CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™
ADVANCING ETHICS, COOPERATION AND EDUCATION

2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 4: Friday, April 11, 2014 (10:25 am – 11:25 am)

PROTECT US!

What The Carrier Expects And Needs to Know From Its AttorneysIn Bad Faith Litigation

I. Communication Between the Attorney and Carrier

During the litigation of a claim an attorney can be intimately familiar with a case but may not effectively communicate what needs to be done from a litigation perspective to protect the carrier's insured and the carrier itself. For example, Missouri, a notoriously plaintiff-friendly state for bad faith litigation, has essentially provided a framework for plaintiff attorneys to follow in trying to set up a bad faith claim. Specifically, plaintiff attorneys will try to skew the facts to show one or more of the following:

(1) The insurer concluded that insured had no coverage before investigating, while at the same time, coverage has been provided to other insureds on similar facts, and by doing so;
(2) The insurer denied coverage to persons injured in the accident before full investigation;
(3) The insurer accepted legal conclusions from outside counsel that the insured had no coverage without legal citation or reference;
(4) The insurer ignored the insured's financial interests and made no inquiry as to the extent of the plaintiffs' injuries or the risk the insured would be subjected to if a suit were carried forward; and
(5) the insurer rejected a settlement offer within policy limits without consulting the insured or considering the damage to her interests—even while considering defending under a reservation of rights, thus implying that coverage was in doubt.

***Shobe v. Kelly*, 279 S.W.3d 203, 211 (Mo. Ct. App. W.D. 2009).**

Although an "honest mistake" regarding an insured's belief that a valid defense to a claim exists may bar such a claim, the requisite element of "bad faith" is established when an insurer "ignor[es] that a verdict could exceed policy limits" or fails to recognize the "severity" of a claimant's injuries. Courts also weigh the relative strength of the defense against the probability that a verdict will exceed policy limits. ***See Shobe v. Kelly,* 279 S.W.3d 203, 211 (Mo. Ct. App. W.D. 2009).**

If there is a lack of communication on these issues between the carrier and its attorney, by the time they are resolved, it could be too late and lead to catastrophic results, including a bad faith claim against the carrier. It is absolutely critical from the beginning of the assignment that there is a clear framework and understanding as to the "what," "how" and "when" of communications between the carrier and attorney to ensure the carrier is properly advised of all issues. The carrier often does not have the benefit of time to fully investigate all the nuances of the claim when a policy limit demand is pending. The attorney can assist the carrier in protecting both the insured and the carrier through detailed evaluation done in conjunction with the specialist assigned to the claim.

II. What Does The Carrier Expect To Hear From Its Attorney To Evaluate A Claim That Could Have Bad Faith Implications

There must be open lines of communication between the attorney and the carrier from the outset. A simple analysis of liability may not be enough to justify defending a case in the wake of policy limit demand. Courts have found that "bad faith" existed even if an insurer's officer claimed a good faith belief that the insured was not liable, as did the lawyer it retained. The advice of the insurance company's own adjusters as well as the advice of defense counsel are important factors to consider, but not conclusive. ***O'Neill v. Gallant Ins. Co.,* 329 Ill. App. 3d 1166, 769 N.E.2d 100 (2002).**

It is absolutely vital that the carrier receive clear, well developed analysis from its attorney in order to evaluate a claim in its earliest stages and avoid potential traps by Plaintiff's attorney, such as unreasonable time limits demands. If an attorney or the carrier becomes fixated on the issue of liability only, and does not recognize the potential damages associated with the claim, or vice versa, the consequences could be severe. The carrier must have a detailed analysis on both items along with the potential outcomes if the claim is to be defended. It is often helpful for the carrier to set out its parameters for what is involved if policy limits are demanded or bad faith litigation is threatened, but it is the attorney's responsibility to provide the information sought in a clear, concise manner.

III. How To Prepare A Claims Specialist For A Deposition In A Bad Faith Case

An award of $5.8 million in compensatory damages and $10.5 million in punitive damages was affirmed in landmark case with the Court of Appeals noting that generally "bad faith" can be proven by evidence of (1) an insurer's failure to fully investigate and evaluate a third-party claimant's injuries, (2) an insurer's failure to recognize the severity of a third-party claimant's injuries, (3) an insurer's failure to recognize the probability that a verdict would exceed policy limits, (4) an insurer's refusal to consider a settlement offer, and (5) an insurer's failure to advise the insured of the potential of an excess judgment or the existence of a settlement offer. Looking to that case, a claims specialist must be prepared to show under vigorous cross-examination that he/she:

1. had a sufficient foundation to recognize the extent of Plaintiff's injuries and the probability that the claim would exceed the insured's policy limits;
2. sufficiently investigated the claim to respond to the demand in accordance with insurance industry standards and its own good faith claim handling manual; and

3. kept the insured fully advised, including apprising the insured of the likely exposure for an excess judgment, and right to retain counsel

***Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655 (Mo.App. W.D. 2008)** If the claims specialist is not extensively prepared in each area, it increases the likelihood of a negative result for the carrier. This must start from day one. When the attorney begins communicating with the carrier, it is always wise to pick up the phone and have an actual conversation. In every bad faith case, "Exhibit A" will be the claims specialist's file that will likely contain e-mails, which at the time they were created seemed innocuous, but can later become the backdrop for a large damages award against the carrier. It is also important for the claims specialist to effectively communicate in a deposition why each decision was made at the time it was made, what were the mitigating factors and why the claims specialist decided on a particular course of action. It is imperative for the attorney to conduct multiple mock depositions in order to provide a level of comfort for the claims specialist to handle in these extremely difficult cases.