TRIAL OF THE COVERAGE CASE

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Trial of the Coverage Case

The trial of the coverage case is one of the more challenging tasks that an attorney or an insurer will face. By its nature, the topics involved in the trial are not the most interesting. In fact, some would say that coverage and particularly a coverage trial, is one of the more boring exercises a person can undertake. And these statements are not coming from jurors or potential jurors but from coverage attorneys and adjusters. Second, while boring, coverage can be extremely complicated. Many judges believe coverage to be somewhat akin to the ancient Greek language, something that only a small number of individuals can understand and interpret and have developed mental blocks to the subject. Jurors are even worse. They buy insurance for their cars and homes but know only that the policies are very long, the print is very small, and the terminology used is foreign to them. Finally, there are inherent prejudices to overcome. All judges and jurors have had claims denied by insurers or have close friends or family members who have claims denied by insurers. The claims may have been properly denied. However, the spin put on the story by the time that it gets to them is that the claim was clearly covered and serious bad faith was committed in the denial of the claim.

The question is how does one deal with these issues? How does one make coverage seem exciting? How does one uncomplicate the issue of coverage and make it seem as simple as reading a child's nighttime story? Finally, how does one overcome the inherent prejudice that exists going into the case? How does one get a jury to like someone that they have been told their whole life they should dislike – someone on the level of Adolph Hitler or Joseph Stalin? How does one get the jury to put aside their preconceived ideas regarding what insurers are like and how they conduct business?

These issues will be examined in this paper. It would be nice to say that one solution would fit every single case. Unfortunately it does not. Each case is unique and presents its own problems and issues. However, there are some general principles and propositions that apply to every case. Those will be discussed along with strategies and ideas that have worked in coverage trials in the past.

I. JURY v. NON-JURY

The first issue that an attorney representing an insurer must decide is whether the case should be tried to a jury or to the court. Generally there is a knee-jerk reaction that the case should always be tried to the court. This is not always the case. In many instances, a jury may be preferable to a trial to the bench. This, of course, depends upon the facts and factors that exist in the case. These facts and factors will be discussed below.

A. Jury Trial

What are the pros and cons of trying a coverage case to a jury? There are many concerns that must be addressed before deciding to try a case to a jury. First, a party will not know who will be on the jury until the day of the trial. One may end up with a very conservative jury or one may end up with one that hates insurers. You will not know this until voir dire has been completed and the jury has been seated. One may be aware of the general makeup of the panels of juries for that particular county and this may give you some idea of what your jury will be like.

A second concern that must be addressed is that most, if not all, of the jurors will be insureds. They will have auto, homeowners, health or some other policy and will, in all likelihood, have had some experience in filing claims with insurers. While many will have had excellent experience in the way

they were treated by their insurer, undoubtedly there will be many who feel they have not had a good experience. This results in the possibility of having as your decision maker someone who already has built-in prejudices against the industry your client is in.

A third issue to be addressed in deciding whether to try your case before a jury is the ability of a jury to stay focused on the issues. If the case can be tried in one day, this should be no problem. On the other hand, if the case will take 2-3 weeks to try, the issue becomes more problematic. Will the jury be able to stay engaged the entire time period? If you are the defendant in the case, will the jury still be paying attention by the time you start presenting your case? Or will they have made up their mind? Will they already have decided the issues? This is critical in the determination because no matter how good your case is, if the jury has already decided the case by the time you start your case in chief, it is too late. The decision has already been made. It is too late to convince the jury to change their minds.

A fourth issue to be addressed is the complexity of the case. As stated earlier, coverage cases by their nature tend to be complex. Many people, including jurors, cannot or do not want to understand insurance coverage. They have their own policies at home – their auto, homeowners and health – they only know that the policies are lengthy with small print and language that is foreign to them as Latvian. (spoken only in one country in the world by less than 2.3 million people – the words can be lengthy and look like someone needs to buy a vowel.) Is the issue one that a jury is capable of understanding? Or, will the case be decided on an issue that the jury can understand but which has nothing to do with the coverage issue being presented?

A final issue to be addressed is the length of the trial. Our society is becoming a highly visual society. Not only are we becoming a visual society, but the visual presentation must take place in one or two hours or interest is lost. The attention span is critical. Despite the overprescribing of Ritalin, attention deficit disorder is running rampant in our county. It is running rampant among our jurors. It has been known to run rampant on the bench. If the trial is one that will last two to three weeks, this is an issue that must be taken into consideration by counsel in deciding on whether a jury is preferable than a trial to the court.

B. Non-Jury Trial

The only alternative to a jury trial is a non-jury trial. (Assuming there is no binding arbitration agreement. Not that this is a preferable alternative. Many insurers and businesses have sought refuge in arbitration provisions in their contracts only to find out that arbitration is more expensive, more time consuming, sometimes less predictable and, more importantly, generally not subject to appeal.) As with a jury trial, there are several pros and cons to a non-jury trial that must be considered in deciding the forum for the trial of the coverage case.

First, you will generally know to whom you are trying your case. This is critical. It allows counsel to evaluate the judge's predispositions and how they will impact the case. These predispositions could weigh in favor of a bench trial or weigh against a bench trial, depending upon the trial judge. This is not without qualification. I said "generally" you will know who your trial judge is. If you are in state court and are in Bexar or Travis County, this is not the case. There is the central docket system and in most cases one will not know who the trial judge is until the morning of trial and you receive your assignment of the court. I have not met a lawyer who likes this system. The

lawyers in San Antonio and Austin repeatedly complain about it. It makes evaluation of the case infinitely more difficult not knowing who the trial judge will be. The quality of trial judges in these two counties can vary dramatically. In this instance, as far as predictability is concerned, you are in no better shape than if you were picking a jury.

Generally if you are trying your case to the bench the judge will have a greater degree of education and be in a better position to understand and assimilate the materials. I said "generally." Education does not equate to common sense or rationality. Just because the judge has gone to undergraduate school and on to law school does not necessarily mean he or she will appropriately or intelligently apply the law to the facts. It just means that in most cases, they are starting out ahead of most people.

There are some cases where you may not want the jury to understand your case. If you have a very weak coverage argument and are for whatever reason being forced to try the case, you may not want the fact finder to understand all of the arguments because if they understand them, you will lose. This happens more than we would like to admit. There are some cases where a party is better off trying his case before the ignorant and uninformed because that is the only chance he has of winning. This is why it is critical that the insurer and its attorney have an objective, good-faith view of their case and are not smoking anything when they are doing the evaluation of chance of success in trial or on appeal.

A trial to the court is generally more advantageous when dealing with the presumptions that accompany coverage litigation. Let me give you an example. Under Texas law, every insured is presumed to have read and be aware of the contents of his or her insurance policy. Whether this is a fair presumption is not the subject of discussion for this paper. A judge will be aware of this presumption and will feel duty bound to apply it. On the other hand, everyone on the jury will be thinking that they have never looked at one of his or her insurance policies and that if he or she were the insured in this case, he or she would be sunk by the presumption. As a result, there is an inclination on the part of the jury not to apply the presumption even though the court has instructed them about its existence. There are other presumptions as well. However, this one illustrates the point the best.

A final issue to take into consideration in selecting a trial before the bench or a jury trial is how the ruling will be reviewed on appeal. Technically the judge in a bench trial and the jury in a jury trial perform the same role. They are the fact finders and find facts. However, on appeal, there is a difference in the review that is afforded by the appellate courts. The appellate courts are much more deferential to facts found by juries than they are to facts found by their brethren. For some reason they are more likely to leave the jury verdicts standing than they are to leave findings of fact made by a trial judge alone.

II. COMPANY REPRESENTATIVE

At a trial to the court or a trial to the jury, the insurer will need to have a company representative present. This person is the face of the company. This person exemplifies the persona, the credibility and integrity of the company. The choice of the company representative is one of the most overlooked decisions of all those made during a trial. The primary issue is who should be the company representative? Should it be the adjuster who made the critical decisions in the case? Or should it

be someone who has no knowledge about the events that are the basis of the lawsuit?

A. Someone Without Knowledge

There are several advantages to selecting a corporate representative who has no knowledge about the case. First, you have the opportunity to select the person who projects the image desired. Generally the better corporate representatives tend to be those men and women who are older, distinguished, have gray hair and have a kind appearance. The image sought is that this person is like our grandparents who would never engage in any of the conduct that the insurer is accused. The person projects credibility, integrity, and honesty.

The person will be present during the entire trial and the goal is that the jury will come to identify the company with the corporate representative. The corporate representative is a constant reminder to the jury of the integrity and honesty of the company.

One of the disadvantages is that the person actually does know nothing. If issues of fact arise where quick answers are needed, the person will be of no help. However, because the person does not have knowledge, they should not be called out of turn.

B. Adjuster as the Corporate Representative

The other alternative is to call the adjuster as the corporate representative. There are several disadvantages. First, you are stuck with his or her appearance. If it is good, that is fantastic. If it is bad – not so good. If the adjuster has beady little eyes and a rat-like appearance, the jury will associate this appearance with the company. The jury will have a rat-like company representative before them the entire trial. This person will be a constant reminder to the jury.

Another danger of using the adjuster as a corporate representative is that he or she may be called out of turn. The insured may desire to call them as the first witness in hopes of catching the adjuster unprepared. You have no control of when the adjuster can or will be called. Many cases have been lost because the adjuster was called out of turn and was unprepared for the testimony. (By the way, there is no excuse for this to happen but it does. If the adjuster is the corporate representative, he or she must be prepared to testify from the beginning of the trial through the conclusion of the trial.)

A final problem with having an adjuster as the corporate representative is that it is his or her conduct at issue. They are the one being attacked. Their conduct is being called into question. It is important for the corporate representative not to visibly react when bad testimony comes in, which it will without question. If the adjuster reacts visibly to the testimony, the jury will take its cue. The jury will know that the testimony is negative and has hurt the company. On the other hand, if the adjuster has no visible reaction, the jury quite often will not know if the testimony is positive or negative. There have been many trials when devastating testimony has come in but the jury is unaware because the party and their attorney show no visible reaction. A poker face is a necessity during a difficult trial. If handled appropriately, the jury may never be aware of testimony that is harmful or potentially harmful.

III. VOIR DIRE

Voir dire in a coverage case may be the most important phase of the case. In reality, most cases are won or lost during voir dire. However, it is amazing that many lawyers on both sides of the docket devote very little time and effort to preparing a good voir dire.

What is the purpose of voir dire in a coverage case or any case for that matter? The purpose of voir dire is twofold. First, it is an opportunity to begin to build rapport with the jury. Second, it is the opportunity to eliminate those jurors who would be prejudiced against your client or your client's position.

A. Rapport

Voir dire is the first and best opportunity to build rapport with the jury. Winning a jury trial is about one thing—credibility. The jury will go with whichever side they believe is honest with them and can be believed and trusted. It is all about credibility: Credibility of the party; credibility of the attorney; and, credibility of the positions taken.

Voir dire is the only time in the trial when an attorney can talk to the jury and receive an immediate answer. It is imperative that the attorney begin to build a relationship of trust between him or herself and the jury at the junction.

Voir dire is also the place where counsel for the insurer should start to get the bad facts on the table. He should be the one that brings them up, not the other side. This establishes trust. This establishes credibility. This also can be used to eliminate jurors who are predisposed against your client.

Voir dire is also the point where the attorney should begin to build on the theme of the case. Every case should have a theme. That theme needs to commence in the voir dire and be carried through every stage of the case through closing.

B. Eliminate Jurors

The second purpose of voir dire is to eliminate bad jurors. Many attorneys and clients believe that voir dire is to select or identify those jurors who are favorable to your case. This is not the case. This is not the purpose of voir dire.

There is a danger of identifying your best jurors. For one, you are helping the other side prioritize their strikes and keep all of the good jurors off of the panel. You are wasting time that could be used to identify those jurors who are not receptive to your case. Do not help the other side with their work. Let them do their own work. Focus on your job. In coverage litigation there will be plenty of jurors who have had negative experiences whom you will need to challenge for cause or need to use preemptory challenges. Focus on these jurors—not the ones who are sympathetic.

Some lawyers are concerned about asking the negative questions out of fear that they will taint the rest of the panel or present their case in a bad light. Surveys of jurors have indicated that replies in voir dire do not change their deep-seated views any more than listening to a radio program hosted by liberals will change a conservative or vice versa. The fear of the juror's answers tainting the jury really should not be an issue.

On every panel there will be three categories of jurors—those that are vocal in your favor, those that are vocal and are against you, and the silent minority. It is the silent minority that should cause the greatest concern. Inevitably, there is a juror who has not responded to any questions who gets on a jury and who has very strong feelings one way or the other. Yet they do not respond. When you get to exercise your peremptory challenges, you know nothing about them. What do you do? If you strike them and there is a Batson challenge, Texas courts have held that lack of information is not a

race neutral reason.[1] Therefore, it is critical that counsel be able to personally question as many jurors as possible, especially those at the front of the panel.

IV. OPENING STATEMENT

The opening statement is counsel's second opportunity to talk to a jury and best opportunity to persuade the jury. Counsel has the opportunity to build credibility, tell his or her story and begin telling the story counsel wants the jury to hear.

A. Tell a Story

Opening statement should tell a story from a specific point of view. Many times it seems as if counsel is reading from a table of contents. If the opening statement consists of a listing of the causes of action or listing of the defenses, more often than not, the jury will end up confused and frustrated and holding their confusion and frustration against the counsel and his party. In a coverage case, opening statement should tell the story that underlies the coverage dispute in a convincing and persuasive manner. While the story is being told, counsel must build into the oral argument the essential coverage elements. Counsel must emphasize the facts that support the coverage defenses and make sure the jury is aware of their importance.

B. Develop a Theme

Opening statements must fully develop the trial theme or themes. A trial theme should contain the mantra that you want the jury to recall throughout the case and should also contain values supporting the position. An opening statement without a trial theme or values is worthless. What are the values? One example in a coverage action is that coverage was available to cover the loss and the insured chose not to purchase it. Now the insured is trying to obtain coverage under a policy that was not designed to cover this loss. An insured should not get coverage that they could have purchased but chose not to purchase. This is a value that a jury will understand and can be incorporated into the opening statement.

C. Establish Credibility

An opening statement can go a long way to establish credibility of counsel and the party. Counsel should be honest and not overstate the case. The worst blow to credibility is to overstate one's case and not be able to deliver on the evidence. It is much safer to under-promise and over-deliver.

Counsel should use the opening statement to get bad facts out in the open. They will come out anyway. By discussing them in the opening statement, counsel can obtain credibility and can put his or her spin on the bad facts prior to the time the jury hears them. With this concept, the jury will hopefully filter the bad facts when they come into evidence based upon the explanation that was given in opening statement.

D. Focus on the Standard

Each coverage issue will have a legal standard or legal test that is to be applied. This is the test that will be contained in the charge submitted to the jury by the court. Counsel for the insurer should discuss the test and the facts that will be proven in light of the test. The jury needs to be aware of the standard and filter the evidence that it hears through that standard.

V. EXPERTS

Normally experts are not permitted on the issue of coverage alone. Courts have held that this is an issue for the court and not the subject of expert testimony.[2] However, they

[1] *Moeller v. Blanc*, 276 S.W.3d 656 (Tex.App.—Dallas 2008, pet. denied).

[2] *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App. Dallas 1992, writ denied).

are allowed on the issue of bad faith, and testimony on the issue of coverage can be admitted through the back door of bad faith.

Why is expert testimony so important? It allows counsel to summarize his case with one witness, explain the standards with the same witness and allows the expert to explain the why's of coverage. The expert can explain why the policy was constructed the way it was and what was intended to be insured. There is symmetry with insurance, and it is critical that the jury understand the symmetry. An expert is in a perfect position to explain that symmetry.

If the coverage question has already been determined in favor of the insured, the expert can explain the issue of a reasonable basis for the position that the insurer took and why under prevailing law it was reasonable.

The insured should be credible, i.e., testify for both insureds and insurers. The expert should have advocacy skills and be able to persuade the jury with his or her testimony. The testimony should have the academic background and experience to have credibility with the jury.

Most importantly, the expert should be used to advance the theme. The testimony of the expert should be built around the theme and values for the case. The expert is in the best position to explain the values, why they exist and what will happen if the values are ignored.

VI. DEMONSTRATIVE AIDS

Demonstrative aids are a must in a coverage case. The policy provisions cannot be read from the witness stand. They must be enlarged or contained in juror notebooks so the jury can follow along and be able to understand how the policy is constructed. Often times the language of the policy may have to be diagrammed which must be done where the jury can understand it.

Surveys have shown that jurors are much more visual than they were 50 years ago. The ability to comprehend and understand auditory input has been diminished. Graphics, illustrations, high-lighting, etc are a must. particularly for those Gen X , Gen Y or Millenial jurors

VII. THEMES AND VALUES

Themes and values are an integral part of every case. In the coverage case, they are a little more difficult to construct and implement. Coverage litigation generally does not present a lot of moral or value judgments. Some examples will be discussed below.

A. Other Coverage Available

One theme that has been used with success is that the insured had other coverage offered that would have covered the loss and chose not to purchase it. This is a very convincing theme. The insured is trying to obtain something they did not pay for and in fact rejected. This is not allowed in other contractual situations and should not be allowed here. It is especially easy to use in voir dire with practical situations that would apply to every juror.

B. Bad Acts of Insured

In many liability cases, the conduct of the insured may be especially reprehensible (though potentially covered). The theme in these cases is whether this type of conduct should be covered. Do we as society want to encourage this conduct by insuring it?

C. Inconsistency of Positions

In much of the coverage and bad faith litigation involving liability policies, there is an excellent opportunity to point out how the insured has taken one position before

one court or jury and is now taking an entirely different position before the present jury. An excellent example is *State Farm Fire & Cas. Co. v. Gandy*.[3] This was a case where a stepfather repeatedly molested his stepdaughter. At the trial of the underlying case, the focus was on the reprehensible nature of the conduct and how it should be punished not only with actual damages, but with punitive damages as well.

At the coverage/bad faith trial, the theme was that if there had been a better defense provided, the insured may have escaped liability. It was pointed out at trial and on appeal how the plaintiff was claiming in the underlying case that the conduct was indefensible, yet before the current tribunal she was claiming (as assignee of her stepfather) that a better defense would have resulted in no liability. She was either molested or she was not. If she was, then no defense would have made a difference. If she was not, she was entitled to no recovery. The supreme court noted the inconsistency and it played a significant part in the decision.

D. Failure to Response to Request for Information

Another theme is the failure of the insured to respond to request for information. In these cases the insurer has requested repeatedly information to evaluate the claim and finally denies the claim. The insurer eventually gives up and denies the claim. At the coverage trial the theme is that if the insured wanted to press the claim, they should have provided the information. Because they did not provide the information, the claim was denied. If the information had been provided, the claim would have been evaluated and perhaps paid. Because the insured failed to do what was required under the policy, the insurer had no choice but to deny the claim.

There are many other themes that have been used that are not listed here. However, it is important to note that each theme must be specially crafted to fit the facts and legal issues of each case.

VIII. CHARGE

In a coverage case, one of the most important stages of the case is the charge. However, the charge has importance well before any trial has commenced and any witness put on the stand.

A. Discovery

The charge should be written well in advance of the trial and should be the template for written discovery and depositions. It defines the relevant issues in the case, what evidence will be relevant, and what issues the party will have to persuade the jury.

B. Policy Interpretation

The charge will also contain instructions on many issues important to policy interpretation. Issues such as who had a duty will be determined in the charge. The placement of the burden of proof will also be addressed there. If an ambiguity is being submitted to the jury, the manner of resolving the ambiguity will be addressed. Likewise, presumptions that may be created under the law will also be addressed in the charge.

C. Appeal

Without question, most of the reversals on appeal occur as a result of charge error. This is the mother lode for reversal if the insurer is concerned about a large verdict. It cannot and must not be overlooked. When there is the possibility of a large verdict, counsel for the insurer must affirmatively work to build in error into the charge. Counsel must be

[3] 925 S.W.2d 696 (Tex.1996)

asking for instructions or questions that he does not want the court to give. A successful charge lawyer is one who does not win every argument -- but one who wins the important ones even though he or she may lose the unimportant ones.