

INSURANCE COVERAGE LITIGATION- INSURER AND POLICYHOLDER PERSPECTIVES

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Presentation

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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

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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

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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 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. MOTIONS TO DISMISS – VALUABLE TO BOTH SIDES



CASE CLOSED

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:
 1. Insurer counsel may have overpromised likelihood of success
 2. If dismissal is denied, insurers may treat claim differently
 3. When insurer is unsuccessful in motion to dismiss, settlement window may open

4. DISCOVERY – USING IT EFFECTIVELY

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4. DISCOVERY – USING IT EFFECTIVELY

❖ 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

4. DISCOVERY – USING IT EFFECTIVELY

❖ Policyholder Perspective

❖ Offensive discovery:

1. Use offensive discovery to build the story of improper denial and bad insurer conduct
2. Identify those involved through written discovery; take depositions of claims examiners and underwriters who were personally involved
3. 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
5. Aggressively challenge improper privilege assertions

4. DISCOVERY – USING IT EFFECTIVELY

❖ Policyholder Perspective

❖ Defensive discovery:

1. Whereas offensive discovery wins cases, poorly prepared policyholder witnesses can result in inaccurate testimony and lost cases
2. Insurance issues are often complex and multifactored; corporate witnesses should not be expected to understand issues without preparation
3. 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

4. DISCOVERY – USING IT EFFECTIVELY

❖ Policyholder Perspective

❖ Depositions:

1. Know the rules for objections
2. 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
6. 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

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**FINAL
DECISION**

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.

5. SUMMARY JUDGMENT – OFTEN A CRITICAL JUNCTURE

- ❖ **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

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