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"YOUR INSURANCE WILL COVER EVERYTHING"

Public Adjuster Practice in Illinois
in light of

Power Dry of Chicago, Inc. v. Maurissa Bean, et al.

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I. INTRODUCTION.

II. PUBLIC ADJUSTING – – WHAT IT WAS AND WHAT IT IS.

A. Generally.....

1. The Good.

Large commercial claims, and the insureds advancing them, benefit from public adjuster's activities.

2. The Bad.

Claims involving damage suffered by a residence or a small business are generally well-adjusted by organizations retained by the insurer. Prior to the change in the Public Adjuster's Law, and where the public adjuster generally was compensated only by receiving a percentage (10%) of the amount obtained from the carrier, if both the carrier and the public adjuster performed their duties perfectly, the insured would never do better than 90% of that to which she or he was entitled.

3. The Ugly.

(See Exhibit A, pp. 28 through 31). Often, the contractor either beats the insurer to the insured, or establishes a relationship with the insured before the insurer can or does take any action. This relationship often includes the insured executing a contract with the public adjuster which includes the insured's promise to assign its policy recovery rights to the adjuster. At this point, a third-party becomes involved in a fiduciary relationship involving insurer, on the one hand, and insured, on the other. Often, the third-party (the contractor) is asked for, or without being asked, offers, information and opinions on policies it has never seen, and coverages it has never confirmed. The public adjuster may also immediately attempt to begin repair operations, or, at the very least, mitigation activities, without clearing such activities, in advance, with the insurer.

At this point, the insurer might find itself facing a confused insured, and a hostile contractor who claims that it has provided services, and, because of an assignment, is entitled to payment. In addition, the availability of instant communications and social media platforms make it highly likely that a party might take a position which is, at the very least, unflattering when discussing the behavior of others involved in what has become a tripartite relationship **(Exhibit A, pp. 4, 5)**. Ultimately, and as demonstrated in the *Power Dry v. Bean* case, such circumstances tempt the public adjuster to act aggressively to "remediate" and "repair," and, if their demands for payment are not met, to mount a multifaceted legal attack on insurer and insured alike.

B. The Current Public Adjuster Act

The public adjusting paradigm was substantially impacted by the change in the law, though the definition of public adjusting, and the consequences associated with acting as a public adjuster if one is unlicensed, has remained unchanged. **(See Exhibit A, pp. 29, 30; Exhibit C)**.

III. THE CASE.

A. Overview.

The case is worth studying because this matter, truly, had one of everything:

-- from the tactical (procedural challenges; nonstandard discovery; skilled opposing counsel; nonstandard case dispositive motions).

-- to the strategic (coverage issues; the creation and maintenance of a united front; the need for case discipline).

B. The Contractor's Play Book.

1. Get to the insured early – get them to sign a contract – get them to "assign" their rights against the insurer.

2. Start a relationship with the insured, and start work, immediately.

3. Challenge the insurer early, aggressively, and repeatedly.

4. If things aren't working, file suit -- against everyone -- for everything **(Exhibit A, pp. 5 to 7)**.

   breach of contract or agreement;
   imposition of a mechanic's lien;
   quantum meruit;
   breach of insurance agreement;
   insurance code/unreasonable and vexatious delay of payment;
   tortious interference/contractual relations;
   tortious interference/economic expectancy;
   defamation;
   exemplary damages; and
   attorney's fees.

5. Split the defendants.

6. Because an adverse outcome could be worth multiple times the value of the claim that is being threatened, effect a settlement.

7. This is not a "one-off;" this approach has been used successfully in Cook, Lake, DuPage, and Kane Counties.

C. The Response.

1. The medical malpractice defense maxim.

2. Be ready for the contractor to aggressively attempt to flip the insured or the insurer's adjuster, or both.

3. Recognize that the contractor has built a pyramid, but has balanced the pyramid on its capstone **(Exhibit B, p. 13 *et seq.*)**.

   -- **If the agreement between the contractor and the insured is not valid, there can be no mechanic's lien; there can be no quantum meruit claim; there can be no assignment; there can be no tortious interference claim; and there can be no unreasonable and vexatious delay of payment claim, and claims for exemplary damages and attorney's fees fall away.**

   -- **Thus, if the contractor is acting as a public adjuster but is unlicensed, establishing that essentially eliminates the contractor's assault.**

4. What must you consider:

   -- Getting all the data you can.

   -- Remembering that the average public adjuster wannabe/contractor can't seem to help himself or herself; they'll do all the work for you **(Exhibit A)**.

   -- A premises liability litigation lesson: the magic five questions.

   -- A second premises liability litigation lesson: "don't go away mad – just go away." **(See V.F2. *infra.*)**

IV LESSONS LEARNED.

A. Get Out Ahead of This,… (because if it hasn't happened to you yet, it will).

1. … before the claim is made (with the insured, with your agents, with your adjuster.
2. … before suit, but after the claim is made.
3. … before the suit goes too far.

B. Emails Can Be Good, Can Be Bad, But Are Forever.

1. Careful with yours.

2. Get the insureds, and get the adjuster's.

3. Remember what you're looking for. **(See Exhibit A, pp. 20, 21 and Exhibit C)**.

C. Eyes On the Prize.

1. Don't get dragged into the briar patch – – stick to the script.

2. You'll need a surgeon or two, not a hospitalist.

D. Think Free Agency -- get everybody on your team (before they accept an offer to join the other one).

E. Those You Oppose Will Give You What You Need -- But You Have To Go Get It.

1. Emails/other communications.

2. The Ferrari Gambit: What did your adjuster learn when, in investigating the case, he "tested the policy for a response"?

3. Has the contractor beaten your people to the punch? Harvest information from the contractor, and from your insured.

4. Remember, given the circumstances, contractors really can't help themselves.

V. IT'S YOUR TURN ("ASK NOT WHAT YOUR FELLOW MEMBERS MIGHT DO FOR YOU,"...)

A. Personal Injury/Advertising Injury Coverages.

B. Right To Repair Provisions.

C. Limits on Assignment of Insured's Rights (Some, But Not All).

D. Did the Insured and the Public Adjuster Actually Form a Contract?

E. Should You Request Arbitration?

F. Should You Play The Long Game?

1. The Japanese/Chinese model.

2. Doctors/grocery chains/substandard carriers: what do they have in common?

APPENDIX

Exhibit A	**Brief of Lutheran Mutual**
Exhibit B	**Court's Opinion**
Exhibit C	**Is She / He /It A Public Adjuster?**

DID THE CONTRACTOR . . .WITH REGARD TO A FIRST PARTY CLAIM

ACT ON BEHALF OF THE INSURED	**AND**	• ADJUST A CLAIM
		OR
		• HOLD HIMSELF OUT AS A PUBLIC ADJUSTER
		OR
		• SOLICIT BUSINESS
		OR
		• ADVISE THE INSURED RE:
		  • FIRST PARTY CLAIM LOSSES (OR)
		  • DAMAGES AGAINST
		OR
		• ATTEMPT TO OBTAIN A CONTRACT REGARDING SAME
			AND	DO IT FOR:
				• COMPENSATION
				OR
				• A THING
				OR
				• VALUE
				OR
				• A SET AMOUNT
				OR
				• A RIGHT TO POLICY PROCEEDS

EXHIBIT C