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Inconvenient Truths Every Claims Professional Needs to Know About Litigation

Everyone is guilty from time to time of getting caught in self-reinforcing feedback loops. It is comfortable to surround ourselves with others who share our worldview. This can be especially true in our professional lives, where we tether so much of our sense of value and confidence to the view that we are great at our jobs. Claims investigators are no different. Very few SIU investigators have to search long or far to find like-minded SIU investigators who share their suspicions about certain physicians, claimants, or claims. SIU investigators must understand, however, that the vast majority of people outside of their profession are not predisposed to view the world as they do, and this is never more urgent a consideration than when breach of policy and bad faith litigation is imminent. In this column I take a break from my usual format of reporting on interesting insurance fraud cases, and I share instead a few fundamental, and perhaps inconvenient, truths I have gleaned from a career spent defending insurers at trial. I have discovered many truths along my professional path, certainly enough to comprise full-day seminars, but here are just five in no particular order of importance:

A jury won't call someone a liar if you won't.

We are used to SIU investigations concluding in claim denials because a policy holder violated a policy prohibition against material misrepresentations, but ordinary people don't speak "insurance policy". Nobody in their daily lives reacts to someone lying to them by accusing the liar of "*intentionally concealing or misrepresenting material facts and circumstances*." We call liars, liars. And few people levy such accusations casually. It is indelicate to accuse someone of deceit. Who likely is hesitant to accuse others of lying? Any random 12 people who end up on a civil jury. Put aside the formal language of the misrepresentation provision. If a case goes to trial on the issue of whether a policy holder lied, someone on behalf of the insurer has to be comfortable taking the stand, looking those jurors in the eyes, and explaining that the policy holder did, in fact, lie, and then defending that view in the face of the policy holder counsel's umbrage-fueled cross examination. "We had to deny the claim because Mr. Policy Holder lied to us about his financial circumstances and his whereabouts at the time of the suspicious fire. There was no innocent explanation for his lies." The witness stand is no place to hide in the dense prose of an insurance policy. Speak plainly, call a liar a liar and prove it with evidence. If nobody is willing to do that, a jury of polite citizens will not take that leap for you.

Jurors can be more willing to find that a policy holder lied than find that he broke the law.

Any trial attorney who has defended insurers in bad faith suits long enough has probably seen this truism play out. A claim investigation reveals convincing evidence that a policy holder intentionally set a building on fire for financial gain and lied about all sorts of material matters along the way. However, the local fire marshal performed just a cursory investigation and local prosecutors declined the case. Mr. Policy Holder is never charged criminally. The absence of criminal charges absolutely can be a barrier to a jury finding that Mr. Policy Holder committed arson. Lay jurors with no claims experience and no understanding that authorities view fires in vacant buildings in distressed areas differently than fires that injure or kill people may never get past the lack of criminal charges. As indelicate and uncomfortable as it is to accuse someone of lies and deceit, accusing someone of being an arsonist is even worse. Even where the evidence of an

insured's role in intentionally setting a fire is considerable, if a jury understands that it can find in favor of an insurer by finding that the policy holder lied and simply passing on the question of whether that policy holder committed arson, it often will do so.

Jurors want to find experts credible.

Once again, lay jurors with no claims experience do not view the world as cynically as we sometimes do. Experienced injury claim investigators and defense attorneys may believe that Dr. Feelgood uses chasers to round up patients, often bills for services he never provides, charges far too much for the services he does provide and has never seen a patient whose injuries were not the direct result of the minor fender bender at issue in a case. Jurors, however, often just see the doctor's impressive C.V. and glitzy anatomical exhibits, and all they hear is the doctor's kind, professional delivery on the witness stand. This plays into a well-understood component of juror psychology: jurors want to believe that witnesses are honest, and especially highly credentialed experts who have specialized knowledge to share. Jurors have to see a lot of incongruences from experts before they conclude they are being lied to. It takes a well-orchestrated cross examination with a lot of evidence to disabuse jurors of that predisposition. Not to mention, much of the evidence that informs our jaded view of Dr. Feelgood comes from countless prior cases, and almost none of that is admissible in any given trial. Any experienced trial attorney at some point has conducted what they felt was a masterful dismantling of an opponent's expert, only to find it made no impact on the jury, which remained impressed by that alphabet soup of designations after the expert's last name. Your subjective view of the inadequacy of an opposing expert should not be the primary basis you decide to take a case to trial. There is no substitute for evaluating each claim objectively, on the merits.

Nobody reads their insurance policies or wants to understand the nuances of coverage.

Almost nobody reads their insurance policies. Not jurors, not judges. Defend insurers long enough, and you may find that even a few claim representatives don't read their policies. Worse, most consumers view buying insurance as the equivalent of choking down expensive medicine they wish they did not have to take. The insurance industry has never been the beneficiary of glowing coverage in the media. Consider media coverage of the many business interruption coverage disputes during the early days of the Covid pandemic. How many of those stories provided a sober view of standard ISO virus exclusion? Media consumers learned instead about the hard-working business owner who paid her premiums on time only to watch her insurance company abandon her when she needed it most. There are not too many corporate defendants that jurors are predisposed to view more harshly than insurers. Understand this mindset, shared by so many of the people you will have to persuade over the course of a trial, and strategize your trial defense accordingly. Explain what a policy is.

Explain that mere payment of premium does not guarantee that every claim is covered. Explain what a condition precedent is. Explain exclusions. Explain why they are necessary. Explain that it is actually much easier and preferable to pay claims than to deny them, but that sometimes a policy holder's conduct makes denial necessary. Explain that an insurance policy is a relationship with rules just like any other relationship, and one that both parties entered into willingly. Plan to persuade jurors every step along the way. We absolutely can reach jurors on all of these points, but we are wise to start from the assumption that they would rather not vindicate an insurer if they don't have to.

Murphy's Law dictates that your worst day as a claims representative will probably become a trial exhibit one day.

None of us has had our last bad day at the office. For claims representatives, bad days at the office can lead to failures to adequately document the claim file, intemperate claim log notes, and sometimes (I promise, I have seen this) open hostilities between the claims representative and the team manager in the claim log notes. Imagine a snippy back-and-forth between a claims representative and a manager over the adequacy of the claims representative's file handling right there in the claim log notes. Imagine a claim log note casually referring to a repeat claimant as: "here comes this guy once again, looking for another pay day." Now imagine these entries blown up on PowerPoint slides and broadcast to angry jurors a few years later. This can happen to you, and sometimes it seems that the universe actually shifts and realigns to make it happen as soon as you hit "enter" on that log note. No claims representative to whom this has happened has ever repeated that behavior on future bad days. Always ask yourself: how would a neutral third-party view this note I am about to add to the claim file in permanent ink? A few deep breaths could spare you, your employer, and your trial counsel a fight that can be really difficult to win.

CONCLUSION

The fight against insurance fraud is challenging enough on the merits, but we know how to win that fight. Claims professionals must also understand the atmospheric challenges we face persuading courts and juries once we commit to that fight in litigation. We absolutely can reach judges and lay jurors in these fights, but we have to be prepared to meet them where they are, not where we are or where we wish they were.

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