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LITIGATING THE INSURANCE CLAIM

I. FILING A DISPOSITIVE MOTION

A. SUMMARY JUDGMENT MOTION

1. GENERALLY FILED BY DEFENDANT INSURANCE COMPANY BASED ON POLICY LANGUAGE RE NON-COVERAGE;

EXAMPLE: PLAINTIFF IS INJURED WHEN DEFENDANT INTENTIONALLY STRIKES THE PLAINTIFF WITH A HAMMER- CARRIER BRINGS A SUMMARY JUDGMENT MOTION AFTER THE COMPLAINT IS FILED SEEKING DISMISSAL OF THE CASE BASED AN INTENTIONAL TORT EXCEPTION.

2. ALSO FILED BY DEFENDANT INSURANCE COMPANY IF THE CLAIM IS ABOUT VALUATION AND THE VALUE OF THE CLAIM IS REASONABLY DEBATABLE, TO DISMISS A CLAIM FOR BAD FAITH. (**BUSHEY V. ALLSTATE** 164 VT.399(1995)-(attached)

EXAMPLE- SOFT TISSUE INJURY OF THE LOW BACK. PLAINTIFF VALUES THE CASE AT $100,000 BUT DEFENDANT VALUES THE CASE AT $30,000 AND HAS A PHYSICIAN STATING THE PLAINTIFF HAS FULLY RECOVERED AND IS AUTHORIZED TO RETURN TO WORK.. - VERY DIFFICULT FOR PLAINTIFFS TO RECOVER IN SUCH CIRCUMSTANCES UNLESS THE VALUE OF THE CASE IS CLEARLY NOT DEBATABLE SUCH AS A DOUBLE AMPUTATION OF ONE'S LEGS WHERE THE CARRIER OFFERS $50,000, THERE ARE NO ISSUES OF LIABILITY AND THE CASE IS CLEARLY WORTH MORE THAN THE POLICY OF $500,000.

3. ALSO FILED BY DEFENDANT INSURANCE COMPANY TO DISMISS A CLAIM BASED ON A PUBLIC POLICY EXCEPTION TO THE POLICY TO OVER RIDE A POLLUTION EXCLUSION PROVISION IN A POLICY- **MASKA U.S. INC. V. KANSA GENERAL INSURANCE COMPANY, ET AL** 198 F.3D 74(1999-US CT. OF APPEALS-2ND CIRCUIT) -Circuit Judge Sonia Sotomayor held that (1) absolute pollution exclusions in primary policies did not violate any established Vermont public policy, and (2) coverage was not available under an excess liability policy.- (attached). The US District Court of Vermont (Murtha) had initially granted partial summary judgment for the Plaintiff Maska against its insurers, stating that the pollution exclusion clauses in Vermont were routinely held invalid by the Vermont Department of Banking and Insurance as violative of Vermont public policy. CAVEAT: THE PUBLIC POLICY ARGUMENT WAS FIRST RAISED ON APPEAL-HAD THE PUBLIC POLICY ARGUMENT AND THE ARGUMENT THAT THE CARRIER'S POLICY LANGUAGE HAD NOT BEEN APPROVED BY BANKING AND INSURANCE, BEEN RAISED IN THE LOWER COURT, WE MAY VERY WELL HAVE HAD A DIFFERENT OUTCOME- IN FAVOR OF THE PLAINTIFF INSURED. THE COURT ALSO HELD THAT IF THE VERMONT DEPARTMENT OF

BANKING AND INSURANCE HAD ESTABLISHED A "RULE" THAT PROHIBITED POLLUTION EXCLUSIONS, THE OUTCOME OF THE CASE WOULD BE ENTIRELY DIFFERENT- i.e. the verdicts would have been upheld.

II. SUCCESSFUL STRATEGIES IN INSURANCE COVERAGE CASES

A. LOOK AT THE POLICY LANGUAGE-IS IT AMBIGUOUS-IF SO IT GETS DECIDED IN FAVOR OF THE POLICY HOLDER

B. CHECK WITH THE BANKING AND INSURANCE DEPT. TO SEE IF THE POLICY HAS BEEN APPROVED OR IF THE COMMISSIONER HAS ISSUED REGULATIONS OR BULLETINS DISAPPROVING OF CERTAIN LANGUAGE

EXAMPLE: POLICIES THAT ATTEMPT TO EXCLUDE COVERAGE IN A HIT AND RUN CASE WHERE THERE IS NO PHYSICAL CONTACT- INSURANCE BULLETIN 152 PROHIBITS A REQUIREMENT OF PHYSICAL CONTACT-

JOHN DOE V. ABC INSURANCE COMPANY- CARRIER DENIED COVERAGE WHEN CLIENT WAS FORCED OFF THE ROAD WITHOUT PHYSICAL CONTACT- CLIENT INCURRED ABOUT $13,000 IN MEDICAL EXPENSES- WIFE HAD ANOTHER $5500. IN MEDICAL EXPENSES. SUIT WAS FILED IN BENNINGTON SUPERIOR COURT AND REMOVED TO FEDERAL COURT BY THE DEFENDANT. BECAUSE OF THE COMMISSIONER'S BULLETIN (**Number 152),** AND THE CONCERN THE CARRIER HAD THAT THE BULLETIN WOULD SERVE AS A BASIS FOR THE COURT AND JURY VIEWING THE CASE AS AN IMPROPER DENIAL, THE CASE SETTLED FOR $400,000, PRIOR TO ANY DEPOSITIONS.

III. HOW TO STRATEGICALLY HANDLE BIFURCATION DURING TRIAL

A. CARRIER WANTS THE ISSUE OF COVERAGE TO BE TRIED FIRST WITHOUT THE JURY HEARING ABOUT THE ACTS OF BAD FAITH.
B. ARGUE THAT THE CARRIER ALREADY HAS AN UNEVEN PLAYING FIELD WITH LIMITLESS RESOURCES AND THAT IT IS AN UNDUE BURDEN ON THE PLAINTIFF TO BRING HIS/HER EXPERT TO COURT TWICE TO TESTIFY FIRST ON COVERAGE AND NEXT ON THE ACTS OF BAD FAITH.

EXAMPLE:
1. LIFE INSURANCE CLAIM- INSURED'S HUSBAND DISAPPEARS WITHIN TWO YEARS OF THE POLICY ISSUANCE. THE SUICIDE FORFEITURE CLAUSE IS APPLIED BY THE CARRIER. HOWEVER, NO ONE CAN CONCLUSIVELY PROVE SUICIDE. CARRIER WILL WANT TO BIFURCATE AND HAVE THE FIRST TRIAL ON WHETHER THERE IS OR IS NOT COVERAGE. DURING THAT PORTION OF THE TRIAL, THE CARRIER WILL WANT

TO KEEP OUT ITS INTERNAL MEMOS INDICATING THE PLAINTIFF'S WIDOW IS ENTITLED TO COVERAGE. IF THE BAD FAITH AND COVERAGE ISSUES ARE TRIED TOGETHER, ALL THE CARRIER'S DOCUMENTS FROM ITS FILE WILL LIKELY COME IN TO EVIDENCE.

IV. CONTRIBUTION PROTECTION- Generally, there is no contribution in Vermont unless a statute specifically authorizes contribution- e.g. Between a dram shop and an intoxicated driver.

7 V.S.A. § 501(f). Apart from any statute to the contrary, we have consistently held that there is no right of contribution between joint tortfeasors. **Swett v. Haig's, Inc**. 164 Vt. 1(1995).
See
Peters v. Mindell, 159 Vt. 424, 427, 620 A.2d 1268, 1270 (1992); *Howard v. Spafford,* 132 Vt. 434, 435, 321 A.2d 74, 75 (1974) (adoption of comparative negligence did not abrogate no contribution rule). The parties here are joint tortfeasors; there is no question that contribution is unavailable under the common-law rule. The narrow question before us is whether § 501(f) has created a right of contribution.

V. CONTAINING A PUNITIVE DAMAGE JUDGMENT-

A. PLAINTIFFS DO NOT WANT TO CONTAIN SUCH JUDGMENTS-SHOW THE RESERVE SHEETS ESTABLISHED BY THE CARRIER- PLAINTIFFS MUST SHOW THAT THE CONDUCT WAS "RECKLESSLY UNREASONABLE", THE TERM USED BY THE VERMONT SUPREME COURT IN **PEERLESS INSURANCE COMPANY V. FREDERICK, ET AL** 177 VT. 441(2004)

B. SHOW THE ACTIVITY LOGS.

C. TAKE THE DEPOSITION OF THE ADJUSTER AND GET SPECIFICS OF HOW HE/SHE ARRIVED AT THE VALUE OF THE CASE.

D. TO CONTAIN A PUNITIVE AWARD DEFENDANTS WANT TO PORTRAY THE CARRIER AS A GROUP OF PEOPLE ACTING IN THE BEST INTERESTS OF THEIR INSUREDS AND WANTING TO PROTECT THE PUBLIC AGAINST FRAUD WHICH DRIVES UP THE COST OF INSURANCE FOR EVERYONE.

VI. DECLARATORY ACTION

A. USED BY CARRIERS TO OBTAIN DECISIONS EARLY ON IN THE DISPUTE THAT THERE IS NO COVERAGE.

B. DISCOURAGE USE OF THE DECLARATORY JUDGMENT ACTION BY THE INSUREDS WHENEVER THERE ARE POSSIBLE ACTS OF BAD FAITH. INSUREDS SHOULD ONLY USE THE DECLARATORY JUDGMENT APPROACH WHEN THERE ARE CLEARLY NO POSSIBLE ACTS OF BAD FAITH.

VII. ALTERNATE DISPUTE RESOLUTION AND OTHER SETTLEMENT OPTIONS

A. TO AVOID THE COSTS OF DEPOSITIONS, EXPERTS, TRAVEL AND LONG DELAYS, ASK TO MEET WITH THE CARRIER'S COUNSEL AND THE ADJUSTER'S SUPERVISOR-SOMEONE WHO HAS SETTLEMENT AUTHORITY. BE WILLING TO MEET AT THE CARRIER'S PRINCIPAL PLACE OF BUSINESS.

B.BE WILLING TO DO MEDIATION WITH A PERSON RESPECTED BY THE CARRIER.

C. ARBITRATION-DEPENDING ON THE POLICY LANGUAGE. CARRIERS ONCE WANTED ARBITRATION, BUT NOW BECAUSE OF LOW JURY VERDICTS, AVOID ARBITRATION.

VIII. COMMON ETHICAL ISSUES AND HOW TO RESPOND

A. RULES OF PROFESSIONAL CONDUCT

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

1. EXPERIENCED ATTORNEY V. NEWLY ADMITTED ATTORNEY

B. CONFLICTS OF INTEREST

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A LAWYER SHALL NOT REPRESENT A CLIENT IF THE REPRESENTATION OF THAT CLIENT WILL BE DIRECTLY ADVERSE TO ANOTHER CLIENT, UNLESS:

(1) THE LAWYER REASONABLY BELIEVES THE REPRESENTATION WILL NOT ADVERSELY AFFECT THE RELATIONSHIP WITH THE OTHER CLIENT; AND

(2) EACH CLIENT CONSENTS AFTER CONSULTATION.

(b) A LAWYER SHALL NOT REPRESENT A CLIENT IF THE REPRESENTATION OF THAT CLIENT MAY BE MATERIALLY LIMITED BY THE LAWYER'S RESPONSIBILITIES TO ANOTHER CLIENT OR TO A THIRD PERSON, OR BY THE LAWYER'S OWN INTERESTS, UNLESS:

(1) THE LAWYER REASONABLY BELIEVES THE REPRESENTATION WILL BE ADVERSELY AFFECTED; AND
(2) THE CLIENT CONSENTS AFTER CONSULTATION. WHEN REPRESENTATION OF MULIPIPLE CLIENTS IN A SINGLE MATTER IS UNDERTAKEN, THE CONSULTATION SHALL INCLUDE EXPLANATION OF THE IMPLICATIONS OF THE COMMON REPRESENTATION AND THE ADVANTAGES AND RISKS INVOLVED.

DEFENSE COUNSEL HIRED BY THE CARRIER-IS THERE AN INHERENT CONFLICT?

IF THE CLAIM HAS THE POTENTIAL TO EXCEED THE POLICY LIMITS SHOULDN'T THERE BE SEPARATE ATTORNEYS FOR THE INSURED AND THE CARRIER FROM THE OUTSET?

THE ISSUES TO CONSIDER:

1. DEFENSE COUNSEL IS BEING PAID BY THE INSURANCE COMPANY-IS THE ALLEGIANCE TO THE INSURANCE COMPANY?

2. WHAT'S THE INSURED'S PRIMARY CONCERN? Not having to pay a judgment and not being involved in litigation.
a. What happens if the insured directs the carrier to pay the policy at the outset?
b. Does the carrier's attorney have a motive to extend the litigation?

C. **ATTORNEY'S FEES**

NOT GENERALLY RECOVERABLE UNLESS:

1. THERE IS A CONTRACT STATING THEY ARE RECOVERABLE- RARE IN INSURANCE CONTRACTS.

2. THERE IS A STATUTE AUTHORIZING THE RECOVERY OF ATTORNEY'S FEES.

3.. YOU USE A REQUEST FOR ADMISSION TO PROVE VARIOUS POINTS IN THE LITIGATION WHICH ARE DENIED. THE COST, INCLUDING ATTORNEY'S FEES, NECESSARY TO PROVE THE POINTS ARE RECOVERABLE IF YOU ARE THE PREVAILING PARTY.