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Know When to Hold 'Em and When to Fold 'Em

I. Overview

Despite reasonable claims handling, careful evaluations of coverage issues and appropriate and timely communications with policyholders, claims go to litigation. The carrier's best interests are served by understanding that it will be called on to defend claim specific decisions taken on a file as well as its practices and procedures related to the particular issues presented by the claim. Essential to this understanding is deciding, as early as possible, whether a specific claim in litigation is better resolved through settlement and compromise. Or, whether the carrier is better served by pushing a matter to a trial, either before a judge or jury, and perhaps even on to an appeal resulting in a written opinion that creates beneficial precedent for the carrier and the industry as a whole. While each claim in litigation is unique, a carrier can oftentimes anticipate most components to the litigation that will assist in making a decision about how to resolve a particular litigated claim. These components include evaluation of the jurisdiction and venue, the issues and events specific to the claim, costs associated with the reasonably anticipated discovery, depositions and expert witnesses and likelihood of success at trial and, if necessary, on appeal.

II. The Claim: Pre-Litigation

A claim is presented. It is adjusted or investigated. A claim decision is made. The common thread of events running through all insurance claims that begins and ends with communication with a policyholder and/or policyholder representatives. This communication is required whether or not a claim goes to litigation. Typically, the communication comes in the form of claim presentment, providing documentation and information to support the claim, and making demands to resolve disputed issues. Oftentimes, communication through policyholder representatives results in delay in presentment of documentation, and once provided, gaps in what is eventually presented. Nonetheless, across jurisdictions, the carrier must respond reasonably and timely. Maintenance of the claim file in a manner that supports an accurate record of these communications, submissions by the policyholder or its representatives and the carrier's responses and other investigation or inspections is vital. And, when a claim goes to litigation, a carrier must anticipate that the claim file will be scrutinized by attorneys, expert witnesses, and eventually a judge or jury – all evaluating whether the carrier performed a reasonable and prompt investigation of a claim and made a coverage decision supported by the responding insurance policy and the claim file.

Memorialization of the events that comprise the claim file activity oftentimes drives a future decision to take a litigated claim to trial. Irrespective of the type of claim at issue, the claim documents are typically where the litigated claim's evaluation begins. In the first party property context, this file will support the carrier's compliance with local, state rules governing how the claim was handled and the timing of any coverage decision and claim payments for undisputed damage. In the third party liability context, this file will demonstrate an evaluation of an insured's tender of defense or the carrier's basis in deciding to reject a policy limits settlement demand. The claim file is the primary source of the trial narrative should a carrier decide that a trial is the better path to resolution.

III. The Claim: In Litigation

Once litigation starts, the events and outcome of the claim itself become almost secondary to other considerations that drive the lawsuit. One critical consideration is where the lawsuit is filed and where the lawsuit will be litigated to verdict. Trial attorneys have long understood that the competitive setting where adversaries engage can be as crucial as any factor in determining the result of the engagement. In litigation particularly, it is appreciated that either side gains real advantages over the other by determining the forum in which a dispute will take place. Plaintiffs decide where the original lawsuit will be filed, although defendants may then have opportunity to transfer venue based on a particular jurisdiction's rules governing where a case can be properly prosecuted. As a basic rule, plaintiffs will generally prefer state courts, while defendants tend to prefer that their cases be litigated in federal courts. Claims arising out of insurance disputes follow these same general preferences. As plaintiffs, policyholders will generally steer towards a state court system; whereas, insurance carriers will almost invariably evaluate federal court options when defending such actions. Depending upon the jurisdiction, the choice between state and federal court hinges on whether the judge presiding over the trial is elected or appointed and whether the jury pool encompasses a narrower or broader potential jury pool – critical considerations in predicting how a particular litigated claim will eventually resolve.

Established (and even more subtle) aspects of motion practice, discovery, trial procedures and timing tend to work in favor of a plaintiff suing in state courts. For one, the standard applied when deciding whether an initial claim has sufficient merit to proceed beyond the pleading stage is relatively lenient under most state court procedural law. Further, allegations that include legal conclusions will not establish grounds for objection, as long as fair notice is communicated by the complaint as a whole. In addition to pleading requirements, other areas of distinction between state and federal court proceedings may shape the outcome of insurance disputes. In jury trials, for example, state courts typically call for twelve jurors and require less than unanimity to issue a verdict. Federal juries, by contrast, will consist of between six and twelve members, whose decisions must be unanimous. Fed. R. Civ P. 48. Commonly, attorneys have more autonomy when conducting voir dire in state courts, whereas many federal judges assert far greater control over the jury selections process. A final comparison revolves around a particular court's willingness to grant pre-verdict dispositive motions. Generally speaking, the plaintiff prefers a venue with a court unwilling to grant dispositive motions prior to or during trial.

Early on in the process, both sides to litigation are evaluating the costs associated with prosecuting and defending a litigated claim. One key consideration is the expense related to hiring expert witnesses. While a carrier may have an opportunity to scrutinize the reasonableness of the rates and expenses charged by the opposing side's chosen experts, the initial consideration for the insurer is the rate and expenses charged by the carrier's own experts. Depending upon the type of litigated claim, an expert – and often more than one – will be required to support the insurer's defense before, and at and through, trial. Resolving the dilemma of what expert testimony is essential and then, what experts to retain, requires an early assessment of the likely issues that will remain in dispute at the time of trial. From the plaintiff's perspective, the main inquiry is whether the expert testimony is necessary to survive a pre-verdict dispositive motion. Clearly then, an area of attack from the defense side is the qualification of the plaintiff's expert and whether his or her opinions are reliable and helpful to the trier of fact. The carrier is better served by weighing the costs and benefits of an eventual "battle of the experts" in considering whether to pursue a case to trial.

A second key consideration related to costs associated with participating in the written discovery process and the production of documents. Particularly with higher stakes commercial litigation, both sides are considering the scope of discovery they can anticipate and the commiserate expense in answering discovery and producing documents – particularly if the case mandates a production of information that is otherwise maintained in an electronically stored format. Knowing that claims go to litigation mandates that a carrier be mindful of, and sensitive to, the identification and production of electronic discovery. Electronic discovery is the electronic aspect of identifying, collecting and producing electronically stored information (ESI) in response to a request for production in a lawsuit. ESI can include emails, documents, presentation, databases, voicemail, audio and video files, social media and web sites. Electronic data is more dynamic than hardcopy evidence and often contains metadata with time-date stamps, author and recipient information and other file specific properties. The sheer volume of electronic data that must be identified, collected and produced can be daunting, with astronomical expenditures associated with this aspect of litigation. In *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, article authors Nicholas M. Pace and Laura Zakaras conducted an extensive analysis and concluded that "the total costs per gigabyte [of the capture and review of ESI discovery] were generally around $18,000.00" (RAND Corporation. 2012). Depending upon the issues specific to a litigated claim, the cost associated with ESI discovery alone can be a paramount consideration in whether to resolve a case, pre-trial. In today's litigation environment, it has become crucial for a carrier to identify its ESI relevant to a particular litigated claim in anticipation of its review and production. An early evaluation of the impact of content, and costs associated with the production of ESI, are essential to a decision to resolve a claim – even a claim with threshold coverage issues and otherwise favorable facts.

Similarly, essential to an evaluation about whether to take a case to trial are the witnesses who will voice the carrier's position to a judge or jury. From a carrier's perspective, its narrative is typically provided through the claim file and the testimony of a handling adjuster and a carrier's corporate representative(s). Evaluating the credibility of the adjuster who had the initial, direct contact with a policyholder or a policyholder representative is an important component in deciding whether to consider pre-trial resolution. Adjuster's actions and character will be challenged by opposing counsel, scrutinizing the adjuster and direct

supervisors for bias, improper motive and competency and qualification. Questions will be posed about monetary rewards tied to outcomes; job security being dependent on claims decisions; proper training and experience to be assigned to the claim in litigation. Similarly, the person who serves in the role as corporate representative will be tested and scrutinized, whether the topic is a carrier claims handling procedure, the intent behind policy terms and exclusions or the basis for underwriting a risk. Likewise, the carrier will question the motivation of the policyholder in filing a lawsuit and will work to establish testimony that demonstrates the policyholder's role in failing to resolve a claim without the necessity for litigation.

In most jurisdictions, the parties will be required to complete some form of alternative dispute resolution – either a mediation or settlement conference, with or without court oversight. Regardless of the claim – whether it is a single catastrophic event or one litigation claim among thousands, the ADR opportunity remains an opportunity for resolution as long as the parties and their counsel have adequately prepared for ADR. With few exceptions, the costs associated with preparing for and attending the ADR session are vastly less than the eventual costs associated with preparing for and taking a case to trial through verdict. Consequently, after an unresolved mediation, both sides are evaluating the financial impact associated with proceeding to trial and whether any information disclosed at mediation supports a change to a party's particular liability or damages evaluations.

IV. Let's Go To Trial!

Time has come to finally decide whether to push a litigated claim to trial – discovery is complete, witnesses are prepared, expert reports exchanged, pre-trial reports finished and decisions to hire jury consultants have been made (perhaps even a focus group or mock trial is complete). The decision has been made to "hold 'em". The parties will have option to proceed as a bench trial – with a judge and no jury – which normally provides an expedited and less expensive process. Or, the parties can try the case before a jury.

The venue and judge can largely drive whether a party elects a bench or jury trial – or even a trial at all. The trial judge is the gatekeeper, with no oversight via an immediate appeal, absent irreparable harm to a litigant. In other words, the trial court's present influence extends to all aspects of the case and an eventual trial. Which experts are allowed to testify and to what opinions? What documents can be shown to the jury and when? What questions will the jury answer? What measure of damages will the jury be allowed to consider? What testimony will be excluded because it may be unduly prejudicial to one side? The election of judges is a controversial issue among attorneys and the judiciary. Judges must make decision that are impartial and are seen to be impartial. Yet, the election of judges requires them to be politicians, seeking votes and in most cases money to campaign for votes. And the contributors to these campaigns are oftentimes the attorneys and their clients asking a judge to rule in his or her favor. While some states have instituted strong recusal rules that promote accountability and help ensure that special interests cannot buy justice, a carrier is best served not underestimating the impact of an elected judge presiding over a trial about his or her constituency.

Similarly, the jury pool from which the jury will be selected is an essential consideration when a carrier decides to proceed to trial. The jury selection process is not an opportunity "to

pick a jury". Instead, the attorneys and their clients go through this process to eliminate people they think would hurt their case using a mixture of intense questioning, critical observation and stereotyping. Jury selection for an insurance case is a particular challenge because many jurors will have had some experience with insurance and insurance claims. This insurance experience may have little to do with the actual issues of a claim in litigation but may have affected the prospective jurors' attitudes towards insurance companies and the reasons why carriers make insurance decisions. One aid in selecting a jury is whether to retain a jury consultant to assist. Jury consultants offer a variety of resources from mock trials, focus groups, opening statement consultation, jury instruction review, in addition to aiding in jury selection. Leading jury science practitioners "boast that they can predict with greater than ninety percent certitude the outcome of trials before the evidence has been heard." Jeremy W. Barber, *The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom* 31 Am. Crim. L. Rev. 1225, 1232. Although adding a jury trial specific cost, the use of jury consultants is a consideration for a carrier who has made a decision that pre-verdict resolution is not its better course.

Jury questions and instructions are the questions and legal rules given by the judge to the jurors before they retire to deliberate about the case. These questions and instructions are to be followed when deciding a case. Generally, the issues that will be included on a jury charge and the recoverable damages related to each jury question are considerations of both parties well before the actual trial begins. The instructions go to how the jury is to weigh the evidence, assess the credibility of witnesses and can also include definitions about terms used in the questions and the burden of proof specific to the case. When deciding whether to pursue a jury trial for a litigated claim, the carrier is better served when it can anticipate what questions will be asked of a jury, including what measure of damages will be presented to a jury. The ultimate questions to be asked, and the commiserate instructions related to the questions themselves are the primary determiners of the pre-trial motions, witness and exhibit lists and issues to be explored during the voir dire.

Not be overlooked is the court reporter capturing the record of all pre-trial and trial proceedings. A record is commonly created for all matters – beginning with pre-trial rulings on limine motions, through voir dire, trial testimony and through arguments at the charge conference and ending with the argument of any post-verdict motions. Whether a party decides to appeal a verdict is largely dependent upon the record and whether and how errors were preserved for appeal. Like the claim file, the trial record will be scrutinized and evaluated to decide the merits of an appeal – with both sides weighing the pros and cons of an appeal and the make-up of the appellate court reviewing the record. In other words, the decision to "hold em" can survive an adverse verdict and create opportunity for an appeal that results in a written appellate opinion.

Claims go to litigation. Knowing when to hold a case to trial and when to fold a hand and settle, pre-trial, will be dependent both upon the claim activity that was completed prior to the litigation and the events that arise once litigation commences. The evaluation to pursue a decision by a judge or jury, like the litigation process itself, is dynamic. The carrier is best served by understanding, early on, the importance of venue, judge, and jury pool on this decision. Likewise, the carrier has an opportunity to include in its evaluation the costs associated with holding a case to a trial and weighing the impact of a verdict on the carrier's own policies as well as the insurance industry as a whole.