2020 Annual Conference
March 18-20, 2020
Dallas, TX

Owning the Claim File When Working with Specialists, Experts & Attorneys

Introduction

Insurers receive premiums and issue policies. They have certain non-delegable claims responsibilities – thus they "own" the claim. At that same time, insurers often utilize others in handling a claim. How much deference should the adjuster provide to other parties assisting in claim adjudication? Does the insurer itself need to stay deeply involved to ensure a correct outcome? What if in a liability case against the insured defense counsel provides an evaluation the adjuster disagrees with or defense counsel's analysis is not thorough enough? What can/should be done? If an independent or third-party administrator adjuster is used, how "distant" can the company adjuster afford to be? In a denial, should a "national coverage counsel" be the only source of coverage analysis if state decisional law is complex and unique? Declination and reservation of rights letters can be drafted by counsel but sent by an adjuster – what issues should be considered? Can an engineer, accident reconstructionist, forensic accountant, life care planner be "managed"? If things go well in the end (claimant is satisfied) and no one is challenging orchestration of parties retained by the insurer, then all is well that ends well. But, if a claim is under a microscope in claim-based litigation against the insurer, can these types of issues make a difference? This session will address these issues and more. Running through our discussion is this theme: maintaining claim ownership while using outside resources.

I. Working with Counsel Defending an Insured

In the industry, defense counsel (DC) routinely evaluates liability and damage exposure of his/her client, the insured, and provides that analysis to both the insured and the insurer. In recent decades, insurers have become proficient in promulgating "litigation guidelines" to DC. Such guidelines are respective of the tri-partite relationship and insurer's duties to protect the interests of defended insureds. These guidelines usually provide for budgeting, billing criteria and reporting specifics. Some insurer guidelines and other communications to DC are more exacting than others in setting forth expectations for how DC is to evaluate, and report insured defendant exposures.

Insurers should be specific with DC on this important issue. A best-practices standing expectation informs DC to provide "component analysis" – i.e., analyze liability, chance of win/lose, damages range,

etc. Do not allow DC to simply report: “this case has a settlement (or projected jury verdict) value of $___” with no supporting analysis behind counsel’s all-up value estimate.

Additionally, the insurer needs to understand DC’s evaluation, probe and ask questions when appropriate. For example, assume DC said there is approximately a 50/50 chance of winning on liability (no comparative; either a complete win or a complete loss), and a damages range would be $500,000 to $700,000 should liability be found, with an average damage award of $600,000, and we therefore value this case at $500,000.” Clearly something is not adding up. In this simple example, viewing the components, an average case value would be about $300,000, not the $500,000 number last mentioned by DC. Also, sometimes there is “what it would take to settle” vs “what the case is worth.” Insurers should be sure the two are not conflated by DC and the adjusting staff knows the difference.

Whenever DC presents valuation information, an insurer should logic-test it. If defense witnesses are poor for the defense, that should be factored in. Don’t let DC be “too nice” to his defendant client and avoid candidly assessing his client witnesses and adjusting DC’s case valuation accordingly. Her ethical obligation is to objectively and candidly assess, not avoid difficult communications. If the venue is adverse (jury pool, “plaintiff-leaning” judge, etc), that should be factored in but not double counted. Most would agree these evaluations involve much judgment and “art,” as opposed to pure science; but, not having serious, thoughtful evaluations at all can be a real problem. If a policy limit demand comes and DC has provided only a “squishy,” waffling evaluation, then a subsequent “surprise verdict” in excess of the policy limit becomes that much more difficult to defend in a second-generation lawsuit against the carrier. Also, at the time of policy limit demand, a weak DC evaluation could become a factor in the insurer’s settling the claim for more than its true value in the underlying case.

If the insurer has a well-reasoned DC evaluation but chooses to utilize other factors and arrives at a range or value materially different than that of DC, then certain other considerations should apply. The insurer would need to meticulously document its file with all its reasoning. Usually, it would have been better for the insurer to have vetted all differences with DC and arrive at component values and an all-up that both DC and the insurer feel comfortable with and agree on.

Not all DC evaluations are created equal. Some insurers discuss with DC her upcoming written evaluation prior to DC’s committing it to writing. When DC has provided many evaluations to an insurer with specific, cohesive content aligning with the insurer’s evaluation requirements, there may not be a need for prior dedicated verbal discussions. But, when an insurer has no reason to have confidence that a particular DC will “get it right the first time,” it might be a good idea for the insurer to speak with counsel prior to his written evaluation. Such discussions are not to “steer” DC to a particular value or range but are simply to ensure quality and thoroughness of the evaluation.

There are other considerations for an insurer to think about in working with DC. If DC wants to “depose everyone in sight,” even though some of the parties would have minimally impactful or redundant

testimony, the insurer, being respectful of tri-partite issues, certainly can have a conversation with DC as part of its claim ownership.

If DC has an idea for a motion for summary judgment, but the cost for pursuing it is high and the chances of success are slim and, it would educate plaintiff even more, the insurer is within its rights to vet such issues with DC and make its providing-a-defense ownership decision.

It behooves insurers to train and performance manage their adjusting staffs to feel confident and "equal" in partnering with DC in defense of an insured. It is also positive to the equation for DC to set an atmosphere of welcoming dialogues with the insurer's adjusting staff.

II. Using Coverage Counsel

Coverage counsel (CC) is retained by and for the insurer. The insured is not a client. Yet, insurers expect CC to analyze coverage issues thoroughly, competently, and be mindful of the insured's interests as well as the insurer's philosophy of adjudicating coverage issues. Many carriers subscribe to "tie goes to the runner," "if it's very close call or 50/50, we give the benefit of the doubt to our insured," "we try to look for coverage if it exists," or similar expressions.

Some insurers have "inside coverage counsel." The claims staff still owns the claim, even though other insurer employees may be involved. An accepted practice for the claims department is to allow in-house CC to review a coverage issue and, if in-house counsel opines there is coverage … full stop … run with that. However, if in-house counsel believes there is no or limited coverage, then a good practice is to go to outside CC rather than deny or limit a claim based on in-house counsel's coverage opinion. An insurer would have much better suit-against-insurer optics in using advice of coverage counsel than it would in using advice of in-house counsel.

Outside CC should be experienced and competent. Many multi-state insurers find benefits in using "national coverage counsel," starting with better consistency in applying coverages nationally. Using "national coverage counsel" certainly has merit but there are certain pitfalls to be avoided by the adjusting staff. If a coverage determination is very nuanced and dependent on a complex set of case decisions in a state where national CC has not practiced or is licensed, the insurer needs to think about those optics in a lawsuit in that state challenging the decision to limit or deny coverage. More importantly, the insurer should think very long and hard about whether it is living up to the benefit of the insured's bargain when it paid its premium ("plaintiff insured dutifully always paid its premium but insurer didn't want to spend the money to bring in in-state CC to work with national CC"). Bringing CC in from that state can be a prudent course.

Sometimes we see a coverage attorney "ghost write" a reservation of rights or declination letter for an adjuster to sign and send to an insured. Considerations include: if asked by the recipient insured, can that adjuster "hold his own" in a conversation where the insured is pushing back? What if there is a

litigation challenge – would the adjuster testify as "owning that ROR or denial," or would she be seen as not grasping part of what she signed her name to? Interjecting a letter from a coverage attorney to the insured into the claim adjudication process may have its own additional considerations.

There are risks associated with the insurer's relying on a coverage letter prepared by outside CC, including special considerations when an insurer raises "advice of counsel" as a defense in a bad faith suit. Coupled with asserting advice of counsel comes a reveal of CC's otherwise privileged, non-discoverable materials (along with corresponding insurer materials). The insurer and counsel defending it should think through a number of issues, including whether CC makes a good witness and whether CC could effectively be portrayed as an "adjuster" of the claim.

Two brief mentions: Another issue sometimes to consider is whether an insurer should file a declaratory relief action to adjudicate coverage while defending the insured under a reservation of rights. That course certainly brings in more outside resources to manage. Lastly, "file splitting" (Adjuster A assigned to defense of insured; Adjuster B assigned to coverage) is a common practice in our industry. Smaller insurers with limited claims staffs and few options to use all internal staff for file splitting can consider bringing in an outside adjuster as one-half of the split configuration.

III. Utilizing Independent Adjusting Firms & Third-Party Administrators

Independent adjusters (IAs) and third-party administrators (TPAs) are claim adjudication extensions of the insurer's own claims staff. There are certain best practices for managing both and maintaining ownership of each claim, include providing written guidelines to these outsourced claims handlers. Such guidelines should state all material expectations such as service level standards, time intervals, escalation protocols, expense and indemnity authority levels, errors and omissions insurance requirements, and so on. Insurers have self-imposed claims handling standards for themselves; it would make no apparent sense for an insurer to require contemporaneous file documentation for its own employee adjusters but not require the same when it utilizes IAs and TPAs. Similarly, an insurer should require that an IA or TPA adjuster adhere to any applicable state adjuster licensing requirements. Additionally, IA and TPA adjusters should have a sufficient working knowledge of state-specific claim handling requirements.

When an insurer selects an IA case-by-case, some level of insurer selection diligence makes sense, including whether the assigned IA firm adjuster has sufficient specialization and experience for the claim. If the IA is to handle the claim on a daily basis, with the company adjuster not as closely involved, there should be a clear understanding, preferably in writing, as to what triggers involvement by the insurer's staff adjuster.

For TPAs, generally, selection and retention include verification that a stream of claims will go to TPA adjusters pre-qualified for the types of claims they will handle. Authority levels need to be clearly established, including triggering of notice to or involvement by the retaining insurer.

IAs and TPAs often are authorized to select others (e.g., Engineers, Accountants, etc.) to further investigations, evaluations and developments of claims. The insurer should have very strong and specific controls. An unqualified or struggling specialist selected by an IA or TPA does not "get the insurer off the hook." An insurer should expect that a poor expert or specialist selection or inattentive management of that resource by an IA or TPA would be imputed to the insurer.

TPAs often are permitted to make individual assignments to DC. This should be the case only after the insurer is satisfied that the TPA will make such assignments only to competent attorneys qualified to zealously defense the interests of insureds. It is common for coverage counsel is selected directly by insurers, not TPAs or IAs.

IV. How to Choose, Use & (Hopefully Not) Lose Experts & Specialists

Whether an insurer is retaining an expert in a claim or lawsuit against an insured ("3P claim") or in a claim or lawsuit directly against the insurer ("1P claim"), there are certain fundamental considerations that apply. Similarly, to what is mentioned above in terms of retaining counsel or independent or third-party administrator adjusters, it starts with qualifications, experience, availability, ability, commitment and responsiveness.

In most cases, it is important to consider whether the expert will make a good witness. Qualifications, experience in the expert's field and superior intellectual, analytical and report writing skills can help DC and the insurer better understand litigation exposure. But, for the three percent or so of civil litigation that is tried, clarity of presentation is key. At the same time, when an expert is deposed, opposing counsel who comes away thinking "this guy is good … better than our expert," may lower her demands and the life span of the lawsuit could be reduced.

Effective experts have a likable demeanor, can efficiently back up their opinions, handle cross-examination, and have command of the pertinent facts and an opposing expert's findings.

Experts and specialists can be "managed" – i.e., expert scope should be clearly stated by the insurer, with some flexibility if the expert provides reasoning for a slightly different or expanded scope. That can happen, as the expert knows more about her field than the retaining attorney and insurer. Experts should never be "managed" in terms of their objectivity or their findings. Any indication that a retaining insurer selected an expert because that expert was already "pro-defense" and made up his mind before reviewing case materials could be a very significant problem.

Experts/specialists can also be managed in terms of their investigation responsibilities. For example, an engineer, architect or forensic accountant dealing directly with a claimant or claimant's representative should be given specific parameters to ensure timeliness, avoidance of repetitive or unreasonable requests, and to direct appropriate items back to the adjuster. Though such persons in dealing with claimants are not adjusters, their actions can have consequences on claim handling issues. For example, am unwarranted statement at a joint property inspection that something in dispute was covered can cause issues.

A sense that the expert is "balanced" can become important. Any expert legitimately perceived as "a lapdog for insurers" is a problem. An insurer can easily require a prospective expert to provide prior retention history.

The following can help defeat assertions of expert bias:

- Expert's ability to demonstrate an understanding of both sides of the case;
- A command of the entire case and ability to "connect dots";
- Expert has worked both plaintiff and defense, for and against insurers;
- In some cases, independent research regarding contested issues.

V. Fraud Investigation Resources

Insurers are required by state departments of insurance to have fraud investigation capabilities. Larger insurers find it efficient to have these resources internally and branded as "Special Investigations Unit" or SIU. Companies most often have their SIUs investigate claims but not assume file handling as an adjuster. If is important that claims handling staff maintain file ownership, meaning that all state-imposed timelines and other requirements must be met. Claims management holds the SIU responsible for conducting objective and useful investigations on a timely basis.

When an insurer outsources investigations, robust expectation settings for and management of those investigators is key. Otherwise, an insurer can lose the desired state of control. Many of the "ownership principles" discussed in sections above apply to use of outsourced investigation resources.

VI. Key Events (Mediations, Settlement Conferences, Arbitrations, Trials)

When an insurer has brought others in to assist in adjudication of a claim, the insurer should be mindful of deployment to key events. If the insurer has an independent or TPA adjuster handling the claim on a daily basis, but the claim is large or complex, different messages are sent depending on who the insurer chooses to send to a mediation or settlement conference. If a liability claim against an insured is fairly valued well below the policy limit, but with a remote chance of an excess verdict, the insurer needs to thoughtfully consider who is deployed. Sending "home office" could signal the insurer believes the value is high, while having only an outsourced person attend could be painted in a second-generation suit following an excess verdict that the insurer did not "care enough."

Trials against insureds present another opportunity for an insurer to work through how it wants to demonstrate ownership of the claim. Options include having DC report as often and detailed as she can during trial, with no separate observational resource deployed to trial by the insurer; sending the insurer's own assigned employee adjuster to trial; sending an outsourced "trial monitor" instead of the company's own employee.

Depending on how DC's defense team is staffed at trial, it is possible a defense attorney will have the time to adequately report. If the insurer chooses to rely solely on reports from DC, it should insist that DC report thoroughly and objectively, the latter sometimes being easier said than done, given DC's huge emotional investment into trial advocacy.

Deploying a trial monitor (TM) can work well, but it is important the TM be qualified, report candidly and with insight. The insurer should consider whether to pay the TM to "get up to speed" prior the trial rather than just "go in cold." If a TM and DC both are reporting daily and their statements differ materially, coupled with plaintiff settlement demands during trial, the insurer will have much to think about. "Thinking ahead" in terms of how such issues could develop during trial should be worked through when the insurer is deciding how to own what it can during trial.

VII. Final Thoughts -- Over-Arching Pointers & Considerations

Effective company adjusters have a mindset they own the claim from cradle to grave and are passionate about doing a detailed, diligent job for the insured and their insurance company employer. They understand vendors are tools for them to manage during the claim. They remain in ownership of the ultimate outcome and the experience along the way.

To own a claim when non-insurance company parties are brought in often requires the insurer to rise to the level of orchestra conductor. Important things to consider and execute on are:

- Ensure all retained parties are qualified, available, talented and will commit to standards/protocols ensuring good faith claims handling;
- Adjuster complacency toward their work is the enemy;
- Avoid even optics of "hiding behind experts/specialists" or "steering their findings"; adjusters care, so be sure claim file reflects the right level and type of adjuster engagement exists;
- Adjuster dissatisfaction with performance of any other party involved in claim can happen; avoid finger-pointing or gratuitous criticsism documentation that "builds plaintiff's case"; instead, find a smart way to ensure competent support on a go-forward basis;
- A powerful company adjuster mindset throughout a claim life cycle is "the buck stops here," recognizing that no party or person other than the insurer "owns the claim." It was the insurer who received a premium and issued the policy, not any of the others.