



INSURERS CAN be in a no-win situation, regardless of whether they decide to settle or defend claims.

Claiming Victory

Insurance companies are often in a gray area when deciding whether it's better to settle a claim or defend it at trial.

By Michael Eisenbaum and Richard Williams

It is often said that in litigation, no one really wins. If you are suing someone or being sued, litigation can be stressful and all-consuming. Most litigants, following the conclusion of trial, post-trial motions and the appeals process, will candidly admit it was not worth the time, expense, risk, and personal or professional toll.

It depends upon your perspective, of course. For attorneys, there can be a clearly defined win. For insurance companies, however, there is almost never a clear win. When they defend their insureds against third-party lawsuits, they have a financial expenditure, whether the lawyer delivers a favorable outcome or not.

Often, a win from an insurance company's perspective only comes when they can put an end to a case quickly, even if it means settling a claim where their insured has little or no liability. But, even that is not a clear-cut aftermath.

In the 1980s and into the '90s, claims and lawsuits involving automobile accidents were rampant. Insurance companies followed an industry trend of making relatively small settlement payouts, rather than defending the case at trial.

After decades of this practice, some insurers became more aggressive in defending claims. This resulted in a substantial decline in the number of lawsuits being filed involving automobile accidents.

Insurers may have expended substantially more in defending a given claim, but the long-term impact of the strategy ultimately paid off. In minor injury cases, it simply became economically impractical for claimants to pursue litigation.

Many insurance companies have failed to employ that same strategy when facing other types of litigation. A cynic would say this is especially true given today's economic climate, where the financial

bottom line in each new case is seemingly all that matters.

The cost of defending litigation can be painfully high to an insurance company evaluating a claim. Even when advised by an attorney that a case is defensible, insurance carriers often balk once they are provided with an estimated litigation budget.

Instead, they often try to minimize costs, paying out substantial sums to settle a case rather than defend it. There are many illustrations of this, as well as exceptions. In the end, the question remains: How do you define a win when it comes to insurance litigation?

THE QUESTION OF SETTLEMENT

In one recent case, an insurance company had to decide whether to defend a contractor who had been hired by a bank agent to make cosmetic repairs to a single-family home that was in foreclosure.

While the property was in default, it had been used as a site to grow marijuana. After the police raided the property and removed the pot plants, the contractor ordered a HAZMAT company to inspect and properly dispose of materials such as drums of chemical fertilizers and used pots of soil.

The property was listed for sale by the bank when the repairs were made. It was purchased "as is" by the plaintiff buyers, even though they had learned about the marijuana growing prior to closing.

The purchase price of the property was about \$50,000 less than the appraised value. The buyers declined to perform any professional inspections of the property, even though such inspections were recommended by their own realtor. Not surprisingly, the plaintiffs began experiencing problems with the house, including a gas leak and the discovery of mold inside a wall and under floors.

The buyer's exposure to any harmful chemicals was minimal since the defendant had obtained a HAZMAT clearance of the property. One small error had been made in other repair work, when the defendant improperly strapped a conduit for the electrical line to a new dishwasher, costing the plaintiffs \$60 to repair.

In addition, the plaintiffs were not very pleasant individuals and would likely not appear sympathetic to a jury.

For these reasons, the defense advised the insurance carrier that the client's exposure in the case was a few hundred dollars.

As the case progressed, however, it became very expensive to defend. Days of depositions and court hearings added to the cost. When the cost of the case approached \$100,000, the carrier decided to offer \$50,000 to settle, against the defense counsel's recommendation.

The insurer opted to pay 50 to 100 times the value of the case rather than go to trial. Defense counsel felt that a probable "sure win" was turned into a significant loss by the decision to settle.

While the insurer saw a cost savings to settling the case, the situation was not as clear-cut. They had already spent nearly \$100,000, and it would have probably cost an additional \$100,000 to \$150,000 to defend the case through trial.

A few months later, the insurance company faced yet another lawsuit. From the plaintiffs' perspective,

Summary

- Litigation costs insurers a great deal even when they win cases.
- Frequent settling of claims invites more claims.
- It's difficult to define a win in insurance litigation.

why not sue? Other parties now know the defense will pay rather than fight, even if there is minimal liability or none at all.

POTENTIAL COSTS OF GOING TO TRIAL

In another recent case, the opposite occurred with the same insurance carrier.

This case involved a tenant at an apartment complex who was brutally beaten by the security guard employed by the complex. The beating was captured on video. The plaintiff claimed severe injuries,

including permanent brain damage with cognitive impairments.

He had not worked since the incident, and had been earning about \$50,000 per year as a waiter at an upscale restaurant in Hollywood.

He saw multiple doctors and incurred medical expenses in excess of \$40,000. He claimed he would require future cognitive rehabilitation and physical therapy at an estimated cost of \$500,000.

In addition, he became severely depressed, attempted suicide, and was being treated by a psychologist.

The security company that

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hired the guard was being sued for negligence. Despite efforts to reach settlement, the plaintiff would not agree to settle for anything less than \$1 million, which was the policy limit for the security company.

After about two years of litigation, the case proceeded to trial. Prior to trial, with the depositions of all of the witnesses and experts complete, the insurance carrier was advised

that the plaintiff's injuries were exaggerated, although he did sustain a traumatic brain injury as a result of the incident.

The defense believed that the case was worth at least \$300,000 to \$350,000, with the security company primarily, if not entirely, liable for the plaintiff's injuries and damages. If a jury agreed with the plaintiff's need for extensive future treatment, however, the case value could reach \$1 million.

The carrier was not willing to offer more than \$200,000. While they were aware the case would likely not be “won” outright, they decided to proceed to trial.

The trial lasted nearly seven weeks, and the co-defendant settled during trial for a confidential amount. The result was a verdict for the plaintiff in the amount of \$317,000, which was within the amount predicted.

For the trial counsel, this result was considered a significant win, especially considering it was the predicted outcome and avoided a potential policy limit judgment.

The carrier, however, did not share the same view, as they had spent about \$350,000 on the defense and ended up paying a pro-rata share of the judgment of about \$205,000.

In this scenario, the lowest amount they could have ever settled the case for was \$900,000, and thus, by taking the case to trial, they saved \$345,000.

Yet, somehow the amount of money the defense saved the carrier by going to trial was never mentioned. That was contrary to the view expressed in the earlier case, where saving \$50,000 to \$100,000 was a key reason to overpay and settle the case.

These scenarios provide the perspective of the attorneys, as well as the insurance company, but what was view of the clients?

In the earlier case that was settled, the defendant had mixed emotions. While he did not want to give the undeserving plaintiff a penny, he was nevertheless relieved that the case was over. In the latter case, the defendant was hoping the carrier would settle the case and was understandably nervous when the case went to trial.

Neither of the defendants felt that they had “won” their case despite all the time and money invested.



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