CLM 2016 New York Conference
December 1, 2016
New York, New York

Adjuster training - Teaching "Good Faith" to prevent "Bad Faith," Including Practice Advice to Avoid Extra-Contractual Claims in the Claim Handling Process

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I. Definition of BAD FAITH

A. General Rules

"The general rule is that an insurer may be guilty of bad faith for failure to settle a lawsuit if, in its handling of a claim against the insured, the insurer does not exercise 'the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his or her own business'. . . . In executing this good faith duty of diligence, 'the insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person faced with the prospect of paying the total recovery, would do so.' The purpose of this rule is to protect the insured from any excess judgment that might result." Infinity Insurance Co. v. Berges, 806 So. 2d 504 (Fla. 2d DCA 2001) (quoting Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980)).

Bad faith is more than mistaken judgment, more than failure to comply with terms of the contract, more than an erroneous decision on coverage. The standard of conduct varies from state to state, and case law, statutes, and jury instructions often define improper conduct. For example, in addition to the Florida law cited above, in New York, the insurer's conduct must be egregious or in gross disregard of the interests of the insured. In California, negligence may be sufficient and the relevant question is what would a reasonable insurer have done. In Illinois, bad faith lies in an insurer's failure to give at least equal consideration to the insured's interests as to the insurer's own interests.

B. 1ST PARTY v. 3RD PARTY CLAIMS

1. **A third party bad faith claim** arises out of liability insurance. It is essentially a claim by the injured Plaintiff against the insurance company. The basis for the claim is that the insurer had an opportunity to settle the

claim within the liability policy limits, but acted unreasonably in failing to do so. An excess judgment is obtained against the insured and because of the insurance company's unreasonable action in failing to settle, the insurance company becomes liable for the full award of damages, unrestricted by the liability policy limits stated in the insurance policy. The injured third party is permitted to bring the third party bad faith claim directly against the first party's insurer.

2. **A first party bad faith claim is** a claim by the insured against his or her own insurance company. First party bad faith was not recognized under the common law. Various states have enacted statutes to create first party bad faith. In some states, there may be a "cure period" for the insurer pursuant to the statute. However, if a bad faith case is not resolved during any such cure period, and the insured prevails, then the insured may be permitted to recover attorney's fees and costs.

II. INSURER'S DUTY

The insurer must investigate the facts timely and adequately. The insurer must give fair consideration to a settlement offer that is not unreasonable. The insurer must settle, if possible where a reasonably prudent person faced with the prospect of paying a total recovery would do so.

III. HANDLING DEMANDS

A. DETERMINING IF A DEMAND IS NECESSARY

An insurer is not immune from bad faith exposure simply because the claimant has not made a formal demand within the policy limits.

B. COMPUTING TIME

There is no exact time frame for settlement demand to be reasonable or unreasonable. Demands with as short as a 10 – 30 day response time have been determined to be reasonable. This is factually dependent.

Claim handlers should be aware that unilateral offers to settle by a Plaintiff must be complied with in all material respects in order for the settlement to be effective. Courts in some states, including Florida, treat these demands as unilateral contracts, and in order to properly accept a demand there must be a "mirror image acceptance."

Moreover, in certain states where a statute permits a "cure period" following a timely demand, the insurer must both respond timely and, if curing, cure timely. Such a cure period allows an insurer a safe harbor period in which to pay the underlying claim and avoid unnecessary bad faith litigation. In Florida, that time period is 60 days from the filing of a civil

remedy notice pursuant to Florida Statute §625.155. Even if you do not intend to cure or resolve the claim, you must respond timely or bad faith may be presumed.

C. PROVIDE A DEFENSE TO YOUR INSURED IN A CLOSE CASE

An insurance company's duty to defend is broader and separate from the duty to indemnify. In many states, the duty to defend is determined solely by the allegations in the complaint, not the true facts. If the allegations in the complaint contain facts which could potentially bring the claim within coverage, the insurer must defend the entire suit regardless of the merits. Thus, it is often the best route, certainly in a close case, to defend your insured under a reservation of rights to later deny coverage.

D. NOT "TENDERING"

Tender has a specific legal definition. It is not merely the readiness, ability or offer to pay the money, but also the actual delivery of the sum to the person or entity who is to be paid.

E. FALLING INTO THE MULTIPLE CLAIMANT/INSUFFICENT LIMITS TRAP - GLOBAL SETTLEMENTS HELPFUL

In certain states, including Florida, where multiple claims result from the same accident the insurer must "1) fully investigate all claims arising from a multiple claim accident; 2) seek to settle as many claims as possible within the policy limit; 3) minimize the magnitude of possible excess judgments against the insured by reasoned claim settlement; and 4) keep the insured informed of the claim resolution process." See General Security National Insurance Co. v. Marsh, 303 F. Supp. 2d 1321 (M.D. Fla. Feb. 10, 2004) (holding that insurer had met such a burden and granting summary judgment for the insurer); Farinas v. Florida Farm Bureau, 850 So. 2d 555 (Fla. 4th DCA 2003) (bad faith was jury question where issues remained as to "whether Farm Bureau's quick settlement with three of the possible claimants was reasonable, whether Farm Bureau's rejection of global and other settlement options contemplated the best interests of the insured, whether Farm Bureau adequately investigated the facts of all of the claims, and whether Farm Bureau properly rejected advice of legal counsel and suggested settlement strategies proposed by Farm Bureau employees.").

IV. SET UPS

A. SETTING YOURSELF UP WHEN SEEKING ADDITIONAL INFORMATION

When seeking additional information, an insurer must keep in mind their good faith duty toward the insured. For example, Florida's bad faith statute obligates an insurer to act "fairly and honestly toward its insured," and "with due regard for her or his interests." §624.155, Fla. Stat. In Florida, this good faith duty is clearly described by the Florida Supreme Court in Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980):

> An insurer, in handling the defense of claims against its insured, 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. For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. . . . The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith.

Id. at 785 (citations omitted). "[T]he purpose of an insurer's obligation to act in good faith is to protect an insured from an excess verdict. . . ." Berges v. Infinity Ins. Co., 896 So. 2d 665 (Fla. 2004) (the court reaffirmed the principles announced in Boston Old Colony Ins. Co.). However, mere negligence or mistake is not enough to show bad faith.

There may be instances where further information is necessary to fully investigate and evaluate all the potential claims in order to determine what decision is in the best interests of the insured (for example, a multiple claimant/insufficient limits scenario). It is important to determine whether this additional information is necessary because certain courts, including in Florida, have held that "[w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations." Powell v. Prudential Property & Cas. Ins. Co., 584 So. 2d 12 (Fla. 3d DCA 1991). "Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause." Id. at 14. Thus, it is imperative to determine that there is a reasonable necessity for any additional information that is sought, keeping the best interests of the insured in mind at all times.

B. LAUNDRY LIST OF DEMANDS

1. NOT DOCUMENTING, DOCUMENTING, DOCUMENTING

If you didn't record it, it did not happen! Clear and well written letters and notes will assist you in deposition and in defending bad faith cases.

In certain states, in a bad faith case, the insurer has the burden to show that there was no realistic possibility of settlement within the policy limits based on the totality of the circumstances. See Barry v. Geico Gen. Ins. Co., 938 So. 2d 613, 618 (Fla. 4th DCA 2006). Without documentation at every step, it is difficult, at best, to demonstrate the claimant never intended to settle within the policy limits and/or that there was never an opportunity to settle.

For this reason, as well as many others, it is imperative to document everything that goes on with a claim, in the event that a bad faith lawsuit is filed.

2. DO NOT WRITE A LETTER, OR EVEN A LOG ENTRY, THAT YOU WOULD NOT WANT A JURY EXAMINING

Assume that your file will be reviewed by a third party, maybe even a judge and jury. So, dance like no one is watching; but write emails like they may be one day be read at a deposition.

Keep in mind that in a bad faith action, all materials contained in the underlying claim and related litigation file or material that was created up to and including the date of resolution of the underlying disputed matter, and which pertain in any way to coverage, benefits, liability, or damages may be subject to discovery. Even work product in the underlying case may be discoverable in the subsequent bad faith litigation.

In certain circumstances, attorney-client privileged communications are not discoverable. Genovese, M.D. v. Provident Life & Accident Ins. Co., 74 So. 3d 1064 (Fla. 2011). However, "under the 'at issue' doctrine, the discovery of attorney-client privileged communications between an insurer and its counsel is permitted where the insurer raises the advice of its counsel as a defense in the action and the communication is necessary to establish the defense." Id. at 4.

3. NOT COMMUNICATING WITH YOUR INSURED

The insurer "has a duty to advise the insured of settlement opportunities and the probable outcome of a lawsuit and to warn him of the consequences of an excess judgment so that he might take whatever steps are available for his own protection." Powell, 584 So. 2d at 14 (case remanded for submission to jury on issue of bad faith where insurance company failed to offer limits until 62 days after accident where driver struck pedestrians, liability was clear and damages were severe).

4. DON'T BURY YOUR HEAD IN THE SAND

The moral of the story is that insurers must be proactive in order to avoid bad faith. Time periods prescribing as few as 10 days to comply with a policy limits demand have led to bad faith awards far exceeding the policy limits. For example, in Hartford Accident and Indem. Co. v. Mathis, 511 So. 2d 601 (Fla. 4th DCA), rev. denied, 518 So. 2d 1275 (Fla. 1987), the court noted its displeasure with a 10 day demand period, but nevertheless affirmed a bad faith award of $2,941,698.47 where the policy limits had consisted of $25,000 in liability limits and $1,000 in medical coverage. The court observed that it was clear that it "was a horrendous injury including brain damage to a minor," that liability was "nearly absolute," and that the policy limits were extremely low. Id. at 602. However, because the insurer failed to respond for a month to an oral demand for the policy limits, never communicated the demand to the insured,

and failed to meet the ten day time limit of the written demand, the court affirmed the nearly $3 million verdict on a policy that provided only $26,000 in coverage.

So, be a tiger, not an ostrich!