

Don't let insurance companies  
set your court's agenda

*snippets of thought on  
procedure in insurance cases  
from a policyholders' lawyer*

barry hill

## ***The way I see it...***

◆If a bunch of plaintiffs' lawyers got together and dreamed up nightmare scenarios for insurance companies, they wouldn't come close to the stuff these people actually do to themselves. Sometimes I'd swear the only explanation is an uncompromising intent to dig the deepest hole possible by picking the stupidest course imaginable and sticking to it despite having available all the information necessary to realize a folly is in the making.

◆When the insurance company says it doesn't know why it's in the case, the problem has been identified.

◆When an insurance company's summary judgment motion has more than a half-inch of exhibits attached, you can bet there are material facts in dispute.

◆There are two kinds of lawyers who tout the insurance companies' convoluted legal theories: those who do it because they get paid well to do it, not because they believe in them or even care if they relate to reason; and those who really do believe in them, because they also believe insurance companies are run by decent, honest folks who would never take a position if it isn't right, or at least reasonable. By and large the first group is made up of good people you can talk to. The second group is lethal. Stay away from them.

◆There are plaintiffs' lawyers – and you'll know who they are soon enough – who think every inconvenience to them, particularly being forced to do more work than they think they should have to do, is bad faith. You can usually spot these guys from their annoying habit of ending every letter to an insurance company with "I will consider it an act of the utmost bad faith if you fail to respond to this missive within fifteen (15) working days." Jeez, now that's really scary. The adjuster probably won't be able to sleep from worrying about getting a response out in time.

## ***A stroll through some of the Civil Rules...***

### **◆Rule 9**

•*Rule.* A party wanting to deny its capacity to be sued must do so by specific negative averment supported the particulars which are peculiarly within the knowledge of the party making the denial.

•*Insurance implication.* Lots of insurance companies operate under group or holding company names; and acquisitions, mergers, reorganizations, and name changes happen all the time. A policyholder's lawyer often can't figure out in advance of filing suit what is, and what isn't, a suable entity.

For instance. Federal Kemper Casualty Insurance Company wrote auto policies in West Virginia for years. A few years ago Kemper sold its auto insurance business to Anthem P&C

Holdings, a subsidiary of Anthem, Inc., the parent of Anthem Blue Cross/Blue Shield of Indiana. Anthem P&C also acquired Shelby Insurance, Insura, and some other casualty company. All these were operated as the Insurance Company of Decatur for a year or so. Then Anthem Casualty Insurance Company was created to replace Kemper Casualty, with Insurance Company of Decatur disappearing, and Shelby, Insura, and the other one operating as sister companies to Anthem Casualty under Anthem P&C and ultimately Anthem, Inc. Then Anthem P&C sold all of its business (Anthem Casualty, Shelby, Insura, etc.) to Vesta Insurance Company. Vesta then began marketing exclusively under the name of Shelby Insurance. Anthem Casualty, Insura, and the one I can't remember became nonexistent. But there are insurance policies out there in the hands of policyholders written by Kemper, Insurance Company of Decatur, Shelby, Anthem Casualty, and Insura. If one of these policyholders has a dispute, who do you sue? Most of the policy-issuing companies are nonexistent, but how is one supposed to figure all this out? The burden has to be on the insurance people, not only to tell you if you got the wrong one (at least as they see it), but also to specifically identify the right one.

Other examples. Axa is the second-largest insurance company in the world, but is it a suable entity? Is Nationwide Insurance a suable entity? How about AIG (American International Group), which has the State of West Virginia's liability coverage? Or State Farm Insurance?

The insurance industry creates these structural quagmires to suit its marketing and tax interests, and it has the obligation to clarify the things (as they exist at any given moment) for the rest of us. Complaints should never be dismissed because of a bunch of insurance guys playing hide-the-peanut.

#### ◆**Rule 11**

•**Rule.** Neither Rule 11 nor any of the Civil Rules creates a substantive cause of action.

•**Insurance implication.** You'll be amazed how often insurance companies will file a counterclaim to a policyholder's suit, asking for damages predicted on Rule 11. This is really stupid and should be treated as such. In fact, I think the filing of a cause of action, known to anyone with a fair working knowledge of tort and procedural law, as being nonexistent and impermissible, is itself a *per se* Rule 11 violation.

#### ◆**Rules 12 & 56**

•**Rule.** A motion to dismiss cannot go beyond the face of the complaint. If it does, then it has to be treated as a summary judgment motion.

•**Insurance implications.** Insurance companies love motions to dismiss and motions for summary judgment, but they mix them, and they'll mix you up, too, if you don't insist on a strict analysis of what they're doing.

The following observations might come in handy.

1. If the challenge is to the validity of the cause of action itself, this is a question of law which ought be addressed under the standards applicable to a motion to dismiss. There should be no affidavits, depositions, or other such stuff involved. No amount or type of discovery will be useful.

2. If there are statements, depositions, or other exhibits attached to the motion, it's a summary judgment motion even if it's called a motion to dismiss or something else. A summary judgment motion is premature if filed before the close of discovery, unless it reveals a fatal flaw which cannot be overcome, no matter how much discovery is done.

3. Beware of the rolling summary judgment motion. Here's how these work. The company files a summary judgment motion, with a bunch of exhibits attached, but either doesn't set it for hearing or the judge conditionally denies it as premature, subject to reconsideration on its merits after discovery closes. Then in a couple of months the company files a supplement to its summary judgment motion with more stuff attached. Then in a couple more months another supplement gets filed. Then comes the renewed summary judgment motion with more stuff plus copies of all the other junk which has already been filed at least twice before. Besides being a procedural nightmare, there's usually legerdemain afoot here, too. The whole theory the company is using has done a 180° turn somewhere between the first filing and the last. What's the other side supposed to respond to? What law and facts are the judge supposed to consider? Those responsible for the rolling motion, on whom the concept of intellectual honesty is lost, think it's everyone else who has a problem. They won't admit to a change in theory, even though it's obvious to everyone there has been one.

4. Anyone who files a motion for summary judgment or to dismiss, and simultaneously files a motion to compel discovery, should be battered about the head with the one-volume edition of Hogg's Equity Pleading (1895 edition).

•*Rule.* Only evidence which would be admissible at trial can be considered in ruling on a summary judgment motion.

•*Insurance implications.* First, watch out for "recorded statements". Typically these are transcripts, typed by an unidentified person from an audiotape, long-since reused and hence unavailable, of a telephone conversation between an adjuster and a witness or a policyholder, made before suit was filed, not under oath, and restricted to what and how the adjuster chose to address the subject at hand. These things have about the same chance of being admitted by the judge during trial as a confessed terrorist carrying a machine gun. But insurance lawyers will slap these things onto a summary judgment motion as if they represent unassailable truth.

Second, be on the lookout for the lawyer's narrative. The statements of counsel in a summary judgment motion cannot be considered unless supported by admissible, independent evidence. But these people don't care; they fill in missing pieces of evidence by simply saying it was this way or that way, as if it's okay for lawyers to implicitly give testimony in a written narrative, which they could never give at trial. Sometimes this is done subtly and skillfully, and sometimes it's painfully obvious. Either way it's bad business, and some measure of punishment beyond ignoring it isn't a bad idea.

•*Rule.* The applicable law determines what facts are material to resolution of a cause of action.

•*Insurance implication.* This one takes some thinking. Assume an insurance company advocates one line of legal reasoning as being the law which should be accepted by the court as determining the interpretation to be given to an exclusion in its policy. But the policyholder is advocating different line of legal reasoning as controlling the meaning of the exclusion.

Nonetheless the insurance company moves for summary judgment, saying there are “no issues of material fact,” which is true *pro tanto* but misleading, because the whole truth is, “There are no issues of material fact *if* one accepts the company’s view of what the controlling law is or should be.” An example is an exclusion which takes away coverage if the activity is part of a business pursuit of the insured. If the law requires a profit motive in order for an activity to qualify as a business pursuit, then the existence of a profit motive is a material fact the carrier has to prove. On the other hand, if profit motive isn’t required, its absence isn’t material.

#### ◆*Rule 16*

•*Observation.* You’re going to be amazed with the “trial calendars” insurance lawyers bring to scheduling conferences. Lawyers six months out of law school will come in booked up with a trial-a-week for the next 40 weeks. The older folks will have no openings for two years. I don’t know who’s filing all the cases these guys are defending. Maybe everyone in these firms puts everyones trials on everyone’s calendar so that they all look really busy and thus really successful. What I can say is Rule 16 scheduling conferences come early-enough in the case to replace anyone who’s so in-demand he or she can’t schedule anything for more than a year.

•*Suggestion.* Courts put time limits on all kinds of things, opening statements, closing arguments, discovery, etc. I’d like to see Rule 16 scheduling orders put a one-hour limit on depositions, exclusive of objections and so forth. A good deposition can almost always be taken in an hour if the lawyer spends enough time in advance framing the right questions.

#### ◆*Rule 19*

•*Rule.* A case can be dismissed for failure to join an indispensable party.

•*Insurance implication.* A motion to dismiss the plaintiff’s case for failure to join an insurance carrier which does or might have a subrogation interest. The solution: *If getting the subro carrier into the case is as important as you say it is, then you bring it in under Rule 14, and quit trying to clog up the court’s arteries with a bunch of tripe about dismissing the case.*

#### ◆*Rule 24*

•*Rule.* An entity with an interest in the outcome of a case usually should be allowed to intervene and become a party.

•*Insurance implication.* Insurance companies are forever making late efforts to intervene. By late I mean six months or less before trial. They always claim they only need minimal discovery and have no intention of doing anything to interfere with the scheduled trial date. Then, after the company worms its way into the case, the scope of its true intent becomes apparent. Depositions all-over-the-place, new experts, all kinds of motions. The next thing you know there's no time to prepare for the original case, because you're so tied up dealing with what was supposed to be a trifling dab or discovery. Solution: *If it's as easy as you say it is, file your own separate case, and if it's ready for trial when this one is, we'll consolidate them for trial.*

◆**Rule 25.**

•*Rule.* 25(c) allows the court to substitute or join an entity to which an existing party's interest has been transferred.

•*Insurance implication.* When an insurance company in the case ceases to exist as an entity against which judgment can be enforced, because of merger, acquisition, reorganization, or the like, the court ordinarily should, at least in my opinion, allow the new insurance entity to be substituted or joined, so that a judgment can be enforced without filing a new lawsuit.

◆**Rule 26.**

*Suggestion.* An insurance company cannot simultaneously rely on an advice-of-counsel defense and claim attorney-client privilege as to discovery of the carrier's dealings with the attorney whose advice is being claimed as a defense. If the company wants attorney-client privilege, it can't maintain an advice-of-counsel defense. If it wants to use an advice-of-counsel defense, it waives attorney-client privilege as to all transactions related to the attorney's advice.

*Suggestion.* When a plaintiff is trying to get corporation information from an insurance company, and the company resists for whatever reason, the court should make it clear that if the information the company wants to shield is available on the internet, the harshest sanctions reasonably permitted will be imposed. I can think of a few judges who wouldn't hesitate to get on the net at the hearing for a protective order and find out right then and there what the truth is about availability, confidentiality, and so on. The look on an insurance lawyer's face, upon realizing that what he or she has been ordered to protect at all costs from the policyholder, is available free, day or night, 365 days a year, to the whole world, is not a pretty sight.

◆**Rule 37**

*Suggestion.* At least one circuit judge has an inflexible rule of awarding sanctions in every discovery dispute he hears, and he won't allow a discovery motion to be removed from his docket by the parties once it's been set. The long-term effect of this rule has been to almost completely end discovery disputes in this judge's court.

◆**Rule 42.**

•*Rule.* Issues can be bifurcated for trial in the interest of clarity, economy, avoidance of prejudice, etc.

•*Insurance implication.* You will from time-to-time be astounded by the bizarre permutations the insurance people will make up – and ask for with a straight face – for bifurcating issues. Here’s the key to cutting through the fluff and buff and getting to what’s really going on. Is the bifurcation (or trifurcation or quadrifurcation if there is such a word) designed to get the carrier’s best defense decided first and in isolation from all the really nasty stuff it did? If so, the motion has nothing to do with justice and everything to do with manipulation. Be particularly wary of a request which is designed to get a causation issue decided before getting to fault.