Compliance

The Three Wise Men

Lessons Learned From Recent Litigation and Regulatory Actions
The Three Wise Men:
Lessons Learned From Recent Litigation and Regulatory Actions

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Session Number 35: The Three Wise Men
Introduction: The Three Wise Men

- Legal issues pervasive in our industry
- Lawyers aren’t going away any time soon (like it or not)
- Much (not all) involvement of lawyers revolves around “dispute”
- Many “disputes” involve actual litigation – but by no means all
- So, get to the point Rafalko – what do you mean by “dispute?”
- Last year has seen some interesting developments
- Your best protection is knowledge
Introduction: Who Are The Three Wise Men?

• Because not all disputes are litigation per se, lawyers fill many different roles
• Three perspectives on disputes
  – Pat Reeder (in-house regulatory counsel)
  – Pat Carmody (in-house general counsel)
  – Mike Rafalko (outside counsel)
• Each with a slightly different perspective
• What makes us wise?
Introduction: What Do We Hope To Accomplish?

- Discuss real-life legal issues and disputes from three perspectives
- Survey some of the hot litigation and regulatory trends facing the industry
- Discuss red flags, pitfalls, and take-aways
- Have fun (why else are we here?)
Introduction: How Do We Hope To Accomplish It?

- Nine Vignettes (each about 5 minutes)
  - Pat Reeder: recent regulatory disputes and considerations
  - Pat Carmody: the politics of disputes and dispute management
  - Mike Rafalko: recent litigation and litigation trends

- Opportunities for audience participation
- Opportunities to win prizes (gold, frankincense, and myrrh)
Wisdom Found In Being Regulated

- Petition for Liquidation of Penn Treaty Network America Insurance Company – May 3, 2012
- Court denied Commissioner’s petition to move from Rehabilitation to Liquidation
- Court found Company able to pay bills now
- Court noted “rate regulation is governed by politics, not actuarial evidence or legal principles.”
Wisdom Found In Being Regulated

• Commissioner has appealed Commonwealth Court decision
• Consider other states’ rate regulation
• Implications for guarantee associations
Question: What must be proved before a company can be moved from Rehabilitation to Liquidation? (Hint: one of two elements)
Answer:

• Continued Rehabilitation would either:
  – Substantially increase the risk of loss (creditors, policyholders or the public); or
  – Would be futile
In 2012, a very high profile class action lawsuit was filed against SHIP.

At the time of filing, the Plaintiff’s attorneys also released a very negative press release to over 200 media outlets. The media attention to the allegations was nearly universal. "Thousands of policyholders scammed," "Insurer tries to take advantage of war hero." SHIP talked to several media contacts, but the concessions SHIP secured were small. If SHIP was fortunate, the media contact would simply print one or two lines of our statement and then still include all of the negative statements. In the end, SHIP just stopped trying to defend itself. We would give our prepared statement and nothing more.
The prepared statement actually worked pretty well except for one major point of communication. SHIP contacted our state of domicile (Pennsylvania), and our state of residence (Indiana), but we did not contact the state in which the lawsuit was filed (lawsuit DOI).

Subsequently, several weeks after the lawsuit was filed, the DOI notified SHIP that it was going to conduct a claims audit on SHIP. It was an uphill conversation from that point on.

SHIP received many letters asking about our financial solvency following the lawsuit.
• If a person Googled SHIP, the negative postings and links appeared at the top of the search results.
• Public relations benefits.
• Search Engine Optimization (SEO).
• Spend the time and money to monitor the comments that appear. Search for negative postings and links and neutralize them.
**Question**: In a Federal class action lawsuit, a proposed settlement must be approved by the presiding judge. Can the judge approve a settlement in which the class members receive no monetary or material award?
Answer:

• Yes, the award may be equitable in nature and this fact greatly enhances the creativity that can be used to settle the case at a minimal cost to your company.

• The settlement can be as inexpensive as providing equitable relief by removing a rider from the policy for all impacted class policies.

- Insurer sued for breach of contract, violations of Unfair Trade Practices Act, seeking unspecified punitive damages
- Plaintiff put back on benefits after lawsuit is filed, but no reimbursement of back benefits; out of pocket $150K
- “Continual” vs. “Continuous”
- New medical report: “severe cognitive impairment”

- $34.25 million verdict was entered against Insurer
- On post-trial motions, verdict reduced to $12.25 million (maximum amount allowable under the Montana statute)
- High demand cases follow (probably not a coincidence)
Question: How should carriers interpret “Continual” in “Continual Supervision?”
Answer: While there are dictionary definitions to support everything from “repeated often” but not “round the clock” to “round the clock, 24 hours a day” essentially uninterrupted, most courts have interpreted “Continual” to be repeated often, but not round the clock. “Continual” ≠ “Continuous.”
Wisdom Found In Being Regulated

• Rate Review Appeals
  – What legal options do you have when you hear “no” or no response?

• Varies by state
  – KNOW the state’s rules
  – Understand the added “players”
    • ALJ; AG; Courts
  – Understand “public” versus “private”
Wisdom Found In Being Regulated

• Generally
  – Requires “Final Order”
    • Know what a Final Order is
  – Administrative Law Judge
    • Not every state
  – Commissioner Reviews ALJ Decision
    • Not every state
  – Appeal
    • Ranges from Trial Court to Supreme Court
    • Standard of Review (not de novo?)
Question: Is an appeal process for denied LTCi rate increases available in all states? (Hint: trick question)
Answer: No. Not all states have LTCi rate review authority.
Repeat Plaintiff’s Attorneys

- The attorneys that repeatedly sue SHIP are located in two states.
- Polarized positions: evil v. good.
- These Plaintiff’s attorneys believe that the only way to get the attention of Insurers is to sue them.
- SHIP learned that if we could quickly research the case and then reach out to the attorney with a suggested solution, they would usually talk to us.
- At peak, SHIP had 27 cases from one of these attorneys. We bundled and settled the cases 6-8 at a time.
- Complaints are opportunities.
- SHIP has had zero lawsuits from the most active 3 firms in the last 18 months.
Question:
• As part of a settlement agreement, the defense counsel wants to ensure that this Plaintiff’s attorney won’t continually sue on the same issue on other plaintiff’s behalf.
• Defense counsel increases the plaintiff’s attorney’s fees in consideration for the Plaintiff’s counsel’s promise not to sue the company for that particular issue in the future.
• Would this arrangement be appropriate if, at the time the settlement is entered into, the counsel for the Plaintiff has no other clients similarly situated?
Answer:

- No, this would be a violation of most State Bar Association ethical cannons because the agreement could deprive future plaintiffs of their right to sue when they have been injured by the company.
- What you can do is extend an offer to the Plaintiff’s attorney that if he/she will call you prior to filing a lawsuit, their request will be handled with the highest priority and consideration will be given for payment of fees and costs incurred by the Plaintiff’s attorney prior to contacting the company.
Vaught v. The Hartford Life & Accident Ins. Co.

- Plaintiff was receiving disability benefits under a long-term disability insurance policy with The Hartford.
- Complaint alleges that The Hartford, through its investigator, improperly videotaped Plaintiff on her property and, based upon these tapes, The Hartford denied the continuation of disability benefits and terminated her policy.
- Plaintiff alleges that The Hartford and its investigator violated her right to privacy under Ohio law by secretly videotaping her during a claim investigation.
Lawlor v. North American Corp. of Illinois

- Marketing company hired a private investigation service to determine if its ex-employee had made telephone calls to clients in violation of her non-compete clause.
- Investigators unlawfully acquired the ex-employee’s phone records to make this determination.
- A jury awarded the marketing company a $629,000 verdict against the former employee for her violation of the non-compete clause, but also awarded the former employee a $1.81 million verdict against the investigator and the marketing company for the illegal accessing of the former employee’s phone records.
- The Illinois Supreme Court reduced the award in favor of the former employee, but upheld the verdict that found the marketing company liable for the actions of the investigator despite no direct evidence of knowledge of the investigator’s illegal actions.
Question: What steps can you take to insulate a company from risk caused by vendor misconduct?
Answer:

- Know your vendors
- Make sure your vendors:
  - Understand the boundaries within which they may operate on your projects
  - Have a contractual obligation to indemnify you
  - Have the financial wherewithal – through insurance or otherwise – to honor that indemnity obligation
Wisdom Found In Being Regulated

• Legislative / Regulatory Actions
  – What problem is the Legislator / Regulator trying to solve?
  – Use that “lens,” not just your own

• Consider Examples
  – NAIC
  – CA
  – SC
Question: You could be the next insurance commissioner in your state. What three ways can you get the job?
Answer:

• You could become an insurance commissioner by:
  – Appointment by Governor
  – Appointment by Commission
  – Election
Bearing the Gift of Gold
Resolution of Litigation Threats Without the Use of Outside Counsel

• This can be highly dangerous and many times I do it with outside counsel serving as my silent advisor during the process.

• Always start out with the statement that this conversation is in pursuit of settlement and ask for an agreement to that understanding in writing.

• If I know the opposing counsel, it is all the easier for SHIP to reach out and call with a possible solution.

• More than 90% of all litigation threats to SHIP are settled by verbal negotiation.
Question: What two things should a company’s attorney do in order to best protect the company when litigation threatening cases are settled before suit with non-lawyers outside of the formal legal process?
• **Answer:**
  – Use written settlement documents.
  – Recommend in the settlement agreement that the non-lawyer have the agreement reviewed by an attorney on his/her behalf prior to signing off on the settlement agreement.
• Even if the person does not take the document to an attorney for review, it strengthens the company’s case at a later date if the agreement is brought into question in the future by a lawyer representing the non-lawyer.
Bearing the Gift of Frankincense

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• Class action complaint filed May 7, 2012, seeking class certification for all Unum LTCi insureds with an issue state other than Florida, who resided in Florida since 2008, and who were charged a rate increase while living in Florida.

• Complaint alleges Unum improperly increased rates on policies while plaintiffs were residents of Florida, while not raising the rates of other policies issued in Florida.

• Plaintiffs seek declaratory judgment requiring Insurer to implement rate increases based on the insureds’ residence state at the time of renewal of their coverage immediately prior to the rate increase becoming effective.
Question: Are rate increases governed by the laws of the state in which the contract was issued or in the state to which the insured has moved?
Answer: Uncertain . . . although conventional logic would suggest that the laws of the state of issuance apply, that may not always be the case.
Bearing the Gift of Myrrh
Questions for the Wise Men?

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