

Policyholder Playbook Episode 31: Develop a Succinct and Compelling Theme to Tell Your Bad-Faith Story

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Quick Overview of the Play – To support a bad-faith claim, develop a succinct and compelling theme that you can weave through your briefing and your case.

Theme. Theme. Theme. In an insurance coverage dispute where the tendency of the judge, the judge’s clerks and the jury may be to say – “Boring!” – it is critically important to develop an attention-grabbing theme that will resonate and support your claims. That is particularly the case with bad-faith claims, which some courts (e.g., New York) love to dismiss at the pleading stage. And why shouldn’t they? By trimming a case at the pleading stage, it may resolve more quickly or, in the least, it should involve less briefing and fewer filings for the court to sift through. Developing a theme that captivates your audience can help to avoid that outcome and can help to push your claims—even bad-faith claims, and even in New York—to the next stage.

That is exactly what happened in a New York state case that will be oft cited in the coming years: *Rockefeller Univ. v. Aetna Cas. & Sur. Co.*, 217 N.Y.S.3d 562 (1st Dep’t 2024). The policyholder in *Rockefeller*, a non-profit research institution, initiated the action because its insurers refused to cover thousands of sexual abuse claims.¹ The policyholder brought claims for breach of contract, breach of the implied covenant of good faith and fair dealing and breach of a New York consumer protection statute. The trial court denied the insurers’ motion to dismiss the latter two claims; the insurers appealed, arguing that those claims are routinely dismissed under New York law.²

In its appellate briefing, the policyholder leaned on themes to support its implied covenant and consumer protection claims, and importantly, it advanced its central themes in the *first two sentences* of its brief. Here is what the policyholder wrote:

This case is about two multi-billion-dollar Insurers protecting their own financial self-interests to the detriment of their insureds. In the wake of the 2019 passage of the Child Victims Act (“CVA”), which revived expired claims of childhood sexual abuse survivors, the Insurers developed a wait-and-see strategy to obstruct and delay CVA claims resolution while underfunding their reserves.³

There are four themes in those first two sentences. First, the insurers are massive companies that can afford to provide coverage. Second, the insurers are putting themselves before the policyholders they promised to protect. Third, this case is about the need for insurance coverage to fund claims made by childhood sexual abuse survivors. Fourth, the insurers did not promptly cover the claims but developed a “wait-and-see strategy” designed to limit their exposure. Those first two sentences packed a punch.

The intermediate appellate court ultimately denied the insurers’ appeal, and it was clear the policyholder’s themes resonated with the court, as the court noted some of them, expressly, in its

decision. For example, when discussing why the policyholder’s implied covenant claim was not duplicative of its breach-of-contract claim, the court noted that the plaintiff argued “that defendant insurers’ wait-and-see scheme over the past half-decade placed great financial strain on it.”⁴ The court also noted that the policyholder sufficiently alleged that the insurers’ practices “damaged . . . sexual abuse survivors.”⁵ This case could have gone the other way—many in New York do—but by artfully leveraging themes supporting bad-faith conduct, the policyholder survived to the next stage. Good themes have that power.

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¹ See Br. of Pl.-Respondent, *Rockefeller*, 2024 WL 4335555, at *1 (1st Dep’t June 25, 2024).

² See, e.g., Joint Br. of Defs.-Appellants, *Rockefeller*, 2024 WL 4335553, at *20 (1st Dep’t Apr. 26, 2024) (“[T]his court and others have routinely ordered dismissal of implied covenant claims. . . .”).

³ See Br. of Pl.-Respondent, *Rockefeller*, 2024 WL 4335555, at *1.

⁴ *Rockefeller*, 217 N.Y.S.3d at 562.

⁵ *Id.* at 563.