

The 5 Biggest Blunders Policyholder Attorneys Make

By Jeff Sistrunk

Law360, Los Angeles (December 21, 2015, 1:30 PM ET) -- Even the most experienced attorneys representing corporate policyholders can make missteps that endanger their clients' chances of winning insurance coverage litigation, like making assumptions about policy language based on past cases. Here, experts discuss some of the mistakes that can trip up policyholder lawyers.

Becoming Complacent

Policyholder attorneys can't merely rely on their existing knowledge about the language of a particular insurance policy in approaching a new case involving an identical or similar policy, according to experts.

While it's easy to accept conventional wisdom about what is and isn't covered under a policy, the only way to know for sure is by "reading, analyzing and studying the policies at issue, and doing it again and again," said John E. Heintz, leader of Dickstein Shapiro LLP's insurance coverage group.

"That's the turning point of your case — you better know the policy inside and out," Heintz said. "You're not going to win cases unless you're thoroughly conversant in your policies when you start. There are many pitfalls hidden in the arcane language we encounter. You can't go into it blindly."

Kasowitz Benson Torres & Friedman LLP partner Linda D. Kornfeld said that her mentor, the late insurance recovery lawyer Randy Paar, told her that reading a policy over and over is critical — at the outset of a case, at the end of discovery and many times in between.

Some coverage attorneys make the mistake of litigating a case throughout based on a detailed but preliminary review and analysis of the policy language, and may "miss the nuanced nuggets that can win your case, that are gleaned only after a fifth or sixth or 10th or 12th read of the insurance policy as the case and facts develop," Kornfeld said.

"You should not make any assumptions of how your memory of policy language that was at issue in a prior case will get you through this case," she said. "The key is, even when you've done your detailed review for the case at hand, not relying on a past idea of how the insurance works."

Not Knowing a Client's Business

Some policyholder attorneys focus too narrowly on a single insurance coverage dispute facing a client, instead of taking the time to learn how the dispute will affect the client's business on the whole, experts

say.

"In an insurance dispute, the coverage issue may be only part of the equation; the client's business needs are also important," said Bill Passannante, a shareholder in Anderson Kill's New York office. "That may mean taking the most aggressive stance possible, or taking the most accommodating stance possible, depending on the circumstances."

If policyholder lawyers want to establish a long-term partnership with a client instead of being a "one-shot" litigator, they must become intimately familiar with how the client operates, according to attorneys.

"It's crucial to really take the time to understand the client's business, and the goals of the individual decision makers, unique risk appetite and exposure, the corporate temperament, and what their corporate structure is," said Saxe Doernberger & Vita PC partner Greg Podolak. "That's what commercial clients look for: They want someone who's going to be part of their team, troubleshoot and find efficient solutions. They don't want attorneys who will just be responsive to one-off issues."

Clients need their coverage counsel to take a holistic approach, understanding that coverage issues involve nuanced business relationships as well as contract language, according to Podolak.

"It's important to work hand-in-glove with a client's risk managers, general counsel and brokers," he said. "That's a whole other facet to the dynamic, beyond the fact that a company bought an insurance policy, what that policy says and how it should be interpreted. The longevity of those relationships can be a major factor in getting a successful resolution. It's all about digging in and getting below the surface."

For instance, Podolak said, it's important to understand where a particular coverage claim fits into a client's past experiences with an insurance carrier.

"If a carrier has taken a specific position in the past and deviated from that, that's something to take into account," Podolak said.

Overemphasizing Case Law

While finding on-point case law that addresses a specific coverage issue is an important part of what policyholder attorneys do, it's not the answer to a client's problem in and of itself, experts say.

Lawyers must take an approach that results in the best resolution for the client, which may mean taking steps to avoid litigation, according to attorneys.

"Attorneys often look at reported cases as the be-all and end-all," Passannante said. "Quite frankly, they are tombstones: problems that got solved in litigation."

In addition, only a small number of insurance cases go before state supreme courts, and many coverage issues don't have definitive answers from those courts, Passannante noted.

Getting Distracted

Insurance companies often assert a laundry list of defenses to a claim for coverage, from policy

exclusions to the argument that a claim fell outside of the policy period. Policyholder attorneys should take aim at just a few of those defenses in litigating the coverage dispute, according to experts.

"In reading the answer to a complaint, an insurer could assert a dozen or more defenses. Usually, only a couple will be critical," Heintz said. "Finding an efficient, non-time consuming way of identifying those and putting aside the others is always important."

Policyholder lawyers should also try to produce clients' discovery materials quickly and comprehensively, to avoid unnecessary time-sapping disputes with opposing counsel, attorneys say.

"People get bogged down in endless discovery disputes that distract them from what they're ultimately trying to accomplish," Heintz said. "That's a really critical thing that policyholder lawyers should be mindful of in pursuing their cases."

Ignoring Outside Evidence

While there are substantial hurdles in many jurisdictions to getting extrinsic materials regarding an insurance contract admitted into evidence, it's always worth attempting to do so, according to attorneys. Some policyholder lawyers fail to make effective use of outside evidence, such as communications between a client and an insurer, to support their case, experts say.

"Something that has gotten somewhat lost in recent years is the use of extrinsic evidence reflecting or concerning the meaning of the policy language that's in dispute," Heintz said. "That can be a critical factor in a coverage case."

Policyholder lawyers can also look to the drafting history of a policy to bolster their position, including both evidence of how the insurer has changed the policy over time and how the Insurance Services Office developed the policy form, said Kornfeld.

"ISO drafting history used to be a mainstay in insurance coverage litigation discovery," Kornfeld said. "Over time, however, ISO discovery has become less routine."

If the disputed policy language in a particular case came from an ISO form, an ISO committee may have discussed the purpose or intent of the language in a written record that can be obtained through the subpoena process, according to Kornfeld.

"That can be an incredibly fruitful path to obtaining insight on language you might never have thought would have been discussed by ISO in a manner that can help you win your case," she said.

--Editing by John Quinn and Emily Kokoll.
