



CLM 2016 Atlanta Conference  
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### **Mock Trial Seminar**

#### **I. Claim Investigations/SIU Referrals**

Claim investigations start at the frontline. Frontline claim representatives should be trained to identify and/or flag suspicious circumstances regarding the claim. Factors and/or flags should be developed to assist in indicating suspicious or false claims.

Some factors to consider and which warrant an SIU investigation consist of suspicious and/or exaggerated damages, suspicious fact patterns and/or loss facts, possession and/or control of item and/or vehicle, insurable interest, misrepresentations in the application of insurance, misrepresentations in the garaging of the vehicle and extensive claim histories.

Misrepresentations must be material. A material misrepresentation can occur in either the presentation of the claim, meaning untruths about the facts of the loss, the damages being claimed and/or it could be in the form of a misrepresentation in the procurement of the policy. In other words, false statements in the policy application.

#### **Material Misrepresentations/Policy Fraud**

##### What constitutes fraudulent procurement of an insurance policy?

Material misrepresentations made by the insured in the policy application could warrant first party claim denials and/or voiding the policy depending upon the state where the contract was made.

Under New York law, no misrepresentation shall void any contract of insurance or defeat recovery. Each state will be different in this particular issue. In New York, we can utilize a misrepresentation in the application to deny first party claims. However, innocent victims remain covered.

#### **Materiality**

### How does one determine materiality?

Under New York's Insurance Law in determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks will be admissible.

Therefore, materiality of the misrepresentation will be viewed by the Courts both as material to the application of insurance and also taking into consideration past performance of the insurer with respect to similar risks.

Generally, a misrepresentation is material where the evidence adduced at trial demonstrates the insurer would not have issued the policy had it known the true nature of the matter being misrepresented.

Some examples of material misrepresentation are misrepresentations in ownership and/or the identity of the principal operator (insurable interest), rate evasion, avoiding higher premiums or trying to secure lower premiums by concealing material facts from the insurance carrier and/or agent regarding where the vehicle will be principally utilized and the location where the vehicle is garaged.

Insurance carriers can deny the insured's first party benefits because the insured was a participant in the fraud. An insured's misrepresentation or fraud in obtaining the policy bar the insured from recovering policy benefits.

An insurance carrier can defend the claim being made in a declaratory judgment action by asserting affirmative defenses that the insured was a participant in the fraudulent procurement of the policy. Therefore, misrepresentations in the application and/or fraudulent procurement of a policy can not only affect the name insured it could also affect the claimant should it be determined that the claimant participated in the fraudulent procurement of the policy.

### **Material Misrepresentations and Coverage with Respect to the Presentation of the Claim**

Generally, material misrepresentations made in the presentation of a claim do not affect third party liability coverage. However, material misrepresentations made in the presentation of a claim will affect the first party claims of the person making the misrepresentations with respect to the presentation of the claim.

Some policies also contain concealment and/or fraud clauses and these would apply when an insured misrepresents facts to the insurer during the investigation of a loss.

## **II. Investigation Techniques**

When initiating an investigation, the SIU investigator will have various tools available for purposes of conducting the investigation. These tools are as follows:

1. Scene photos and canvass.
2. Securing statements from the insured and the operator of the vehicle.
3. Experts.
4. Examinations under oath of the individuals/insureds.
5. Background investigation checks and index searches for prior claims.

When looking to investigate a claim, involve counsel and experts early. This will assist with the process of determining whether or not a reasonable and legal basis exists for potential denial. Use of counsel during examinations under oath will prove helpful so that the investigation can be focused and conclusions supported with evidence.

#### **Reasonable Basis to Request an Examination Under Oath**

In some states, the examination under oath is a condition precedent to coverage and is contained within the policy. Other states it could be considered a verification request. In some states it is both a condition and verification.

The following are some examples of a reasonable basis for requesting the examination under oath of the claimant:

1. Suspicious loss facts and discrepancies in the presentation of the claim by claimant/witnesses determined through securing statements from these individuals.
2. Insurable interest issues and/or possible fraud in the application and issues with the garaging/location of the vehicle.
3. Extensive claim histories in combination with background investigations to determine the person's credibility.

The use of examination under oath testimony is probably the most useful tool to establish material misrepresentations either in the presentation of the claim and/or in the application of insurance. The examination under oath process is sworn to testimony which can be readily admissible at the time of

trial. Statements assist with respect to determining whether or not further investigation is warranted but statements are difficult to get into evidence.

### **Canvassing and/or Site Inspections**

It is useful to go to the location of the loss and/or insured residence to determine multiple issues. If you are dealing with a loss/accident you could determine if the scene as described by your claimant fits the facts. If you are looking for policy application issues, canvassing the area could determine if the individual in question actually resides where they claim to reside and if the vehicle was actually garaged at the location.

### **Use of Experts**

The use of an expert in determining whether or not the loss as presented is false is of great assistance. If you are dealing with an automobile loss, the use of an engineer could assist with determining whether or not the damage is consistent with the facts as presented. The use of an expert with respect to issues associated with damage enhancement and/or false damage claims is also extremely useful and will assist in proving the defense of the claim at trial.

With respect to issues associated with policy application misrepresentations, the use of an underwriter will be required at the time of trial to establish that the policy would not have been written had the carrier known the true facts of where the vehicle was being garaged or the true facts concerning the risk being insured.

When engaging an expert, consideration must be given to the expert's qualifications and whether or not that expert will be considered an expert at the time of trial and will pass muster with respect to a *voir dire* concerning their eligibility to testify.

When dealing with scientific evidence, you could also face challenges by your adversary concerning the legitimacy of the scientific testing being performed on the particular item in question.

### **Background checks/claim history**

Background investigations, claim index searches and the use of same to attack the credibility of the claimant must be measured against the perception of how the claimant/insured is being treated when ultimately trying the case before a jury. In other words, you have to determine how far is too far.

In addition, would such prejudicial evidence concerning the credibility of the claimant be precluded as being to prejudicial. These are issues to balance and determine during the claim committee review.

The admissibility of these types of background investigations and index searches must be considered as well. You will have to get these searches into evidence through the business record exception to the hearsay rule. The business record exception to the hearsay rule is as follows:

Business records are usually admissible and would be an exception to the hearsay rule if you could establish that the business record was made in the regular course of any business and that it was in the regular course of such business to make it at the time of the act and/or transaction or occurrence or within a reasonable time thereafter and that the record was kept contemporaneously with the event and/or circumstance that it was recording.

### **III. Claim Review Process/Claim Committees**

Every carrier has a different claim review process but there should be a determination made by the committee. The review committee will incorporate all of the information secured through the investigation and determine whether or not to deny the claim or pay the claim.

The claim committee will balance the information and determine its materiality. The claim committee should review all testimony, photos, policy language, expert reports and counsel opinion.

Considerations must be given to whether or not the claim committee review and/or claim committee report will become discoverable. In addition, claim notes and/or investigative notes from SIU could also be discoverable and consideration must be given to what they say. A thorough review of the claim file prior to denial is warranted to make sure that everything that is in your claim file can be discovered.

### **Disclaiming Coverage/Denying a Claim**

If the claim committee has determined that the claim should either be denied and/or coverage disclaimed, it must issue a disclaimer/declination letter. These letters should include policy language and a summary of the facts leading to the opinion reached by the carrier. These letters must also contain, depending upon the state, information concerning the state agency where the individual/claimant can contest the disclaimer/denial.

Keep in mind that disclaiming coverage can affect the rights of others affected in the claim and/or loss. It could potentially leave an injured third party without coverage. In addition, disclaiming coverage for bodily injury liability could create an uninsured event triggering the rights to procure uninsured motorist coverage or to make an uninsured motorist claim.

In most jurisdictions, the only time that a misrepresentation will affect third party liability coverage is when the misrepresentation is such that the underlying incident was the product of a staged or intentional event therefore, not an accident.

When an incident is determined to be the product of a staged or intentional event, you can disclaim liability coverage to third parties. However, in some jurisdictions, the innocent third party's rights are viewed from the innocent party's viewpoint. If the occurrence was unexpected or unattended from the viewpoint of the innocent party, it is therefore an accident as defined by the policy of insurance as it relates to that innocent party. This would be true even if the accident was the result of an intentional act on the part of the other vehicle.

### **Declaratory Judgment Action**

Following a disclaimer and/or denial, the carrier can commence a declaratory judgment action to determine its rights under the policy. Declaratory judgment actions could also be brought by the individual affected by the denial/disclaimer. These actions are essentially a request for the Court to determine one's rights and/or liabilities under the policy of insurance and to declare a judgment concerning the coverage under the policy.

Declaratory judgment actions can be an important tool to utilize at the conclusion of an investigation in order to have the carrier's rights declared into a final judgment.

Declaratory judgment actions are also economical as they resolve all disputes concerning the coverage under a policy when the carrier could be facing multiple litigations from various claimants. The carrier would be able to procure a judicial determination that could affect the rights of all claimants under the policy. If considering a declaratory judgment action, you should also consider a stay of all underlying litigation and/or arbitrations that are pending at the time.

### **IV. Trial Techniques/Burden of Proof**

After your declaratory judgment action has been commenced either by the carrier or by the party affected through the use of the disclaimer/denial, then the declaratory judgment will move through the court system, going through discovery and a trial. The trial of your declaratory judgment action will pose complications as it relates to admissibility of hearsay evidence which could consist of witness statements, photographic documentation, audio recordings, statements, index searches, etc. It is important to determine the admissibility of all the evidence that you have relied upon during the investigation stage. Be prepared to establish exclusions to the hearsay rule specifically with business records and the business record exclusion previously discussed herein.

### **Experts**

If you will be using an expert during your declaratory judgment trial, determine the expert's qualifications and make sure that they could pass an attack concerning the admissibility of the expert either based upon the expert's credentials and/or the scientific methodology utilized to reach their conclusion.

## **Burden of Proof**

Finally, you will have a burden of proof and this burden of proof will be charged to the jury. Generally, the insurance carrier's burden of proof would be to establish the materiality of the misrepresentations as a matter of law. The insurer must present documentation concerning its underwriting practices, such as handwritten manuals, bulletins and/or rules pertaining to similar risks that show that it would not have issued the same policy if the correct information had been disclosed in the policy application.

With respect to misrepresentations in the presentation of the claim the carrier would have to prove the materiality of the misrepresentations and how it affected the carrier's investigation and ultimate conclusion that the loss facts as presented were false. Simple conclusory statements by insurance company employees that are unsupported by documentary evidence are going to be considered insufficient to establish materiality as a matter of law.