Policyholder Playbook Episode 34: Use Hypotheticals to Underscore the Absurdity of the Insurer's Coverage Denial

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PRACTICES Insurance Recovery, Litigation

Quick Overview of the Play – The best policyholder advocates think creatively about how to convey to the court that the insurer's coverage denial is based on an unreasonable interpretation of the policy language. One underutilized technique is to use a hypothetical, or a series of hypotheticals, to demonstrate the absurdity of the insurer's position.

Insurance coverage disputes often center on whether the insurer or the policyholder (or both) have articulated "reasonable" interpretations of the policy language. The best policyholder advocates therefore think creatively about how to demonstrate that the insurer's interpretation is unreasonable, such that they should win. One technique for doing so is utilizing hypotheticals, or a series of hypotheticals, to demonstrate the absurdity of the insurer's interpretation. This is akin to what we discussed in Episode 21—Carrying the Insurer's Argument to its Logical Extreme, but with a law school twist, insofar as we are talking about using the Socratic method—a form of argument based on asking and answering questions—to drive home a point.

This technique was on display in a recent policyholder victory in Utah, in the case captioned, *Prime Insurance Co. v. XXXV Club*.[1] The dispute in *Prime* centered on whether an alcohol exclusion applied to bar coverage for a wrongful death claim brought against the policyholder, a "gentlemen's club."[2] The exclusion precluded coverage for "Bodily Injury . . . for which an Insured is obligated to pay Damages by reason of . . . the use of alcohol."[3] The underlying wrongful death claim arose out of a car accident that was caused by a patron of the club who did not drink alcohol at the club, but who was denied entry into the club because he appeared intoxicated and correspondingly directed to leave the premises.[4] The insurer denied coverage because the "accident arose from the use of alcohol" and thus, in its eyes, triggered the alcohol exclusion.[5]

The policyholder argued the exclusion did not apply because it was designed to apply to situations where the policyholder served alcohol on its premises, not where "alcohol is 'involved' in any way, directly or indirectly," to the underlying claim.[6] The policyholder then unfurled a series of hypotheticals "to illustrate the point . . . that no reasonable insured would be notice from the exclusion that the fact that alcohol was somehow 'involved,' even though it had nothing to do with serving or providing the alcohol, could result in a denial of coverage."[7] One hypothetical had the court consider a claim against the policyholder-club arising out of a fire caused by faulty electrical work, where the negligent electrician admits that, before work at the club, "he had a few beers."[8] The policyholder asserted that, "[u]nder [the insurer's] interpretation of the policy, there would be no coverage because of the alcohol exclusion."[9] The policyholder's hypothetical had the court take the insurer's argument to its logical extreme.

That approach resonated with the court. Not only did the court deny the insurer's summary judgment motion and grant the policyholder's cross-motion, but the court quoted the policyholder's hypotheticals—verbatim—in its opinion.[10] If that's not a ringing endorsement of the "consider using hypotheticals technique," I don't know what is.

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[1] No. 23-cv-206, 2024 WL 5109269 (D. Utah. Dec. 13, 2024).

[2] *Id.* at *1.

[3] *Id.*

[4] *See id.*

[5] *Id.* at *2.

[6] *See* Def.'s Opp. to Pl.'s Mot. for Summ. J. at 2, 6 (D. Utah July 17, 2024) [ECF No. 28].

[7] *Id.* at 8.

[8] *Id.*

[9] *Id.*

[10] 2024 WL 5109269, at *5.