



2020 CLM Focus Conference
December 3, 2020
Virtual Conference

“THE EXTRA-CONTRACTUAL YEAR IN REVIEW: ROUNDTABLE ONE”

Presenters and participants will review the most significant case law, as well as any administrative and regulatory extra-contractual decisions, from across the country in 2020 to engage participants and attendees in a compelling discussion of how these decisions impact industry claim handling.

The roundtable will dissect the current state of extra-contractual law and litigation by exploring its economic costs and financial impact on insurers and policyholders, examine fresh ideas and dynamic defenses to EC claims and litigation, and discuss innovative tools to maximize successful outcomes and results.

IMPORTANCE OF AN ANNUAL REVIEW OF EXTRA-CONTRACTUAL CASELAW DECISIONS

Doing the same thing over and over is not going to achieve a different outcome. It’s time to improve the way we do things, explore better options, step out of our comfort zones, and try doing things differently.

RECONSIDERING PREVAILING PRACTICES

When a claim is received, the insurer attempts to determine which claims are valid. The insurer has a duty to its policyholders to pay valid claims. But, the insurer has an equal duty to its policyholders not to pay invalid claims. These two duties are equally important when determining the insurer's obligations.

What is the standard for an insurer to be determined to be acting in good faith? A review of the current case law establishes that the many attempts to define when an insurer has acted violated the duty of good faith and fair dealing offer little consistency and that there is no universally accepted standard.

To have violated the duty of good faith and fair dealing generally requires something worse than simply being negligent. It usually requires a showing of more than that the insurer did something wrong; but that the insurer acted intentional or willfully. An accusation that an insurer breached the duty of good faith and fair dealing requires more than a showing that the insurer did not act in good faith.

REVIEWING A PARADIGM SHIFT IN THE ADJUSTMENT AND LITIGATION DEFENSE OF EXTRA-CONTRACTUAL CLAIMS

The law of extra-contractual liability arose as the result of “bad acts” by some insurers. These bad acts were viewed as intentionally wrong and resulted in courts and legislatures creating remedies for the parties injured by those bad acts. Consistent with this principle, the foundational element of an extra-contractual claim should be a showing of actual wrongful intent by the insurer. For example, a plaintiff should be required to show that the insurer acted with an intent to deny the plaintiff the benefits of the insurance contract.

With that definition, bad faith moves away from negligence and closer to the definition of insurance fraud. This is appropriate. Fraud is an act committed with the intent to obtain something you would not get absent the intentional misrepresentation. Acting in bad faith is an act committed with the intent to gain something to which one is not entitled.

Bad faith is not, and should not be, merely mistake, ordinary negligence, or error. It should not be established if the record shows that the insurer, through unintentional error, didn't properly process the claim or did a less-than-thorough investigation. The law should recognize the reality that someone can be wrong without acting in bad faith. There ought to be a requirement for a showing of some element of intentional behavior or at least a reckless disregard for the rights of the insured. Bad faith should be established if the record shows evidence of a knowing intent to evade the requirements of the contract or to improperly process the claim or to conduct an inadequate investigation.

Since insurers must rely upon consumers to tell the truth to create a fair insurance contract and consumers must rely upon insurers to perform the duties created by the contract, the standard for bad faith should be based on intent and be equally applicable to insurers as well as to applicants for insurance and claimants for policy benefits.