-LITIGATION – WHAT GOES ON PRIOR TO FILING SUIT







1. Pre-Litigation: What Goes on Prior to Filing Suit *The Insurer Perspective*

Investigate. Evaluate. Communicate.

- Contrary to popular policyholder perception, insurers are not looking for a fight
- Determine existence of coverage—or potential for coverage
- When issues arise:
 - Correspond with policyholder
 - Develop additional information
- Considerations include:
 - -Nature of dispute
 - -Jurisdiction
 - -Burden
 - -Timing

1. PRE-LITIGATION – WHAT GOES ON PRIOR TO FILING SUIT

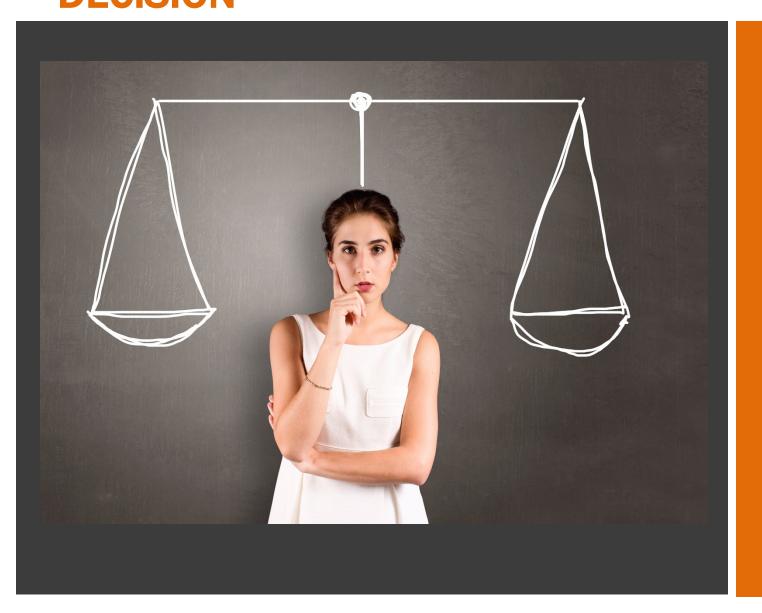


- Policyholder Perspective
 - Pre-litigation best practices for policyholders :
 - 1. Fully Evaluate Claim
 - 2. Fully Evaluate Law
 - 3. Send letters to Insurers refuting improper denials
 - 4. Compliance with insurance policy conditions, even when waived through denials of coverage
 - Develop Strategy to Maximize Legal Recovery
 - Expect impossible requests for information and respond accordingly

2. FILING A COMPLAINT – WHAT DRIVES THE DECISION







2. FILING A COMPLAINT – WHAT DRIVES THE DECISION



- Policyholder Perspective
 - Key question to be addressed Will filing suit maximize legal recovery?
 - A number of factors go to into decision

2. FILING A COMPLAINT – WHAT DRIVES THE DECISION



- Policyholder Factors in Filing Suit
 - Choice of Law
 - Law of jurisdiction
 - Risk of being sued first in improper jurisdiction
 - Insurer reputation
 - Insurer conduct / bad faith
 - Reasons for denial (legal, factual, or industry custom and practice)
 - Overall case strategy and client objectives

2. Filing a Complaint: What Drives the Decision *The Insurer Perspective*

Not Every Dispute Ripens Into a Lawsuit

- Novelty of issue
 - If issue of first impression, important to select the "right" case
- How clean are the facts and law
- First party versus third party disputes
 - Duty to defend
 - Jurisdiction matters
 - Four corners or extrinsic evidence
 - Reimbursement of defense costs
 - Withdrawal from defense
 - Issue matters; Burden
 - Coverage: Timing, damage/injury, relief sought, occurrence
 - Exclusions/other issues
 - Duty to indemnify
 - First party: coverage versus valuation; jurisdiction









3. Motion to Dismiss: Valuable to Both Sides *The Insurer Perspective*

Very Case Specific; Be Selective in Filing Motions to Dismiss

- Jurisdictional and standing issues
- Whether claimant is insured under policy
- Timing of injury, if discrete
- Clear cut issues of law where facts are undisputed/undisputable
- Bad faith
- Statutory claims handling causes of action

3. MOTIONS TO DISMISS - VALUABLE TO BOTH SIDES



Policyholder Perspective

- Policyholders file motions to dismiss when insurers file suit in the wrong jurisdiction
- Policyholder complaints should be drafted so dismissal is not possible
- Insurers tend to file motions to dismiss more often than policyholders

3. MOTIONS TO DISMISS -**VALUABLE TO BOTH SIDES**



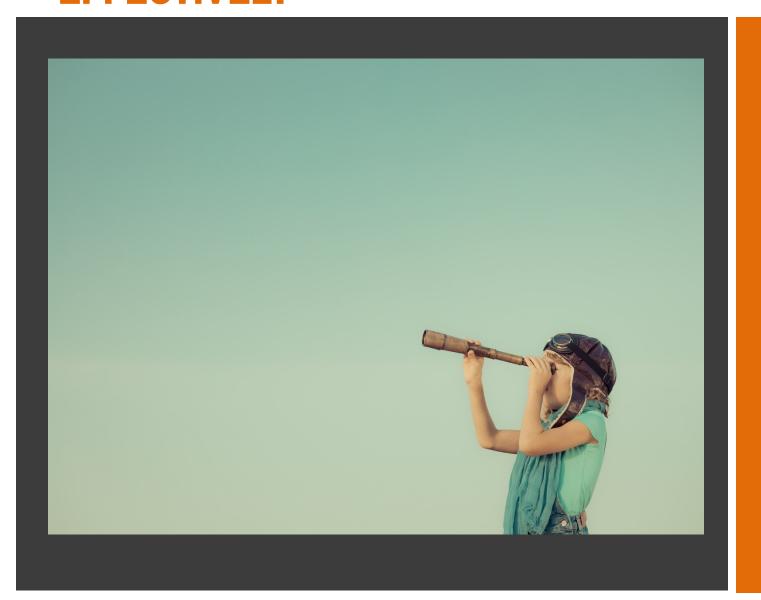


Policyholder Perspective

- Insurer motion to dismiss filings, nonetheless, often benefit policyholders:
 - Insurer counsel may have overpromised likelihood of success
 - If dismissal is denied, insurers may treat claim differently
 - When insurer is unsuccessful in motion to dismiss, settlement window may open









- Policyholder Perspective
 - Two kinds to discovery:
 - 1. Offensive, and
 - 2. Defensive
 - Both kinds of discovery need to be focused on elements of proof at trial



Policyholder Perspective

- Offensive discovery:
 - 1. Use offensive discovery to build the story of improper denial and bad insurer conduct
 - Identify those involved through written
 discovery; take depositions of claims examiners
 and underwriters who were personally involved
 - There is typically a story of improper conduct, and depositions prove up that story
 - 4. 30(b)(6) depositions are generally a waste of time; Insurers have experienced professional deposition takers
 - Aggressively challenge improper privilege assertions



Policyholder Perspective

- Defensive discovery:
 - 1. Whereas offensive discovery wins cases, poorly prepared policyholder witnesses can result in inaccurate testimony and lost cases
 - Insurance issues are often complex and multifactored; corporate witnesses should not be expected to understand issues without preparation
 - With proper preparation, corporate witnesses can explain the truth; without preparation, the truth may not be told, and inaccurate factual testimony can result
 - 4. Understand that the go-to place for testimony for insurers are brokers and risk managers



Policyholder Perspective

Depositions:

- 1. Know the rules for objections
- Ignore common beliefs about taking control of your depositions; focus instead on testimony needed for each and every document
- 3. Prior to taking depositions, consider what documents need to be authenticated for trial, and what documents should not be authenticated
- 4. Consider hearsay rule and exceptions (can document be used at trial or not)
- 5. Don't rely on stipulations of authenticity, as blanket stipulations are seldom proper
- Listen and remain flexible

4. Discovery: Using It Effectively *The Insurer Perspective*

Build Your Defenses and Themes from the Discovery You Produce and Obtain; Do Not Reverse Engineer Discovery to Fit a Story

• Document requests

- Use but do not rely on "catch all" requests.
- Think about what specific types of documents you want and particularize so policyholder knows what to look for.
- Consider what documents experts may need and, if possible, consult experts on requests.
- Use depositions as tool to learn about different categories or specific documents to request.
 - Make request at deposition for documents not produced and remember to follow up.

Interrogatories

- Use these strategically: identification of documents, witnesses, facts.
- Untargeted interrogatories often yield little useful information beyond what it is in the pleadings.
- Value of interrogatories may vary by jurisdiction.

4. Discovery: Using It Effectively *The Insurer Perspective (continued)*

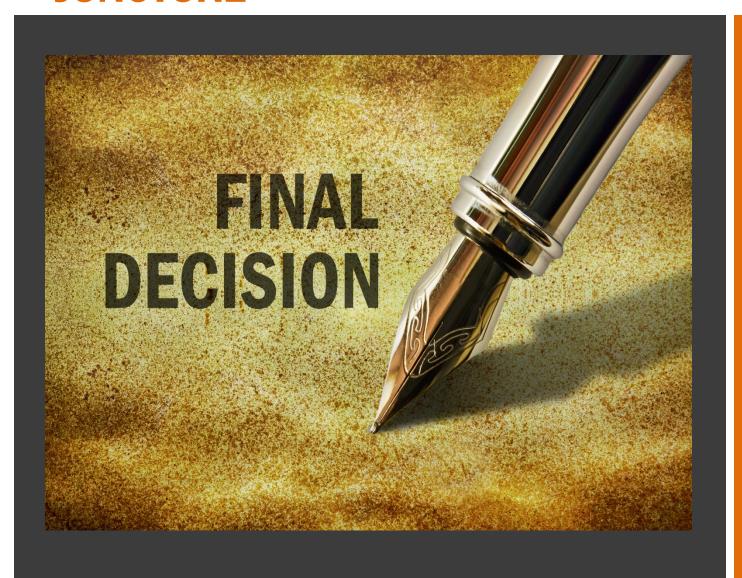
- RFAs
 - Paired with interrogatories
 - Discrete admissions
 - Authentication
- Depositions
 - Usually the most effective discovery tool
 - Prepare, prepare, prepare
 - You are still "discovering" in depositions
 - Find the right people to depose; not always party deponents

Use discovery to find areas of agreement, undisputed facts.

5. SUMMARY JUDGMENT - OFTEN A CRITICAL JUNCTURE







5. Summary Judgment: Often a Critical Juncture *The Insurer Perspective*

Summary Judgment Orders Can Often Be the Only Substantive Pre-Trial Decisions in an Insurance Coverage Action—So Frame the Issues Wisely

- Varying purposes of summary judgment process:
 - Resolve entire dispute; avoid trial.
 - Knock out specific claims; narrow issues.
 - Obtain direction from court on law; facilitate settlement.
- Evaluate facts and law and determine most effective use of summary judgment process for case.
- Know what undisputed facts you will need for summary judgment before depositions.
- Not all facts are "material."
- Be true to evidentiary record.
- "Genuine issue."
- Dangers of overreaching.

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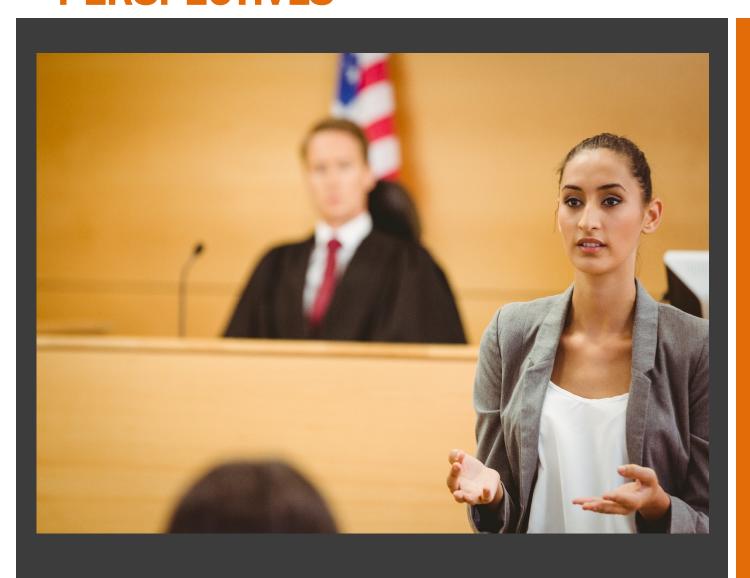


- Policyholder Perspective
 - The overall goal for policyholders with respect to summary judgment motions is to get to trial
 - Insurers may not consider settlement until their summary judgment motions are defeated
 - Policyholders can also prevail on duty to defend summary judgment motions, as an insurer must defend, so long as there is any potential of coverage

6. TRIAL - BEST PRACTICES AND PERSPECTIVES







6. TRIAL – BEST PRACTICES AND PERSPECTIVES



Policyholder Perspective

- Trial preparation starts on day one, and everything that is done from there on is designed to win at trial
- A case theme is developed based on improper denials, and that theme is expanded and honed through discovery
- Once you get to trial, the case is simplified to its essential elements that are necessary to prove up necessary elements and to tell the story
- Jury trials are preferable, unless case is so complex that even the lawyers cannot follow
- Simplify; make things interesting; be likable

6. Trial: Best Practices and Perspectives *The Insurer Perspective*

"Your trial presentation wasn't complicated enough," said no one ever.

- Keep it simple and consistent.
- Focus.
- Consider burden issues—who should go first?
- Know elements and what evidence will be introduced to prove or disprove them.
- Prepare order of proof.
- Remember the big picture.
 - "Aha" moments should be obvious to all.
 - -Repeat themes, but resist the urge to make every point with every witness.
- Humanize witnesses: don't be over-technical and don't stretch.
- Use, don't overuse, documents.

CONTACT INFORMATION

Insurer Counsel

Deborah L. Stein Direct: (310) 407-7525 dstein@stblaw.com

Simpson Thacher **Policyholder Counsel**

Mark E. Miller
Direct: (202) 760-3161
millerm@millerfriel.com

