Ruminations About Trying Coverage Disputes

An insurer that decides to proceed to trial in a lawsuit that involves or includes coverage disputes with an insured or an additional insured generally faces exposure for the principal amount claimed or sought by or on behalf of the insured, as well as claims for bad faith or extra-contractual damages. In “direct action” states like Louisiana where the author principally practices, third party litigation may also create such exposure. Another factor is that insurers named or involved in litigation are generally perceived by most jurors or judges to have less favored status than insureds. This article provides some tips and best practices when an insurer proceeds to trial on three issues: whether or not a jury trial has been or should be requested; how to follow the “KISS” rule regardless of who may be the trier of fact; and, what to do when the insurer chooses or has to present a witness to defend a coverage denial, disclaimer or other limitation, particularly where bad faith or extra-contractual claims are involved.

Judge or Jury Trial? Most insurance coverages and exclusions are written based on the occurrence or claim “arising out of” certain defined acts, conduct, omissions or occurrences. If possible, the first question to address before deciding whether or not the insurer should itself request a jury trial is to identify whether or not there are any material facts that may be in dispute. Whether or not an alleged or actual act, claim, event or occurrence “arises out of” any circumstances that may be covered by a policy often only involves a question of law. In that instance, coverage should be a question of law that the judge should decide because there would be no need for a trier of fact to decide any disputed issues of fact. Nonetheless, the issues involved in a coverage dispute may appear to involve disputed issues of fact, which requires an assessment of whether such facts are material, which again is another question of law. Where a material fact pertaining to coverage is in dispute, the determination of any coverage issues involve mixed questions of fact and of law. In that instance, the trier of fact – whether the judge or the jury – should decide any issues of fact that pertain to coverage, whereas the Court should decide whether or not any coverage exists based on the ultimate findings of fact.

So, if the case involves disputed issues of fact, and no other party has requested a jury, what should the insurer do? As a general principle, questions of contractual interpretation that require the resolution of disputed issues of material fact are usually better left to be decided by the judge as the trier of fact. Jury instructions that charge a jury with interpreting an insurance policy’s words, terms or conditions, or any separate indemnity obligations, seem to normally call for a translator for most jurors, no matter how carefully the instructions are drafted. Moreover, jurors will ordinarily not have the “big picture” of coverage when deciding disputed issues of fact. The general practice and preference should be for the judge handling the case to decide the factual disputes involved in any insurance coverage dispute, as well as the legal issues. Of course, this choice will always be impacted and influenced by the judge to whom the case is allotted, and the jurisdiction and typical jury composition where the matter is pending.

Following the KISS Rule. If the insurer has no choice in the matter because another party has requested a jury trial, that circumstance involves a discussion of best practices for handling an insurance coverage case for an insurer facing a jury trial. “Keep It Simple Stupid” is the byword phrase and rule for virtually every case tried before a jury. That is perhaps especially true in cases where insurance coverage is at issue, particularly since the insurer is often facing
the risks of extra-contractual or punitive damages and the policy terms and provisions are lengthy and may be complex. There are also often a multitude of reasons why the alleged act, claim, event or occurrence may or may not be covered or excluded. As such, if there are disputed issues of material fact that pertain to coverage, the insurer and its counsel should identify which coverage defense or defenses have the least amount of disputed facts and which defense(s) concerns facts where any credibility determination should or appears to favor the insurer’s denial or limitation of coverage. This may often require the insurer and its counsel to “skip past” or minimize any discussion of the insuring agreement and instead focus on an exclusion or limitation, or to emphasize one exclusion or limitation over another. In any event, the optimal goal should always be to present the jury with simplest or most straightforward issues of fact that are the most favorable to a specific coverage defense, as opposed to presenting the best coverage defense that may involve the most complex factual disputes.

As an example, an “additional insured” endorsement typically requires first determining whether or not the act or occurrence at issue solely related to the named insured’s performance of its work or duties based on an agreement or undertaking involving the additional insured in some manner. There may also be an indemnity obligation that the name insured or other insured owes to the additional insured or to another. There may be a myriad of exclusions or provisions that also provide a basis to bar or limit coverage. Even so, the most fundamental question where “additional insured” coverage is implicated is often a very simple one: did the named or other insured’s conduct have anything to do with the claim or occurrence at issue? Any trier of fact - whether a judge or a juror – should usually be quite capable of assessing and deciding whose fault or negligence caused or contributed to the accident, as opposed to determining a complicated series of facts that cover a wide range of cover the waterfront issues. If the conduct of the named insured is unconnected or at best tenuous, this circumstance is one where the question of fault or negligence issue should be the focus of an insurer that aims at adhering to the KISS rule, despite the myriad of other coverage defenses that involve more facts. The emphasis should be on marshalling the facts that demonstrate the absence of any fault or any connection between the named or other insured and the additional insured, with respect to the claim or occurrence. This will usually induce the trier of fact to focus on the lowest common denominator set of facts that support the insurer’s coverage position, and avoid the confusion or inconsistent results that may ensue when the shotgun blast of all relevant defenses and facts is fired.

Explaining the Reasons for the Insurers’ Denials, Disclaimers or Other Actions? Lawyers representing insureds or adverse parties frequently seek to subpoena or compel the insurer’s representative to explain why the company denied, disclaimed or limited coverage since the reasons proffered by the insurer may create exposure or provide evidence for making bad faith or extra contractual finding or award. An insurer’s representative should nearly always avoid using the “advice of counsel” refrain in response to questions posed by opposing counsel. Instead, the principal job of the insurer’s representative should be to describe and explain the facts that support the insurer’s decision to deny, disclaim or limit coverage. On the other hand, the insurer’s representative should generally not be tasked with defending the legal reasons why the terms or conditions of the insurance policy bar, exclude or limit coverage. The difficulty often lies with identifying an insurer’s representative who is able to avoid blurring the lines
between the facts that support and explain the insurer’s coverage position, as opposed to interpreting or commenting on the policy’s terms or provisions that do so.

One means to assist the insurer’s representative with avoiding the temptation or opportunity to embark on a coverage analysis and defense is to file a motion in limine that restricts the testimony of the insurer’s representative to being questioned about the facts in dispute, as opposed to risking the insurer’s representative offering testimony about policy interpretation that is nothing more than opinion testimony. It should be the Court’s duty to determine whether or not there is any colorable basis to instruct or charge the jury with the law on bad faith or extra contractual liability, which ultimately rests of how the facts are presented and determined by the trier of fact. Just as an expert should generally not be allowed to tell a trier of fact how to resolve a disputed issue of ultimate fact or opine on a question of law, the same is true for an insurer’s representative. Rule 704 of the Federal Rules of Evidence “does not open the door to all opinions. The Advisory Committee notes make it clear that questions which would merely allow the witness to tell the jury what result to reach are not permitted. Nor is the rule intended to allow a witness to give legal conclusions.” Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983).

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