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“How Do You Define a Win?”

For as much as lawyers and clients talk about “winning” their cases, you won’t find a definition of “win” in Black’s Law Dictionary. There may be “winners” and “losers” at the end of a trial. But you can’t tell who’s who just by looking at the verdict sheet.

What constitutes a “win” is in the eye of the beholder. And, in insurance cases, carriers and their counsel may not see eye to eye on the subject. Even when they do agree, their mutual client, the insured, may not be quite as enthused with their claimed victory.

Left unstated, differing objectives cause friction in this tripartite relationship. To function effectively as a team, carriers, policyholders and counsel must define their objectives at the start of each case. In this article, we explore the increasingly conflicting objectives held by carriers and their counsel, the differing perspectives of each participant in the process, and the manner in which all of these perspectives may contribute to a “winning” strategy.

I. What Does “Winning” Mean?

A. *Historical Views*

“Millions for defense but not one penny for tribute.”

– Robert Goodloe Harper, 1798

When France demanded multimillion dollar bribes from the United States, Congressman Harper used these words to express the contempt of a nation besieged by its rival’s unwarranted seizure of American ships. Unwilling to meet these demands, hostilities

between the two nations continued for two years before American and French diplomats ultimately resolved the conflict on more amicable terms. American defiance produced a favorable settlement.

Over the next 200 years, insurers have echoed these sentiments in response to the inflated demands of their adversaries. Exclaiming that the “best defense is a good offense,” claims managers were more apt to take dubious claims to trial. Understanding the risks, litigation managers would tell their counsel that “if you aren’t losing any cases, you aren’t trying enough of them.”

B. Modern Trends

As their front line soldiers prepare for battle, the generals in home office now question the cost of ammunition. Mr. Harper’s descendants may want millions for defense, but defense counsel must answer to claims managers who pinch pennies on legal expense. Hawkish exclamations have been replaced by voluminous guidelines designed to curb attorney’s fees.

Now that “every case has a value,” adjusters are more inclined to pay tribute on claims that their predecessors might have denied. As their counsel work toward “winning” at trial, claims professionals are increasingly evaluated on the speed with which they resolve their cases. Thus, while defense verdicts may be the pinnacle of success for trial lawyers, the celebration may be muted in claims departments that must account for a spike in “legal spend.”

II. Differing Perspectives

Defense counsel may define winning a case in terms of dismissals, defense verdicts, or settlements at the close of discovery. Claims managers concerned with the expense and length of litigation may have different objectives. Though both are required to promote the “best interests of the insured,” their policyholders may have concerns which go well beyond the financial interests of the carrier or differ from the competitive goals of their counsel. One cannot form a “winning” strategy without considering the perspectives of all participants in the litigation process.

A. Counsel – cases are assets to law firms

1. Focused on Facts of Specific Case
2. Trained to Win Outright or Greatly Curtail Recovery
3. Litigation as an Investment with Saves on Indemnification Costs

B. Carriers – cases are liabilities to insurers

1. Adjusters Focus on Specific Facts
2. Upper Management Focuses on Global Concerns
3. Litigation May be Viewed as a Cost to be Avoided

C. Policyholders – cases may have broader consequences

1. Impact on Business Relationships
2. Impact on Reputation
3. Disruption and Distraction of Litigation
4. Financial Considerations May Differ from Carriers
 - a. Where Defense Costs Erode Coverage
 - b. Where Defense Costs Do Not Erode Coverage

III. Managing to Win: Defining Common Objectives

Like any effective business plan, winning litigation plans define specific goals which accommodate all interests. Working together, carriers and their counsel may meet the company's global objectives in a plan that is flexible enough to consider the realities of specific claims.

A. Be Specific

B. Consider the Costs ... and the Benefits

C. Be Flexible