

## 5 Tips For Policyholders To Prevail At Trial

By **Jeff Sistrunk**

*Law360, Los Angeles (April 14, 2015, 7:08 PM ET)* -- Insurance companies' justifications for denying coverage may vary wildly depending on the circumstances, but for policyholders taking on insurers at trial, the basic story largely remains the same: There was a promise made, and it was broken. Here, policyholder attorneys share tips for navigating the complexities of policies and coming out on top in the courtroom.

### Keep It Simple

The key for a policyholder to prevail at trial is crafting a straightforward, understandable narrative that the jury or judge can follow, according to attorneys.

Underlying the myriad technical disputes about policy language that abound in coverage litigation is the simple concept of an insurance company breaking a promise to protect its policyholder against a risk, experts say.

"The idea of a promise is simple — the policyholder paid premiums for a policy, and the insurance company's job is to step up to the plate and pay," said Gary Thompson, managing partner of Reed Smith LLP's Washington, D.C., office. "If it failed to do so, that's a breach of contract. The idea of an unfulfilled promise is easy to understand. Most juries have an expectation that that's why you buy insurance."

A policyholder's entire case should be set forth in the first minute of its opening arguments, and details be fleshed out as the trial proceeds, according to Thompson. It is important to not "dive into the weeds," he said.

"Let the insurance company be the one that makes it complicated," Thompson said. "You don't ever want to be the one who has to explain too much."

One strategy is to determine at the outset of the case what the jury charge will look like, and to work backwards from there, according to Brian S. Scarbrough, a partner at Jenner & Block LLP. The phrasing of jury instructions and jury interrogatories can become very important if a case ends up proceeding to trial, he said.

That approach can also help a policyholder to identify legal and factual issues that can be resolved prior to trial, thereby narrowing the issues that will be presented to the jury, Scarbrough said.

"If you have an environmental coverage case, for example, the only issue that may be going to the jury is, 'When did property damage happen?'" he said. "You may be able to resolve other questions, such as whether there was an occurrence and whether there was timely notice, on summary judgment. That helps streamline the case — and if you can dispose of issues on summary judgment, it is quicker and cheaper."

### **Put It in Context**

A policyholder should present the relevant policy language in the correct commercial context so the jury or judge understands why the insured purchased the policy in the first place, said Lon A. Berk, a Hunton & Williams LLP partner.

Judges and juries may be offended if it appears the insurance company is using a "gotcha" approach to policy language in order to deny coverage, according to Berk.

"If it looks like the insurer is using language like a silver bullet, then it will be hard to convince the court that its interpretation is correct," he said. "Putting language in the right context often reveals that that is precisely what the insurer is attempting to do."

In addition, placing policy language in the appropriate commercial context makes it difficult for insurers to explain why certain language wasn't disclosed up front, when the policy was marketed and sold, Berk said.

"Think of buying an insurance policy like buying a car," he said. "If the seller hasn't disclosed that the car won't work on the roads where the driver tends to drive, that should be disclosed to the buyer up front. The same is true of a policy. If it won't protect the insured from risks that the insured typically faces, the insurer should have disclosed that up front and, if it wasn't, then that is evidence that the insurer is putting forward an incorrect policy interpretation."

### **Limit the Focus**

A policyholder must ensure that the trial is focused on the insurance company and the coverage issues, not issues such as the insured's liability for any underlying claims, according to attorneys.

"Try your insurance coverage case and don't try the underlying suit," Scarbrough said. "You don't want to focus on whether the policyholder is actually liable. A coverage case is about coverage, not anything else."

According to Robert M. Horkovich, managing shareholder of Anderson Kill PC, the insurance industry has many trial lawyers "who are experts at making the trial about the faults of the policyholder."

"They will say, for example, that the policyholder was a polluter, used asbestos or was somehow negligent," Horkovich said. "They try to put the policyholder on trial about the policyholder's actions or inactions. The policyholder's lawyer has to make sure the judge and the jury are looking at the insurance company and its failure to provide coverage."

### **Get Visual**

Visual aids can be valuable in helping to distil the complexities of a coverage dispute and highlighting

inconsistencies in an insurance company's conduct, according to attorneys.

"There is no such thing as too many visual aids," Horkovich said.

Timelines can show when an insurer raised certain theories for the first time, according to Berk.

"You often find in these situations that an insurance company presents multiple interpretations of why they're doing what they're doing," he said. "A timeline can make clear that some of those interpretations were created after the fact."

In many cases, issues regarding the insurer's investigation are relevant, and a timeline "can help show that an investigation was just a pretext or that it wasn't conducted in good faith," Berk said.

Many lawyers present blow-ups of policy language they want to emphasize, which can be helpful but can also backfire, according to Berk.

"It can make it seem as though you're running away from parts of the policy," Berk said. "Be careful what demonstratives you use."

### **Don't Be Dramatic**

Policyholder lawyers should be courteous to everyone in the courtroom — including opposing counsel and witnesses for the insurance company — and avoid grandstanding and over-the-top tactics, according to experts.

Juries "don't fall for smoke and mirrors or theatrics," according to Thompson.

"Let the other side be the one to put on a TV show, with loud, dramatic cross-examination," he said.

"If you're honest and cheerful at the same time, the jury will see that you're credible," Thompson continued. "You're not going to win your case because you're good at blustering and pointing a finger at someone on the witness stand."

--Editing by John Quinn and Emily Kokoll.