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Sometimes the Illogical Is Very Logical

Off-point arguments can be persuasive if they address fundamental fairness

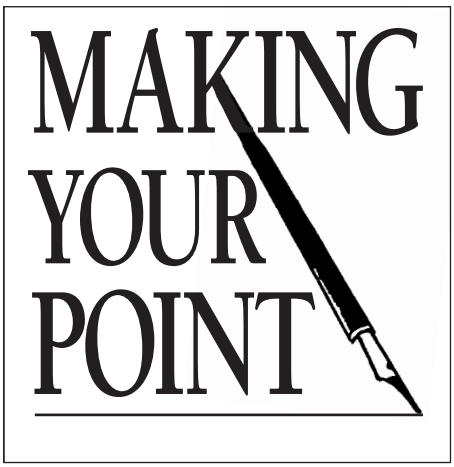
By Kenneth F. Oettle

We all admire logic, but sometimes we enslave ourselves to it. We narrow our vision by insisting that every argument "go" to the issue before the court.

Suppose you represent a patient whose health insurer reimbursed a ridiculously small portion of huge medical bills. You sue the insurer for breach of contract and breach of fiduciary duty under ERISA. You also sue the insurer's co-venturer, Insurer X, described in an agreement between the co-venturers as a "re-insurer." Insurer X moves for summary judgment on the ground that as a re-insurer (someone who agrees to accept a piece of the underlying risk in return for a fee), it has neither a contractual nor a fiduciary relationship with your client.

You have facts to counter that argument. Insurer X shared 50-50 in the profits and losses of the health insurance business; it set premiums and collected them; and it helped administer claims, all of which in your view makes it a contracting party and a fiduciary.

Your assigning partner wants you to argue as well that Insurer X belongs in the lawsuit because it knowingly used an old and downwardly skewed database to determine how much to reimburse patients for what they pay their doctors. You resist because you think Insurer X's method for paying claims is irrelevant to whether Insurer X has a contractual or fiduciary duty to your client. The method for calculating reimbursement, you say, does not go to



the insurer's contractual or fiduciary status. You are so sure of this that figuratively, if not literally, you stamp your foot.

Such scenarios play out between partners and associates every day. The partner is thinking that if Insurer X (the so-called re-insurer) is dismissed from the lawsuit, then Insurer X can continue underpaying claims with impunity. It will never be called to account.

The associate thinks, "I suppose Insurer X deserves to be held liable, but I can't ask the court to rule that Insurer X breached a contractual or fiduciary duty to the insured when I haven't even proved it had such a duty. The issue of breach isn't before the court on this motion."

This is where you have to take your thinking to a different level. By arguing that Insurer X underpaid claims, you aren't looking to prove its contractual or fiduciary status. You are looking to persuade the court that Insurer X's method of calculating reimbursement is flawed and unfair. You are not giving the court an additional ground on which to find a contractual or fiduciary relationship. You are giving the court incentive to be satisfied with the grounds it has.

Underpayment of claims wouldn't be a heading or even a subheading in the argument section of your brief, but you would include a thorough explanation of how the claims process works in your Statement of Facts. Then in the argument, you might write something like, "If Insurer X is dismissed from this suit, it will continue to underpay claims, and persons who paid their premiums thinking they would be meaningfully insured will continue to be devastated by their medical bills."

A sentence that won't work is, "Another reason that Insurer X has a duty to plaintiff is that it underpays claims." That isn't a reason why Insurer X has a duty. It's a reason why it deserves to answer for its actions.

Will targeting Insurer X's claims practices foster that great bugaboo, "result oriented jurisprudence"? Not really. You do want the court to choose

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a result (keeping Insurer X in the suit) rather than the rule (that re-insurers have no relationship with the insured), but you contend that the "re-insurer" in your case falls within an exception to the rule because of its involvement in profits, premiums and claims. By trying to fit Insurer X within an exception to the rule, you are playing by the rules.

Without reasons why the court should deem Insurer X to have a contractual or fiduciary duty to your client, your black hat argument ("Insurer X underpays claims") will fall flat anyway. It isn't intended to work alone. It's a clincher, a scale-tipper, a source of comfort for the court that by making a call in your favor, the court is doing the right thing.

New lawyers may view such out-of-the-box arguments as street fighting bordering on rule breaking. It isn't. It's just smart tactics. You'll lose points with the court for making such arguments only if you have no support for the premise you must prove to win the motion — here, that Insurer X had a contractual or fiduciary relationship with your client.

The argument that Insurer X underpaid claims is actually "logical," but in support of a premise different from the one you must prove to win the motion. The alternate premise is that Insurer X should remain a defendant in the lawsuit so the court can supervise and, if appropriate, penalize Insurer X.

When you make arguments that can be considered "outside the box," you have to be clear what you are doing. You can't pretend that underpaying claims — as opposed to handling claims — establishes a contractual or fiduciary duty with the insured. That would be illogical. But it does suggest that the court should keep a grip on Insurer X.

At bottom, courts want to do the right thing. If a court can see that Insurer X would be getting away with something if released from the lawsuit, then the court will be inclined to keep Insurer X in the suit if you provide at least arguable reasons why Insurer X has a contractual or fiduciary relationship with your client. If Insurer X underpays claims and thus wears a black hat, the reasons why it has a contractual or fiduciary relationship with the insured may not have to be as strong, especially for purposes of defeating a summary judgment motion.

Most courts are in the business of doing justice, not of throwing up their hands and saying, "I'm sorry; I am powerless." Courts sometimes declare themselves powerless, but it's usually when the defendant's alleged transgression isn't very offensive or when the plaintiff is, for whatever reason, undeserving.

Puzzler

Which is better, Version One or Version Two?

> Version One: Defendants moved to have all inadvertently supplied evidence suppressed and for the return of all attorney-client communications.
>
> Version Two: Defendants moved to have all inadvertently supplied evidence suppressed and all attorney-client communications returned.

After the word "and," the reader is ready for any of the following: another verb in the position of "moved" (e.g., Defendants moved…and sought…"); another verb in the position of "to have" (e.g., Defendants moved to have…and to compel…"); another verb in the position of "suppressed" (e.g., "to have…evidence suppressed and returned"); or a new noun-verb combination (e.g., evidence suppressed …and… communications returned," as in Version Two).

At the word "and," the reader is ready for a verb, for action, or a noun, for something acted upon. The reader is not ready for a prepositional phrase – "for the return of." In Version One, as the reader finishes the thought that a motion was made to have evidence suppressed, the reader is surprised by the new structure.

In Version Two, the second part of the sentence meets the reader's expectations by repeating a structural element from the first part. "All communications returned" echoes "all evidence suppressed." The consistency and rhythm of the repetition carry the reader along.

This recommendation falls under the rubric "parallelism." Version Two is better because it uses parallel construction. ■