

What to Do if Your Insurance Claim is Denied?

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What is Covered?



The Placement

- Work with broker to place coverage.
- Ensure accuracy and completeness of application materials.
- Pay premiums.
- Keep underwriting and marketing material.
- Request changes to policy language before placement.
 - But avoid describing the process as a “negotiation.”

The Notice

- Provide timely notice of claims or potential claims broadly.
 - Give notice to all potentially responsive carriers, including primary and excess layers.
 - Don't delay out of fear of premium increases – concerns are often overstated compared to the risk of losing coverage.
- Be aware of policy period start and end dates and when policy terms are changing.
 - Consider extended reporting periods (tail coverage).
 - Evaluate giving notice of “circumstances.”

Review the Denial Letter

- Is policy language quoted correctly?
- Is policy language quoted fully?
- Are the claim facts stated correctly?
- Should you commence a state insurance department review?

**YOUR ACTIONS WITH ONE INSURER SHOULD
BE UNDERTAKEN WITH THE “WHOLE
COVERAGE PICTURE” IN MIND AND
CONSISTENT WITH A STRATEGY TO
MAXIMIZE COVERAGE**

Maximizing Coverage

- More than one policy year?
- More than one type of policy triggered?
- Triggering multiple towers
 - *W Holding Co. Inc. v. AIG Ins. Co.*, No. 3:11-cv-0227-GAG BJM, 2014 WL 3378671, at *4 (D.P.R. July 9, 2014)
- Liberalization endorsements
 - *Am. Cas. Co. of Reading, PA v. Gelb, et al.*, No. 653280/2011, slip op. at 8-10 (N.Y. Sup. Ct. June 23, 2014)

Hypothetical #1

- The insurance excludes coverage for damage caused by “pollutants.” The insured is being denied coverage based on the meaning of the word “pollutant.” The word is not defined in the policy.
- *How will the insurer determine how the word is interpreted?*
- *What will a reviewing court look at? How can you persuade the insurer?*

Four Common Principles of Policy Interpretation

- (A) Policyholders have burden of showing the claim falls within coverage.
- (B) Insurance companies have the burden of proving a claim or loss falls within an exclusion.
- (C) Exclusions generally are construed narrowly, whereas coverage grants are construed broadly.
- (D) Ambiguities are construed in favor coverage.

Look at the Policy as a Whole

- How are key terms used throughout the policy? Is there consistency?
- Are provisions inconsistent with each other?
- Does the insurer's construction make the coverage illusory?

Evidence Outside The Policy

- Highlight that the insurer could have drafted more precise language.
 - See, e.g., *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 518 n.3, 667 A.2d 617, 624 n.3 (1995).
 - Potential sources
 - Language in the policy itself
 - Filings by your carrier and other industry participants (SERFF filings)
 - Industry Groups (e.g., ISO)
- The insurer's position in other cases on the same language may highlight ambiguity or reasonableness.

Hypothetical #1 - Continued

- The insured is headquartered in California but incorporated in Delaware. The insurer denies coverage, relying on (1) a narrow definition of “pollution” from Merriam-Webster; and (2) a Delaware case, while ignoring authority from other states.
- *Which state’s law applies, and why does choice-of-law matter for interpretation?*
- *Does the dictionary definition control?*
- *How can policyholders leverage the existence of competing authorities to persuade the insurer or a court?*

The Applicable Law Is Often A Disputed/Dispositive Issue

- Insurance is state-law specific.
- What law applies to the interpretation of the policy?
- Under applicable law, has the operative language been subject to court review and does it support coverage?
- Different state law could lead to a completely different result.

Ambiguity and Competing Definitions and Authorities

- When a policy term has multiple reasonable definitions, courts apply the one favoring the insured. In most states, the policyholder need only show its interpretation is reasonable — not the “most” reasonable.
- Conflicting interpretations from different courts reinforce that multiple reasonable readings exist. *St. Paul Mercury Ins. Co. v. Fed. Deposit Ins. Corp.*, 669 F. App'x 851, 852 (9th Cir. 2016)

Hypothetical #2

- Insured Company and CEO are sued for harassment and discrimination. The Insured Company loves its Am Law 100 firm. Partner rates at the Am Law 100 firm are \$1500 per hour. The insurer is willing to compromise on a small Tysons Corner firm with partner rates at \$590 per hour. The insurer refuses to pay more than \$590 per hour.
- *Who has the ability to select counsel? How does the rate issue get resolved?*

Securing Your Preferred Defense Counsel at Full Hourly Rates

- Easier in certain lines of coverage
- Use helpful comparisons
 - The firms hired by the insurers to defend their interests.
 - The counsel approved by insurers in other cases.
- Highlight benefits to your counsel (deep experience with type of claim, familiarity with insurer's policies and procedures, knowledge of insured's business)
- Have objective survey of rates in jurisdiction by the subject matter of the claim

A Stealth Denial - Litigation Guidelines

- Defense counsel has ethical obligations to you.
 - The ABA Standing Committee on Ethics and Professional Responsibility and state ethics committees have developed guidelines governing panel counsel's obligation to withdraw from representation of an insured, panel counsel's obligations to abide by "panel counsel guidelines," and panel counsel's submission of work description and legal bills to insurers and third-party auditors
- Use ethical rules to avoid unreasonable guidelines; set parameters of what you will accept up front.

**MANY INSURANCE CLAIM DISPUTES ARISE
AT THE TIME OF SETTLEMENT OF THE
UNDERLYING CLAIM**

Settling Your Claim Before Trial

- Effective ways to pressure insurer to settle lawsuits before trial
 - Highlight ongoing cost of defense – emphasize that settlement avoids mounting defense expenses (particularly powerful where defense costs are paid outside the limits of liability)
 - Defense counsel's recommendation
 - Third-Party claimant's demand within limits
 - Fund settlement under reservation of rights to cap exposure

Settlement

- Consent to Settle the Underlying Action May Be Required
 - District of Columbia law: *Eureka Inv. Corp., N. V. v. Chicago Title Ins. Co.*, 530 F. Supp. 1110, 1119 (D.D.C. 1982), aff'd in part, rev'd in part, 743 F.2d 932 (D.C. Cir. 1984) (An insurer that wrongfully denies coverage "may be held liable for the costs of a reasonable settlement reached by the insured even if the insurance company has refused to consent to the settlement.")
 - New York law: *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 151 A.D.3d 632, 633, 58 N.Y.S.3d 38, 39 (N.Y. App. Div. 2017) (finding that insurer's denial of claim "justifies plaintiffs' settlement of those claims without [insurers'] consent."); *Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 884 N.E.2d 1044, 1046 (N.Y. 2008) (holding that insurer was entitled to disclaim coverage because insured failed to obtain consent to settle)

Settlement Issues

- Insurer liability for excess judgments
 - State specific elements
 - Negligent failure to settle
 - *Swedish American Hosp. Ass'n v. Ill. State Med. Inter-Ins. Exchange*, 916 N.E. 2d 80, 94 (Ill. App. Ct. 2009) (finding that typically, a breach of a good-faith duty to settle is a tort claim that is subject to the requirements of a traditional negligence claim)
 - Bad faith failure to settle
 - *Goldstein v. Nat'l Cas. Co.*, No. 4:07CV00028, 2008 WL 2944873, at *3 (W.D. Va. July 28, 2008) (holding that, under Virginia law, bad faith requires more than simple negligence, an insured must show by clear and convincing evidence that the insurer acted to further its own interest, with intentional disregard for the financial interest of the insured)
- Some states apply a strict liability rule
 - 3-23 New Appleman on Insurance Law Library Edition § 23.02(e)(ii) (discussing Rhode Island's strict liability rule, and California and New Jersey courts that have discussed a strict liability rule with approval)

Insurance Company Conduct in Denying Coverage Matters

- An insurer's failure to assert a defense in its reservation of rights may lead to waiver of the un-asserted defense
 - *See Central Armature Works, Inc. v. Am. Motorists Ins. Co.*, 520 F. Supp. 283 (D.D.C. 1980); *Commonwealth Lloyds Ins. Co. v. Marshall, Neil & Pauley Inc.*, 32 F. Supp. 2d 14 (D.D.C. 1998)
- Breach of the duty to defend – an insurer that breaches its duty to defend may be precluded from challenging indemnity coverage
- Failure to file with regulators – in some states, failure to file may render unfiled form void
 - *e.g., Bailey v. Fed. Ins. Co.*, 214 F. Supp. 3d 1228, 1238 (N.D. Ala. 2016)

Resolving Denial Through Negotiation

- Present a compelling coverage argument
 - Case law
 - Representations during underwriting
 - Regulatory filings / alternative forms
 - Marketing Materials
- Broker's connections to senior claims representatives
- Bring business relationships / premium dollars to the table
- Use mediation strategically
 - Evaluative mediation

Hypothetical #3

- XYZ corporation contracts with numerous parties, including ABC. One of the provisions in XYZ's standard contract is that the other party (ABC) must name XYZ corporation as an additional insured in ABC's insurance program for liabilities "arising out ABC's work."
- XYZ is sued for negligence arising out of an incident involving ABC's and XYZ's employees. XYZ tells ABC to notify its insurer. ABC refuses, saying it doesn't want to trigger premium hikes or coverage disputes.
- *Can XYZ give notice directly to ABC's insurer as an additional insured?*
- *What are the consequences if notice is late or never provided?*

Hypothetical #3 continued

- After much haranguing, XYZ finally convinces ABC to report the suit to ABC's insurers. ABC's insurer and XYZ's insurer are pointing at each other claiming the other owes primary coverage. XYZ's business representatives are very worried about the relationship and threatening to pull out of future business dealings.
- *How should XYZ proceed in this scenario?*
- *How can XYZ protect both its coverage rights and its business relationship with ABC?*

Additional Insured Disputes

- Notice
 - Additional insureds can tender claims directly to the insurer to preserve coverage.
 - Insurers must usually show prejudice to deny based on late notice.
- Keep the fight insurer vs. insurer – portray the fight as insurer v. insurer and push for defense now, allocation later.
- Practice Tips
 - Require access to the actual policy or at least declarations page and additional insured endorsement (not just a certificate) in contracts.
 - Consider adding express obligations for the counterparty to tender claims and share policies on demand.
 - Specify in the contract that ABC's policy will apply on a primary and non-contributory basis to XYZ.

An Insurer's View of Coverage Tends to Minimize Coverage



Data Analytics Regarding Insurance Cases

- Lex Machina's 2024 Insurance Litigation Report
 - Analyzed more than 17,500 federal court cases involving insurance coverage disputes
 - Insurance companies dominated the lists of the most active plaintiffs and the most active defendants.
 - In 2023, \$1.2 billion of insurance damages were awarded.
 - 79% of cases recorded came out with likely settlements.

Sometimes Filing a Lawsuit is the Best Option to Address Denial

- When is it time to file?
 - When insurance company refuses to reconsider a denial or will not pay fast enough
 - Consider whether the initiation of litigation will help resolve the dispute
- Is the issue forum sensitive?
- What claims are available in coverage litigation?

Considerations in Filing a Lawsuit

- Where to file? There are multiple considerations
 - Which state's law will the forum apply?
 - Whether relevant law of the venue is favorable or unfavorable to policyholders
 - How fast are disputes generally resolved?
 - How sophisticated is the bench?
 - What resources do judges have?
 - State v. Federal court

How Discovery Helps Win Insurance Disputes

- What is extrinsic evidence?
- When can you use extrinsic evidence?
 - Some courts only allow consideration of extrinsic evidence if there is a patent ambiguity; other courts allow extrinsic evidence to determine if ambiguity exists.
- Role of extrinsic evidence
 - To help with the construction of ambiguous policy language
 - To determine whether ambiguity exists
 - Evidence of trade usage can be used to illuminate contract terms

Knowing the Boundaries of Bad Faith

- Delaying Coverage is Part of the Insurance Business Model

“One reason we were attracted to the P/C business was its financial characteristics: P/C insurers receive premiums upfront and pay claims later. In extreme cases, such as those arising from certain workers’ compensation accidents, payment can stretch over many decades. This collect-now, pay-later model leaves P/C companies holding large sums – money we call ‘float’ – that will eventually go to others. Meanwhile, insurers get to invest this float for their own benefit.”

- Warren Buffett’s 2015 Letter to Berkshire Hathaway Shareholders

Bad Faith: Knowing the Boundaries

- **Maryland:**

- An insured may recover expenses and litigation costs if its property and casualty insurer failed to make “an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim.” Md. Code Ann., Cts. & Jud. Proc. §3-1701 (West)

Bad Faith: Knowing the Boundaries

- **Virginia:**

- “[C]ourts should apply a reasonableness standard. A bad-faith analysis generally would require consideration of such questions as whether reasonable minds could differ in the interpretation of policy provisions defining coverage and exclusions; whether the insurer had made a reasonable investigation of the facts and circumstances underlying the insured’s claim; whether it appears that the insurer’s refusal to pay was used merely as a tool in settlement negotiations; and whether the defense the insurer asserts at trial raises an issue of first impression or a reasonably debatable question of law or fact.”
Cuna Mut. Ins. Soc. v. Norman, 237 Va. 33, 38, 375 S.E.2d 724, 727 (1989).

Bad Faith: Knowing the Boundaries

- **District of Columbia:**

- Applies the standard duty of good faith and fair dealing to insurance contracts: “This duty means that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. ... In addition, a party to a contract may be liable for a breach of the duty of good faith and fair dealing if the party evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party[.]” *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 321 (D.C. 2008); see also *Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1087 (D.C. 2008).
- An insurer is may not “Refuse to pay a claim for a reason that is arbitrary or capricious based on all available information” DC Code § 31–2231.17 (but no private right of action)

Bad Faith: Knowing the Boundaries

- An insurer has a duty to settle to protect its insured from an excess judgment
- An insurer that breaches this duty can be required to pay judgments in excess of policy limits

Mediation Techniques and Strategies

- Insurer settlement strategies
 - The “Oldest Trick” – frustrate you with “wasted” mediation day
 - Start very low and move incrementally
 - Send representative with limited settlement authority
 - Refuse to “bid against themselves”
 - Negotiate toward a middle point

Drafting Insurance Settlement Agreement With Insurers – Top Tips

1. The scope of the release is usually the BIGGEST OBSTACLE after the amount
2. Understand whether insurer maintains subrogation or contribution rights
3. Don't forget about the impact on excess insurance
4. Courts may make “Confidential Settlement” communications discoverable

TAKEAWAYS & CLAIMS CONSULTING RESOURCE

Claims Consulting Resource

- Nossaman attorneys will offer free three-hour consultations to ACC members and/or its clients to assist with the claims resolution process.
- We will run initial check for any conflicts
- We will issue-spot and focus on ways to resolve the dispute in a cost-effective manner
- It would be helpful to receive core documents prior to the call (e.g., the policy, the underlying claim, correspondence with the insurer).

Questions?



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