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Summary Judgment Cross-Motions in Insurance Coverage Litigation: Sound Strategy or Landmine?

Weighing the Pros and Cons from Policyholder and Insurer Perspectives

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Cross-Motions for Summary Judgment in Insurance Coverage Litigation: Sound Strategy or Landmine?

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Introduction: Motions for Summary Judgment

- Federal Rule of Civil Procedure 56 provides that “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
- Seemingly efficient procedure
- Often encouraged by the courts

Introduction: Cross-Motions

- Both (or multiple) parties move for summary judgment
- Sometimes on the same issue
- Sometimes on different issues
- A cross-motion may concede that the court can decide the entire action—thus, no trial—*cf. Cal. Union Ins. Co. v. Liberty Mut. Ins. Co.*, 920 F. Supp. 908 (N.D. Ill. 1996)
- Respondent must respond to issues framed by the movant
 - Should the respondent cross-move on its own issues?

Introduction—Cross Motions (Pros)

- Can be case dispositive
- May narrow issues for trial
- Opportunity to brief and document record fully (each side typically gets 3 briefs)
- Each side gets a “final word”
- Can be a useful settlement / mediation tool

Introduction—Cross Motions (Cons)

- May be dispositive of case
- May be too complicated to allow court to decide the issue
- Some courts disfavor them—see Hon. Morton Denlow, “Trial on the Paper: an Alternative to Cross-Motions for Summary Judgment,” available at http://www.ilnd.uscourts.gov/home/JUDGES/DENLOW/papers.htm#N_1_
- Costly (three briefs each and supporting documents)
- Possible issues of fact may make the exercise a waste of time (and money)
 - Questions of intent, etc.

A Policyholder's Perspective on Summary Judgment Options

- File an Affirmative Motion
- File a Cross Motion
- Only Oppose an Insurer's Summary Judgment Motion
- Consider a Combination of the Above

Policyholder's Perspective on Moving for Summary Judgment

- Policyholder has a strong coverage case
 - Helpful undisputed facts
 - Favorable law
- Factual record is completely developed from underlying action

Policyholder's Perspective on Moving for Summary Judgment

- Policyholder wants to test/eliminate insurer's affirmative defenses
 - Example: insurer failed to prove an essential element of fraud claim
 - Example: insurer failed to return premium in a rescission claim
 - Example: insurer failed to show prejudice where required
- Consider— filing for summary judgment may make opposing an insurer's motion more difficult

Additional Considerations for Summary Judgment

- Testing theories and positions for future cases
- Benefits of a quick determination
- Cost considerations
- Narrower issues for trial
- Appropriateness of the case for trial
 - Nature of the underlying claim
 - Nature of the client

Policyholder's Perspective on Cross Motions

- Similar considerations to filing an affirmative motion
 - Strength of case
 - Cost
 - Narrower issues

Benefits of Cross Motions

- Opportunity to frame the case from the policyholder's perspective
- Not limited to issues raised in insurer's motion
- Additional briefing
- Opportunity to get the final say

Policyholder's Perspective on the Decision Not to File

- Policyholder wants to argue:
 - Disputed issues of material fact exist
 - Policy is ambiguous
- Case involves a bad faith claim

Policyholder's Perspective on the Decision Not to File

- Trial may yield superior result
 - Example: Judge is not friendly to policyholders
 - Example: Judge is likely to find policy unambiguous and enforce as written
- Claim or client is particularly sympathetic
- Benefit to placing entire case before jury

Insurer Perspective

- Insurers are probably more likely to move for summary judgment, especially when there are strong coverage defenses
- Different strategies where defenses are based on coverage grant versus coverage exclusion

Insurer Perspective

- Policyholder fails to develop or prove its claim
 - No evidence claim falls within coverage grant
- Clear evidence claim falls within an exclusion

Insurer Perspective

- Other circumstances when an insurer should consider a cross-motion for summary judgment
 - Where one issue could determine whole action (or a significant part of it)
 - Where key issues, such as allocation, drop down, number of limits, can be decided
 - To defeat a weak bad faith case

Insurer Perspective

- Possible result?
 - Can force policyholder to put all its cards on the table
 - Can narrow policyholder's claims or get rid of weak claims

Insurer Perspective

- Circumstances when an insurer may not want to file a cross-motion for summary judgment
- Risk that the court will find coverage (and a duty to defend, where applicable) based on the issue you raise

Insurer Perspective

- Appeal considerations in duty to defend situations
 - Is a defense owed until the appeal is final?
 - *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Seagate Technology, Inc.*, 2013 WL 1282971 (N.D. Cal. Mar. 27, 2013)
 - *Auto-Owners Ins. Co. v. Potter*, 242 F. App'x 94 (4th Cir. 2007).

Conclusion

- A cross-motion is a good tool on strong issues
- Don't be baited into filing a cross-motion on a weak issue
- Be aware of possible issues of fact

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