

How to Keep Your Insurance Company On Your Side When Facing a Claim

October 22, 2024

 **ANDERSON KILL**

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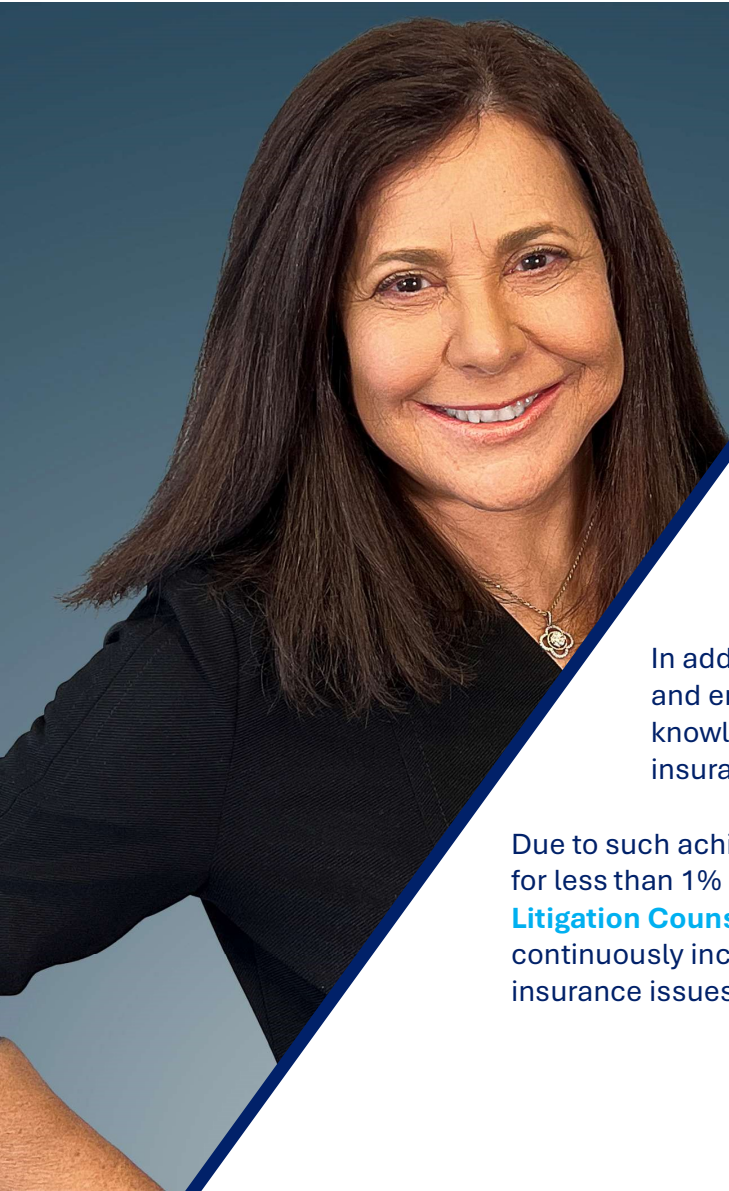
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Rhonda D. Orin

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Rhonda D. Orin is the managing shareholder of the firm's Washington, D.C. office and co-chair of the firm's Climate Change and Disaster Recovery Group.

Rhonda represents policyholders in coverage cases nationwide. She is distinguished by her extensive experience as lead counsel in multiple multi-million-dollar insurance trials, both bench and jury. She has substantial appellate experience as well, having argued before the highest courts of several states, and appeared in two cases before U.S. Supreme Court. Rhonda is distinguished further by the unusual breadth of her substantive knowledge.

In addition to experience with first-party property damage and business interruption claims, third-party tort and environmental liability claims, directors & officers claims and errors & omissions claims, she also is knowledgeable about cyber liability, fidelity bonds, disability insurance policies and the myriad of health insurance and ERISA issues that arise in the context of modern healthcare.

Due to such achievements, Rhonda was named a **Fellow of the American Bar Foundation**, an honor reserved for less than 1% of attorneys. She is ranked in **Chambers USA** and **The Legal 500**, named a **Fellow of the Litigation Counsel of America**, awarded "Star of the Bar" by the D.C. Women's Bar Association and continuously included in **Best Lawyers in America** and **Super Lawyers**. She also writes extensively on insurance issues, including a book honored by *The Wall Street Journal*.



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Cameron R. Argetsinger is a Shareholder in the D.C. office of Anderson Kill. He focuses his practice on insurance recovery counseling and dispute resolution.

Cameron has represented corporate policyholders in a broad range of insurance coverage disputes, including claims involving coverage for cyber liability, directors' and officers' liability, employment practices liability, environmental contamination, antitrust litigation, flood and hurricane damage, intellectual property liability, false advertising, lead-based paint, asbestos, the False Claims Act and overseas tort liabilities.

In addition to insurance recovery, Cameron has represented clients in a wide range of administrative and commercial disputes, including false advertising, construction design defects, international trade and class action litigation.

Recognized as a Washington, D.C. Super Lawyers "Rising Star," Cameron has represented clients in trial and appellate courts and arbitration tribunals all over the U.S., including federal and state courts in Virginia, Ohio, New York, Illinois, North Carolina and the District of Columbia, as well as the U.S. Court of International Trade. Moreover, he has successfully resolved many claims on behalf of policyholders through negotiations prior to filing litigation.



Jesse Raben

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Chief Legal and Risk Officer, Breakthrough T1D

Jesse Raben serves as Chief Legal and Risk Officer at Breakthrough T1D, formerly JDRF International, the leading global type 1 diabetes research and advocacy organization. In his current role, Jesse is responsible for all legal and risk matters including corporate governance, litigation, insurance, enterprise risk management, general legal strategy and a host of other legal areas.

In his prior roles, Jesse Raben served as General Counsel and Chief Operating Officer of the American Insurance Trust, where he had to balance legal and business operations advice and manage risk to the organization; General Counsel at the Common Application, a 501c3 focused on leveling the playing field for all students to apply and enroll in college; and Associate General Counsel of the American Psychological Association responsible for risk and compliance issues across a broad spectrum of legal. Jesse is heavily involved in various chapters and committees of the American Corporate Counsel Association and a graduate of the ACC NCR Leadership Academy. Jesse lives in Washington, DC with his wife, two daughters, and Great Dane.



Insured and Insurer: Competing Goals

- **Goals of the Insured/Policyholder:**
 - Get the most protection possible for the lowest amount of premiums.
 - Collect on all losses without provoking massive premium increase.

Insured and Insurer: Competing Goals

- **Goals of the Insurance Company:**
 - Make money on premiums, without paying it out in risks.
 - But pay enough to keep its policyholders happy, so they keep paying premiums.

Insured and Insurer: Competing Goals

- **Baked-In Bad Incentives:**
 - Deny:
 - Claims not paid stay in the insurer's pocket.
 - Delay:
 - Up-front premium payments mean insurance companies benefit from the "float."

Insured and Insurer: Competing Goals

The Float

“Simply put, float is money we hold that is not ours, but which we get to invest.”

- Warren Buffett, billionaire CEO of Berkshire Hathaway, Inc., explaining one of the benefits of “float” in a 2007 letter to shareholders of Berkshire Hathaway

Insured And Insurer: The Relationship

- Cooperation and partnership is the ultimate goal.
- Relationships can matter more in this business than others!
- But that doesn't mean giving up on your contractual rights.
 - Insurance policies are not supposed to gather dust in drawers.
 - The job of a risk manager is not only to GET coverage, but to USE it.

What To Do When You Have A Claim

- **Give notice ASAP**
 - Timely notice is non-negotiable. Notify first; worry about consequences later.
 - Make your notice as broad as possible. Avoid buzzwords in your notice letter.
 - *i.e., with cyber crime, just say "loss." Don't label it as "social engineering loss."*
 - Nothing bad really happens from giving notice if they don't end up paying you anything.

What To Do When You Have A Claim (cont.)

- **Liberalily share information**

- Insurance companies get suspicious very fast when policyholders are not forthcoming.
- If they're entitled to it, then give it even if you hate it.
 - *i.e.*, under disability policies, insurance companies are entitled to your tax returns.
 - Everyone hates that. Too bad. It's industry standard. Just give them.
- It's always great to invite them to come and look for themselves.
 - If they turn you down, great! You invited them and they chose not to come.

- **BUT – answer the exact questions that you are asked; don't volunteer information that is not responsive.**

- If they ask about "any" incident, they are only asking about one.

What To Do When You Have A Claim (cont.)

- **Document Everything**

- Communications:
 - Requesting information.
 - Requesting clarification and reasons.
 - Providing information.
- Actions:
 - What the insurance company is or is not doing.
 - What you are doing.
- Evidence.

But Push Back If They Say No

- **It's the Float:**
 - Insurance companies make money on delay.
 - This incentivizes them to fight back, even if they pay eventually.
- This means a "No" is not necessarily a "No." Just part of the business plan.
- Often a letter-writing campaign is enough.

How To Push Back

- **Start with the facts, end with the facts. The facts are what win claims.**
 - Develop your strategy before you start talking.
 - That keeps you from taking positions you need to abandon later on.
- **Insurance companies do not pay money because of sob stories or emotion.**
 - Think about it -- their business is accidents, losses and tragedies.
 - They could not operate if they were controlled by emotion.

How To Push Back (cont.)

- **Rage and threats do not work either.**
 - Every policyholder thinks every denial is “bad faith.”
 - But “bad faith” actually is a rare event.
 - It is something more than the fact of a denial.
 - Insurance companies shrug off threats by denied policyholders to go after them for bad faith. It doesn't scare them.
- **What works is:**
 - Strong fact arguments.
 - Good legal support.
 - Impeccable logic.
 - A measured, professional presentation.

Involving Coverage Counsel

- **Keep coverage counsel behind the scenes, at least initially.**
 - “Pre-game” important calls and communications with coverage counsel, but deal directly with the insurance company’s claims handler.
 - Otherwise, the insurance company will assume there IS a coverage problem and involve its own coverage counsel/pump the breaks.
- **Reveal coverage counsel when disputes arise.**

Coverage Counsel vs. Defense Counsel

- **Coverage counsel:**
 - Handles disputes with your insurance company.
 - Communications are privileged as to the insurance company.
 - Bills are not covered by insurance.
- **Defense Counsel:**
 - Defends your company.
 - Communications are not privileged as to the insurance company.
 - Bills are covered by insurance.
- **Open a separate matter for coverage-related issues.**

Managing Defense Arrangements

- **Who controls the defense?**
 - Insurer's "duty" to defend usually comes with the "right" to defend.
 - Insurer can choose the defense counsel.
 - Insurer can control the defense.
 - Potential exception: defense under reservation of rights.
 - Conflict of interest for insurer-hired defense counsel.
 - Negotiating defense arrangements when the insurer has the right to control the defense.

The Emerging Role Of AI

- **By Insurers**

- In the Underwriting Process:
 - Profiling to decide who is a good risk and what to charge in the underwriting process.
 - Racial, sexual, discriminatory implications.



The Emerging Role Of AI (cont.)

- **By Insurers**

- In Claims Handling:
 - 50-state patchwork of insurance regulations will slow the rollout of automated AI claims handling processes.
 - Do we really want AI deciding our claims?
 - Will it become a substitute for human judgment?



The Emerging Role Of AI (cont.)

- **By Insureds**
 - Do you need to add “AI” policies to your collection?
 - Or are you better off relying on your existing policies?
 - *i.e.*, is a loss caused by relying on AI data any different from a loss for any professional negligence?
- **Can your business be harmed in new ways by the rising role of AI?**
 - Duplicate and overlapping coverage can be worse than no coverage at all.



THANK YOU!

QUESTIONS?



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