

DETECTING INSURANCE FRAUD
AND
PURSUING FALSE CLAIMS

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DETECTING INSURANCE FRAUD AND PURSUING FALSE CLAIMS

Juries love a good fraud case. They pay attention. And, it is probably the only time when a jury identifies the insurance company as being on the noble side. The right side.

In the ordinary case, juries view insurance companies with suspicion and fear. They believe insurers are unfair, arbitrary and too powerful. They fear their claim will be unpaid or at least underpaid. They fear cancellation or higher rates if they make a claim. Most of all, they don't understand the nature of insurance and the process of making a claim. They fear the unknown.

But there is a group juries fear even more - criminals. Any review of criminal verdicts shows dominance by the prosecution. Juries are fed up with crime, and angry towards people who play the system, drive up rates for everyone else, and profit from fraudulent claims.

Juries instinctively know insurers do not routinely deny claims for fraud - in fact, their assumption is just the opposite - that a lot of criminal activity goes undetected and, therefore, unpunished. As a result, the carrier begins the fraud trial with credibility at least equal to that of the Plaintiff, if not more. The key to winning the trial is to maintain that credibility, and to tap into juror attitudes favorable to your case.

This paper will set forth the legal bases for a fraud denial, the parameters of handling such a claim, and practice pointers for the trial itself.

I. LEGAL BASES FOR DENIAL.

A. Public Policy. Fraud by the insured is a defense to an insurance company's liability under an insurance policy. For example, public policy does not permit recovery by an insured who knowingly burns insured property. Greenfield v. San Jacinto Insurance Company, 319 S.W.2d 134 (Tex. 1958). Fraudulent losses are excepted from coverage upon principles of public policy and morals because in contracts of insurance, there is an implied agreement that the risks insured against are those risks to which property is usually subject, and the insured cannot voluntarily and intentionally vary them. Id. quoting Columbia Insurance Company of Alexandria v. Lawrence, 9 L.Ed. 512, and Ritter v. Mutual Life Insurance Company, 169 U.S. 139, 18 S.Ct. 300, 42 L.Ed. 693; and Jones v. Fidelity and Guaranty Insurance Corp., 250 S.W.2d 281 (Tex.Civ.App. -- Waco 1952, writ ref'd n.r.e.). Thus, public policy acts: 1) to prevent an insured from fraudulently benefitting from his criminal acts, and 2) to protect insurance companies from incurring increased risks which are voluntarily and unilaterally increased by the insured.

Occasionally, in a fraud case, the claimant will have prevailed on criminal charges and will argue the carrier is bound by the criminal court finding. However, for *res judicata* to bar relitigation of a finding of a previous court, the same parties must have been involved in the previous litigation of the same issue. McGuire v. Commercial Union Insurance Co., 431 S.W.2d 347, 352 (Tex. 1968). A former judgment bars a second suit against all who were in "privity" with the parties to the first suit. Getty Oil v. Insurance Company of North American, 845 S.W.2d 794 (Tex. 1992). To be in privity, a person must have had some control over the previous action or his interests represented by a party to the first action. Id. For collateral estoppel to bar re-litigation of an issue, a party must establish that "1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; 2) those facts were essential to the judgment to first action; and 3) the parties were cast as adversaries in the first action." Cysco Food Service, citing Allen v. McCurry, 449 U.S. 90, 94, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980), Hicks v. Quaker Oats Company, 662 F.2d 1158, 1166 (5th Cir. 1981); Eagle Properties, Ltd. v. Scharbauer, 807 S.W.2d 714, 721 (Tex. 1990); Tarter v. Metropolitan Savings and Loan Association, 744 S.W.2d 926, 927 (Tex. 1988); Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984). For collateral estoppel to apply, it is not necessary that the parties in the second action be identical, but only that the party against whom collateral estoppel is asserted was a party or in privity with a party in the first action. Id., citing Eagle Properties, 807 S.W.2d at 721; Benson v. Wanda Petroleum Co., 468 S.W.2d 361 at 363 (Tex. 1971). A determination of what constitutes "privity" requires careful examination into the circumstances of each case. Id. Privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same facts. Id., citing Coleman v. Bosworth, 180 Iowa 975, 164 N.W. 238 (1917). Due process requires that collateral estoppel only operate against persons whose asserted interests were actually and adequately represented in the prior trial. Id., citing Restatements of Judgments §84 (1942).

Given the different considerations between punishment (the state) and compensation (insurance), as well as the different burdens of proof between civil and criminal, an insurer should not be estopped from presenting its defense of fraud by the lack of a criminal conviction.

B. Insanity. An interesting side issue is whether diminished mental capacity allows the insured to recover in avoidance to the public policy defense. There are no Texas cases directly on point.

The general rule, as stated above, is that intentional destruction of insured property by an insured does not ordinarily allow recovery, even though such a loss is not expressly excepted from the coverage of the policy. Jones v. Fidelity and Guaranty Insurance Company, 250 S.W.2d 281, 282 (Tex.Civ.App. – Waco 1952) citing 29 Am.Jur. p. 777, §1028 and authorities; 45 C.J.S., Insurance Section 822(a) p. 870, and authorities; see also Greenfield v. San Jacinto Insurance Company, 319 S.W.2d 134 (Tex. 1958). But there are no Texas cases addressing the issue of whether a voluntary act by an insane insured gives rise to recovery.

There is not even much out-of-state authority on this point. The few reported cases allow recovery. See Baker v. Commercial Union Insurance Company, 382 Mass. 347, 416 N.E.2d 187 (Mass. 1981), in which the Massachusetts Supreme Court stated:

"It is a well-established rule that 'if the insured was insane at the time that he willfully or intentionally caused the fire, the insurer remains liable on the policy' unless there is an express provision to the contrary in the policy, 18 Anderson, Couch's Cyclopaedia of Insurance Law §74:662, at 586 (2d ed 1968), for, in such cases, the insured is deemed to be incapable of forming fraudulent intent."

Baker, 382 Mass. at 350-51. This statement was based on Hier v. Farmer's Mutual Fire Insurance Company, 104 Mont. 470, 484 (1937); Bean v. Mercantile Insurance Co. of America, 94 N.H. 342, 344-345 (1947); Ruvolo v. American Casualty Co., 39 N.J. 490, 496-497 (1963); Showalter v. Mutual Fire Insurance Co., 3 Pa. Super 448, 452 (1897); and J.A. Appleman, Insurance Law and Practice, §3313 at 396 & n.78 (Rev. ed. 1970).

Interestingly, although Baker states that it is "well established" that the insurer is liable on the policy if the insured was insane at the time he set a fire, one of the cases on which the Massachusetts Supreme Court heavily relied in reaching that conclusion was Ruvolo v. American Casualty Co., 39 N.J. 490 (N.J. 1963). Ruvolo, however, dealt with an intentional acts exclusion in a liability policy. In Ruvolo, the policy in question covered the insured's liability for causing the death of another unless the insured intentionally caused the death. The court held that if the insured was insane at the time he voluntarily or willfully caused the death of another, the insurance company remained liable on the policy. Id. All of the cases discussing whether an insured's insanity bars application of intentional acts exclusionary clauses reach the same conclusion: if the insured is insane at the time he commits the "intentional act" the insurer remains liable on the policy. There is a wide divergence between the states, though, about the definitions of "insane" and about the "intent" required to trigger the intentional acts exclusion.

The fact that Ruvolo, like the vast majority of cases which deal with the issue of insane insureds, was concerned with an intentional acts exclusion in a liability insurance policy is significant. Unlike an indemnity policy which compensates the insured for losses he suffers, the liability policy is designed to compensate third parties for losses occasioned by the insured. The public policy which applies to indemnity policies -- that the insured not benefit from his criminal acts -- also applies in liability policies, but in liability policies there is a competing public policy concern -- compensation of innocent victims of the insured's conduct. Ruvolo, 39 N.J. at 498, 189 A.2d at 208-09; see also 78 Calif.L.Rev. 1027, 1036-37, "Mental Incapacity and Liability Insurance Exclusionary Clauses: The Effect of Insanity Upon Intent," Salton, C.A. As is the case in tort law in general, if one of two innocent persons (the insane or mentally incompetent insured and the victim of the insured's acts) suffers a loss, the loss should be borne by the one who occasioned it. 78 Calif.L.Rev. 1027, 1036-37. Therefore, the focus of inquiry ought to be different depending on the type of policy being interpreted.

Because the cases dealing with insanity in arson claims are based largely on cases considering insanity in liability claims, it is questionable whether it is, in fact, "well established" that the insurer remains liable on the policy if the insured is insane. In Texas, it appears that if the insured's acts are voluntary and intentional and the resulting injury is the natural result of the act, an insurer is not liable for the resulting damage or injury, even though the insured did not intend the harmful result. *Argonaut Southwest Insurance Co. v. Maupin*, 500 S.W.2d 633 (Tex. 1973). If the injury is not what one would usually expect, an insurer remains liable on the policy. *State Farm Fire and Casualty Co., v. S.S. & G.W.*, 858 S.W.2d 374 (Tex. 1993).

Unfortunately, Texas law considering the effect of insanity on indemnity policies is not much more helpful on this issue. There are two Texas life insurance cases that reach opposite results. In *Simon v. Dibble*, 380 S.W.2d 898 (Tex. App. – San Antonio 1964, writ ref'd), the husband shot and killed his wife while he was insane. The Court of Appeals held that the husband could recover under the life insurance policy, both directly under the policy and through his wife's estate. The court ruled that since he was insane, the shooting could not be considered "willful." This is consistent with Texas' law of descent and distribution which adopts the public policy of disallowing inheritance by a person who kills his benefactor, but which allows inheritance in the case of insanity because the wrongdoer cannot form the necessary intent to bar his inheritance. See *Ovalle v. Ovalle*, 604 S.W.2d 526, 528 (Tex.App. – Waco 1980, no writ), *Simon v. Dibble*, 380 S.W.2d at 899.

The other case mentioned above, not discussed in *Simon*, is *Republic v. Hamilton*, 373 S.W.2d 275 (Tex.App. – San Antonio 1963, writ ref'd n.r.e.). In *Republic*, the wife was seeking recovery under a life insurance policy in favor of her husband who allegedly had committed suicide. The policy in question was an accidental death policy. The court determined the husband had intentionally injected himself with heroin, which was a producing cause of his death. The court did not reach the issue of whether he intended to commit suicide. The court simply said that if he intended to inject himself with heroin, then his death was not an accident. The court hardly considered the wife's contention that he could not have intended to commit suicide because he was insane.

In another suicide case, *Aetna Life Insurance Company v. McLaughlin*, 380 S.W.2d 101 (Tex. 1964), the Texas Supreme Court held that if an insured committed an act which would be regarded as suicide in a sane person, the loss occasioned by that act would be excluded from coverage regardless of whether the insured was sane or insane or was capable of realizing that the act would cause death, and regardless of whether he was capable of entertaining an intention to kill himself. A crucial distinguishing factor in the *McLaughlin* case which was not discussed in *Republic v. Hamilton*, and which is not involved in denial of arson claims based on public policy, was that "suicide, sane or insane" was expressly excluded from coverage in the life insurance policy in question. But even in the face of such clear policy language, there was a split in authority among the states about the meaning of that exclusion. The Kentucky rule, which was the minority rule, required that in order to invoke the "suicide, sane or insane" exclusion, one had to be conscious of the physical nature and consequences of the act and have an intention to kill oneself. *McLaughlin*, 380 S.W.2d at 102.

Texas, however, followed the majority rule - it is only necessary that the insured intend the act that results in suicide to be excluded from coverage. Id.

Even though the only courts who have addressed the effect of an insured's insanity on an insurer's liability under a fire insurance or homeowner's policy have found that an insurer is still liable if the insured was insane when the fire was set, comparison of courts' interpretations of exclusionary clauses for intentional acts and their treatment of suicide exclusions in life insurance policies tend to suggest that the result in the arson/insanity cases ought to be different. The fire or homeowner's policy is more analogous to the life insurance policy than the liability policy because in the fire or homeowner's policy and life insurance policy it is the beneficiary of the insurance proceeds who stands to benefit financially from the wrongful or intentional criminal act. In a liability policy, the victim is a third party whom public policy dictates protecting. If Texas courts prevent recovery of life insurance benefits in the case of suicide whether the decedent was sane or insane at the time of the act of suicide, it would seem that they should also prohibit recovery of benefits under other types of indemnity policies regardless of whether the insured was sane or insane at the time they committed the voluntary act.

C. Policy Exclusions. In addition to public policy issues, there are potential contract defenses. Insurance policies are contracts and are controlled by the rules of construction applicable to other types of contracts. Barnett v. Aetna Life Insurance Co., 723 S.W.2d 663, 665 (Tex. 1987). If a policy provision can only be given one reasonable construction, it will be enforced as written. Puckett v. U.S. Fire Insurance Co., 678 S.W.2d 936, 938 (Tex. 1984). A policy is considered "ambiguous" when there is a genuine uncertainty as to which one of two or more meanings is proper. State Farm Lloyds, Inc. v. Williams, 791 S.W.2d 542, 545 (Tex. App. -- Dallas 1990, writ denied). If policy language is susceptible to more than one reasonable interpretation, courts must resolve the uncertainty by adopting the construction that most favors the insured. National Union Fire Insurance Co. v. Hudson Energy Co., 811 S.W.2d 552, 555 (Tex. 1991). The court must adopt the construction of exclusionary clauses urged by the insured so long as that construction is not unreasonable, even if the insurer's proposed construction is more reasonable. Id., 555.

These general rules of construction apply because, generally, the language and terms of insurance policies are deemed to be chosen by insurance companies. Barnett, 723 S.W.2d at 665. Therefore, any ambiguities regarding coverage, particularly exclusions to coverage, are construed against the insurer. The standard homeowner's policy contains a fraud and misrepresentation exclusion that appears to this writer to be unambiguous. A typical provision reads as follows:

Concealment or Fraud. This policy is void as to you and any other insured, if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance, made false statements or committed fraud relating to this insurance, whether before or after a loss.

The Supreme Court has expressed interest in this clause. Texas Farmers Ins. Co. v. Murphy, 996 S.W.2d 873 (Tex. 1999). Keep in mind however, there is also a public policy exclusion adopted by the courts in order to prevent fraud by insureds and to protect insurance carriers from incurring increased degrees of risk occasioned voluntarily and unilaterally by insureds. See Ritter, 18 S.Ct. at 300; Jones v. Fidelity, 250 S.W.2d at 281; Greenfield, 319 S.W.2d at 136. Since the coverage exclusion prohibiting payment for intentionally set fires is consistent with public policy, the usual preference for the insured's construction of a policy ought to be more relaxed in this case, therefore giving the court the ability to choose the interpretation of the public policy exclusion which it finds more reasonable.

Interestingly, there is no comparable provision in the standard Texas auto policy. Thus, the question is more likely to turn on the definition of "theft," for example, or questions of public policy.

II. INSURANCE COMPANY PARAMETERS.

A. Legal Boundaries. An insurer commits a breach of the duty of good faith and fair dealing by "failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear. The Universe Life Ins. Co. v. Giles, 950 S.W.2d 48 (Tex. 1997). Breach of contract does not equal bad faith. Lyons v. Millers Cas. Ins. Co. of Texas, 866 S.W.2d 597 (Tex. 1993). An insurer's liability under an insurance contract remains separate and distinct from the insurer's liability for the tort of bad faith. An erroneous denial of a claim in and of itself is not bad faith. The focus is on the reasonableness of the insurer's conduct in making the claim decision. If the insurer establishes a reasonable basis for its decision on the claim, then it cannot be liable for extra-contractual claims. There is no bad faith if a carrier makes the right claim decision for the wrong reasons. Republic Ins. Co. v. Stoker, 903 S.W.2d 338 (Tex. 1995). There can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered. Therefore, an insurer cannot be held liable for breaching the duty of good faith and fair dealing by denying a claim for the wrong reason when proper grounds for denial exist.

A *bona fide* controversy concerning a insurer's liability is sufficient reason for an insurer to not pay a claim, and will not rise to the level of bad faith. Transportation Insurance Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994), National Union Fire Insurance Co. v. Dominguez, 873 S.W.2d 373 (Tex. 1994). Bad faith is not established when the trier of fact, with the benefit of hindsight, decides the insurer was simply wrong about the factual basis for its denial of a claim or about the proper construction of the insurance policy. Emscor Manufacturing, Inc. v. Alliance Insurance Group, 879 S.W.2d 894, 910 (Tex.App. – Houston [14th Dist] 1994, writ denied) (*citing Moriel*). When there is a *bona fide* controversy, the insurer has a right to have its day in court without facing a bad faith claim. Pioneer Chlor Alkali Co., Inc. v. Royal Indemnity Co., 879 S.W.2d 920, 939 (Tex.App. -- Houston [14th Dist] 1994, no writ) (*citing St. Paul Guardian Life Insurance Co. v. Luker*, 801 S.W.2d 614, 621-22 (Tex.App. – Texarkana 1990, no writ). In other words, the determination of whether an insurer breached its duty of good faith and fair dealing should not be based on the insurer's

success or failure in court on liability for the claim, but on whether the insurer's actions at the time of denial were reasonable. Id.

There is no bad faith if a carrier makes the right claim decision for the wrong reasons. Republic Ins. Co. v. Stoker, 903 S.W.2d 338 (Tex. 1995). There can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered. id. Therefore, an insurer cannot be held liable for breaching the duty of good faith and fair dealing by denying a claim for the wrong reasons when proper grounds for denial exist.

B. Legal Defenses. An insured's failure to timely submit a proof of loss can bar recovery. American Teacher's Life Ins. Co. v. Brugette, 728 S.W.2d 763 (Tex. 1987). Compliance with the Proof of Loss provision is a condition precedent to recovery under the policy. Where a policy requires that proof of loss be filed and one is timely requested, failure to comply is fatal to the insured's claim. See also, Griggs v. State Farm Lloyds, 181 F.3d 644 (5th Cir. 1999). (Inventory and documentation are in the nature of a proof of loss and are each independent conditions precedent to recovery.)

An insured's failure to submit to an examination under oath is grounds for abatement. State Farm General Ins. Co. v. Lawlis, 773 S.W.2d 948 (Tex. App. – Beaumont 1989, no writ). Submitting to an examination under oath is such a vital requirement of the policy that refusal to do so requires abatement of a lawsuit on the policy. Humphrey v. National Fire Ins. Co. of Hartford, 231 S.W. 750 (Tex. Comm'n App. 1921, judgment adopted). The policy provision authorizing an examination under oath is such a material provision that if it "were breached, the insurer would be deprived of a valuable right for which it had contracted." Philadelphia Underwriters' Agency of Fire Ins. Ass'n of Philadelphia v. W.F. Driggers, 238 S.W. 2d 633, 111 Tex. 392 (1922). One of the chief purposes of the insurer's right to take an examination under oath is to permit the insurance company to avoid litigation while evaluating and settling claims.

C. Caveat Insurer. Insurers should not conduct an outcome-oriented investigation. State Farm Fire & Cas. Co. v. Simmons, 963 S.W.2d 42 (Tex. 1998). An insurer cannot insulate itself from bad faith liability by investigating a claim in a manner calculated to construct a pretextual or outcome-oriented basis for denial of a claim. Insurers must perform objective investigations designed to discover objective facts, not outcome-oriented investigations designed to defeat coverage. Evidence of an outcome-oriented investigation is not conclusive, but is evidence that will support a jury finding of bad faith.

Insurers should be careful when hiring an expert. State Farm Lloyds v. Nicolau, 951 S.W.2d 444 (Tex. 1997). An insurer's reliance upon an expert's report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable. In this case, the court held there was some evidence from which the jury could have inferred that the expert's reports were not objectively prepared, and the insurer's reliance on the reports was merely pretextual.

III. PRACTICE POINTERS

The following pointers are useful in most cases, but are particularly necessary in cases involving fraud. Unfortunately, they are not often followed.

A. Do Your Investigation Early, Preferably Prior To Denial. A fraud case often turns on medical, financial, or bank records, or on the existence of prior claim files. These records are often purged on a regular basis and can become unavailable without notice to you. Accordingly, you should order these records as soon as possible, preferably prior to denial. Key witnesses should be asked for recorded interviews, or if that is not practical, an early deposition. Once the lawsuit is filed, the fraud case will not get better, it usually gets worse.

B. Don't Get Distracted By Procedural Issues. I have seen investigations break down over the insured's refusal to provide documentation or to answer questions at an examination under oath. I have seen suits stayed for several months awaiting the insured's compliance with the policy requirement of an examination under oath. Although abatement is at the present time the only remedy available to the insurance company where the insured fails to comply with the requirement for an examination under oath, it is a cumbersome remedy, and the time delay often works to the disadvantage of the carrier. The examination under oath can be used to develop a list of witnesses, and to test the alibi of the insured. If several months pass before the witnesses are identified and before the insured commits to his whereabouts at the time of the loss, it becomes difficult for the carrier to use the information received. I personally do not believe that abatement is an adequate remedy, and would argue for a rule that lack of compliance plus harm equals a policy defense.

At the very least, complete the investigation, and use the delay by the insured as evidence of guilt. This is not a criminal case, so the insured has no right against self-incrimination, and you have every right to comment on the insured's lack of cooperation and lack of forthcoming information in the handling of the claim.

C. Evaluate Your Case Early And Often. Fraud cases are not static. There are always twists and turns, and sometimes new witnesses or other information appear. Just because the case was solid at the time of the denial does not mean it's a good case to take to trial. Most carriers want to know if something changes during discovery that alters your evaluation of the case.

D. Plan Your Closing Argument Early. Very often I am called upon to write an opinion letter on coverage. In that opinion letter, I will often discuss arguments for coverage and arguments against coverage. From that opinion letter forward, I am constantly preparing in my mind the closing argument. As the case develops, I make notes of points to be raised on closing argument. All of my discovery, all of my witness preparation, and all of my trial preparation and presentation is designed around the closing argument that I know I want to make. Invariably, something happens at trial to add to or subtract from the closing argument. However, the basic theme, the basic theory, and the basic message are in place from the beginning of the lawsuit.

E. Pick A Single, Consistent Theory. Presenting a fraud defense requires a single consistent theory of how the loss occurred and who is responsible. In a case of divorcing spouses, it is not enough to say that one of the two did it, you need to decide which one you believe committed the act, and tell the jury. If you find yourself mulling over dual theories, particularly inconsistent theories, take another look at your evaluation. You shouldn't be defending the case if you don't know who committed the act.

F. Challenge The Jury To Find "Who Done It". One of the interesting jury dynamics in a fraud case is the natural curiosity of the jury to determine who committed the crime. Moreover, the jury is more emotionally satisfied if it makes the determination who committed the crime than if it says "we don't know who did it but this person didn't." Use those psychological needs to your advantage. Challenge the jury to find the truth; challenge the jury to point the finger at the person responsible; remind the jury that their oath as jurors requires them to find the truth, and play on the jurors' sense of civic responsibility to make a tough call.

G. Openly Discuss (And Eliminate) Alternative Theories. Oftentimes plaintiff's counsel will argue that someone else could have broken in and set a fire, or that someone else committed the act of vandalism or theft. Don't be afraid to take that idea and run with it. What would that mean? In one case I tried recently, the break in theory would have required the burglar to break into a house, locate a child's bedroom, ignite gasoline on the wall next to the window, climb out the window through the fire, close the window from the outside, and then put the screens back on the window. In the abstract, it made more sense that a burglar would have set the fire than the homeowner. However, once that theory was placed side by side with the physical evidence at the scene, it was obvious that an intruder had not set the fire, since no intruder would step through the fire and then replace the screens. Once it was obvious that no intruder was involved, it was difficult for the jury not to see that the homeowner had set the fire.

H. Do Not Over-try The Case. If you have a case involving ring activity or professional criminals, don't shy away from presenting that evidence to the jury. However, the vast majority of fraud cases, at least the ones that get tried, involve ordinary people who, for whatever reason, decided to try to solve their problems by making an insurance claim. These people are not career criminals, are not a threat to society, and are probably somewhat embarrassed by their conduct, but can't face their friends and neighbors and tell them that they withdrew their insurance claim because they were the guilty party. I recently tried a case involving a young mother who at two o'clock in the morning had set a small fire in her child's bedroom, probably without the intent of making an insurance claim. After that claim became a multi-million dollar bad faith lawsuit, we were faced with the prospect of how to present the mother's guilt to the jury. At one point, my closing argument went something like this "I'm not saying Ms. _____ was a bad person. I'm not saying she's a career criminal, I'm not saying she's done this before, and I'm not saying she's a threat to do this again. All I'm saying is that at one moment in her life, in a moment of weakness, with circumstances pressing in on her, she committed an act that she probably would never have committed at any other

point in her life. We're not asking you to send her to jail for it. But we are asking you not to reward her for it."

This lower standard of culpability made it easier for the jury to find in our favor, since it did not have to pass on her general value as a person.

I. Do Not Let Your Client Hide Behind A "Committee Decision." Many insurance theory behind the committee is to make sure the decision is not personal, and that the insured's rights are protected.

The danger of a committee decision is that a large corporation doing business in fifty states, with multi-millions of dollars of assets, can't produce the person, the single individual, with the responsibility for the decision. Oftentimes, explaining the committee process to the jury makes it sound as if the carrier, or its individual witnesses, are each trying to avoid individual responsibility for a decision (all of which implies that the decision was somehow bad).

I avoid that problem by having the individual with management responsibility for the claim present herself as the company representative at trial, and testify that she had responsibility for the investigation and that it was her recommendation that the claim be denied. That way she can explain the committee process while still taking responsibility both for the investigation and the recommendation to the company. The committee decision is a response to her recommendation as opposed to an effort to avoid blame.

J. Maintain Your Credibility At All Times, Both To The Judge And The Jury. Do I really need to explain this one?

K. Try Your Case Simply And Quickly. The more complicated your case is the less likely it is that you're going to win. You have a simple theory, which is the homeowner/policyholder committed an act that voided coverage. You have the added advantage that the policyholder proceeds first, and has to place the claim within coverage, and prove the amount of damages (plus put on whatever evidence of bad faith they may try to put on). Thus, before you take control of the case, you have had the opportunity to cross-examine the plaintiff, the plaintiff's experts, and any other fact witnesses. Some of your witnesses may already have been called. It should not take long for you to put on your case in chief. A good rule of thumb, which could always be followed, is that your case should take approximately half the time of the plaintiff's. Keep the presentation crisp, stay to the matter at hand, and don't get bogged down in peripheral details.

In summary, many of the principles which apply to trying any case apply all the more to a fraud case. Defendants in a fraud case, however, have the unique advantage of some jury sympathy and some suspicion towards the plaintiff. Moreover, if the denial is solid, you can present your case as being on the side of truth and justice, and calling on the jury's sense of civic responsibility not to pay the insured for committing a crime. Good luck. May the truth always prevail.