LITIGATING THE INSURANCE CLAIM

Introduction

The subject of this portion of the seminar involves litigating the insurance claim. Since the author of this portion of the materials primarily handles first party property litigation from the plaintiff's perspective, the following discussion will likely be seen as an evaluation of these issues in that context. However, even defense lawyers, as well as lawyers handling third-party claims, may well benefit from the perspective and suggestions attorneys dealing with insurance litigation in the first party context and day to day basis.

I. Filing a Dispositive Motion

Dispositive motions will end part or the entire law suit. Usually defendants file these types of motions, seeking a legal resolution in the average context. The two most popular types of dispositive motions are motions to dismiss, almost exclusively a defense tactic, and motions for summary judgment. Policyholder lawyers may also file motions for summary judgment to obtain a ruling on a coverage issue.

A. Motions to Dismiss

When ruling on a motion to dismiss, a court may only consider the allegations contained within the four corners of the complaint, and the ability of the defendant to prove such allegations may not be considered. *See Kreizinger v. Schlesinger*, 925 So. 2d 431 (Fla. 4th DCA 2006). The sole purpose of a motion to dismiss is to determine if the plaintiff has stated a cause of action and, "for purposes of passing on a motion to dismiss a complaint, the court must assume that all facts alleged in the complaint are true." *Hammonds v. Buckeye Cellulose Corp*., 285 So. 2d 7 (Fla. 1973). A motion to dismiss

for failure to state a cause of action is also not a substitute for a motion for summary judgment. *See Consuegra v. Lloyd's Underwriters at London*, 801 So. 2d 111 (Fla. 2d DCA 2001).

Parties should discuss the basis of a Motion to Dismiss and try to reconcile any issues that can be worked out without the necessity of a hearing. For example, if an insurer moves to dismiss an insured's complaint for failure to attach the policy, if the attorneys have a decent relationship, this is the type of issue that should be resolved without the necessity of a hearing. If the issues truly can not be resolved without court intervention, then they should be set for hearing.

Motions to Dismiss should not be filed used as a delay tactic to stall the production of discovery. In some cases, defendants will file motions to dismiss and at the same time file a motion to stay discovery until its motion to dismiss can be heard. In a time where courts are underfunded, it some times takes time before a motion to dismiss can be scheduled. From the plaintiff perspective, these motions unfairly delay the case. From the defense perspective, these motions protect their clients from unnecessary and intrusive discovery.

B. Motions for Summary Judgment

When ruling on a motion for summary judgment, a motion for summary judgment should be granted when the pleadings/discovery, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. After adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. On a summary

judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the nonmoving party. *See National Fire Ins. Co. of Hartford v. Fortune Construction Co.*, 320 F.3d 1260; 2003 U.S. App. LEXIS 2164. These motions can be filed by either party and are helpful in resolving part or even the entire case.

Many times motions to dismiss are filed that are more appropriate for motions for summary judgment.

Partial Motions for Summary Judgment

Sometimes motions for summary judgment will not resolve all of the issues in the case, but will help narrow and define the issues. Partial motions for summary judgment are extremely helpful in coverage litigation. They may not get rid of the entire lawsuit, but they can narrow down the legal issues so that the jury has less to determine and the parties can assess their case more accurately.

For example, due to the numerous hurricanes over the past few years, some property owners had successive losses that fell during the same policy period. Some insurance carriers took a coverage position that it only had to pay one policy limit per policy period unless there were substantial repairs to the property. This issue has been resolved by at least one trial court in the policyholder's favor. The Court determined in a partial motion for summary judgment that the insurance policy specifically stated the maximum amount of coverage per loss. Thus, the Court held that the insurance policy allowed an insured to make a claim for successive losses for non-duplicative damages. Please see attached orders.

Motions for summary judgment are useful in determining whether an insurance policy provision should apply to provide coverage for, or to exclude coverage for, a particular loss. For example, there may be an issue as to whether or not painting is covered under a policy. Even though some policies exclude painting under the subject policy, it may still be covered. If the drywall is damaged by a covered loss, then the painting should still be covered in order to put the insured in the same position he was in prior to the loss.

II. Successful Strategies in Insurance Coverage Cases

A. Discovery

There must be an exchange of information between both parties. Before litigation, both insureds and insurers are required to provide certain information prior to litigation.

An insured's duties are defined in the insurance policy. Most insurance policies require that an insured: provide documents to the insurer, authorize the insurer to obtain documents on the insured's behalf, submit to an examination under oath as reasonably necessary, allow inspections of the subject property as reasonably necessary, etc.

Most insurance policies do not clearly set forth an insurer's responsibilities to its insureds. However, an insurer must attempt to act in good faith to settle claims, when under all circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests. Fla. Stat. 624.155.

The question then becomes: What is fair when negotiating a claim?

Answer:

Promptly exchanging all estimates that the insurer has in its possession, even if the information is in favor of the insured.

Promptly exchanging all reports that the insurer has in its possession, even if the information is in favor of the insured.

Only inspecting the property as many times as reasonable.

Explaining to the insured and/or their representative what coverages may apply to a claim.

Providing the insurance policy to the insured promptly.

Not using an Examination Under Oath as a sword.

Not using the appraisal process/arbitration process like a sword.

Not using delay as a tactic to leverage against an insured.

B. Alternate Dispute Resolutions

Various avenues of alternate dispute resolutions are available to resolve a dispute between an insurer and an insured.

1. Mediation. This is where both parties agree on a neutral mediator. The mediator's fee is usually split between the parties and is an hourly rate. The parties usually discuss their positions in the claim and decide what they are going to offer and what they are willing to accept to conclude the case. Many insurance coverage cases resolve this way than in litigation. More and more courts require mediation prior to allowing a trial to occur.

2. Arbitration. This process can be non-binding or binding. If the parties agree or are ordered to non-binding arbitration, then if a party is not satisfied with the award, he or she must file a motion for trial de novo within 20 days of service of the award, or else the decision is final.

3. Appraisal. In most insurance policies, once the parties dispute the value of the claim, one of the parties can invoke the appraisal process. The requirements of the process are set forth in the insurance policy. Each party names a competent appraiser. The appraisers then agree on a neutral umpire. The appraisers determine the value of the loss. If the appraisers are unable to agree on the amount of the loss, then the matter is referred to the umpire. An award signed by the umpire and one appraiser is sufficient to be binding.

Sometimes parties will agree to an appraisal as an alternative to litigating an insurance claim. Appraisal can be invoked prior to litigation and after litigation. However, if appraisal was invoked after substantial litigation has occurred, parties can argue that since substantial litigation has taken place, the invoking party has waived its right.

III. Declaratory Action

A declaratory judgment action is filed when a party is in doubt of his/her right and files suit to seek a judgment from the court declaring those rights. These actions can be extremely helpful in coverage litigation. Sometimes a policyholder will file such an

action to ensure that he or she is not breaching any duties under the policy. Sometimes insureds and insurers file these actions to seek an answer to a question on coverage or interpretation of a policy provision.