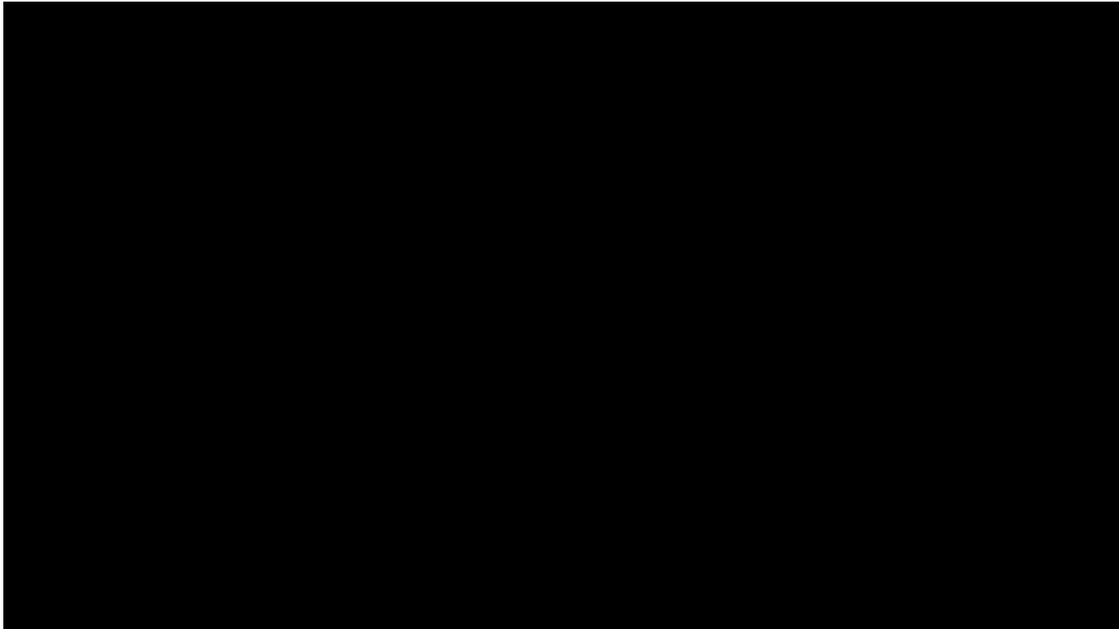


Policyholder Playbook Episode 46: Tips for Pleading Breach of the Implied Covenant in New York

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One of my favorite cases of the last five years is the *Rockefeller University v. Aetna Casualty* because it is a New York appellate court decision that allowed a policyholder's breach of the implied covenant of good faith and fair dealing claim to survive a motion to dismiss and proceed to discovery. By the way, *Rockefeller* is still in discovery, and the court somewhat recently compelled the insurer to produce information regarding its reserves—a big win for the policyholder. But this episode is about lessons learned since *Rockefeller*, and there is one critical lesson—germane to how policyholders plead their cases—based on two recent decisions that, rightly or wrongly, dismissed the policyholders' breach of the implied covenant claims at the pleadings stage.¹

Both cases make clear that, for a breach of the implied covenant claim to survive, the insured “must allege a distinct injury and seek relief grounded in a legal duty independent of the breach of contract.” In other words, according to these cases—which are non-binding trial court decisions, by the way—the insured should articulate very clearly how and why the injury caused by and the relief sought because of the insurer's breach of the implied covenant is different than the injury caused by and the relief sought because of the insurer's breach of the insurance policy.

How can one do this? Well, if we go back to *Rockefeller* and examine the policyholder's Second Amended Complaint, two strategies jump off the page. First, the insured's breach of contract and

breach of the implied covenant claims are pled as separate causes of action. So, visually, we see them as distinct. Second, we see very clearly that different conduct is alleged in support of both causes of action, and different damages are sought. With damages, for example, the insured made clear that it sought *consequential damages* for the insurer's breach of the implied covenant, *but not* for the insurer's breach of contract.

The bottom line? To plead a viable breach of the implied covenant of good faith and fair dealing claim in New York—which is functionally the same as pleading traditional insurance bad faith in many respects—the policyholder might consider alleging, very clearly, how and why the injury caused by and the relief sought because of the insurer's breach of the implied covenant is different than the injury caused by and the relief sought breach of the insurer's breach of contract.

¹ *A&M v. Mount Vernon Fire and Coretto v. Erie Insurance.*