A Newsletter Published by Durrett Law Firm

The Legal Update

POLICYHOLDER REPRESENTATION **MAY 2010**

IN THIS ISSUE

Durrett Law Firm

Holding Insurance Companies Accountable For Their Promises to Policyholders Since 1989.

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Insurance Litigation and The Art of War

Hundreds of years ago a Chinese military general, Sun Tzu, advised, "Keep your friends close and your enemies closer." Sun Tzu meant that friends (those you can trust) should be kept close so that you could be attentive to their concerns, but enemies (those you can not trust) should be kept even closer to avoid getting hurt. In some respects, the advice I give clients in insurance litigation mirrors Sun Tzu's advice.

Typically, when an impasse on an insurance claim is reached, I advise my clients to file suit, withhold service of process and simultaneously mail a demand letter.

Initially, some clients question the wisdom of my advice. Indeed, they may question whether sending a demand letter and secretly filing a lawsuit at the same time is even ethical.

Procedural Background

Valid reasons support this approach and my advice, but to clearly understand the advice you must first understand a bit of legal procedure.

"Keep your friends close and your enemies closer."
-Sun Tzu

Insurance litigation is composed of various causes of action or legal theories of liability. For instance, breach of contract, violations of the Texas Insurance Code and violation of the duty of good faith and fair dealing are examples of common insurance litigation causes of action.

Some of the most favorable causes of action require a 60 day demand letter as a prerequisite to filing suit. Some causes of action, such as breach of contract and violations of the duty of good faith and fair dealing do not require a pre-suit demand letter.

Unfortunately, if the policyholder waits to file his lawsuit until after the carrier receives and evaluates his demand letter for 60 days, often the carrier will pre-empt the policyholder by filing suit first. Texas has a declaratory judgment statute that allows a carrier to ask a court to construe a contract and a set of facts and declare the rights and status of the parties. This construction can be made even prior to breach.

Typically, a carrier upon receipt of a demand letter will rush to the courthouse first and file suit against its insured seeking a judicial declaration or interpretation of the insurance dispute between the parties.

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Ask the Attorney …

Brant Durrett
Attorney at Law

Q: Are there other options than state court umpire appointments?

A: Absolutely! I am hearing a lot of horror stories from appraisers and public adjusters of state court appointed umpires (usually retired judges) that are charging upward of $450 per hour and are unqualified. Unfortunately, this type of umpire is almost all that is available at the state court level. To avoid this trap, consider a federal court appointed umpire for your next appraisal.

Recently, we have begun petitioning federal court judges to appoint umpires for appraisal panels. One benefit of seeking the umpire through federal court is that there is no approved list of umpires. The petitioner can suggest qualified experts such as building inspectors to serve as umpires and federal judges will usually agree to such appointments. Another benefit is overall cost. A qualified building inspector can act as an umpire at a third of the cost of a retired judge.

If you have a question you would like Mr. Durrett to answer, please email it to brant@durrettlaw.com

Insurance Litigation and The Art of War cont.

Lost Rights and Privileges

So what! The insured still has the right to file his counterclaim against the carrier. Right?

While this is true, in my opinion, the policyholder has lost valuable rights in this transaction. By allowing the insurance company to file the lawsuit first, the policyholder will be relegated to the status of the defendant.

The insurer will be allowed to "go first" and frame the issues for trial. In our system of trial practice, the plaintiff gets to explain his version of the facts and the case to the jury first, gets to offer evidence first, gets to present closing argument first to the jury and gets to have the last word in argument with the jury.

These rights are afforded the plaintiff because he has the burden of proof. However, in a situation where a policyholder has been named as a defendant such as in a declaratory judgment situation, these rights are lost.

The burden of proof has not changed, but the right to initially frame the issues, address the jury, present evidence and close argument has been lost.

The Solution

To counter this predicament, I advise the insured to secretly file a lawsuit against the carrier for breach of contract and violations of the duty of good faith and fair dealing (causes of action that do not require a presuit demand) and then simultaneously send the required 60 day demand letter for insurance code violations (causes of action that require a 60 day presuit demand).

Once the suit is filed, the insured withholds service of process until the carrier has had an opportunity to review the demand.

If the parties settle, the suit is dismissed and the carrier will never know it has been sued. On the other hand, if litigation is required, the lawsuit can be amended and the cause of action for violations of the insurance code added. The amended petition with all causes of action is then served upon the carrier.

However, the best part of this strategy is that if in response to receiving a demand letter the carrier files a declaratory judgment action against the policyholder, the two suits will be consolidated into the earlier filed suit, i.e. the suit where the policyholder is the plaintiff and is able to maintain the rights and privileges of the plaintiff.

Conclusion

While Sun Tzu probably never envisioned the litigation process, the wisdom of keeping your eye on the enemy is timeless.

In insurance litigation, this concept requires the policyholder's representative to anticipate possible actions a carrier could use to obtain an advantage and then set up effective countermeasures.

Spoliation of Evidence

Spoliation is the improper destruction of evidence, proof of which may give rise to the presumption that the missing evidence would be unfavorable to the spoliator. A party has a duty to preserve evidence that it knows or reasonably should know is relevant to imminent or ongoing litigation. If a court finds that spoliation has occurred various sanctions can be implemented by the court including instructing the jury that they can assume that the destroy evidence would have been adverse to the party's case.

Think about that for a minute. The jury is getting ready to retire to deliberate the issues in the case and as a part of that process the court instructs the jury that they can assume the missing evidence contained information that would have been adverse to a party in the case. Powerful.

Recently, DLF settled a case with a health insurer that contained a spoliation issue. In the case, our client's claim for reimbursement of medical expenses was denied. Our client maintained that the pre-authorization telephone clerk for the carrier misrepresented the policy to her over the telephone. In the internal insurance appeals process, the carrier sent a denial letter telling our client that it had reviewed tapes of the telephone conversation in connection with her appeal and that the tapes did not contain any misrepresentation. On behalf of our client, DLF sent a certified letter instructing the carrier to preserve evidence of the tapes. Guess what? In the lawsuit, the carrier claimed it destroyed the tapes as a part of its routine document destruction policy. While settlement precluded whether the court would issue a spoliation instruction, I am confident the threat of the spoliation instruction helped settle the case.

Cartoon of the Month …

"Just to be clear: Which one of you is Mumbo and which one is Jumbo?"

Client Bill of Rights

The Durrett Law Firm is committed to the highest standards in legal representation.

We believe that as our client you have the:

- Right to attorney-client privilege;
- Right to have your legal rights and options explained in plain English without legal mumbo jumbo;
- Right to talk to your attorney within a reasonable period of time;
- Right to expect competence from our firm;
- Right to know the truth about your case;
- Right to be updated regularly and in a timely manner as to the progress of your case;
- Right to receive true and correct copies of all correspondence and pleadings prepared or received on your case
- Right to a fair written fee agreement with our firm; and
- Right to make the ultimate or final decision on your case.

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We care enough to send you the REAL DEAL!
Unlike other firms that send clients, associates, and friends an impersonal newsletter that has been created by a service, our newsletter is **100% home-grown.**
It is written and designed in-house—by us!

High Tea at The St. Regis Hotel

Hailie and Shari Durrett at the St. Regis

Being the only man in my family often presents unique challenges. Since I am out numbered two to one, our family outings frequently turn out to be less masculine adventures.

Spring Break this year was no exception! Our family pioneered the Stay-cation concept. A Stay-cation is a vacation where you stay at home. To that end, we each chose a day's worth of family activities in and around Houston.

The highlight of Shari's Stay-cation day was High Tea at the St. Regis Hotel. What an affair! We were assigned a butler, who waited on us hand and foot. We were served four varieties of specially blended teas as well as various sandwiches, tarts and scones.

At the end of the day, I decided that there are some things women just know best and High Tea is one of them. Our Spring Break Stay-cation was fun and memorable.

Get Connected To Attorney Brant Durrett

In the virtual world of the internet, social media is the way people get connected and stay connected. To learn more about Brant Durrett or the Durrett Law Firm make a connection on Linkedin, Facebook and Twitter.

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