



2020 Construction Conference
September 29 – October 1, 2020

Don't Miss the Forest for the Trees

Summary/Description:

A pyrrhic victory is one that comes with such a devastating toll on the victor that it is tantamount to a defeat. The toll inflicted by such a victory negates any benefit achieved by winning. Claims professionals are often faced with “winnable” cases — cases where the underlying claims against the insured are weak or where coverage is questionable, at best. In those situations, a claim professional must keep his or her eye on what matters most for the company, and this often requires a balancing act. Should the company insist on trying a weak case against an insured or enter into a settlement? Where coverage is questionable, should the company defend, deny, or bring a declaratory relief action? When and how hard should the company assert a position to establish an important precedent? This presentation will explore various considerations when faced with a “winnable” case.

I. DEFINING “WINNING”

Traditional Concepts of Winning

“To the victor go the spoils.” Traditionally, we think of “winning” as beating the opposition. In sports, coming in first is always the goal. The scoreboard is what matters. Winners score more points, they run faster, they jump higher. A certain satisfaction comes from winning - knowing that you are better than your competitors.

In litigation, winning often means the one who gets the verdict in its favor. A plaintiff that obtains everything it is looking for is a winner; so too is the defendant who keeps the plaintiff from recovering anything. Verdicts in between are often classified as “plaintiff’s verdicts” or “defense verdicts,” depending on whether the final result is closer to one side or the other. And the competitors in the game are not limited to the parties. They also include the attorneys for the parties and the claims professionals whose company’s often fund the defense and pay for the verdicts.

In the insurance world, winning can mean prevailing on a coverage position. Claims do not always fall within coverage and when they do not, a denial may suffice to dispose of the claim. But some claims are closer calls, which may cause the insurance professional to consider a declaratory relief action. And even where a denial is righteous, the insured itself may bring a coverage action to establish coverage and possibly bad faith.

Considering Broader Objectives than Simply Prevailing

But if one simply focuses on prevailing, he or she may miss something much more important: What course of action will best serve my client or my company? In most cases, our clients and companies are successful businesses. The way they became successful is by making decisions—business decisions—that make sense. Often, simply vanquishing the other side may not be the best approach. Other objectives may come into play for making the right business decision.

The first step is to determine the client’s objectives. To do so effectively, a course of action’s benefits must be weighed against its costs. The client may have several reasons for fighting as hard as it can. One reason is that the client wishes to win. A successful business gets that way by offering what others cannot, by competing, by winning. That mindset often may be hard to shake. The question is whether the desire to win—in and of itself—is enough to overcome the costs.

There could be at least a couple justifications for taking this approach. The first is that the client may wish to establish a reputation that it will fight any claim as hard as it possibly can to

discourage anyone from bringing additional claims against it. Although expensive in the short run, this approach may end up saving the client money in the long run by reducing the claims it ultimately will have to face. This is especially true if the client constantly faces frivolous claims. Even in that circumstance, a consideration in taking this approach may be the amount at issue regarding the claims and whether the amount at issue even matters.

A similar reason to fight hard in a particular case may be to establish a legal precedent. This may arise in the insurance context where a question exists regarding how a certain policy provision may be interpreted. To establish such a precedent, a coverage action is usually necessary. Considerations in deciding how to approach these cases include whether to deny or defend, the amount in controversy in the underlying action, the facts at issue in the underlying action, and the jurisdiction.

Costs Are a Consideration

In determining the client's objectives, a key consideration is costs. The most obvious of these are the attorneys' fees that will be incurred in pursuing any course of action. Other costs must also be taken into account. The flip side of seeking to establish a reputation or precedent is considering how an adverse verdict may affect the client's objectives. For example, will an adverse verdict result in the opposite result than the client wished to achieve? If so, one must consider how that could affect other cases and the potential costs of such a result.

Another key consideration is opportunity costs. All businesses have finite resources. If the company elects to pursue certain issues regarding liability or policy language issues, might that affect the amount of time and resources that may be spent on other issues. In making these determinations, one must ensure that the potential courses of action is sufficiently elevated to ensure that someone sufficiently above the canopy can evaluate how those courses of action fit within the client's larger objectives.

A further consideration is the emotional costs involved with pursuing a particular course. Because most our clients are businesses who regularly are involved in litigation, this is not necessarily a key consideration. But where one's opposition is particularly "passionate" and

tenacious, interacting with such opponents can make work challenging and may divert attention for other tasks that might serve a higher purpose.

II. “WINNING” IN LITIGATION

Role of Defense Counsel

The defense counsel’s role in determining what constitutes “winning” is crucial. Defense counsel must determine the client’s potential exposure or recovery—namely the range of likely verdicts that may be rendered for or against the client. In making that determination, defense counsel should determine the percentage chances of prevailing, based on the issues, the facts, the jurisdiction, and experience. Early identification of key legal issues and evidence will provide a solid basis to make these determinations.

Defense counsel need also provide estimates regarding the cost of litigation. As mentioned above, defense counsel should consider more than simply multiplying anticipated hours by hourly rates. AFAs should be considered that can serve both defense counsel’s and the client’s needs. AFAs that tie compensation to the result are often very effective, and not only for plaintiff counsel. For example, if defense counsel can resolve a matter within a certain amount of time and within a certain amount, incentive payments coupled with a lower hourly rate may be an approach to consider. Creativity in addressing fee arrangements is one consideration that should always be taken into account in serving the client’s interests.

Communication Is Critical

To be effective, defense counsel should be in constant communication with his or her clients, including the claim professional. Such communication is critical to ensure that proper objectives—considering the costs and benefits—are set for the defense. Defense counsel and the client should determine regular intervals during which defense counsel and the client will re-evaluate the case with regard to any changes in the status quo and whether any such changes will affect the objectives in the litigation. Regardless, defense counsel should keep the client immediately apprised of any significant changes in the status quo.

III. “WINNING” IN COVERAGE

Claims professionals are tasked with trying to find coverage under insurance policies. But in some instances, coverage does not exist. In those cases, the claims professional’s job is to deny coverage in order to maintain the integrity of the contract, especially given the actuarial considerations relating to the coverage determination. The claims professional may be faced with situations where there is a clear lack of coverage or where there might be a relatively strong basis to deny. In those instances, the claims professional needs to determine the tack he or she will take.

Among the questions faced by the claims professional is whether he or she should simply deny. But even that decision should not end the analysis. In that circumstance, the claims professional must consider whether the insured may bring a declaratory relief action or possibly even a bad faith action. Alternatively, the claims professional may consider coupling a denial or acceptance of a claim with a declaratory relief action. Key considerations should include the nature of the underlying case (“good facts make good law, bad facts make bad law”), how the coverage issues will be presented to the court, and whether the company has taken consistent positions regarding the issue, both within and outside a particular jurisdiction.

In determining what may constitute “winning” in the coverage context, the claims professional should consider hiring coverage counsel. Coverage counsel will be able to serve a similar role as litigation counsel in providing advice regarding the nature of the issues, the chances of prevailing, the impact any decision could have in other cases, and the pros and cons of various approaches.

IV. CONCLUSION

Not missing the forest for the trees means that those involved in litigation or determining coverage issues should take a look at the big picture. But that does not mean that the details should be overlooked. Rather, seeing the big picture usually requires more work than less. Rather than focusing on one issue to dictate a course of action, one must understand the details. The details are like small pieces of tile in a mosaic. Without those details, there cannot be a picture. But only by understanding those details can one make decisions that will make the most sense possible for the client.