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# The Insurance [P]Art of the Deal: Negotiation Perspectives From Insurance In-House Counsel

By Jason E. Fellner

Insight into the negotiation strategies of insurance in-house counsel took center stage at one of the programs presented during the Fall 2015 National Legal Malpractice Conference. Speakers from the world of insurance provided attendees with detailed insights on how insurance companies evaluate, treat and resolve complex professional liability claims.

The panelists said insurance in-house counsel, also called claims attorneys and/or claims managers, strive to settle claims involving clear liability and undisputed damages early, whereas cases with questionable liability and/or damages present more challenging problems during settlement negotiations.

The participants discussed a number of practical issues that exist for insurance in-house counsel, including:

- immediate challenges presented upon receipt of a claim;
- complicated coverage issues;
- the tripartite relationship;
- responding to settlement demands; and
- bad faith claims.

## Immediate Challenges

Panelist Sally E. Anderson, vice president of claims at Wisconsin Lawyers Mutual in Madison, Wis., told the audience there are two immediate challenges at the outset of a claim for every insurance company: whether to issue a reservation of rights letter and whether a denial of coverage is appropriate.

All panelists agreed best practice dictates that no matter the ultimate decision, even if made with the benefit of outside coverage counsel, all communications with regard to reservation of rights and/or denial of coverage should be made in writing and done promptly. Only adverse consequences can result from failing to promptly notify an insured of the insurance company's decision to accept tender of a claim with a reservation of rights and/or denial of a claim, they said.

Bryan Jordan, claims manager at Zurich in New York, was quick to point out: ''Every claims attorney must appreciate the value and timeliness of a reservation of rights letter.''

At all times, he said, making a good record of the claim from start to finish is necessary, and that begins with the first letter sent out by the carrier upon receipt of a claim.

To the extent the insurance company wants to control the defense of a claim—even when coverage is marginal—better practice is to hold off on pulling coverage and first select insurance defense counsel to assist in the further evaluation of the liability and damages component of the claim, Jordan said.

## Complicated Coverage Issues

Every jurisdiction has different rules regarding an insurer's duties to defend and indemnify, which is usually highlighted in the reservation of rights letter.

In many cases, easy denial of coverage matters such as a retroactive date or clear prior notice of a claim does not require a high degree of sophistication and cross-communication. However, in all other cases where questions of coverage have shades of gray, ''more communication is necessary between all involved'' to properly analyze the coverage issues presented, according to panelist Gerald Merritt, executive vice president at USI Affinity in Matawan, N.J.

In those types of cases, he said, communication is required among the claims manager, the claims supervisor, defense counsel and coverage counsel.

Jordan added that there are instances when it is appropriate to bifurcate a file, with liability and damages to be handled exclusively by the claims attorney and coverage questions handled by a coverage attorney.

Experience shows that using outside coverage attorneys as a leverage point by a rescission action and/or threat of rescission can prove helpful in getting a plaintiff to settle a case, he said. In all, the panelists agreed that complicated coverage cases require more reporting and communication.

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 ISSN 0740-4050

## The Tripartite Relationship

The panelists also touched upon the potential conflicts of interest created in the tripartite relationship among insurer, insured and defense counsel when, for instance, there exists both covered and uncovered claims.

For example, professional liability policies generally do not cover disgorgement of fees as damages, which is often a claimed damage in legal malpractice actions. Even when defense counsel is paid by the insurance company, panelists noted, defense counsel's professional duty of care is owed to the client, the insured.

Merritt said some of the ABA Model Rules of Professional Conduct seem to run counter to the existence of the tripartite relationship that oftentimes contains alternative objectives between insured and insurer. Three he cited:

Model Rule 1.2 provides that ''a lawyer shall abide by a client's decisions concerning the objectives of representation.''

Model Rule 1.8(f)(2) provides that ''A lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.''

Model Rule 5.4(c) states that ''A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.''

As is often the case, Merritt said, the tripartite relationship can be tricky to navigate and it is important to keep in mind that everyone involved from claims attorney to defense counsel to coverage counsel has different duties with respect to each other. Understanding and respecting each party's role is critical to reaching the ultimate goal—resolution of the claim for the benefit of the insured.

## Responding to Settlement Demands

When confronted with a policy limit settlement demand, it is critical for the claims attorney to obtain input from defense counsel and the insured. Further, the claims attorney should respond in writing either directly or through defense counsel. The written response should explain why the demand is being rejected.

Jordan said it is adequate to simply state that more information is required before providing a substantive response to the settlement demand. In any event, he said, it is essential that a response is made and that it is put in writing.

Alternatively, he said, mediation can be a useful forum to work towards resolution. At a minimum, Jordan said, it can be a place to identify factual and legal issues presented and better understand the emotional underpinnings of a case.

## Bad Faith Claims

The panel highlighted ways that insurers can avoid exposure to bad faith denial of coverage claims.

For example, if the claims attorney can settle a case within the policy limits for a reasonable range, the case should be settled. The general standard employed is whether a reasonably prudent insurer would have accepted a settlement offer within the limits based upon the likelihood and degree of the insured's exposure.

Here again, good practice dictates written communication with all those involved, including the claims attorney, claims supervisor, defense counsel and the insured.

Proper handling of a claim by a claims attorney requires constant attentiveness, communication and thoughtful analysis, which all play a role in negotiated strategies that work towards resolution of a claim and elimination of a potential bad faith action.

  MOPC ISSN 0740-4050