THE STATE OF DENIAL

An Insurer's Image Can Turn on a Phrase, Especially When It Comes to Coverage Decisions

By Matthew J. Smith, Esq.

Words are important. "Beautiful," "placid," and "inspiring" bring to mind a vision of something we would like. "Slime," "vulgar," and "putrid" immediately cause us to mentally turn away from anything associated with their mention.

American science fiction writer Philip K. Dick once noted, "The basic tool for the manipulation of reality is the manipulation of words. If you can control the meaning of words, you can control the people who must use the words."

Words also shape the manner in which we deliver a message. The expression "You're not going to believe this!" creates a spirit of anticipation. Saying "You'd better sit down and brace yourself" is rarely followed by good news.

Disavowing insurance coverage frequently leads to retention of legal counsel and litigation. By training, attorneys are masters of words. A traffic accident is converted in the courtroom by plaintiff's attorneys into a "crash." Independent medical examinations become "defense medical examinations." What appears to be insignificant is often part of a well-orchestrated plan to influence the minds of jurors, and even judges, to a more favorable disposition. The insurance profession and defense counsel have been slow to understand, respond, and change these misinterpretations. As author Malcolm Gladwell noted in his best-selling book *The Tipping Point*, it is the smallest things that create the tipping point in culture.

We have allowed ourselves to be painted into a corner regarding what are incorrectly termed "denial letters." It is time for us to fight our way out of that corner, correct the misuse of this description, and aggressively define the efforts undertaken to reach a proper and correct coverage decision.

Anyone knowledgeable with insurance claims, including the plaintiff's bar, knows the vast majority of claims are paid and very few are denied. The extremely small percentage of claims resulting in a lack of coverage do not meet the correct definition of a "denial" when applied to the process of the coverage decision.

The Oxford Dictionary defines the noun "denial" very simply as "The action of declaring something to be untrue." Unless we are willing to concede that our claims investigations and coverage analyses are "untrue," why would we deem a correct, well-reasoned, and accurate coverage decision to be a denial?

In legal cases spanning the last 30 years, you would be hard-pressed to encounter even one insurance carrier desiring to reach a false, incorrect, or untrue coverage decision. Indeed, insurers make a conscious decision to pay a claim where coverage is highly questionable to avoid litigation or because the expense of disclaiming coverage would exceed paying the disputed claim.

The goal on every claim must be to reach the correct and proper coverage decision. Whether the investigation focuses on determining if the loss is a covered peril, if material misrepresentations were made concerning the securing of the policy or the claim, or if there was an intentional act voiding coverage, the goal of a proper coverage investigation never changes. At the end of the investigation, the duty is owed to reach a prompt and correct decision and to notify the insured of both the decision and the underlying basis for reaching that decision.

When done properly, there is no way that the decision results in a denial of coverage. If we address whether there is coverage for a specific loss or peril under the policy and we correctly reach the decision that the claim is excluded or not covered under the policy provisions, we are not denying coverage, because no coverage existed in the first place. A well-reasoned investigation and analysis confirms the cause of the loss was never contained within the coverage parameters of the insurance contract.

In an investigation involving misrepresentation or intentional acts, it is in no way denying coverage even though the loss would otherwise be a covered

peril. If the investigation leads to a determination that the insured acted intentionally or made material misrepresentations, the acts of the insured voided all coverage under the policy by the clear terms of the insurance contract. It is not the insurance company denying coverage but the insured's own actions or misrepresentations that led to the voiding of coverage.

So what is the better terminology? If you have not noted by now, it is important we cease referring to these as "denial letters" and correctly term them "coverage decisions." Following a proper investigation and research (both of the facts and law), an insurance carrier does not reach a conclusion for denial but instead reaches a coverage decision. In consultation with counsel, this decision is conveyed to the insured or their legal representative by correspondence. That correspondence may convey either a decision to extend coverage or explain the rationale as to why coverage is not available for the claim submitted.

As with most semantic issues, it is not sufficient to simply stop there. The world is not that easy. How we convey our coverage decision is as important as whether we term it a "coverage decision" or allow it to be misconstrued as a denial.

Insurers still issuing one-page coverage decisions are doing both themselves and their insureds a tremendous disservice. For too long, fearful insurers believed the myth that sending brief letters would avoid difficult questioning in depositions or trial. Overlooked was the extent of corporate arrogance and disrespect that failing to explain the coverage decision conveyed. Any insurer must expect pointed questions regarding a coverage decision. Those questions are coming regardless, and a terse, cold letter easily allows the plaintiff's attorney to paint the insurance carrier as an evil corporate monster.

A well-written coverage decision letter explains the extent and scope of the investigation and cites the specific policy language upon which the coverage determination is founded. Rather than avoiding or fearing the investigation, the letter should point out how the facts of the loss and policy language combined with the investigation led to a correct and proper coverage decision. This may include making reference to or attaching statements, examination under oath testimony, governmental reports, or analysis done by experts. The letter should summarize why the result of the investigation has led to the correct conclusion that coverage is not available for the claim.

We are still not done. A well-written coverage decision letter never places the insurance carrier in a position superior to its insured or makes it seem unwilling to acknowledge potential error or consider new information. Each coverage decision letter should afford the opportunity to submit new or additional information if the insured believes the carrier has reached an incorrect decision. A reasonable time limit should be placed on the insured to submit any further information, as the claim investigation does need to reach a final conclusion.

While it should not be done on

every claim, insurance carriers may consider offering to file at their expense a declaratory judgment action in a court of competent jurisdiction to have their decision reviewed. Offers to consider new information or file for declaratory judgment demonstrate that the insurer is acting with the utmost of good faith and has every confidence that the coverage decision is correct even when subjected to judicial review.

It is crucial to remember that the purpose of the coverage decision letter extends beyond conveying the decision to the insured. Understanding that litigation is likely to follow, a proper coverage decision letter becomes the centerpiece for defense of the insurer's coverage decision and against any claim of bad faith. Consider the well-authored coverage decision letter as the road map to guide the carrier and counsel throughout the litigation to follow.

One of the first exhibits to mark at the deposition of a plaintiff suing an insurer for breach of contract and bad faith is the coverage decision letter. After confirming the insured received the letter, hand them a yellow highlighter. Request that they use the highlighter to go through the entirety of the letter and highlight anything it contains that they are prepared to testify under oath is either false or inaccurate. Typically, you'll then go off the record to allow the witness and counsel the time necessary to highlight the letter.

Invariably one of two things occurs. Either the insured will highlight nothing or almost everything written in the letter will be yellow. Should the latter occur, go through each highlighted statement and, using documents from the claim file, show the insured the report, statement, or finding upon which the statement they claim to be false or inaccurate is based. After each piece of evidence is reviewed, ask them, "Do you now see that the insurer did have a factual basis to include that information in the coverage decision letter?" Next, ask them to re-highlight the sentence with a green highlighter. By the end of the process, you'll end up with a letter converted from yellow to green.

Once complete, acknowledge that the insured has every right to disagree with the insurance company's coverage decision, but get them to agree that they simply believe the decision is wrong and have no basis to claim that the insurance carrier did not reach the decision based upon a thorough and accurate investigation. Achieving that concession alone is often sufficient to secure summary judgment on all claims for extra-contractual or bad faith damages.

Use of the coverage decision letter becomes more important at trial. No plaintiff's attorney should refuse to stipulate that the coverage decision letter is a necessary exhibit at trial. Stipulating admission allows counsel to utilize the letter on opening statement. During the opening, outline to the jury how the coverage decision letter will be your road map for the testimony to come. Explain how the coverage decision letter resulted from a team investigation leading to the coverage decision. Also explain how they will meet many of the members of that team, learn the extent

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of the investigation, and understand why the correct decision was reached. Throughout the trial, you should have various witnesses discuss their portion of the investigation and how it was accurately relayed to the insured in the coverage decision letter.

When you reach closing arguments, remind the jury that during voir dire they agreed to be fair and base their verdict on the facts, evidence, and law. Then strategically and methodically walk through the coverage decision letter explaining that, as was promised on opening statement, evidence proved every aspect of the coverage decision letter to be true and correct. As such, their only verdict must be in favor of the insurance carrier, as all aspects of the coverage analysis and decision were confirmed through evidence and witness testimony. In conversations with jurors after defense verdicts, you'll find that, while they never believed they would rule in favor of the insurance company, the evidence proven through the coverage decision process was so overwhelming they felt compelled to rule in the insurer's favor.

Changing insurance culture from the world of the "denial letter" to a "coverage decision" will not be quick, nor will it be easy. Change will, however, bring a more positive future. Years ago, polling in America showed that the term "Liberal" evoked a very negative connotation. Rather than justifying its position, the Democrat party rebranded itself as "Progressive." Especially in this election year, you will rarely hear the term "Liberal" used, because a conscious effort has been made to rebrand an entire political party as being progressive. The semantics of the words speak for themselves.

Change will be a step-by-step process. Attorneys and insurance professionals need to correct their writings to use the proper terminology of "coverage decision" in emails, correspondence, and discovery responses. Equally, in depositions and trials, we must politely but firmly correct opposing counsel and even judges stating that we provided a coverage decision and not a denial. Even if initially rebuked, we can make our point by explaining why "coverage decision" is the correct term.

The reality is that insurance carriers will continue to suffer a negative perception by many jurors and judges. Change comes slowly, and semantics alone will not solve the problem. Using the term "coverage decision" instead of the wrong label of "denial letter" may be a baby step forward, but some babies become marathon runners by learning from their initial steps. Words do matter and have implications; by using them correctly, we can begin a positive change for the future. CM

Matthew J. Smith, Esq., is founder and president of CLM Member Firm Smith, Rolfes & Skavdahl Co. LPA. He is a member of CLM's Insurance Fraud Committee and can be reached at (513) 579-0080, msmith@smithrolfes.com, smithrolfes.com.

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