Litigating the Insurance Claim: What Every Plaintiff's Attorney Needs to Know

By Marshall W. Conick

Your client calls you and informs you that they received a letter from a law firm for their insurance company. The client informs you that their insurance company is questioning their claim, demanding that they sit for an examination under oath ("EUO") or worse yet, their claim has been denied. The stakes can be high. In the case of an automobile claim, your client's car or truck may range in value from $15,000 to $60,000 or higher. The homeowners and commercial claims range in the thousands to millions of dollars in potential loss to your client and their company.

Because this involves one of your best clients, you consider keeping the case rather than referring it to another practitioner who specializes in insurance matters.

For many policyholders who may be forced to file suit against their insurance company, the case is lost before they ever file a complaint. It is no easy task educating yourself in the vast body of case law and insurance regulations that can impact your client's claim. Don't forget that by the time a demand has been made on your client to answer questions under oath, the insurance company has more than likely conducted an extensive investigation which may include police and fire department reports, written and oral statements taken from your client and other witnesses, interviews with police officers, neighbors, friends, and reports from forensic locksmiths or cause and origin experts.

Do not present your client for the EUO before you and the client are ready.

Typically, the law firm representing the insurance company will make a production demand on your client in the form of a letter that will include an extensive list of documents that your client is to produce and moreover, providing a short time frame in which to do it. The insurance company's attorneys will be quick to draw your attention to the fact that the courts have long held that the insured must cooperate and answer questions under oath. [1]

Do not allow your client to be forced to sit for an EUO prematurely or worse, refuse to present your client or refuse to produce certain documents because you are not prepared. This conduct will only aide the insurance company in denying your client's claim based on the insured's breach of policy provisions requiring that the insured cooperate, produce documents and answer questions under oath. [2]

Instructing the client not to sit for an EUO is one of first mistakes many practitioners make, with the idea in mind that they will file suit at a later date.

Another common mistake is presenting your client before demands have been made on the insurance company to produce certain documents and tangible items including the policy, statements, photographs and moreover, demand that the insurance company make the insured's property available for inspection to your expert for reasons which will be explained more fully below.

As noted above, your opponent will press you for a short date on which to present your client and attempt to characterize setting the date of the EUO on a later date as a delaying tactic by your client that is prejudicing the insurance company's investigation. These are further attempts to build more grounds for denial of the claim. Keep in mind that the insured can make the same argument in the event the insurance company fails to timely respond to a request for production of documents and tangible property.

Retaining an expert early.

Depending on the size of the claim, consideration should be given to retaining an investigator, and not just any investigator. The investigator should be an experienced insurance investigator, one who is familiar with claim handling techniques, insurance data banks and Special Investigation Units. This is even more true in the case of a fire. Your choice of an investigator should be experienced in cause and origin investigations. Finding the right investigator is not an easy task in a day and age when a number of investigators are hired by insurance companies, thus reducing the potential pool of experts available to the plaintiff.

Authorizations

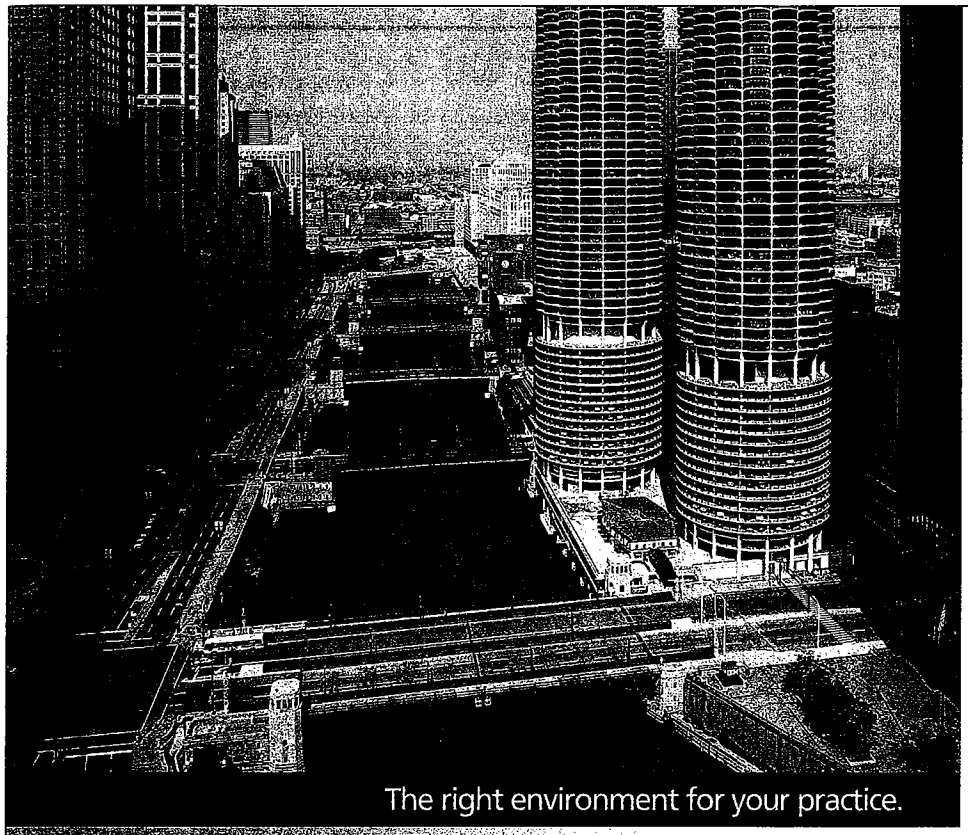
In addition to giving a statement, your client may have executed one or more authorizations prior to seeking your advise. Many insurance companies ask their policyholders to sign broadly worded authorizations allowing them to obtain various types of records including financial documents, and may include language that the insured consents to the company sharing this information with other insurance companies. Additionally, companies often have insureds sign authorizations allowing them to remove evidence from the insured's property.

A demand should be made for production of these authorizations, and consideration given to revoking the authorizations, particularly after the claim has been denied. Further, demand should be made on the insurance company to produce all chain of custody documents and for return of the insured's property. The insurance company may refuse your request for return of the property, but at a minimum, you should make arrangements to inspect and photograph your client's property before it is altered or disposed of.

Keep in mind that the manner in which the company responds to your request on behalf of the policyholder may very well be another factual allegation in support of a cause of action for vexatious and unreasonable delay. Moreover, the manner in which the insurance company preserves or fails to preserve the evidence may give rise to a count in your complaint for conversion, spoilation of evidence and discovery sanctions.

Obtain your client's policy.

The old adage that *"if you have seen*



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one, you have seen them all" is not true in the insurance case. Obtain a copy of the policy, declaration page and all endorsements before you produce documents and your client for an EUO. Illinois courts have held that the insured is charged with notice of the contents of the insurance policy. [3] You would not think of litigating a contract case without an accurate copy of the written agreement and being aware of the terms and conditions at issue. This is even more important in the insurance case where the advise that you are asked to give, and your client's rights, flow from the the policy contract.

Most policies contain a cooperation clause. Although many policies are modeled after the standard fire, auto and commercial policy forms, the policies may vary from company to company. Don't assume that the company has the right to demand what it is asking for. In addition, don't assume that your client has done something wrong or violated a policy provision. In order to serve the best interest of the client, counsel for the insured must examine all the facts and evidence with an objective eye. You are unable to do that if you are blocked from the evidence.

Further, the company may make a demand for the insured and members of his family to do certain things that are not provided for in the policy. For example, the insurance company may demand that all members of the insured's household sit for an examination under oath when the policy does not give the company that right. *In State Farm Fire & Cas. Ins. Co. v. Miceli,* the court held that the duty to submit to examination under oath applied only to named insureds and not their children, even though coverage extended to the children. [4]

As noted above, although the insured should comply with the terms and conditions of the policy, care should be given not to waive your client's rights by producing that, or doing that, which the company is not entitled to.

Obtain your client's statements.

By the time the client seeks your advise, they may have already given a statement to the initial claim handler and another more extensive recorded statement to the Special Investigator. Demand a copy of the transcripts, recording of your client's recorded statement, and other documents well before the EUO. Only after you have the documents that you need should you present your client. Be aware that misrepresentations made by your client during the presentation of their claim, including the EUO, can be grounds for denial of the insured's claim. Therefore, it is of utmost importance to review all the facts with your client before he or she testifies.

The Denial Letter.

Assuming the insurance company denies the claim, your client will receive a letter setting forth the reasons for the denial and citing policy language. The letter that your client receives declining his claim is generally referred to as a "denial letter." Scrutinize this letter. It will be the first exhibit at the adjuster's deposition.

Statutes and Regulations controlling the handling of claims.

The way in which your client's claim is handled is governed not only by the Illinois Insurance Code, but also Chapter 50, Section 9.19 of the Illinois Administrative Code. Rule 9.19 sets forth rules regarding the insurance company's handling of your client's claim. [5] Compliance with or violation of these rules by the company will aid you in enforcing

your client's rights, and if need be, provide you with the framework of how the insurance company violated the standard of conduct established by the Illinois Department of Insurance, and set the stage for your client's potential suit. The Illinois Administrative Code includes rules that range from the specific handling of the insured's claim, including the time frames for adjusting and denying the claim, to the very framework for the denial letter.

Rule 9.19 requires an insurance company to provide their insured with a timely and written basis for any denial of his claim which is referred to as "first party claim." Specifically, Rule 9.19 provides that in first party claims, where the settlement of a claim is less than the amount claimed, or if the claim is denied, the company shall provide the insured with a reasonable written explanation of the basis of the lower offer or denial within 30 days after the investigation and determination of liability is completed, and that this explanation shall clearly set forth the policy definition, limitation, exclusion or condition on which denial was based. [6]

This regulation highlights the need to scrutinize the language of the denial letter, and compare the grounds for the insurance company's denial against the defenses raised by the insurer.

Drafting the Complaint.

There are a number of practice books that contain form complaints for suits against insurance companies. However, it is important to plead more than the elements and several facts. Section 155 of the Illinois Insurance Code provides the policyholder with a means of seeking recovery of not only compensatory damages but attorney fees. [7]

As the Illinois supreme court noted in *Cramer v. Insurance Exchange Agency*, [8] Section 155 of the Insurance Code "provides an extracontractual remedy to policyholders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable." The supreme court added that an insured could recover reasonable attorney fees and other costs as part of a breach of contract action to recoup the proceeds due under the policy. [9]

Illinois courts have further held that the purpose of section 155 is to discourage the insurer from using its superior financial position to profit at the insured's expense.[10]

The court in *McGee v. State Farm Fire & Casualty Co.*, held that the "key question in a section 155 claim is whether an insurer's conduct is vexatious and unreasonable" and that determination is "a matter committed to the trial court's discretion."[11]

Courts have noted that factors to consider are the insurer's attitude, whether the insured was forced to sue to recover, and whether the insured was deprived of the use of his property.[12]

Many practitioners make the fundamental mistake of placing undue emphasis on the length of time that has passed from the date of loss until the claim is denied, or until the insured is forced to file suit. Although time is a factor in considering the insurance company's conduct, the duration of the pendency of the claim is not controlling in determining whether an insurer is guilty of vexatious delay in refusing to settle a claim.[13]

When an insured must resort to bringing a declaratory action against the insurer in order to enforce its right to coverage in an underlying lawsuit, the insured may recover section 155 attorney fees incurred in both the underlying case and the declaratory action. [14]

However, an insurer is not liable for attorney fees under section 155 merely because it litigated, and lost, the issue of insurance coverage. If the insurer is found to be vexatious and unreasonable in refusing to process a claim, however, section 155 authorizes the court to award fees and costs.[15]

Before considering filing a lawsuit, you should obtain and analyze as much information from your client concerning how the insurer handled his claim. Typically, the complaint will contain very few facts concerning the reasons why the handling of your client's claim was vexatious or unreasonable. Often, the need to focus and plead improper claim handling is overlooked. Many practitioners will merely quote the Insurance Code and add that the insurer's denial of the claim was "unreasonable and vexatious."

Illinois courts held that merely alleging the insurer unreasonably delayed and refused to pay the claim without some modicum of fact, is insufficient to state a cause of action for sanctions under the Insurance Code.[16]

In the case of a count seeking sanctions under Section 155, more is better. Attorneys for the insurance company routinely meet your complaint with a motion to dismiss claiming that you have failed to plead sufficient facts. As noted above, merely paraphrasing that the company "vexatiously and unreasonably delayed" your client's claim, will set the stage for dismissal of the very count that provides your client with the means of recouping his attorney's fees against a financially superior defendant, all of which could have been avoided by marshaling more facts before filing the complaint.

The affirmative defense. Do not assume the defendant's affirmative defense is valid.

Often practitioners faced with a hectic schedule will elect not to challenge an affirmative defense believing that the insurer is entitled to the defense or because of time constraints, and forego an opportunity to move to dismiss the alleged defense. This can be a fatal mistake that could result in the insurance company prevailing on a summary judgment motion or receiving a jury instruction on defenses that as a matter of law, it is not entitled to.

Crafting a defense is a tactic that you should be wary of. In short, your opponent may attempt to weave various inapplicable policy provisions into a defense. For example, the insurance company raises an affirmative defense, claiming that your client failed to cooperate without providing facts. Or, the insurer alleges that your client made fraudulent misrepresentations and fails to cite the applicable policy provision and moreover, fails to allege facts with the degree of specificity required. In further example, the insurer claims violations of other policy provisions, again with little or no facts.

Later, after you replied to the defense and have now had the opportunity to thoroughly read the policy, you realize that the policy does not contain a concealment or fraud provision which allowed the insurer to deny the claim based on fraud, or, you learn that your client clearly cooperated with the company and that the insurer asserted an affirmative defense merely by pleading conclusions rather than facts. Had you had the time and familiarity with the insurance regulations, policies and the specifics of the client's claim, you may have been able to press the insurer, by motion, to allege more facts which it would have been unable to do, thereby thwarting the insurance company's attempt to assert a defense that it was not entitled to.

One of the first steps in analyzing your client's claim is to examine the denial letter. What is not included in the denial letter is

often more telling than what language is included.

As noted above, the insurer may attempt to raise a new policy defense after suit is filed. Remember, the burden is on the insurer to plead and prove an affirmative defense that a loss fell within the scope of exclusion in policy.[17]

Scrutiny of the insurance company's denial letter will reveal that the insurer did not inform your client that it was denying his claim for the reasons raised for the first time in its affirmative defenses. Illinois Courts have held that insurers are precluded from denying a claim on one basis and then changing the basis for denial during litigation. [18]

The hypothetical and case law noted above clearly demonstrate the need to carefully examine the denial letter and refer to that document throughout the litigation. What the insurance company adroitly omits from the denial letter will not only aide you in challenging defenses but also aide you during discovery when deposing the adjuster or investigator and ultimately aide your cross examination at trial.

Discovery, discovery, discovery!

Discovery in the insurance case, particularly a fraud claim, is akin to the old real estate adage that it is location, location, location. Discovery in the insurance coverage case, particularly a fraud case, is critical. The lack of a full and complete response by the insurance company can deprive you of important documents and evidence that you will need to prevail. Accordingly, it is important to tailor your discovery requests, particularly the interrogatories that question the basis of the denial and policy provisions that the company relies on in its defense.

In order to request the right information, you have to know what the company has or could have in its file. Sometimes insurers will claim that they do no have a claim manual or that you requested a manual when really what they have is a handbook. This is where knowledge of the claim process, insurance industry and well crafted discovery will come in to play.

Claim Manuals

These manuals are an important tool in your suit. As you might expect, insurance companies do not welcome production of their claim manuals, and will claim that the request is overly burdensome or harassing. or seeking proprietary information. The insurance companies recognize that their claim manuals, which some adjusters will refer to as "the bible", contain the standard of care and methodology to be applied by the adjuster when handling the claim. Apart from aiding you in your discovery, the manual can be used to impeach the adjuster with his or her breach of company standards, and ultimately prove that the company did not follow its own guidelines let alone Insurance Department regulations. Other documents and data base search results exist in the claim file which will not be volunteered unless you specify these documents in your request, or even press for them in the face of a denial that they exist.

Conclusion

Knowing what the insurance company is and is not entitled to, coupled with diligent preparation, and persistence in obtaining evidence is the key in prevailing in the insurance case.

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1. *Claflin v. Commonwealth Insurance, Co.*, 110 U.S. 81, 94-95, 3 S.Ct. 507, 515, 28 L.Ed. 76, 82. (1884) "The object of an examination under oath enable the company to obtain information material to their rights, to enable them to decide upon their obligations, and to protect them against false claims.

2. *Horton v. Allstate Ins. Co.*, 125, Ill.App.3d 1034, 467 N.E.2d 284 (Ill.App. 1 Dist. 1984) (Suit by insured was barred, where insured did not fulfill condition precedent in policy requiring insured to produce certain documents, including books of account, bills, invoices and other vouchers upon insured's reasonable request following a loss, and where insured did not attempt to excuse noncompliance.);An insured must comply with such provisions or he cannot recover. *Niagara Fire Insurance Company v.Forehand*, 169 Ill. 626, 48 N.E.2d 830 (1897); *Horton v. Allstate Insurance Company*, 125 Ill.App.3d 1034, 81 Ill.Dec. 584, 467 N.E.2d 284 (1st Dist. 1987); *Purze v. American Alliance Insurance Company*, 781 F.Supp. 1289 (N.E. Ill. 1981); *Piro v. Pekin Insurance Co.*, 162 Ill.App.3d 225, 113 Ill.Dec. 220, 514 N.E.2d 1231 (1987), (See *Crowell v. State Farm Fire & Casualty Co.*, 631 N.E.2d 418, 197 Ill.Dec. 415 (5th Dist. 1994), stands for the proposition that, unless an insurer can establish prejudice from delay, an insured may be permitted to cure a failure to comply with a demand for an examination under oath by offering to sit for a deposition in a subsequently filed action.

3 *Florsheim v. Travelers Indem Co.*, 75 Ill.App.3d 298, 30 Ill.Dec.876, 393 N.E.2d 1223. (1 Dist., 1979). (The insured is charged with notice of the contents of the insurance policy.).

4 *State Farm Fire & Cas. Ins. Co. v. Miceli,* 164 Ill.App.3d 874, 518 N.E.2d 357 (1 Dist. 1987). (Duty, to submit to examination under oath applied only to named insureds and not their children, even though coverage extended to them.)

5 Title 50 Insurance, Chapter I, Subchapter 1, Part 919.50.of the Illinois Administrative Code.

6 Id.

7 215 ILCS Section 5/155 of the Illinois Insurance Code 8. *Cramer v. Insurance Exchange Agency*, 174 Ill.2d 513, 520, 221 Ill.Dec. 473, 675 N.E.2d 897, 900 (1996),

8 Id.

9 Id.

10 *Valdovinos v. Gallant Insurance Co.*, 314 Ill.App.3d 1018, 1022, 248 Ill.Dec. 211, 733 N.E.2d 886 (2000).

11 *McGee v. State Farm Fire &Casualty Co.*, 315 Ill.App.3d 673, 681, 248 Ill.Dec. 436, 734 N.E.2d 144, 151 (2000),

12 *Mobil Oil Corp. v. Maryland Casualty Co.*, 288 Ill.App.3d 743, 224 Ill.Dec. 237, 681 N.E.2d 552 (1997).

13 *Dark v. United States Fidelity & Guaranty Co.*, 175 Ill.App.3d 26, 30-31, 124 Ill.Dec. 681, 529 N.E.2d 662 (1988).

14 *Dark v. United States Fidelity & Guaranty Co.*, 175 Ill.App.3d 26, 30-31, 124 Ill.Dec. 681, 529 N.E.2d 662 (1988).

15. *Mobil Oil Corp. v. Maryland Casualty Co.*, 288 Ill.App.3d 743, 224 Ill.Dec. 237, 681 N.E.2d 552 (1997).

16. *Scudella v. Illinois Farmers Insurance Co.*, 174 Ill.App.3d 245, 528 N.E.2d 218 (1st Dist 1988). (Merely claiming that its insurer, unreasonably delayed and refused to pay without some modicum of fact, is insufficient to state a cause of action for sanctions under the Insurance Code.)

17. *Raprager v. Allstate Ins. Co*, 183 Ill.App.3d 847, 539 N.E.2d 787,, 132 Ill.Dec. 224 (2 Dist., 1989) (The burden was on the insurer to plead and prove as affirmative defense that loss otherwise covered fell within scope of exclusion in policy.

18. *Smith v. Union Automobile Indemnity Co.*, 323 Ill. App.3d 741, 752 N. E. 2d 1261 (2nd Dist 2001). (insurers are precluded from denying a claim on one basis and then changing the basis for denial during litigation.)

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