

Insurance Bad Faith Pre-Trial Strategies: Demand Letters, Pleadings, Defenses, Damages, Bifurcation, and Experts

Developing Winning Pre-Trial Tactics for Policyholders and Insurers

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Insurance Bad Faith Pre-Trial Strategies:

**Demand Letters, Pleadings, Defenses, Damages,
Bifurcation and Experts**

Strafford Webinar

March 2, 2017

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Bad Faith Demand Letters

1. The “golden ticket” for insurance bad faith cases is the threat of extra-contractual liability, or bad faith. Being able to “pop the top off the policy” is every plaintiff lawyer’s dream, and every insurance company’s nightmare. The following are some of the critical principles that govern bad faith in the context of settlement demands and set-up letters.
 - a. California insurance law requires an insurer owes a good faith duty to initiate settlement discussions. See, *Garner v. American Mut. Liab. Ins. Co.* (1973) 31 Cal.App.3d, 848; *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689, 319 P.2d 69, 74; and *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 906. In fact, California Insurance Code section 790(h)(5) requires insurers to attempt “in good faith to effectuate . . . settlements of claims in which liability has become reasonably clear.” Insurance Code section 790(h)(5) imposes a duty on the insurer to actively attempt to settle a claim by making, and by accepting, reasonable settlement offers once liability has become reasonably clear. *Pray By & Through Pray v. Foremost Ins. Co.* (9th Cir. 1985) 767 F.2d 1329, 1330.

Bad Faith Demand Letters

- b. An insurer has an implied duty to accept reasonable settlement demands on covered claims within the policy limits. *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 40. In deciding whether or not to settle a claim, the insurer must take into account the interests of the insured. *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658-661. In other words, an insurer that breaches its duty of reasonable settlement is liable for all of the insured's damages proximately caused by the breach, regardless of policy limits. *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 725 (citing *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315 and *Comunale v. Traders & General Ins. Co.*, *supra*, 50 Cal.2d at p. 661.)
- c. The only thing an insurer can consider in determining the reasonableness of a settlement demand is "whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the settlement offer." *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 16. An insurer's good faith but incorrect belief there is no coverage is not a defense to liability for its refusal to accept a reasonable settlement demand. *Id.*, at 15-16.

Bad Faith Demand Letters

- d. The case law speaks of an insurer's liability for breach of the duty of reasonable settlement. An insurer that breaches the implied covenant of good faith and fair dealing may be liable for the full amount of the judgment based on breach of contract. See *Archdale v. American Internat. Specialty Lines Ins. Co.* (2007)154 Cal.App.4th 449, 468.
2. In light of these black letter principles, the most powerful strategy that a plaintiff (or defendant) can follow is to make a policy limits settlement demand a thorough and comprehensive policy limits demand.
- a. A plaintiff must make sure that the carrier has all the facts and information to reasonably consider such a policy limits demand, and the demand must be kept open a reasonable time, but if the carrier fails to reasonable settle a case within policy limits, it may be exposed to bad faith liability.
 - b. The process of obtaining an assignment of bad faith rights is also critical, but outside the scope of this presentation. The listener should consult a learned treatise for the practice and procedure of effectuating such as assignment.

Bad Faith Demand Letters

3. One final important point to remember is that the mediation privilege is very broad. Thus, in order to guarantee that policy limits settlement demands are admissible in a later bad faith trial, all such settlement communications must be formally made in writing outside of the mediation context.

Bad Faith Pleading Requirements

1. Procedural Issues

- a. Not the defendant and cross-complainant
- b. Control the forum, venue, jurisdiction, state law, etc

Bad Faith Pleading Requirements

2. Substantive Issues

a. Bad Faith

1. Best cause of action in CA

- a. Standard is very low – reasonableness
- b. Tort remedies for breach of contract
- c. Attorneys fees

b. Breach of Contract

1. Easy to plead for insurance, but attach the policy

Bad Faith Pleading Requirements

2. Substantive Issues

c. Declaratory relief

1. Make sure you include separate COA for each dec relief claim
2. That way you can move for MSA or MSJ
 - a. Duty to defend
 - b. Right to Cumis counsel

Bad Faith Pleading Requirements

2. Substantive Issues

- d. Use a sniper rifle, not a shotgun for preparing your complaint
 - 1. All you need are causes of action for bad faith, breach of contract and declaratory relief
 - a. Do not include fraud, intentional infliction, 17200, etc
 - b. Will waste your time in demurrer and motion to strike
- e. Plead punitive damages in great detail

Bad Faith Pleading Requirements

3. Miscellaneous Issues

- a. Be careful of factual statements
 - 1. Judicial admissions
 - 2. Client may not be accurate in explaining facts to you
- b. Attach exhibits
 - 1. Picture is worth a 1000 words

Proving Insurer Breach of Duties

➤ What Does A Policyholder Need To Prove?

- Common Law
- Statutory



➤ What Is The Policyholder's Burden Of Proof?

- Preponderance Of The Evidence
- Clear And Convincing Evidence

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Calculating Damages

(*See also Using Experts in Bad Faith Cases)

Direct and Consequential Damages (For Breach of Implied Duty of Good Faith and Fair Dealing)

Punitive Damages (Constitutional Limitations)

Attorneys' Fees (Lodestar; Factors)

Prejudgment Interest (Compound Versus Simple)

DAMAGES

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Using Experts in Bad Faith Cases

Required? Permissible? Valuable?

“Although an insured is not required to prove an insurer’s bad faith practices through expert testimony, such expert testimony is permissible if it is helpful to the trier of fact and is otherwise admissible.”

-- *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417, 421 (W.D. Pa. 2016)

“[W]e reject ... a categorical requirement that the insured produce expert testimony to establish every bad faith claim against an insurer. We conclude that when an insurer’s alleged breach of its duty of good faith and fair dealing toward its insured involves facts and circumstances within the common knowledge or ordinary experience of an average juror, an insured need not introduce expert testimony to establish a bad faith claim.”

-- *Weiss v. United Fire & Cas. Co.*, 541 N.W.2d 753, 758-59 (Wis. 1995)

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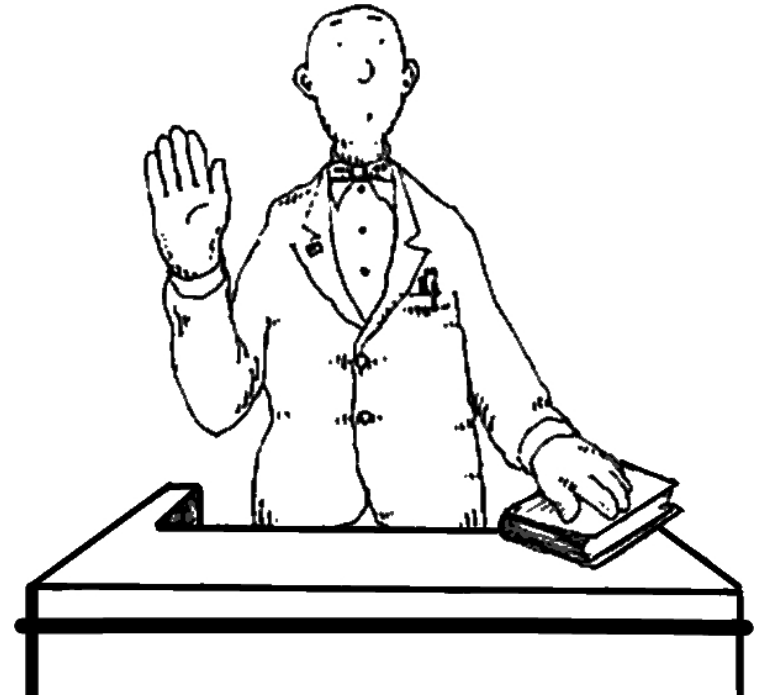
Using Experts in Bad Faith Cases

Helpful:

- » Insurer's net worth
- » Reasonableness of attorneys' fees
- » Insurance industry customs, practices, standards
- » Insurance claims adjusting procedures

Avoid:

- » Contract construction
- » Legal opinions
- » Ultimate legal issue
- » Subjective intent



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Responding to Demand Letters

» “Bad Faith Set Up”

- › A demand letter intended to expand an insurer’s exposure beyond the policy limits, rather than to resolve the claim
- › Does the demand letter attempt to create a no-win situation for the insurer?

Responding to Demand Letters

- » Is the demand time limited? What is the deadline?
 - › *Hartford Accident & Indem. Co. v. Mathis*, 511 So. 2d 601, 602 (Fla. Dist. Ct. App. 1987).
 - › *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 626 N.E.2d 24 (N.Y. App. 1993).
- » Does the demand release all claims against all potentially liable insureds?
 - › *Sorocka v. Severe*, 858 So. 2d 388 (Fla. Dist. Ct. App. 2003)

Responding to Demand Letters

- » Is the demand letter difficult to understand, difficult to accept or easy to reject?
 - › What are the essential terms and conditions of the demand?
 - › What is a counter-offer?
- » What are the insurer's obligations under applicable state law and regulations?

Bad Faith “Defenses”

- » Pleading standard
- » What is bad faith?
 - › Is unreasonableness enough?
 - › Is something more required?
- » An insurer has a right to investigate. There will be no bad faith if an insurer’s conduct and investigation was reasonable.

Bad Faith Defenses

- » No Coverage
- » Reasonable Coverage Defense
 - › Fairly Debatable
 - › Genuine Dispute
 - › *Bona Fide* Dispute
- » Statute of Limitations/ Suit Limitations Provision
- » Advice of Counsel
- » Release/Standing
- » Res Judicata/ Collateral Estoppel
- » Insured's Breach of Policy Conditions or Reverse Bad Faith
- » Collusion or Fraud

Change of Venue and Removal

- » Procedural means to move the case from one court to another.
- » **Timing**
 - › Must be addressed before a responsive pleading is filed.

Change of Venue and Removal

» Change in Venue

- › Did the plaintiff file the lawsuit in a venue with a remote connection to the accident or a venue that would be an inconvenient location for a trial?

» Removal to Federal Court

- › Does jurisdiction exist in federal court?
- › Diversity jurisdiction?

Bifurcation

» Bifurcation of Breach of Contract and Bad Faith Claims

- › Discovery
- › Trial

Benefits of Bifurcation

- » **Keeps “bad faith evidence” out of the coverage trial**
 - › Some such evidence may be privileged
 - *Procopio v. GEICO*, 433 N.J. Super. 377 (App. Div. 2013)
 - › Some such evidence may involve other claim files
- » **Keeps jury focused on the merits**
- » **Avoids unfair prejudice**

Drawbacks of Bifurcation

- » **As the insurer, you want to show that a careful and thorough claim investigation was conducted**
 - › Lends credibility to claim determination
 - › You want to tell “the whole story” to avoid unanswered questions in the mind of the jury
- » **As the insurer, you may want to show that the policyholder was being unreasonable and uncooperative**
 - › But this argument may be precluded from the bifurcated coverage trial

How Do You Prepare Insurance Company Witnesses?

- » **Use the right witnesses**
- » **Spend the time**
 - › Study the claim file together
 - › Mock examination and cross
 - › Credibility is dependent upon accuracy
- » **Jury consultants can be very helpful**



Claims Professional Testimony

Establish Credibility: an insurer cannot win unless it has absolute credibility with the jury

Build Rapport: the insurance company's representatives are likeable and honest

Tell The Story: why the insurer did what it did, why was that a reasonable thing to do.

Claims Professional Testimony

Goal: demonstrate that claim was handled in a fair and reasonable way – the way the jurors would want their claim handled

Goal: demonstrate that the insurance company is not a faceless, heartless bureaucracy

- › it is an organization of everyday **people**, doing their best to help others

Questions?

Thank You!



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