2019 New York Conference
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THE EXTRA-CONTRACTUAL YEAR IN REVIEW: ROUNDTABLE TWO

Presenters and participants will review the most significant caselaw, administrative, and regulatory extra-contractual decisions from across the country in 2019 to engage participants and attendees in a compelling discussion of industry best practices and claim handling procedures in respect to the same.

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, examining fresh ideas and dynamic defenses to EC claims and litigation, and achieving collaborative organizational implementation of the same 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 change the way we do things, explore better options, step out of our comfort zones, and try doing things differently.

We should endeavor to rethink extra-contractual law and litigation by exploring its economic costs and financial impact on insurers and policyholders, examining fresh ideas and dynamic defenses to EC claims and litigation, and achieving collaborative organizational implementation of the same to maximize successful outcomes and results.

RECONSIDERING PREVAILING PRACTICES

When a claim is received, the insurer attempts to determine which claims are valid. The insurer has a duty to its policy holders to pay valid claims. But the insurer has an equal duty to its policy holders to deny invalid claims. These two duties are different sides of the same coin and are equal in their importance to the ability of the insurer to fulfill the promises made by the insurer to the honest policy owners.

What is the difference for an insurer between acting in good faith and acting in bad faith? A review of the current case law establishes that the many attempts to define when an insurer has acted in bad faith offer little consistency and that there is no universally accepted definition of the term.

The term "bad faith" applies to something worse than simply being negligent. It is bad behavior combined with a bad intent and scholars agree that bad faith requires a showing of more than that the insurer did something wrong. An accusation that an insurer acted in bad faith requires more than a showing that the insurer did not act in good faith.[1]

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[1] There is no bad faith if the insurer did not act "unreasonably" or without proper cause. In some states this defense is handled through eliminating the elements of the insurer's claim. See, Adams v. Auto Owners Ins. Co., 655 So.2d 969, 971 (Ala. 1995), and Pickett v. Lloyd's (A Syndicate of Underwriting Members), 621 A.2d 445, 450 (N.J. 1993).

In other jurisdictions, a bad faith claim can be defeated by showing there was a "genuine dispute" or the claim was "fairly debatable." See, Chateau Chamberay Homeowners Association v. Associated. International Ins. Co., 90 Cal.App.4th 335, 346 (2001); Griffin Dewatering Corp. v. Northern Ins. Co. of N.Y., 176 Cal.App.4th 172, 209 (2009); Lunsford v. American Guarantee & Liability Ins. Co., 18 F.3d 653 (9th Cir. 1994) (applying California law); and, Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1275 (Colo. 1985).

Even if there is no state law, this defense should be raised because it is common sense. If there was no legal precedent on the coverage issue and the reason the insurer took the position it did was sound, the insurer's position cannot have been unreasonable.

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 caused courts and legislatures to create remedies for the parties injured by those bad acts. Consistent with this principle, the foundational element of a bad faith claim should be a showing of actual bad intent by the insurer. For example, the 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.