

## **Insurance Bad Faith Trial Strategies: Case Evaluation, Jury Themes and Bifurcation**

Developing Winning Trial Tactics for Plaintiffs/Policyholders and Insurers

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TUESDAY, JULY 19, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

**Scott Glovsky, Founder, Law Offices of Scott Glovsky, Pasadena, Calif.**

**Todd S. Schenk, Partner, Tressler, Chicago**

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# Bad Faith Trial Strategies: The Plaintiffs' Perspective

Presented by:

Scott Glovsky

**The Law Offices of**

**Scott C. Glovsky**

# Case Selection:

- Provable Liability
- Damages (physical, economic, and/or emotional)
- Class or Individual Action
- Federal or State Court
- Type of Plan (Self Insured, Medicaid/Medicare, ect.)
- ERISA
- Arbitration

# Pre-filing options:

- Internal appeal/grievance
- External appeal
- Independent Medical Review (IMR)
- Administrative exhaustion(Medicaid/Medicare)

# Discovery

- Pattern and Practice evidence
- *Colonial Life & Accident Ins. Co.* (1982) 31 Cal. 3d 785, 791 (in a bad faith case “a plaintiff may establish a claim by showing either that the acts that harmed him were knowingly committed or were engaged in with such frequency as to indicate a general business practice”)



# Trial

- Developing the trial story

## Further resources:

- *Fighting Health Insurance Denials: A Primer for Lawyers Paperback* – January 15, 2016 by Scott Glovsky
- Trial Lawyer Talk – Bi-monthly Podcast available on iTunes

# Thank You

Scott Glovsky

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# Bad Faith Trial Strategy

Presented by:



**Todd S. Schenk**  
Tressler LLP

**Strafford webinar**

July 19, 2016

**Insurance Bad Faith Trial  
Strategies: Case Evaluation,  
Jury Themes and Bifurcation**

# Do I Take My Bad Faith Case To Trial?

## There are the obvious considerations...

- › Strength and weaknesses of the case
- › Trial judge
- › Jury pool
- › Sympathy of the plaintiff



# Do I Take My Bad Faith Case To Trial?

**But there are also less obvious, but very important considerations...**

- › Do we have time and resources to put together an effective trial presentation?
- › Will my client allow my witnesses the time needed to prepare for and attend trial?
- › How will my witnesses perform?
- › What are likely *in limine* and evidentiary rulings, and how will they impact what jury hears?

# Goals for Insurance Company Witnesses?

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

- › Focus on **handling** (timely, reasonable, respectful)
- › Not just the **result** (amount paid)

**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

# What Must My Witnesses Do To Achieve These Goals?

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

- › depositions, pleadings, trial testimony
- › \*opening statements

**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.



# 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**



# How Do You Prepare Insurance Company Witnesses?

## Teach the witness:

- › Admit mistakes: own them, apologize, move on
  - Emphasize any offers to make amends and steps taken to avoid similar mistakes in the future
- › Do not be rude or argumentative
  - Be the nicest person in the courtroom
- › Always answer the question, if you understand it
  - Then add explanation, if needed
- › Trial testimony should be different and less defensive than giving a deposition
  - You are trying to tell a story, not just give information

# Other Ways to Humanize the Company

- » **Insurer must have a representative at trial**
  - › Be present for voir dire and entire trial
  - › Stay off the phone while court is in session
  - › Pay attention, take notes, engage
  - › Be careful about behavior in halls, elevator, etc.
- » **Personalize your company representatives**
  - › Children, vacations, hobbies, etc.
  - › They may be more likeable than the plaintiff

# What Do Jurors Think About Insurance Companies?

## General Attitude

- » Jurors hold a slight (not overwhelming) negative bias against insurance companies
- » This is based upon general perceptions and attitudes, not personal experience – emotional
- » General bias not predictive of behavior

## Specific Attitude

- » Some jurors hold a bias against insurance companies due to personal experience, as well as emotion
- » Specific bias is predictive of behavior, and difficult to overcome

# Voir Dire

## » Sort general from specific attitudes

- › Research shows about 50% of people feel they or someone close to them has been treated unfairly by an insurance company
- › Likely to have specific attitudes adverse to an insurance company
- › If you can identify panelists with specific attitude, consider challenges for cause.

## » Use voir dire to start eroding general attitudes and personalizing your client

# Do I Want To Bifurcate My Trial?

- » **Coverage claim is tried first and, depending on outcome, bad faith claim is tried**
  - › In many states, there is no bad faith in the absence of coverage
- » ***Equitable Life Assur. Soc. of U.S. v. Berry*, 212 Cal.App.3d 832 (1989)**
  - › Judicial efficiency is promoted by trying the coverage issues before the bad faith issues because coverage trial is shorter and may render bad faith trial unnecessary.

# 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**
  - › Limiting instructions aren’t sufficient



# Drawbacks of Bifurcation

- » **As the insurer, you want to show a careful and thorough investigation was conducted**
  - › You want to tell “the whole story”
  - › But ability to put in the entire claim file may be limited if trial is bifurcated – there is a gray area
  - › Or, you put in the claim file, and open the door
- » **As the insurer, you want to show that the policyholder was not cooperating**
  - › But this argument may be precluded from the coverage trial



# Practical Considerations for Bifurcation

## Jury

- » You will generally use the same jury for both trials, since bad faith case builds upon coverage case
- » Jury renders verdict on coverage trial, and then court and parties determine what kind of bad faith trial (if any) is needed

## Evidence

- » Parties need to meet and confer on what evidence is admissible for coverage trial
- » Exhibit numbering can get a bit confusing
- » Witnesses called up multiple times

# What Themes Are Effective?

## » An insurance policy is a contract

- › Both sides have rights
- › Both sides have duties
- › Neither side is required to go beyond the duties imposed, and neither side has more rights than what are expressly provided
- › The insurance company prices the policy based upon the well-defined scope of the policy
  - Otherwise, it couldn't stay in business

# What Themes Are Effective?

- » **Good claims handling is good customer service and, thus, good for the bottom line**
  - › We look FOR coverage, not to DENY coverage
  - › While still being faithful to the insurance policy
- » **Insurance company is made up of everyday people, working hard and doing their best to fairly adjust claims**
  - › Adjuster made judgment call, and jury should not fault a reasonable and honest, though arguably incorrect, decision
  - › Jury owes adjuster same degree of fairness it owes to the insured

# What Themes Are Effective?

- » **Insurance company acted honestly and reasonably, and was always up-front**
  - › Reasonable basis for position, legally and factually
  - › Insurer was always forthcoming with the insured
- » **Insurer went above and beyond contract**
  - › Paying for losses that probably were not covered
  - › Giving multiple extensions to the insured
- » **Insurer offered to compromise disputed claim**

# What Themes Are Effective?

## » Delay

- › Passage of time is inherent in the claim adjusting process
- › Unavoidable circumstances
- › The policyholder caused some or all of the delay
- › Despite obstacles, insurer tried to expedite the claim adjustment as much as possible

## » Mistakes

- › It was an honest mistake, with no dishonest motive
- › Own them, apologize, and move on
- › People make mistakes – an insurance company is people
- › We learned from mistake, and have implemented changes

# Punitive Damages

- » **The goal is to avoid juror anger, even if there is juror sympathy**
- » **Punitive damages almost always come from anger, not from sympathy**
  - › Jurors aren't usually angry with an insurer who was honest and reasonable
  - › Or even one they think was unreasonable, but gave an honest effort and was forthcoming
- » **Effort and conduct matter!**

**BUSINESS ETHICS**

# Dealing with Punitive Damages

- » **Company does lots of good**
  - › Pays claims in times of tragedy or disaster
  - › Supports charitable causes
  - › Provides many local people with good jobs
  - › Mission Statement; Code of Ethics
- » **A large award could have negative consequences to the company and its employees**



# Themes to Avoid

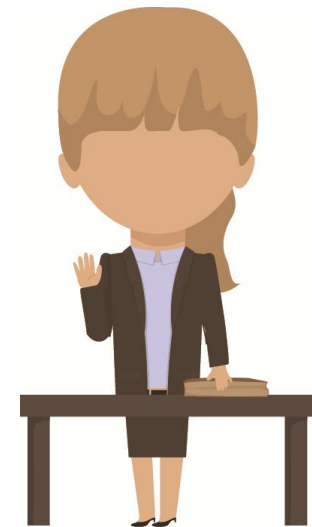
## » We were too busy

- › Even in the wake of a catastrophe, jurors expect the company to ramp up and provide a reasonable level of service to its policyholders



## » The insured was being dishonest too

- › Jurors forgive some dishonesty by the insured, and still expect the insurer to be honest
- › They think inflation of a claim is common and generally accepted part of adjustment process





# Questions?

Thank You!



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