DEFENDING AND TAKING THE ADJUSTER'S DEPOSITION

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The topic of this paper is Defending and Taking the Adjuster's Deposition. In coverage and bad faith litigation, there generally is no greater watershed event than the adjuster's deposition. If there has been proper preparation and the adjuster does well, the insurer has gone a long way to constructing the defense that it needs to defend itself in the coverage or bad faith case. On the other hand, if there has been inadequate preparation for the adjuster's deposition, the insured has taken a major step in prevailing in the case and in many occasions, the insurer will have no choice but to settle the case based upon the adverse testimony. If the adjuster has been presented as a corporate representative, the impact is even more dramatic. The testimony is binding. It is a judicial admission and if the appropriate objections are made at trial, it cannot be controverted nor can inconsistent evidence be introduced.

The point of view from which this paper is written is that of preparing the adjuster for deposition. As such, it is also a guidebook for taking the adjuster's deposition. It is an outline of areas to focus on in the deposition. It is a listing of the topics where the adjuster is most vulnerable. It identifies areas where the adjuster has the greatest strength. As such, it is useful for both taking and defending the deposition of the adjuster. There is no source for the presentation of the materials in this paper. It did not come from a book or from case law on discovery in insurance coverage and bad faith cases. It is rather the product of taking and defending adjuster depositions for over 30 years and seeing what works and what does not work.

It should also be pointed out that the scope of this paper is limited to the depositions of adjusters. Not included in this discussion are the depositions of underwriters. That is an entirely different topic which should be addressed in a different paper. However, no coverage or bad faith suit should be prosecuted by an insured without the deposition of the underwriter. In many occasions, the ground is as fertile if not more fertile than taking the deposition of the adjuster. The topics are different. The approaches are different. Because of that, this topic will not be addressed here.

I. CAN AND SHOULD THE ADJUSTER'S DEPOSITION BE TAKEN AT ALL

The first question that must be addressed is whether the adjuster's deposition should be taken at all. Is it relevant to any issue in the case? If so, what? Is the issue to be tried before the court a question of fact or a question of law? If one is representing the insurer, one should insure that there is a fact issue to be tried before presenting the adjuster for deposition.

If the question before the court is one on the duty to defend, it is doubtful that the deposition of the adjuster is proper. The duty to defend is governed by the eight corners rule. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.*, 2009 LEXIS 1042 (Tex. 2009). As such, it generally is a question of law for the court based upon a reading of the petition and the insurance policy. That being the case, what the adjuster says or doesn't say is irrelevant in many cases involving the duty to defend. If the issue before the court is truly one of applying the eight corners rule, counsel for the insurer should object to presenting the adjuster for a deposition because nothing he can say will be relevant or admissible in the determination of the duty to defend.

This, however, is not true in all cases. If a party (i.e., the insured) has pled ambiguity, then the testimony of the adjuster may become relevant. However, just because ambiguity has been pled does not necessarily mean that a fact issue has been created. The court must first apply the plain meaning rule. If after the application of the plain meaning of the policy language there can be given a specific or definite legal meaning or interpretation, then the provision is unambiguous and the court will interpret it as a matter of law. *Texas Farm Bureau Mut. Ins. Co. v. Sturrock*, 146 S.W.3d 123 (Tex. 2004). The court must apply the accepted rules of interpretation in applying the plain meaning rule. If after applying the rules regarding the meaning of words in reviewing the policy the intent is clear, the court interprets the policy as a matter of law and the inquiry ends.

The duty to defend issue is not the only issue in which the question may be a question of law for the court and not a question of fact. The law in Texas is quite clear that the duty to indemnify is determined by the actual facts, and not the pleading. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.*, 2009 LEXIS 1042 (Tex. 2009). If the case is one that has been tried, the fact finder is generally limited to the evidence upon which the underlying jury made their decision. *Swicegood ex rel. Estate of Swicegood v. Medical Protective Co.*, 2003 WL 22234844 (N.D. Tex., September 29, 2003). On the other hand, if the case has been settled, the evidence is much broader and can include things such as pleadings, discovery, depositions and documents produced in the case. *Enserch Corp. v. Shand Morahan & Co., Inc*., 952 F.2d 1485 (5th Cir. 1992). In cases where the underlying facts are undisputed or are limited to the facts of the underlying case, it is doubtful that the adjuster's testimony would be relevant to any issue in the case. Anything he or she might say would be inadmissible under the rules governing the admission of evidence and should not be received into evidence.

Generally, the testimony of the adjuster is relevant on the issue of bad faith and the manner in which the claim was handled. On this issue there perhaps is no more relevant evidence than the testimony of the adjuster. However, because there is a claim for bad faith or violations of the insurance code does not necessarily mean that the adjuster's testimony should be taken. Under Texas law, there can be no bad faith or violations of the insurance code unless there is coverage. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995). Even if the claim was handled improperly, if there is no coverage then the conduct of the insurance company or the adjuster cannot be a proximate or producing cause of the insured's damages if there was no coverage initially. In many bad faith cases and in many other areas of the law, the court will order separate trials where one issue is dependent upon the finding of another part of the case and the evidence to be introduced in the second part of the case would be prejudicial. For example, in a negligent hiring case, in many instances the court will try the issue of whether the employee was negligent in the first place before going to the second phase of the negligent hiring because the testimony in the second phase could be prejudicial to the trial in the first. And, unless there is a finding of negligence on the part of the employee, as a matter of law there can be no negligent hiring. The same is true for bad faith cases. If the coverage part of the case is closely and hotly contested, the trial court may be required to order a separate trial on the issue of bad faith until there has been a determination of coverage. The same logic would apply in this situation. The evidence in the bad faith portion of the case could be extremely

prejudicial to the coverage portion and the trial court may be required under the rules governing separate trials to order a separate trial. If a separate trial is appropriate, the question is raised as to whether discovery in the second phase should be stayed as well. In this situation, defense counsel may want to object to the deposition of the adjuster going forward on the issue of bad faith.

II. PREPARATION FOR THE DEPOSITION

Without question, the most important part of taking or defending an adjuster's deposition is the preparation. The performance of the adjuster at the deposition is proportionately related to the time and effort spent preparing him or her for the deposition. If the appropriate amount of time and effort is spent, generally the deposition will go well and the case can be defended. On the other hand, is an insufficient amount of time is spent preparing the witness, in most cases the deposition will not go well and the case cannot be defended. Bad faith cases are generally won or lost at the deposition stage. There is a corollary to this rule and that is that the file will serve as a template for taking and defending the adjuster's deposition. The better the file is documented, the easier the deposition is to defend. The poorer the file is documented, the more difficult the deposition is to defend.

A. KNOWLEDGE OF THE FILE

The first step in preparing an adjuster for a deposition or in taking an adjuster's deposition is knowledge of the file. The attorney preparing the adjuster must have not only a working knowledge of the documents, but an intimate knowledge. He or she must know where the problems are in the file. He or she should have created a timeline to know what was happening when another event in the case was occurring. He or she must know if the adjuster takes inconsistent positions in the file. This must be fully explored prior to preparing or taking the deposition. Then, if the attorney is preparing the adjuster for the deposition, this knowledge must be imparted to the adjuster. The adjuster must also have an intimate knowledge of the file and the implications of everything that he or she has written in the file. There can and should be no surprises based upon what is contained in the file. There is no excuse for the adjuster to be caught off guard based upon what is contained in the claim file. In many circumstances, several hands may touch the file. The adjuster must also be familiar with what others in the company has written in order to be prepared for questions regarding their conduct. If the supervisor or other adjuster has written notes that are inconsistent, then the adjuster must be prepared to address the inconsistencies that exist in the file.

B. MENTAL STATUS

Part of the role of the attorney in preparing an adjuster for deposition or in taking the deposition of an adjuster is to play the role of psychiatrist. The defense attorney must have an accurate assessment of the mental status of the adjuster. The relative psyches that defense counsel must deal with run the gamut. At one end of the spectrum is the adjuster who thinks he or she knows it all and is anxious to give his or her deposition. These are the most dangerous because they think they are smarter than anyone else, they are unwilling to listen to advice, and it is very easy to lead them into a trap based upon their own vanity. How do you deal with them? Sometimes you cannot. They are so set in their ways they will not respond to any type of advice. Others are more pliable and the job of defense counsel

is to show them how they can be led down the primrose path and made to say things they do not want to say. Once they come to this realization, then generally they will be responsive to the advice that is being offered. On the other end of the spectrum is the adjuster who is terrified of depositions and wants to be any place other than giving his or her deposition.

C. LEGAL CONTEXT

It is impossible to anticipate every question that may be asked. Therefore, in preparing an adjuster for deposition it is necessary that he or she be intimate with the legal context in which the case is going to be tried. For example, if the case is a first-party bad faith case for breach of the duty of good faith and fair dealing, the standard is failing to pay a claim in which an insurer's liability has become reasonably clear. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997). That is the question for the case. The insurer does not have to be correct in its determination. In fact it may be wrong. That does not result in liability. The focus of the adjuster in the preparation and in answering the questions is this—at the time the decision was made on the claim, was the insurer's liability reasonably clear? Was there information requested that had not been provided? Was the evidence conflicting? Were there other policy defenses that were still in play? All of these issues would prevent the insurer's liability from being reasonably clear. The adjuster does not have to establish that his or her decision was correct—only that he or she had a reasonable basis for taking the position that they did. If they can do this, there is no bad faith or breach of the duty of good faith and fair dealing. This is the legal context they must keep in their mind when answering the questions from counsel. The same is true for the coverage deposition. It is critical that the adjuster be intimate with the legal standard governing the coverage issue and how the evidence impacts it. They must be able to filter the questions that will be asked through the legal standard counsel has given them that will determine the coverage issue in order to appropriately answer the questions that will be presented. The questions to the adjuster must also be in the appropriate legal context. Counsel for the insured must be intimate with the appropriate legal standard. If he or she is, the information obtained in the deposition may be case dispositive. This is particularly true if the adjuster has been designated as a corporate representative. On the other hand, if the attorney is not familiar, he or she may be asking questions that are not binding on the insurer and are irrelevant at trial because the wrong standard was used.

D. FACTUAL CONTEXT

Just as the adjuster must be aware of the appropriate legal context when answering the questions, he or she must also be aware of the factual context in which they are answering the questions. They must be familiar with the prior testimony in the case—particularly with respect to prior testimony of the insurer. One of the worst things that can happen in a case is for two witnesses from the same company to testify inconsistently on their understanding of material facts in the case. It gives the appearance of incompetence and that the left hand does not know what the right hand is doing. If the appearance can be created for a jury that one part of the company is unaware of what is happening in another part of the company, it is not a far reach for the jury to conclude that the company does not have in place proper policies and procedures in place for the handling of claims and that bad faith has been committed. Sometimes it is impossible to avoid inconsistencies in testimony. However, they should be few and far between. Also if the witness is

aware that he or she will be testifying inconsistently with another witness, it will not come as a surprise during the deposition and a logical and cogent explanation can be prepared for the inconsistency.

E. REGULATORY CONTEXT

It is assumed by jurors that anyone working at a job should be aware of the laws and regulations that govern the performance of their job. If they are not, then it is not a far leap for the jury to conclude that the person probably is not properly prepared for his or her job. The same is true for adjusters. It is critical that the attorney preparing the adjuster for his or her deposition make sure that they are aware of the regulatory context in which they operate, even if those regulations are not involve in the case. Let me give you an example. A question is asked to the adjuster: "What standards does your company have to insure the prompt investigation of claims under your policies?" Many will respond that there is no claims handling manual and that each claim is adjusted on its own facts. 28 TAC 21.203(3) defines "unfair claims settlement practice" to include "failing to adopt and implement reasonable standards for prompt investigation of claims arising under its policies." The adjuster has just admitted to an unfair claims settlement practices act. Similarly, an adjuster may be asked to produce a complete record of all complaints received during the past three years. Many adjusters may not want to spend the time looking for the complaints or even ask if they are maintained and will prefer to answer that there is no such record of the complaints in order to avoid having to produce them. Once again they have admitted to an unfair claims settlement practice. 28 TAC 21.203(6) makes it an unfair claims settlement practice to fail to maintain "a complete record of all complaints. . . which it has received during the preceding three years or since the date of its most recent financial examination by the commissioner of insurance, whichever time is shorter." While the lack of standards in and of itself may not be case dispositive in that particular case, if there are enough violations of the regulations, the jury will think "where there is smoke, there is fire." The scope of regulatory context in Texas is broad. Texas has greater regulation of its insurers than any other state in the United States. To cover the waterfront, one must look at the Insurance Code, the Administrative Code, board orders, board bulletins and any other positions taken by the TDI.

F. COMPANY POLICIES

As indicated above, the insurer is required to maintain certain policies. If they do not, it is an unfair claims settlement practices act as defined by the regulations. Many companies will have their own claims handling manuals and procedures. First, it goes without saying that any insurer that has its own claims handling manual should have a disclaimer in the front in capital letters and bold print indicating that it is to serve only as guidelines and that the handling of an individual claim will vary depending upon the individual facts of the case and that the procedures and steps set forth in the manual cannot and do not apply to every single case. If, however, an insurer does have policies and procedures, the adjuster should be intimately familiar with them in order not to present testimony inconsistent with their own policies and procedures. Nothing is more damaging than to have an adjuster present testimony about the procedure he or she followed and then be impeached with the insurer's own policies and procedures. The question is "Why didn't you follow your own policies and procedures?" Usually the answer that follows is not one that the attorney for the insurer wants to play back to

the jury. The focus should not be limited to merely written policies and procedures. Most every insurer now has a web site as part of their advertising. On the web site, there typically is a mixture of advertising and policy. Generally, the copy has not been written by one in the claims department but someone in the marketing department. This can lead to embarrassing questions to the adjuster. On many occasions the marketing department may have assumed duties or responsibilities that are not imposed by law. For example, the statement that "We put the interests of our insureds first" sounds great from a marketing standpoint but does not accurately reflect duties under Texas law. By placing the statement on the company website, an argument can be made that the company has assumed a duty not imposed by Texas law.

G. RULES OF CONSTRUCTION

If the deposition concerns a coverage question, and the deposition of the adjuster is focused on the coverage issues, it is imperative that the adjuster be aware and fully informed of the governing rules of policy construction and interpretation in Texas. This may be difficult. Many lawyers and sometimes judges do not fully understand the steps and rules that govern policy interpretation under Texas law. (See "Algorithm for Construction of Insurance Policies under Texas Law" by Cooper, Sheffield and McClelland, 10th Annual Insurance Law Institute, University of Texas Continuing Legal Education, Austin, December 8-9, 2005.) However, the adjuster should have a basic primer on the rules of construction in order to prepare himself or herself for the deposition. For example, the Texas Supreme Court has held that a policy is ambiguous if it is susceptible to two or more reasonable interpretations. *Texas Farm Bureau Mut. Ins. Co. v. Sturrock*, 146 S.W.3d 123 (Tex. 2004). Whether or not a policy provision is ambiguous is a question of law for the court. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc*., 907 S.W.2d 517 (Tex. 1995). In many cases, resourceful attorneys will try through the deposition of the adjuster to create an ambiguity. For example, the adjuster may be asked "If another court has interpreted a policy in a certain manner, it must be reasonable, because otherwise you are saying that the court is unreasonable." Most adjusters do not want to call a judge or court unreasonable and will agree that the other interpretation is reasonable and counsel for the insured will argue that, as a result, there are two or more reasonable interpretations. This is not the law. The fact that a court may interpret a policy differently does not create an ambiguity. *Sturrock*, 146 S.W.3d 123 (Tex. 2004). Courts misinterpret policies all the time. The number of times that trial courts and courts of appeals in Texas have been reversed based upon their interpretation is innumerable. However, it does not make their interpretation reasonable. The adjuster needs to be prepared for this type of question from the creative insured's attorney. Likewise, the adjuster may be asked "If the policy is ambiguous, is it interpreted against the insurer?" Most adjusters will answer this question "yes". However, that is not the correct answer. The answer according to the Texas Supreme Court is that the rule of contra proferentum is a rule of last resort. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430 (Tex. 1995). It is only resorted to after application of the rules of construction have been applied to resolve ambiguities and extrinsic evidence examined to determine the parties' intent. Adequate time needs to be spent with the adjuster insuring that he or she has a basic understanding of the rules of construction

and will not be misled by opposing counsel's questions.

H. PRIOR POSITIONS OF THE COMPANY

The advent of the internet is a blessing and a curse. For insurers and large corporations, it is generally a curse. Now it is possible for attorneys to research many of the cases that these large corporations have been involved in. For many companies, being sued is a normal part of their business and the number of cases that this happens every year is quite large. In all of these cases, these companies, through their attorneys, are taking positions reflecting the company's view on a particular subject. Most federal cases and pleadings can now be accessed through PACER. Many of the state court proceedings and pleadings can be accessed through subscriptions with West Publishing and LexisNexis. If the company is taking a position on a critical issue, it is incumbent upon the counsel to use his or her best efforts to determine if the company has previously taken a position on that particular subject. This is not possible in all cases. However, it is extremely damaging to a case for the adjuster to be asked: "And your company's position on this subject is 'x'?" Then the next question will be: "Well, didn't your company take the position of 'y' 6 months ago in this case?" The credibility of not only the adjuster, but the company itself, can be tremendously impacted by this type of impeachment. Therefore, a critical part of the deposition preparation is to identify other positions taken by the company in other litigation. This can often be a very troublesome proposition. However, if the insurer has someone in the general counsel's role or has coordinating counsel, the job is much easier, and it is much easier for the company to maintain consistent positions in litigation throughout the nation.

I. THEME OF THE CASE

Every case should have a theme. It is critical for trial counsel to develop that theme as early in the case as possible, preferably before the key depositions of the adjusters. The manner in which deposition questions will be answered will in large part be determined by the theme. For example, if the theme of the case is that the insured knew of the loss or that a loss was likely to occur before the policy was issued, it is critical that this theme be supported by the deposition testimony. It does the trial strategy of the case no good if the adjuster is led to the point where he or she admits that there simply is no way that the insured could have known that this loss had occurred or was going to occur before the policy was issued. If this is the testimony of the adjuster, then the position and theme should never have been adopted to begin with. The deposition of the adjuster, particularly if the adjuster has been designated as a corporate representative, must snugly fit into the theme of the case. If it does not, then the insurer needs a new theme or new adjuster.

III. THE DEPOSITION ITSELF

Assuming the requisite preparation has taken place, the next step is the deposition. If the adjuster has been properly prepared, most of the hard work has been done and the deposition itself should not be strenuous. However, there still are a number of steps that must be taken by the adjuster during the deposition to insure that the testimony will be received as favorable as possible.

A. APPEARANCE OF THE ADJUSTER

Most depositions in large cases are videotaped. There are several reasons. First, most of our society is extremely visual. Studies show that juries pay more attention to videotaped depositions and

retain more of the information than in depositions that are read from the witness stand. Second, the fact that the deposition is being videotaped puts additional pressure on the deponent because he or she knows that not only will the jury hear their answers, but will also be able to see how they answered the questions. Therefore, in the videotaped depositions, the adjusters must not only be prepared in the substance of their answers but also how they answer the questions. They must be prepared on how they should dress and appear on the videotape. (Wear no article of clothing or jewelry, including piercings that might be offensive to anyone on the jury, including the most conservative little old lady or most liberal 18 year old young man.) The adjuster must also be prepared on body language. In interviewing jurors, the most common comments are not on what the witnesses said, but on their body language. Were their arms crossed? Did their eyes go back and forth? Did they slump in the chair? Did their face get red with the hard questions? Did they perspire? The appearance of the adjuster cannot be overstated. He or she must be professional looking and know how to respond to questions in an open manner. He or she must not be argumentative and should always be polite in answering questions. If the adjuster is rude and overbearing in the deposition, the jury will assume that the adjuster was rude and overbearing in the manner in which they dealt the insured. On the other hand, if the adjuster is thoughtful and methodical in the way he or she responds to the questions, the jury will assume that the adjuster was thoughtful and methodical in the manner in which he or she responded to the claim at issue.

B. OBJECTIONS

Defense counsel must be on his toes when defending the adjuster's deposition, particularly on the issue of objections to the questions. Many of the questions referred to above that are quite useful to the insured are quite objectionable. For example, if the adjuster is asked whether he or she agrees that an insurance company has a duty to put the interests of the insured above their own interests, the question is improper. Generally, the issue of the existence of a duty is a question of law for the court and is an improper question. (By the way, the answer to the question is that under Texas law, there is no such duty on the part of the insurance company.) Questions regarding duty and the existence of duty are easy to spot and identify and assert the appropriate objection. On the other end of the spectrum, there are some questions involving pure issues of fact that may not be subject to any objection. For example, does the insurer have policies in place to insure the prompt investigation of claims? The more difficult area is the one involving mixed questions of fact and law. Was there a reasonable basis for failing to pay the claim or delay in payment of the claim? This question clearly involves questions of fact but also involves questions of law as well.

C. DUCES TECUM

Nearly every notice of deposition of an adjuster will come with a duces tecum or prior request for production of documents. No doubt, counsel will assert objections to some and seek to withhold them. The extent of the privilege will turn on each case and in large part depend upon if the case is a third party liability case or is a first party case. Generally, in a third-party liability case, the scope of privilege is more narrow. In a third-party liability case, such as *Stowers*, the insured is entitled to its attorneys' file and generally entitled to the claims file for the adjuster handling the liability portion of the case. Typically, little, if any can be withheld. One of the most common items withheld in third-party liability, such as

Stowers, claims is the reserve information. Currently, there are cases going both ways on the discoverability of the reserve information. In withholding information and presenting a witness for deposition, the attorney needs to be careful that the testimony still remains consistent with the withheld documents. There have been several cases where the adjuster was presented for deposition while certain documents were withheld. The adjuster was asked very specific questions and answered them in a specific fashion under the mistaken belief that the documents would remain privileged. A motion to compel was filed and the court ordered the documents to be produced. The information in the documents directly related to what the adjuster had sworn to under oath. At the trial of the case, the credibility of the adjuster was totally demolished when it was shown he testified one way when the documents that had not been produced directly contradicted his testimony. Another area of critical importance is emails. Generally, there will be a request for relevant emails early in the case. Care should be taken when suit is filed or notice of a claim is given to see that all relevant emails are preserved for litigation. *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998). Once a party has notice of litigation or threatened litigation, a duty exists under Texas law to see that all relevant evidence is preserved. *Id*.

D. PRIVILEGES

No doubt the issue of privileges will arise during the deposition. As with the issue of documents, the issue of privilege will in large part depend upon if the case is a third-party liability case or a first-party liability case. If the adjuster is the liability adjuster in a third-party case, there will be few privileges until the time of anticipated litigation. If the case is a first-party case, then the anticipation of litigation may have occurred very early in the case if there were threats of litigation. When representing insureds, this is one reason to hold off threatening litigation. Once the threat has been made, the privilege attaches. The threat of litigation is probably not going to change the manner in which the claim is handled and should be withheld as long as possible if the insured wants to push the anticipation of litigation date back as far as possible.