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"Bad Faith Discovery and Related Litigation Strategy"

I. Litigation Strategy in Defending First Party Bad Faith Insurance Claims

A. Venue

Venue selection, one of the first strategy decisions to make, is crucial in bad faith litigation as the forum selected can affect the course of the litigation. In deciding the most advantageous forum for your client, certain factors should be considered.

First, determine if a judge or jury would be better to rule on the complexity of the bad faith issues. See generally Although in some jurisdictions, a jury decides the bad faith issue regardless of whether in state or federal court (FL, CA, NY, IL, TX to name a few), in certain state courts, such as Pennsylvania, the trial judge decides the bad faith count.

Second, consider whether it is more advantageous to have federal or state law govern the unique, complex issues involved in bad faith litigation, including discovery issues, as discussed in greater detail below. This is further important for purposes of bifurcation[1] and disposition of pretrial motions.[2]

Further, as with defending against any claim, consider the composition of the jury pool. Insurers generally avoid "liberal" jury pools. Federal juries will likely be more diverse. Attorneys should also consider the pace with which the litigation may be heard in federal versus state court. Generally, federal court dockets result in a speedier disposition.

Although the decision is subjective and case specific, the above considerations assist insurers in determining whether it is advantageous to seek venue transfers within state court, or remove the case to federal court where appropriate and permissible.

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[1] Even though appropriate in state court, certain federal courts will deny motions to bifurcate. Consugar v. Nationwide Ins. Co. of America, 2011 WL 2360208 (M.D. Pa. June 9, 2011) (court refused to bifurcate UIM case from bad faith claim as there was no such requirement in federal court despite procedure being appropriate in state court).

[2] Insurers may have greater success with dispositive motions in some forums rather than others. Getting out of a bad faith case prior to trial is an efficient and cost-effective way of disposing of the bad faith claim.

1. Removal Issues

If the parties are of diverse citizenship, and if the amount in controversy exceeds $75,000, a bad faith action may be removed to federal district court. See 28 U.S. C. § 1332(a). In bad faith cases it can be difficult to determine whether the claim for damages meets the jurisdictional threshold, especially where plaintiff's complaint is silent to the amount.

Courts generally require defendants to establish by a preponderance of the evidence that the amount in controversy exceeds the jurisdiction amount. Wilson v. Hibu Inc., 2013 WL 5803816 (S.D. Tex. Dec. 30, 2013). Merely because plaintiff may demand, or recover, more than the federal jurisdiction amount after removal is not sufficient to support federal jurisdiction. Speedway Super America, LLC v. Dupont, 933 So. 2d 75 (Fla. 4th DCA 2006). Courts will further not base federal jurisdiction solely on claims for punitive damages if plaintiff acted in good faith in asserting that the amount in controversy was below the federal jurisdiction amount. Id. Where the jurisdictional amount is established, remand is appropriate if a plaintiff can establish that his recovery will not exceed the jurisdictional threshold to a legal certainty. Id; see also Frederico v. Home Depot, 507 F.3d 188 (3d Cir. 2007).

Plaintiff may seek to preclude removal by stipulating that the claimed damages do not exceed $75,000. By contrast, defendant may also request plaintiff stipulate that the amount in controversy will not exceed $75,000.[3] In order to be successful, this stipulation or affidavit should be filed prior to removal. 2013 WL 5803816, at *3 (defendant successfully argued plaintiff's filing her post-removal affidavit in reliance on Texas Rule of Civil Procedure 47 was misplaced and the post-removal affidavit does not mandate remand).

Plaintiff may further seek to defeat diversity jurisdiction and preclude federal removal by joining the insurer's employees. However, in some instances the joinder of an insurer's employees to defeat diversity of citizenship jurisdiction may be fraudulent and fail to defeat federal court jurisdiction . Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256 (5th Cir. 1995).

B. Severance, Stay of Discovery, and/or Bifurcation of Trial

Bifurcation is an effective strategy utilized in defending bad faith claims in order to ensure the efficient and fair resolution of multiple claims during litigation. Richard McMonigle, Jr., Insurance Bad Faith in Pennsylvania § 7:19 (15th ed. 2014).
If necessary and permitted, bifurcation is strongly encouraged in bad faith litigation and generally sought by insurers for two reasons. Id.

First, bifurcation is necessary to prevent undue prejudice to the insurer as the insured will likely seek to obtain and introduce documents irrelevant to the underlying

[3] Such a stipulation capping damages can benefit the insurer as it compels plaintiff to clarify the amount in controversy earlier in the litigation.

claim. See id. Secondly, insurers seeking to bifurcate bad faith from the underlying contractual claims advances the interests of judicial convenience and economy by streamlining discovery and potentially eliminating the bad faith claim through motion practice.

Although severance and bifurcation is an effective strategy in defending the bad faith claim, courts have been inconsistent in ruling on motions to bifurcate. Some courts stay bad faith claims from the underlying contract claims until the contract claim is resolved, reasoning that the issues and discovery accompanying each claim are too distinct. For instance, "UIM claims require a determination of liability and assessment of the plaintiff's injuries, where the process that the insurer went through in investigating plaintiff's claim is not relevant to that issue. Moninghoff v. Tilet and Allstate Insurance Company, No. 11-Civi-7406 (E.D. Pa. June 27, 2012). Courts have also stayed bad faith claims where the information relevant to a bad faith inquiry may be confidential and proprietary in nature and prejudice the insurer during the litigation of the underlying contract claim. Dunkelberger v. Erie Ins. Co., No. 2010-01956 (Lebanon County, Jan. 24, 2011). In addition to the potential prejudice that may occur, courts have stayed the bad faith claim due to concerns over unnecessary time and money that will be spent. Procopio v. Government Employees Ins. Co., 433 N.J. Super. 377 (App. Div. 2013); see also Richard McMonigle, Jr., Insurance Bad Faith in Pennsylvania § 7:19 (15th ed. 2014).

To the contrary, courts have denied an insurer's motion to bifurcate where the potential for prejudice is minimal and marginal conservation of time and money would result if the matter were bifurcated. AAF-McQuay, Inc. v. Northbrook Property and Cas. Co., 1998 WL 1978562 (E. D. Tex. 1998). Even where courts have acknowledged potential prejudice, courts deemed bifurcation unnecessary where the potential prejudice can be minimized by proper jury instructions. Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc., 78 Cal. App. 4th 847 (Feb. 28, 2000). Other courts have further denied bifurcation motions where discovery requests for the contract and bad faith claims overlapped, ruling that issues concerning the proprietary nature of information discovered could be addressed with a confidentiality agreement. Frederick v. Emily's Inc. v. Westfield Grp., 2004 U.S. Dist. LEXIS 17274 (E.D. Pa. Aug. 27, 2004).

In Florida, courts have specifically stated that the bad faith action cannot commence until the liability of the uninsured tortfeasor and damages have been established, regardless of whether the breach of contract and bad faith actions are brought together or separately. Blanchard v. State Farm Mut. Auto Ins. Co., 575 So. 2d 1289, 1291 (Fla. 1991). Similarly, courts in other jurisdictions have also required severance where the insured is unable to prevail on the bad faith claim without first establishing the insurer is liable under the insurance contract. In re Allstate County Mut. Ins. Co., 447 S.W. 3d 497 (Tex. App. Houston 1st Dist. 2014)(court required severance where insured alleged insurer failed to make a good faith settlement offer).

Ultimately, motions to bifurcate are more likely to succeed where there is not significant overlap of issues relevant to both the underlying contractual and bad faith claims, the potential prejudice to the insurer is significant, and the insurer is able to

demonstrate that separate witnesses and materials would be necessary to defend a contemporaneous trial. Further, even where bifurcation is denied at the earlier stages of litigation, the insurer should seek to file a motion *in limine* to bifurcate the claims at trial.

C. Discovery Requests and Responses

Regardless of whether the claims at issue are bifurcated, it is essential for the insurer to effectively and strategically manage discovery pertaining to the underlying contractual claim and the bad faith claim to ensure the insured's discovery requests are relevant and not seeking privileged information.[4] The insurer should challenge those discovery requests that are vague, overly broad, privileged and otherwise not relevant to the claims. In propounding their own discovery requests, insurers should engage in early and aggressive written discovery, including contention interrogatories, to posture the case for a successful dispositive motion. Such direct discovery requests requires the insured to address and set forth the details of alleged bad faith and increase the likelihood the bad faith claim will be dismissed earlier in the litigation.

D. Using Experts to Prove Bad Faith

Generally, expert testimony is not required in order to maintain a bad faith action. Although not required, insureds regularly utilize "bad faith experts". Caro v Sharp, 2003 WL 21354602 (Tex. App. June 12, 2003); Berg v. Infinity Ins. Co., 896 So. 2d 665 (Fla. 2004). In determining if it is necessary to offer expert testimony on bad faith, consider the complexity of the bad faith issue and whether a judge or jury is deciding the bad faith claim.

Some courts have precluded expert testimony regarding whether an insurer acted in bad faith finding that a reasonable juror possesses the requisite knowledge to assess the bad faith allegation, which is neither complex nor scientific. Schifino v. Geico General Ins. Co., 2013 WL 2404115 (W.D. Pa. May 31, 2013). Courts have further precluded experts from testifying where the testimony on the issue of bad faith did not assist the trier of fact in understanding the evidence or determine a fact in issue. Denison Custom Homes, Inc. v. Zurich American Ins. Co., 2005 WL 5994166 (S. D. Texas 2005). Even where an expert is permitted to testify in a bad faith suit, his or her testimony may be limited to the subjects of industry-standard claims-handling procedures yet excluded on the issue of bad faith. Denison, at *2.

II. Discovery in Bad Faith Litigation

One of the challenges facing insurers is the general broad scope of discovery. Discovery requests directed to insurers in bad faith cases are no exception, requesting, *inter alia*, the insurer's claim file, claims manuals and guidelines, policies, and

[4] Addressed below is a brief discussion of how various jurisdictions have handled certain discovery requests in bad faith litigation, however it is also important to emphasize the importance of devising an early strategy to handle and manage discovery requests related to bad faith claims.

information pertaining to other claims. However, some of these documents may not be relevant to the particular claim, and should be handled accordingly.

A. Claim Files, Manuals, Training Materials

Although an insured's claim file may be discoverable, certain jurisdictions permit the work product doctrine to limit plaintiff's attempt to discover portions of an insured's claim file. Shaffer v. State Farm Mut. Auto. Ins. Co., 2014 U.S. Dist. LEXIS 30436 (M.D. Pa., Mar. 10, 2014); *see, e.g.*, Robertson v. Allstate Ins. Co., 1999 U.S. Dist. LEXIS 2991, at *3 (E.D. Pa., Mar. 10, 1999) (finding that plaintiff could discover claim file in bad faith case, but applying the work product doctrine to limit the plaintiff's attempt to discover "the unredacted UIM claims file and all documents associated with the file"). However, not all jurisdictions have permitted an insurer to utilize the work product doctrine in limiting its production of their claim files. Cozort v. State Farm Mutual Auto. Ins. Co., 233 F.R.D. 674, 676 (M.D. Fla. 2005)(holding claim file generated up to date underlying matter resolved was discoverable in first party bad faith action). Certain state courts have held that first party bad faith claimants are entitled to discovery of all materials contained in the underling claim and related litigation file up to the date of the resolution of the claim. Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121, 1128-30 (Fla. 2005) (finding insurers are required to produce claim file regardless of whether it may be considered work product because it is the only source of direct evidence on issue of insurance company's handling of the claim).

Regarding claims manuals, guidelines and training materials, some courts have ruled that insurers are entitled to have some topical and temporal limitations set on the disclosure of claims manuals and other training materials. Stephens v. State Farm Fire & Cas. Co., 2015 U.S. Dist. LEXIS 48024, at * 10 (M.D. Pa., April 13, 2015)(insurer instructed to provide those policy provisions for only the years at issue in the lawsuit, and not the four to five year period of disclosure requested by plaintiff).

Various courts have also ensured plaintiff first establish a connection between the claims manuals and the subject claim before permitting discovery of claims manuals. Cont'l Ins. Co. v. Tollman-Hundley Hotels Corp., 636 N.Y.S.2d 319 (N.Y. App. Div. 1996)(court permitted discovery of claims manuals after plaintiff sought to establish that the insurer did not adhere to its own procedures when resolving a claim and thus, acted unreasonably; see also Safeco Ins. Co. of Am. v. M.C.E.S., Inc., 2011 WL 6102014 (E.D.N.Y. Dec. 7, 2011)(permitting discovery when claims procedures were tied to a particular claim).

The insurer should further attempt to limit disclosures to those portions of the claim manuals applicable only to the handlings of the claim at issue. Kaufman v. Nationwide Mutual Ins. Co., 1997 U.S. Dist. LEXIS 18530, at *2 (E.D. Pa., Nov. 12, 1997) (requiring insurer to produce information contained in manuals to the extent that information concerns procedures used by employees who directly handled plaintiff's claims).

In addition to relevance objections, if applicable, the insurer should seek protection of claims manuals and guidelines asserting they are trade secrets. See, e.g., Fla. Stat. § 90.506. In asserting this and other applicable privileges, the insurer must provide evidentiary support.

As the scope of discovery of claims manuals and guidelines is still somewhat unpredictable, insurers should proactively evaluate claims practices and policies, ensuring that the policies unequivocally demonstrate, *inter alia*, the insurer does not favor their interests over the insured and the insurer's employees continue to act reasonably in handling claims. Insurers should further ensure the manuals and guidelines cannot be misconstrued in the event they are produced, reducing any potential exposure to bad faith allegations.

In the event the insurer must produce claims manuals or guidelines, the insurer should seek a protective order or confidentiality agreement when producing its claims manuals to prevent general access to these materials.

B. Prior Claims/Lawsuits

In addition to privileged portions of an insurer's claim file not being subject to discovery, some courts generally refuse to permit discovery of previous lawsuits filed against insurance companies concerning the disputed policy provisions at issue in the current bad faith litigation. McCrink v. Peoples Benefit Life Ins. Co., 2004 U.S. Dist. LEXIS 23990 (E.D. Pa. Nov. 30, 2004). Federal courts in Pennsylvania further refuse to permit discovery seeking information regarding all bad faith cases brought against defendant as it outweighs the likelihood of finding relevant material. Id. at *20-21. The court reasoned most of this information is likely to be irrelevant, particularly because insurance litigation rests upon particular factual circumstances, which are likely to differ significantly from case to case. Id. at *21.

C. Evaluations, Impressions, Conclusions, Opinions of Insurance Adjuster

Mental impressions and opinions of a party and its agents are not generally protected by the work product doctrine unless they are prepared in anticipation of litigation. Keefer v. Erie Ins. Exch., 2014 U.S. Dist. LEXIS 29282, at *11 (M.D. Pa., Mar. 7, 2014).[5] Consequently, it is imperative to determine when and why a document was created. Where no evidence has been provided demonstrating when litigation was reasonably anticipated, courts generally permit plaintiff to inquire into the adjuster's opinions, mental impression, and conclusions that he or she formed while investigating the claim in the ordinary course of business and not formed with litigation reasonably

[5] Some courts have held that documents created after the filing of a bad faith complaint may constitute work product. Lane v. State Farm Mut. Auto. Ins. Co., 2015 U.S. Dist. LEXIS 64679, at *11 (M.D. Pa., May 18, 2015) (finding mental impressions of insurer's employees recorded after filing of complaint constitute work product).

anticipated. Id. at *12-13. However, once the breach of contract or bad faith litigation has commenced or been noticed, discovery of those portions of the insurer's claim file created after suit may be protected from discovery.

D. Scope of Insurance Adjuster's Testimony at Deposition

Regarding the scope of an insurance adjuster's testimony in a bad faith suit, courts will permit plaintiff to inquire into the processes used to investigate plaintiff's claims and an insurer's policies for handling claims. Keefer v. Erie Ins. Exch., 2014 U.S. Dist. LEXIS 29282, at *10 (M.D. Pa., Mar. 7, 2014). However, certain jurisdictions have recently narrowed the scope of plaintiff's questioning, permitting the deposition of an insurance adjuster to proceed insofar as the questions are limited to the factual details of the insurer's investigation and evaluation of insured's claim. Rau v. Allstate Fire & Cas. Ins. Co., 2015 U.S. Dist. LEXIS 69466 (M.D. Pa., May 29, 2015). Where questioning goes beyond the factual details and seeks information concerning insurer's work product made in anticipation of litigation, plaintiff goes beyond the scope of discovery. Id.

E. General Considerations and Suggestions

At all times, the insurer, insurer's employees, and counsel should treat every document, correspondence, as if it may be introduced into evidence, as it has the potential of becoming a trial exhibit. Always be professional and act reasonably during claims handing and throughout the litigation. Even the mere appearance of impropriety should be avoided. Insurers should also be aware of the conduct that may expose them to alleged bad faith. In first party bad faith claims, the focus is generally on the investigation, timing and any delay of payments and communications, and the final claim decision and related basis provided. Further, be aware of the corporate representative verifying those documents produced in discovery to ensure they are the best corporate individual to do so.