2020 CLM Focus Conference
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Virtual Conference
Narrative

We Will Not Be Bullied...Carriers Have A Right To Defend Claims!

I. Evaluating Risk to Your Insured:

A Carrier has a duty to place its insured's interests above its own, but at what point do the interests of the carrier become different from those of the insured if there is a defensible claim with the potential for exposure beyond the limits of the insured's policy in the event of an adverse verdict. The purpose of the insurance company is three-fold:

- Provide protection for the insured.
- Be financially viable.
- By providing insurance, a public service is provided that allows people to undertake certain activity with the security of being protected in case of a negative incident regarding an insurable interest.

When a claim is presented, the Carrier must evaluate liability and damages. During this evaluation, multiple issues are examined. In cases where liability defenses are strong and damages are small, the decision is usually easy for the carrier and the insured to defend the claim in absence of a nominal settlement. The second scenario occurs when liability is adverse and the damages are in excess of the policy limits. This is also a situation that lends itself to a relatively easy thought process for the Carrier to try and resolve the case on behalf the insured. The most complex situation arises when the Carrier receives a claim that has strong liability defenses but large damages. The way these claims are handled could have significant repercussions for both the Carrier and the Insured in the event of a negative outcome.

It is not an unusual circumstance that when the Carrier receives a policy limit demand with a short time to reply it may not have had a chance to evaluate pertinent information. As a result, the Carrier can find itself in a precarious because if it does not respond within the proscribed timeframe, Plaintiffs' attorneys will threaten to recover from the insured personally if the demand is not met. Such tactics often act to prevent a full and detailed investigation of a claim. Usually, the police report and statement from the insured will provide a fairly strong idea as to the nature of liability. The damages itself will likely take a longer time to fully explore.

The Carrier must have the ability to defend a case, but by doing so, is it placing the insured's financial interest at risk in the hopes of a defense verdict or a verdict below the policy limits, and is the Carrier acting in bad faith? The answers to both are almost always "it depends on the facts of the case."

Inexplicably, despite the services Carriers provide to the public, they are not looked on favorably in the public eye. Without them, much of how the world operates would be adversely affected. Despite that, there is a mindset that the Carriers and their attorneys are only concerned about money. In addition, this is a trying political time, once favorable jurors now have different tendencies and express anger on issues that have no bearing on a particular case through their verdicts.

There is only one duty when evaluating a case and that is the duty to the insured**.** The Carrier must not place its insured's financial interest at risk in the hopes of a defense verdict or a verdict below the policy limits. That does not mean a Carrier is always putting the insured's financial interests at risk simply because it is defending a case with significant damages. In order to protect itself, training of those evaluating and handling claims is imperative.

What is the protocol for evaluating damages? This is a tricky situation because every claim is different and thus will be evaluated differently; however, protocols are important and must provide the claims specialist with sufficient instruction when a high exposure claim is being defended. It is critical to have a proper evaluating procedure in the case of large verdict, because no result is guaranteed. Questions a claims handler must address in this process are listed below:

A. The insured

This is critically important. Whether the carrier is dealing with a simple individual insured, or a sophisticated business person or a large commercial business. Simply analyzing a claim without any thought as to the individual needs of the insured could lead to a path that a Plaintiff's attorney will attach to in establishing the insured's needs were not met if a bad faith action is pursued after an adverse outcome.

1. **The insured's expectations**

It is important to remember that the relationship between the Carrier and the Insured is a contractual one. As a result, the Insured's expectations are extremely important. Most Courts are going to find that the Carrier is an advantageous position when compared to the insured. As a result, the insured's belief as to how a claim is to be defended under the policy is of great importance. Obviously, many insured's do not consider this when the insurance contract is entered to, but this can become a significant issue later on if an unfavorable verdict is rendered. As a result, when a suit is filed it is important to discuss the case (liability and damages) with the insured when appropriate.

2. **The Claimant**

This seems simple enough, but it is truly amazing how many times this does not go into the analysis. A lot of times, the focus on the value of the claim is based on the amount of special damages and some sort of risk analysis with chances of liability. It is also just as important to collect knowledge on the plaintiff and his/her injuries as early as possible. Social media is such a powerful tool, and is often not taken advantage off. ISO hits, prior lawsuit filings and social media posts is essential in evaluating who is making the claim. Sometimes this analysis may not be sufficiently completed until the time of the deposition. Nonetheless of an evaluation to defend a case with potential exposure without a thorough picture of the Plaintiff is incomplete. Will the Plaintiff require future surgery or other medical treatment? Are there permanent issues related to the injury? Are the injuries easily quantifiable? How old is the Plaintiff and will his/her physical characteristics that will make the Plaintiff more or less sympathetic to a jury.

B. Liability Defenses:

1. **Facts of the Case**

How strong are the liability defenses? Is the claim one of zero liability, doubtful liability, questionable liability or probable liability? Has the adjuster contacted the insured, witnesses and claimant (before representation)? Did the nature of the accident merit an accident reconstruction or at least a scene investigation?

2. Venue

The venue is as important in determining whether the case will be defended. Recognizing where the case will be tried has a tremendous impact on the end result. An analysis of the judiciary and the jury is critical. Even if a file is not open, a quick call to defense counsel in the area will provide you with the information need in the event the claims handler is unfamiliar with the venue.

3. File Documentation

Once you make your own evaluation and if you have outside counsel, remember your claim notes. Claims notes are critically important in documenting your evaluation and analysis.

II. Communications with Insured

It is critical to keep the insured advised of the evaluation process The Carrier does not have the right to determine how much risk the insured is willing to take. In states like Missouri, it is almost considered *per* se bad faith if the insured is not kept advised of negotiations. Depending on how sophisticated the insured is, many times the insured is willing to take the risk of defending and defensible case. Almost every Carrier sends the standard letter at the beginning of a case regarding the right to have outside counsel, but it is in the Carrier's interest to have that discussion with the insured, followed up with an acknowledgement that the risks have been discussed and plan of action has been agreed upon. This can also be done by counsel as well. If the insured is PROPERLY advised and understands the reasons for defending along with potential exposure, the Carrier is solidifying its course of action.

It is important for the Carrier and the retained counsel, if there is one, to keep the insured involved throughout the litigation. In some states, (**Missouri, for example),** the Carrier has a duty to provide the insured notice of policy limits demands and the ability to settle within the policy limits. This is regardless of whether the case has strong defenses or not. It is worth considering whether to send the demand itself to the insured so there is no argument later that the Carrier did not disclose all material information from the insured.

Ultimately trial is an unpredictable process. Most attorneys believe in the jury system, but that does not mean that juries are not always going to get it right. It is impossible to discuss with absolutely certainly what the jury is going to determine or how much it would be willing to award. Because of this unpredictability, the insured has an absolute right to know that when personal exposure is a possibility. Again, this is something that is done by either retained counsel or the Carrier when the decision has been made to defend a case through trial, but make no mistake about it, it should be done.

In some instances, the insured is just not willing to take the risk of an excess verdict. This tends to happen as the case moves closer to trial. In those instances, the insured may demand the case settle within the policy limits. Different states have different requirements at this point, but many times the case has been completely worked up at this point and both counsel and the Carrier are confident in a positive result. A controversial option is to opt for what is known as a "Blue Sky Agreement". Essentially, the Carrier removes the "limits" from the policy in the event that there is an excess verdict. This eliminates the financial risk to the insured, and once that is done, the insured will feel more comfortable going to trial. Obviously, this is not something a Carrier wants to do as there are limits on an insurance policy for a reason, but it is an option.

III. Bad Faith Implication in Defending High Exposure Cases

Traditionally, Plaintiffs' attorneys will focus on the following when it came to prosecuting a bad faith cases against a carrier:

1) insurer's failure to settle within the policy limits even when liability is doubtful in the event of large damages;

2) failure to settle without adequate investigation; and

3) will depose the front line adjuster, focusing on the specific manner in which the front line adjuster handled the file, facing substantial scrutiny on the individual decision-making process irrespective of the larger broader policies of the Carrier.

There is a growing trend for Plaintiffs to target the policy and procedures of the Carrier as a whole rather than the adjuster that handles the claim. Plaintiffs' attorneys place a microscope on all of the Carrier's policies and guidelines, suggesting that adjusters are provided strong incentives to or even force claims staff to deny policyholders the benefits in their policies. Specifically, it focuses on any incentives to claims handlers to deny claims and general policies that are geared toward increasing profits by doing so. This is why keeping the insured advised is particularly important.

In recent years, top level executives are also being deposed more often at length and forced to provide justification for almost every guideline surrounding claims handling, settlement determinations and decisions that lead to POTENTIAL exposure to the insured.

It is unfair for any entity, to suggest that insurance companies do not have the right to defend a claim when the insured is not at fault. It is worthwhile to look at how various states address what the Carrier's duty and how it is viewed by the Court.

A. **Illinois:**
The insured can assign a bad faith claim, but if there was a good faith defense in the underlying case, the Carrier likely has avoided bad faith. Illinois is generally known as a favorable state for the Carrier with regard to defending a claim with strong liability defenses, but exposure.

B. **Missouri:**
Missouri is an unfavorable state. Significant tort reform went into effect on August 28, 2017 that provides Carriers with a better ability to protect itself in the wake of Sham "Consent Judgments" and unreasonable time limit demands, but the general consensus is that high exposure verdicts with good liability defenses are not worth the potential repercussions in most cases.

C. **Texas:**
Insurers have a duty to act with ordinary care to settle a third party claim when a reasonable settlement demand is made within the policy limits. Failure to do so could result in a negligence action against the insurer for damages on an excess verdict. The duty is known as the "Stowers Doctrine," which requires the insurers to exercise the same degree of care that a person of ordinary care and prudence would exercise. The courts look to the terms of the demand and whether an ordinarily prudent insurer would accept it considering the likelihood and degree of the insured's potential exposure and excess verdict.

D. **Oklahoma:**
Insurance contracts carry an implied duty that an insurer will act in good faith and fair dealing not to deprive the insured of policy benefits. Insurers must give "faithful consideration" to the insured's interest by acting as if the insured alone were liable for the entire amount of the third party claim. ***Deelow v. Mid Century Insurance*, 2005 OK 48, 121 P.3d 1080, 1093.** Insurers are not required to settle if there is a legitimate basis to deny payment. *Hale v. A.G. Ins. Co.*, 138 P.3d 567.

It requires a clear showing that insurer unreasonably withheld payment through the examination of four elements: (1) Insured is covered under the liability insurance policy issued by the insurer and the insurer is required to take reasonable acts in handling third party claims against the insured. (2) Insurer's action was unreasonable under the circumstances. (3) Insurer failed to deal fairly and in good faith toward the insured in handling the third party claim. (4) The insurer's breach of the duty of good faith was the direct cause of damage incurred by the insured.

The primary inquiry is based upon what the insurer knew or should have known at the time it refused to settle. If there is a legally justifiable reason at the time of refusal, then there is no liability for a bad faith action. If there is uncertainty as to whether the insurer's actions were taken in bad faith, the reason of the insurer's conduct is determined by the jury.

E. Florida:

It starts with the basic proposition that when an **insurer** is handling claims against its insured, it "has a **duty to** use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business." *Berges v. Infinity Ins. Co.,* 896 So.2d 665, 668 (Fla.2004) (quoting *Boston Old Colony Ins. Co. v. Gutierrez,* 386 So.2d 783, 785 (Fla.1980)). This duty includes an obligation to **settle** "where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so." *Boston Old Colony Ins. Co.,* 386 So.2d at 785. Breach of this duty may give rise to a cause of action for bad faith against the **insurer**. *Cunningham* agreements under Florida law. These agreements involve the situation where there is not a previous excess judgment but an **insurer** and a third-party claimant enter into an agreement and stipulate to try the bad-faith issues first. The parties further stipulate that if no bad faith is found, the third-party claimant will **settle** for the policy limits, thus protecting the insured from exposure to an excess judgment. *Cunningham* agreements have been held by this Court to be the "functional equivalent" of an excess judgment. *Cunningham,* 630 So.2d at 182. This Court has explained:

In *Cunningham,* the court approved a procedure in which the parties could avoid the time and expense of going through a trial to obtain a final judgment. In following that procedure, the parties agree and the courts recognize that a stipulated final judgment has the same force and effect as a final judgment reached through the usual judicial labor of a trial when the parties agree that it shall. *United Servs. Auto. Ass'n v. Jennings,* 731 So.2d 1258, 1260 (Fla.1999). Under a *Cunningham* agreement, the **insurer's** actions protect the insured against an excess judgment.

A fourth recognized circumstance involves a claim not of the insured or the third-party claimant, but of the excess carrier, which may bring a bad-faith claim against a primary **insurer** by virtue of equitable subrogation under certain circumstances where the primary **insurer** has not acted in good faith. Under the doctrine of equitable subrogation, an excess **insurer** has the right to "maintain a cause of action ... for damages resulting from the primary carrier's bad faith refusal to **settle** the claim against their common insured."

F. California

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Rest.2d Contracts, § 205.) "The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement. [Citations.] The precise nature and extent of the duty imposed by such an implied promise will depend on the contractual purposes." (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818, 169 Cal.Rptr. 691, 620 P.2d 141.) Breach of the covenant of good faith and fair dealing exposes an insurer to breach of contract and tort damages. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 684, 254 Cal.Rptr. 211, 765 P.2d 373.) But "a breach of an insurance contract does not automatically subject an insurer to tort damages for **bad faith**." (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 194, 97 Cal.Rptr.3d 568.) An insurer's tortious "breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself." *529 (*California Shoppers Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 54, 221 Cal.Rptr. 171.) In simple terms, an insurer's tortious **bad faith** conduct is conduct that is unreasonable. (Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra,* ¶¶ 12:52, 12:224, pp. 12A–19 to 12A–20, 12B–4.)

IV. Reverse Bad Faith

Plaintiffs will continue to make policy limits demands in cases where they may or may not be warranted. It is imperative that any time a policy limits demand is received that it is forwarded to the insured. The insured may ask the Carrier to settle the case within the policy limits, but the Carrier should have the ability in conjunction with the insured, to make that decision by properly evaluating the claim and determine whether defending the claim is consistent with the insured's best interest. If it is determined that the case should be defended, the insured has an obligation to cooperate in that defense. There are times where the insured does not do so for a number of reasons and the Carrier is severely prejudiced in defending the claim.

Reverse bad faith allows for a cause of action against an insured, granting the insured affirmative relief for a frivolous or bad faith action. Cathryn M. Little, *Fighting Fire with Fire: "Reverse Bad Faith" in First-Party Litigation Involving Arson and Insurance Fraud*, 19 Campbell L. Rev. 43, 44 (1996). This is a potential opportunity for a Carrier to take an aggressive action if a fair and proper insurer-insured relationship is not maintained by the insured. Claims for reverse bad faith will require that the following elements be established:

(1) an insured owes his insurer a duty to act in good faith;
(2) the insured in bad faith acts, or fails to act;
(3) such bad faith act, or failure to act, by the insured interferes with the insurer's adjustment, investigation, defense, or settlement of a claim; and
(4) the insurer is prejudiced by the insured's bad faith conduct.

This was most often proposed in first party litigation cases where the insured has a direct cause of action against the Carrier. Given the prominence of various kinds of bad faith actions in third party actions, the amount of exposure associated with them, and often times, the involvement of the insured in directly or indirectly contributing to this growing trend, there is a movement to also apply this in third party litigation as well.

As one would expect, supporters and detractors exist for this equitable, albeit alternative concept for a legal system that seems to be moving towards a goal of compensation rather than justice. Some of the arguments made regarding the adoption of reverse bad faith as a cause of action include: (1) reverse bad faith is a proper cause of action because there is a "mutual obligation of good faith," (2) the insurer has a right to dispute coverage when a claim is considered fairly debatable; and (3) by recognizing the tort of bad faith in this context, it eliminates the unfair advantage created for the claimant by the insured in a third party action.

How issues are presented in a bad faith claim depends on which acts constitute bad faith by the insured. No one can dispute that in almost every insurance contract there is a mutual obligation to act in good faith. In first party litigation, states have noted that there is an unfair advantage created for the insured. ***Johnson v. Farm Bureau Mutual Insurance Company***, ***533 N.W.2d 203 (IA 1995).*** Yet many states are reluctant to allow this kind of action to proceed.

Parties opposed to adopting reverse bad faith argue the following points: (1) It is unnecessary because adequate alternative remedies are available to the insurer through court sanctions. ***Id****; (2)* "merely asserting the existence of that contractual relationship "without more" fails to give rise to the "exceptional level required for the imposition of tort liability.") ***In re Tutu Water Wells Contamination Litig*****., 78 F. Supp. 2d 436, 452 (D.V.I. 1999)**; (3) California permits the defense of comparative bad faith, ***California Casualty Gen. Ins. v. Superior Court,*** **173 Cal.App.3d 274, 283-84, 218 Cal.Rptr. 817, 822-23 (4 Dist.1985)**, and reasons that a breach of the covenant of good faith and fair dealing is essentially a breach of contract at the most fundamental level and therefore there is no need to recognize another cause of action in the form of reverse bad faith. ***Agric. Ins. Co. v. Superior Court*****, 70 Cal. App. 4th 385, 389-90, 82 Cal. Rptr. 2d 594, 595 (1999)**; and (4) the insured does not assume the same obligations undertaken by the insurer when they enter into an insurance contract, therefore they cannot bear the same risk of affirmative tort liability in the face of a breach of a "fiduciary-like obligation." ***Agric. Ins. Co. v. Superior Court*****, 70 Cal. App. 4th 385, 390, 82 Cal. Rptr. 2d 594, 596 (1999).**

The landmark Missouri case of ***Johnson v. Allstate Insurance Company,*** is an example of where an insured was directly responsible for the Plaintiff's injury, failed to cooperate effectively in the defense and ultimately received an assignment of a "bad faith claim" in which he retained a portion of the judgment. It is this kind of inequitable relief that has led the call for the Carrier to proceed under a theory of reverse bad faith to even the playing field. Otherwise, both the claimant and the insured could potentially profit from insured's own bad faith.

The failure to act by an insured can often times put a Carrier in a difficult position in defending the insured. Reverse bad faith is essentially stating the insured owes more to the Carrier then just paying a premium. If the law does not hold the insured accountable in the insured-insurer relationship, it can result in a systematic failure. It is only when the parties are both acting in mutual good faith that the insurer-insured relationship can be productive.

The failure of the insured to act, whether it be acknowledgment of service, cooperating with counsel or failing to work with the Carrier in the fact-finding process of the claim can prejudice both the insured and the Carrier, with the Carrier bearing a heavier burden. In prosecuting a reverse bad faith claim, it will be the burden of the Carrier to show that it has been prejudiced sufficiently and how the insured prevented the Carrier from properly defending the claim. Not receiving the insured's cooperation results in the Carrier not putting on an effective defense which results in larger settlements and/or judgments. The insured has a contract with the Carrier and should not be allowed to act in a way detrimental to the insured-insurer relationship, yet not be subject to an appropriate consequence.

V. Conclusion:

A Carrier must have the right to defend claims that should be defended even if there is a potential for excess verdict. The right has not been completely eroded, but it is becoming more difficult and the scrutiny on the decision making process is strict. As a result, the Carrier must have a thorough detailed evaluation process that includes the insured's involvement throughout. Every case is evaluated on an individual basis, but there is no more greater leverage in negotiating than being willing to try a case that should be tried.