

**APPELLATE ADVOCACY AND
COMPLEX INSURANCE COVERAGE DISPUTES**

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At the appellate stage, the successful handling of complex insurance coverage cases depends principally upon the same mix of talent and preparation as the appeal of any other type of complex commercial litigation. Distilled to the basics, the appeal of a complex insurance matter, like the appeal of any complex case, requires that:

- long before the appellate stage, during pretrial preparation, the litigants identified their case theory and, at the trial stage, ensured that the necessary record was made to support that theory;
- the appellant has selected from the host of factual and legal determinations made by the trial court, the handful of critical issues of law from which the appeal will be taken;
- most importantly, the appellate briefs present the vastly complicated factual and legal issues in a comprehensible, yet comprehensive, manner to appel-

late judges who share little of the practitioners' specialized background in insurance coverage matters; and

- the oral advocate is equally prepared to address the most intricate legal and factual aspects of the case to a court well-versed in the specifics of the case on appeal, or to provide a fundamental overview of the case to a court that, although it may have reviewed the parties' briefs in advance, has had little opportunity to digest the arguments or independently study the case law or record.

Laying the Groundwork

Ideally, the team of lawyers who handled the insurance coverage case during pretrial and trial thought through the case and consciously laid the groundwork for appeal -- that is, they identified the ultimate questions of fact and law upon which the issues of coverage would turn and molded the evidentiary record at trial to support those theories. Whether representing the policyholder or the insurer, the trial team should have identified the three or four key issues upon which coverage is most likely to depend and focused their energies on developing the factual support for those issues.

Depending upon the case, those key issues might involve:

- whether coverage is triggered under the policy or policies at issue;
- whether coverage is precluded under specific policy exclusions -- e.g., various "business risk" exclusions that may apply in product liability or construction cases, and various "pollution," "owned property" or "care, custody, or control" exclusions that may apply in environmental cases;
- whether coverage is barred under the "expected or intended" exclusion that is incorporated into the insuring agreements of most standard form CGL policies, or under doctrines of "known loss" or "loss in progress;"
- whether notice was timely; or
- issues of allocation and calculation that might maximize or minimize the coverage available.

All too often, however, the day-to-day tribulations of discovery and motion practice obscure the trial team's focus on the ultimate issues on appeal. The most fatal and incurable aspect to successful appellate advocacy is a trial strategy that lost sight of the big picture in

the zeal to take exhaustive discovery and fight pitched battle over every pretrial motion. It is imperative at the pretrial and trial stage that someone be responsible, as the team strategist, for keeping sight of the ultimate issues while coordinating the tactical battles.

Especially in a case tried to the bench rather than jury, as is often the situation in a declaratory insurance case, a tension develops at the pretrial and trial stage between the appellate advocate's desire to preserve issues for appeal and the trial lawyer's desire not to offend the trier-of-fact by insisting too emphatically that an error has been made. While it may be prudent that the trial team not insist too strenuously that the trial court has erred when the issue is one of scope of discovery, for example -- a subject where the appellate court applies a deferential abuse of discretion standard -- the trial lawyer's desire not to offend the trial judge must not be allowed to interfere with making a clear record where the dispute involves one of the key issues upon which appeal may lie. In the latter circumstance, the trial lawyer must clearly indicate his or her objection -- whether it be with a jury instruction as to the burden of proof that applies to proving a lost

insurance policy, the question of whether the "expected or intended" exclusion involves a subjective or objective point of view, or whether "course of conduct" evidence can be used to contradict the plain policy meaning.

Selecting the Issues on Appeal

Whether a policyholder or an insurer, the appellant should identify three -- or, at most, four -- issues upon which appeal will be based. While the trial court may well have made more than three or four errors, there are few appeals where more than three or four fundamental issues of law are worth taking up on appeal. Even if many more fundamental errors of law did occur in the trial court, if appellate counsel can merely persuade the appellate court as to those three or four, then reversal should be assured.

When the appellant enumerates more than three or four issues, the appeal becomes overly cluttered and the focus is lost. The appellate court may become impatient and skeptical when it is handed a long laundry list of mistakes by the trial court. The briefs either become unduly prolonged or, if an effort is made to comply with the court's standing page limits, too little room is available to do justice to each issue. If a cross-appeal

is taken, which often occurs in complex coverage cases, the court may be presented with a dozen or more issues in total.

While only three or four issues should be identified as the ultimate "issues" on appeal, there are creative ways in which multiple sub-issues can be grouped as a single issue on appeal. For example, there are a variety of exclusions in CGL policies that are known generally as "business risk" exclusions, although their wording varies and multiple exclusions may be found in the same policy. Rather than enumerate each of these exclusions as the basis of a separate issue on appeal, they can be included together in a single "issue."¹

In a case where the trial strategy has consciously anticipated the ultimate appeal, the selection of issues on appeal may be relatively straightforward. But even in

¹ In *U.S. Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, in which I represented the appellee policyholder, we phrased one issue on appeal as:

Do any of the policies' business risk exclusions defeat the insurers' duty to defend?

- a. "sistership" or product recall
- b. insured's own product or work
- c. loss of use
- d. failure to perform

such a case, the issues on appeal should be re-scrutinized at the time the notice of appeal is taken. An issue that may have seemed to hold much promise during the early days of trial may no longer warrant appeal. For example, the development of appellate case law in the years while the case was pending in the trial court may render an issue far less likely to succeed than had been previously anticipated. An issue that was never strongly pursued may become a strong candidate for appeal because of emerging case law in another jurisdiction.

Often, when a litigant has been disappointed in the trial results, it will bring in new appellate counsel at this stage. While the merits of this practice are beyond the scope of this article, if such a practice is followed, it is imperative that appellate counsel immediately immerse itself in the entire trial court record to determine not only what issues are promising for appeal but whether they have been preserved. While questions of insurance policy interpretation, like all questions of contract interpretation, are typically questions of law that are reviewed de novo by the appellate court, the issue still must have been raised and argued in the trial court to have been preserved on appeal.

Appellate Brief Writing

The appellate brief is the backbone of successful appellate advocacy, especially in a complex commercial case. To resolve the issues on appeal, the Court needs to understand much that is unfamiliar to it -- including the policyholder's industry or business practices that form the basis of the underlying liabilities for which coverage is sought, the policy language upon which the actual coverage determination must be made, and the legion of court opinions that have issued on each clause of a commercial policy. The appellate brief presents the lawyer with both the challenge and the opportunity to introduce all this unfamiliar territory to the appellate court.

The experienced insurance coverage practitioner, faced with drafting an appellate brief, must somehow return himself or herself to a state of innocence -- to the time before he or she spoke the insurance coverage jargon -- for this is the state in which the appellate court finds itself. Unlike the trial court, which gradually becomes educated to the intricacies and jargon of insurance coverage over the many years in which a case wends its way through the pretrial and trial phases, an

appellate court confronts the whole complicated mass of coverage issues with little advance preparation. The appellate brief is the vehicle, not only by which the parties' arguments are made to the court, but the entire background of the litigation and of insurance coverage law is presented.

A well written appellate brief takes time and planning. It also requires a principal author. The practice of assigning portions of the brief to various draftsmen results all too often in a technically complete document that lacks cohesion and style. While many team members should have input into the final product, the preferred method of obtaining that input is by starting early so that complete drafts can be circulated for comment and revision.

Special care should be lavished on the Statement of Facts. If the appellant's Statement of Facts is well-drafted, the appellate court should already apprehend the nub of the trial court's error before reading the Argument section. If the appellee's Statement of Facts is well-drafted, the appellate court should enter the Argument section secure in the knowledge that the trial record was replete with evidence to support the

ultimate factual and legal determinations of the trial court.

A well-written Statement of Facts is not overtly argumentive. As in virtually all effective advocacy, the argument is made by showing, not telling. Every sentence in the Statement of Facts should be factual in tone, with a citation to the record. Well-chosen, but brief, quotations from the trial testimony and exhibits should be liberally peppered throughout the Statement of Facts. A brief retelling of the relevant Procedural History at the outset of the Statement of Facts can be used to foreshadow the brief's Argument section and place the facts that follow in the context of the issues on appeal.

Both in reciting the Procedural History and the Statement of Facts, the focus should be on those aspects of the case that are germane to the appeal. In a procedurally complex case do not burden the court with information about the procedural history that ultimately are irrelevant to the issues on appeal. For example, if one of the insurers prevailed on a motion for summary judgment unique to it and no appeal is taken from that motion, no mention need be made of that insurer or the motion.

So too, avoid inserting specific dates into the Statement of Facts unless the timing of a particular event matters. If late notice or trigger of coverage are issues, then one certainly must mention the dates relevant to determining those issues. All too often, however, a brief begins with a chronology of irrelevant dates, such as when the coverage suit and notice of appeal were filed. It is frustrating for a reader to assiduously jot down a series of dates, only to discover that all these details do not matter.

If permitted by the court's rules, the appellate advocate should borrow the actual record on appeal from the clerk's office. First, especially in lengthy and complex litigation, documents that belong in the record often are misplaced. By borrowing the actual record and having a paralegal check it against the firm's internal pleading file, the appellate advocate can be sure that there have been no clerical errors in compiling the record.

Second, by examining the actual record, the appellate advocate will have a better sense of how the documents will be made available to the appellate court. Knowledge of how the record is physically assembled may

enable the advocate to give more meaningful explanation of the citation format. For example, in an appeal that I handled, my examination of the trial record led to the following explanatory footnote:

The record on appeal consists of: (1) a bound volume of pleadings; (2) an envelope of loose exhibits and deposition transcripts; and (3) the supplemental record, containing a transcript of the oral hearing held February 14, 1986. The following abbreviations are used in the citations in this brief to refer to these various portions of the record on appeal:

Rec. - The pleadings volume. The page numbers cited appear in the record in pencil in the bottom right hand corner.

....

Ex. - The exhibits to the [title of brief] contained in the brown binder, in the envelope that is part of the record on appeal.

Abbreviated and short form references to parties should be simple and obvious, so that the introductory portion of the brief can be written without cluttering it with defining terms in quotations and parentheses. If multiple insurers are involved, the term "insurers" can be applied collectively without first defining that term. Especially in a declaratory action, where the labels "plaintiff" or "defendant" are not meaningful, omit that

adjective, as well as omitting the status of the parties on appeal.

Many an appellate advocate has frittered away the brief's opening sentence in a complex series of definitional parentheticals that rob the sentence of impact. Take advantage of that first sentence to grab the appellate court's attention with a substantively meaningful statement, not for the empty formality of introducing abbreviations for the parties' full names. Compare, for example, the actual opening sentence of a recent brief, opposing a discretionary appeal:

The petitioning insurers have waged a twelve-year battle to avoid or defer their obligations to provide United States Gypsum Company with insurance coverage for underlying claims that its asbestos-containing products damage buildings and other property.

with this hypothetical variant:

The Defendants-Petitioners insurers (hereinafter the "Insurers") have waged a twelve-year battle to avoid or defer their obligations to provide Plaintiff-Respondent United States Gypsum Company (hereinafter "U.S. Gypsum") with insurance coverage for claims that its asbestos-containing products damage buildings and other property (hereinafter the "Underlying Property Claims").

If obvious abbreviations are used, definitional parentheticals can and should be omitted entirely.

Obviously, the Argument section is the heart of the brief and yet there are few rules that need to be mentioned specifically as to it. Certainly, the Argument should be divided into sections that mirror the issues on appeal. Lengthy sections should be divided into subsections, to assist the reader in following each point or sub-issue.

Each section and sub-section should be introduced by a heading in sentence form that states the substance of the argument. Headings should be long enough to have meaning but not so long as to be unreadable. A two or three line heading is usually ideal. Compare the following heading which was actually used in a subsection of a brief:

1. This Court's decision in Board of Education dictates a finding of "property damage" under the policies.

with the following longer hypothetical, which is much harder to read:

1. This Court's decision in Board of Education that the "essence of the [complaint] allegations is that the buildings have been contaminated by asbestos" dictates a finding of "property damage" under the policies.

This last example also illustrates how hard it is to read a heading that is underlined throughout. Underlining the last line of a heading only, sets off the heading better.

Ample time should be left for revision and condensation. There is no appellate brief that has not benefited from substantial editing and paring. Indeed, parties should endeavor mightily to resist the temptation to obtain liberal expansion of page limits. The brief should be read and re-read, with every throwaway phrase and superfluous word edited out, bit-by-bit. This is a laborious process, but produces a much tighter, stronger brief than the panic-stricken last minute deletion of an entire section, which is the emergency response to page limits when sufficient time has not been left for close editing.

Even more, resist the temptation to expand the available text by ignoring the court's rules on margins or font size. Even if you do not get caught in that subterfuge, the visual appearance and readability of the brief will nonetheless be impaired. The issues presented in a complex coverage case are difficult enough to understand without jumbling them tightly together on a page with little white space.

Indeed, putting aside the court's mandatory rules, which may govern margin width, spacing, and font size, remember that a brief should be organized visually to be easy on the eyes. Modest length single-spaced block quotes jump out at the reader and invite reading. Dense ones that run on for three-quarters of a page are intimidating and the eye skips over them. If that much of a source is quotable, break it into two separate quotes, with some double-spaced text in between. Bullet-pointed indents (see page one, *supra*) are a visually simple way to call emphasis to key points.

Special scrutiny should be paid to footnotes. While explanatory footnotes are fine, an undue use of footnotes to amplify arguments should be resisted. If a substantive point is important enough to warrant a mention, place it in the text. Otherwise, leave it out entirely. On the other hand, an explanatory footnote setting forth the abbreviations used to cite to the record and other parties' briefs is almost a necessity. So too, footnotes may be the perfect way in which to trace for the court which policies contain which variant of certain standard form policy language.

Oral Argument

The art of oral appellate advocacy in general is a subject beyond the scope of this article. Oral appellate arguments in complex insurance coverage cases, however, require some special considerations.

Because the specific language of the policy may be critical, thought should be given to using visual aids -- such as enlarged copies of the key policy provisions, mounted on foamboard -- if permitted by the court rules. Such exhibits may be especially useful if various policies at issue have slightly different language and the differences in the words are crucial to the argument.

While an oral "moot court" practice is useful preparation for any appellate argument, it may be especially helpful for a complex insurance case. Ask three of your partners who engage in general complex commercial litigation -- but who do not specialize in coverage work -- to read the briefs in advance of the "moot" practice and to serve as judges. This is an excellent way to test whether you have managed to simplify the arguments so that they are readily understood by judges who lack specialized training in insurance coverage issues.

Be sure to find out the court's actual practices as to time limits on oral argument. The U.S. Court of Appeals for the Seventh Circuit, for example, enforces those rules rigorously, while the Illinois Appellate Court is generous in allowing advocates to run long, especially when they have been interrupted frequently by the court's questions. In the former court, the oral advocate will need to make some quick decisions as to how to spend the last two minutes of oral argument if he or she was constantly questioned by the court, whereas in the latter court, less of the original argument need be jettisoned.

Conclusion

The art of appellate advocacy in complex coverage cases depends more on a lawyer's skill as an appellate advocate in general, and less on his or her experience in the area of insurance coverage litigation. Indeed, because the court is generally composed of judges without specialized background in coverage law, overly specialized practitioners in this area may have trouble communicating with the court if they fail to consciously structure their argument with an awareness of where the generalist's knowledge ends and the specialist's begins.

While experienced insurance coverage specialists can make good appellate advocates, this occurs when they wed their substantive knowledge of coverage law with the appellate advocate's skills. Those skills, at their heart, involve the ability to identify the essence of the issues on appeal and to use language, both written and oral, that simplifies those issues and explains them in familiar terms to the appellate court.