

Claims



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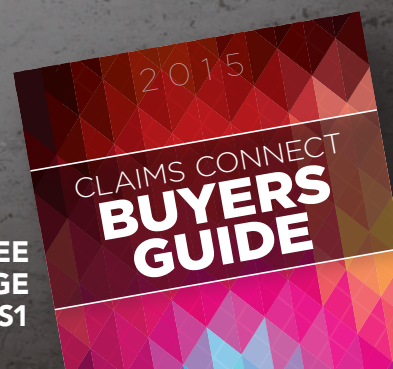
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Legal factors impacting insurance claims

By Bradley M. Jones, J.D. and Anthony J. Alt, J.D.

Editor's Note: In the interest of space, some citations have been omitted.

Notification of a claim or commencement of a suit requires considering what must be done, now. But too

much focus on the present without considering a claim's entire potential lifespan is shortsighted. The possibility of an appeal should influence an insurer's decisions at each step of a claim. Defense counsel in most jurisdictions represent

the insured, not the insurer. This means that, at most, an insurer can influence strategy and decisions. There are a number of considerations where an insurer has a duty to defend or is defending under a reservation of rights.



Selection of Counsel and Venue

Two primary considerations are selection of counsel *suitable* for a claim and venue. Counsel with significant state court experience is not necessarily a good choice for a federal action, and vice versa. For example, a lawyer with limited federal court experience might not properly preserve issues for appeal in federal court because of a discrepancy between state and federal rules of evidence. Selection of suitable counsel

requires considering experience relevant to the claim. In addition, many law firms have appellate specialists who can assist trial counsel with motion practice in district court, and handle a case on appeal. Select the lawyer and law firm you want to handle the case at the district court and appellate levels.

An insurer should also consider which court it prefers to be in. If a claimant commences a state court action, consider removal to federal court. This might be advantageous where the relevant federal circuit court of appeal has favorably ruled on a state-law issue, but the state Supreme Court or court of appeals has not ruled on the issue. A state court is not bound by a federal court decision on state law, whereas a federal district court would likely follow the federal appellate ruling, and the federal circuit court of appeal would likely follow its own guidance on a state-law issue. Consult with defense counsel on the best venue for the case.

District Court and Potential Grounds for Appeal

The goal in district court should be to obtain a favorable decision, but also to ensure that the matter is litigated in a way that (1) in the event of a district court win, forecloses the adversary from having a basis to appeal, and (2) in the event of district court loss, preserves issues for appeal. There are various potential grounds for appeal and ways to preserve issues for appeal, including dispositive motions, motions *in limine*,^{*} jury instructions, and post-trial motions.

Before counsel files a dispositive motion, the insurer should ask if all relevant legal issues and arguments appropriate for the motion have been made. Appellate courts will generally consider only those arguments made to and considered by the district court. And claim handlers want to ensure that motions

are based on proper application of the law in order to minimize the chances of reversal on appeal.

Evidentiary matters are more difficult to preserve for appeal. For instance, motions *in limine* can be used to exclude evidence at trial. To preserve an appeal regarding admission of evidence, however, counsel should also object to the admission of the evidence the first time it is introduced. Insurers should discuss with counsel evidentiary issues and how they will be addressed.

Other important areas for preserving issues for appeal and avoiding reversal on are jury instructions and special verdict forms, which should be accurate when submitted and reflect the law in light of the issues and facts. One phrase in a jury instruction might make the difference between a favorable or unfavorable judgment. Even if a party prevails, it wants to ensure that the court used proper jury instructions to minimize the chances of reversal on appeal. A lengthy trial can be undone with an improper word or phrase in jury instructions. Counsel should object if the court provides improper jury instructions or special verdict forms.

Counsel should also be diligent about preserving potential grounds for appeal after trial. This can be done through certain post-trial motions after verdict, such as a motion for a new trial.

Post-Judgment Considerations

Duties Regarding Appeal. An insurer must also consider its duties to an insured post-judgment and whether it is obligated to defend an insured on appeal or appeal on the insured's behalf. The general rule is that an insurer may not withdraw from an insured's defense until its duty to defend all arguably covered claims has been extinguished through final judgment, which extends through the appellate process.

Conversely, an insurer is not necessarily obligated to appeal an adverse judgment on the insured's behalf. A duty to appeal depends on the policy language, but policies are often silent on whether an insurer has a duty to appeal on the insured's behalf. The majority rule is that absent policy language to the contrary, an insurer's duty to defend includes a duty to

appeal an adverse judgment against the insured if there are reasonable grounds to believe that the insured's interest would be furthered by appeal.

Moreover, courts have held that the duty to defend "precludes an insurer from interpleading its policy limits and walking away from the defense of its insured, at either the trial or appellate level."

Under the reasonable-grounds test, an insurer must conduct an adequate investigation to determine if reasonable grounds exist for an appeal. When considering whether there are reasonable grounds for appeal, the insurer should assess (1) objections and motions at the district court level, (2) the district court's rulings, (3) jury instructions given, and (4) applicable law on appealable issues. The insurer should give great weight to defense counsel's opinion when considering whether reasonable grounds exist.

Excess insurance policies generally follow form to underlying policies and do not contain a duty to defend, with a possible exception where underlying limits have been exhausted. Thus, an excess insurer generally does not have a duty to appeal for an insured. But in some states, it may bring a subrogation claim against a primary insurer where the primary insurer fails to appeal and the excess insurer assumes the insured's defense.

Immediate Post-Judgment Issues

Motions. Before pursuing an appeal, an insurer should first consider whether there are grounds for a sort of appeal without filing an appeal. For instance, a party may move the district court to amend a judgment. [Fed. R. Civ. P. 59(e)]. Such a motion can be used to establish a manifest error of law, to account for a change in law, or to present newly discovered evidence.

A party may also move for relief where there has been a clerical error. [Fed. R. Civ. P. 60(a)]. Or a party may move for relief from a judgment based on (1) mistake, (2) newly discovered evidence, (3) misrepresentation by an opposing party, or (4) a void judgment, where the court lacks subject matter jurisdiction. [Fed. R. Civ. P. 60(b)].

Stay of Execution. If an adverse judgment

is entered against an insured, the prevailing party will want to execute on the judgment, to be paid right away, with either the insured's own assets or insurance limits. Insurers should be aware that the time for which a prevailing party must wait before executing on the judgment depends on the jurisdiction. For example, in federal court there is an automatic 14-day stay during which a party may not execute on the judgment. [Fed. R. Civ. P. 62(a)]. State courts may differ.

Similarly, insurers must be cognizant that filing an appeal does not automatically stay execution on the judgment. Rather, courts generally require an appellant to execute a supersedeas bond or provide other security before granting a stay. Fed. R. Civ. P. 62(d). The takeaway is that once an adverse judgment is entered, an insurer must be prepared to respond quickly to defense counsel's requests and protect the insured's assets by preventing execution on the judgment.

Appellate Considerations

If there are no grounds for filing a post-judgment motion and, an insurer has a duty to appeal on its insured's behalf because there are reasonable grounds to believe that the insured's interest would be furthered by appeal, then the question is the strategy for appeal.

Determine the Issues. The primary focus on appeal is determining the appealable issues and properly framing them. Claim handlers should discuss with defense counsel how to narrow an appeal to only the most important issues in order to increase the chances of success by not distracting the appellate court with weaker arguments.

Standard of Review. The applicable standard of review might influence which issues to appeal and how to frame them. A standard of review is the level of deference an appellate court affords the district court's ruling. The probability of success might depend on what standard applies.

De Novo. Rulings on questions of law are subject to de novo review (Latin for "over again"). The appellate court will review, without deference, the district court's interpretation and application of the law. Such standard makes the chance of reversal *greater* than a deferential

standard of review. A de novo standard applies where the district court granted a motion to dismiss or a summary judgment motion.

Clearly Erroneous. In contrast, a clearly erroneous review is significantly deferential. Such standard applies to a district court's findings of facts, which are difficult to reverse. Under this standard, the appellate court must accept the district court's findings unless it is left with the "definite and firm conviction that a mistake has been committed."

Chances of Success. Besides considering standards of review to determine the likelihood of success, it is helpful to consider statistics regarding success on appeal in order to have realistic expectations and as an additional consideration for potential settlement discussions. Reversal rates differ depending on the jurisdiction, but in general, it is far likelier that the non-appealing party will prevail. For example, the reversal rate in 2012-2013 for civil cases in federal court was 11.2 percent. (U.S. Courts, Administrative Office Table B-5)

Cost of Appeal. Decision makers should also be aware of an appeal's cost. Appeals are not cheap, particularly if the insurer must post a supersedeas bond. Thus, insurers should be aware of the amount of money required to stay execution on the judgment. In addition, a prevailing party may be entitled to post-judgment interest, which will be at a higher rate than what is commercially reasonable and will accrue throughout the appeal. Decision makers must also factor in attorney fees and costs for filing documents, briefing, and oral argument. Attorney fees might equal the trial defense cost.

Counsel. Another important consideration is whether to use trial counsel for the appeal. If liability exposure is high or bad precedent might be set, paying an appellate specialist might be warranted if the district court lawyer lacks appellate experience. Appellate specialists are often used to write appellate briefs. A hybrid approach is to use the lawyer from the district court, but also pay an appellate lawyer to help formulate arguments and provide guidance on appellate procedural requirements. It might also be advisable to consult an appellate specialist during

motion practice in district court.

Additional Considerations. Another consideration is the desirability of the precedent that will be created on appeal. An unfavorable state district court judgment has no precedential value. Thus, if there are bad facts that could create unfavorable precedent, the insurer might choose not to appeal, if it does not have to, or might seriously pursue settlement. Moreover, if the insurer has the option of appealing, consider whether filing an appeal might favorably affect settlement discussions.

The Appellate Process

Requirements. Once the decision to appeal is made, there are specific steps counsel must ensure are taken. Most important is to ensure that a notice of appeal is *timely* filed. Courts require strict compliance with the deadline for filing an appeal, which can be short.

Appellate Brief. The primary way parties on appeal make their arguments is through briefs. Each court has its own formatting requirements, which counsel must follow. Formatting non-compliance reflects poorly on a party.

It is also necessary at the briefing stage to frame the issues and prioritize them. Judges expect the most important issues to come first, not last. And it is important to identify the correct standard of review for each issue. If the standard of review is favorable to you, counsel should emphasize it. Repeatedly.

Oral Argument. Oral argument might be optional. Consider whether counsel should request it. There might be nuances that paper cannot convey. But preparing and appearing for oral argument is an investment of time and money; determine if it is worth it.

The possibility of an appeal should influence each stage of a claim. By keeping the appellate stage in mind, insurers can select defense counsel suitable for the claim, confirm with counsel that a district court win is not erased on appeal, and on the flipside, increase the chances that a district court's error is reversed. 🍷

**In limine — A motion made at the start of a trial requesting that certain evidence not be introduced in trial.*

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