

Protect Yourself Against Bad-Faith Allegations

By Douglas J. Kent

Adjusters and investigators involved in the insurance industry today must fully recognize the significant increase in litigation, including "bad-faith" assertions that the insurer or its agents handled a claim improperly. Those handling insurance claims must protect against allegations of bad-faith by a plaintiffs attorney whenever a claim is denied. Most claims for bad-faith allege that 1) the insurer handled the claim improperly, or 2) analyzed the coverage provided by the insurance policy incorrectly.

Some states require that the insurer or its agents act with malice or ill-will to be liable for bad faith. In other jurisdictions, the insurer can be liable if the claim is simply handled negligently. Failure to manage the claim in good-faith or to properly document that the claim was managed in good-faith can result in significant awards over and above the insurance company's policy limits as well as bad publicity, which can ultimately have a disastrous effect on the insurance company's business. Insurance adjusters and investigators can defeat or limit bad-faith claims by good-faith claims handling.

The potential for bad-faith problems begins with notice of the claim. The initial review of the coverage must be complete and accurate including an analysis of the actual policy at issue. The insured also needs to be advised in writing of the insurance company's coverage position, such as a reservation of rights or a denial. A prompt and thorough investigation must be done within the required time, which is typically 30 days but varies by state and can be as short as 15 days. It can sometimes be longer if a written explanation is provided. This can prevent arguments about unfair claim practices.

There continue to be instances where an insured or his attorney try to set up a bad-faith claim: by creating confusion or disagreements between the adjuster and the investigator by asserting that one of them did not do their job properly; by creating miscommunications or delays, such as sending letters to a different company address, which practically guarantees delays; or by appearing to be fully cooperative, while being indirectly unresponsive or reticent. The insured may also try to impose unreasonable time limits so failure to meet a deadline can be used to their advantage. All of these are red flags and should signal the adjuster to keep tight control with greater follow through and documentation of all activity.

By doing so, you protect yourself and the insurance company from a Court finding that you acted in bad-faith. In one recent case, the Court ultimately found that the insurance company had incorrectly denied coverage and was ordered to pay the original claim. However, the prompt, proper and appropriate investigation by the insurance company was deemed to be in good-faith so they did not have to pay any punitive or extra contractual damages.

Adjusters also face fraud dilemmas and the related bad faith exposure in different situations: Should insurance fraud be asserted against the insured as a basis to deny the claim if you suspect he set his house on fire? Fraud is a serious accusation and difficult to prove (the insured will probably assert bad-faith if the claim is denied on the basis of fraud), but must be investigated and considered nevertheless.

The first step is to review the policy language on the fraud exclusion. A detailed factual investigation by an investigator and a qualified expert must then be conducted. The fire scene must be investigated carefully and thoroughly with photos in this C.S.I./Tera. Any discussions with witnesses must be thoroughly documented, as well as any refusal to give a statement. Tape-record the interview if possible; the person's consent is required in many states. A tape-recording will limit vulnerability to the bad-faith setup to a large extent because disputes regarding the questions and answers in the interview will be limited.

At the end of the investigation, the insured should be given an opportunity to respond, which also should limit bad-faith exposure. The final decision regarding the claim should be made only after a detailed conference between the insurance company's adjuster, legal counsel, the investigator and the expert(s) analyzing the evidence. Document each step along the way to show a methodical, unbiased, and thorough investigation. This will limit the bad-faith argument that parts of the investigation never occurred because they are not documented in the file.

Some points to remember:

- Evaluate any coverage issues that exist as soon as possible.
- Advise all insureds of the insurer's position in writing with the appropriate letter(s).
- Immediately begin a thorough, systematic investigation and evaluate all of the facts.
- Give the insured's interest in the claim equal consideration as to the insurer's interest.
- Document and date all unsuccessful attempts to get information from anyone as well as all refusals or failures to provide information.
- Document the claim file with details for the basis of the evaluation without any personal comments, and comply with all of the insurance company's standard procedures.
- Don't delay; instead, aggressively follow-up on any remaining issues involved in the claim until it is completely resolved and a letter of conclusion is sent to the insured.
- Consider paying claims even in instances where there is no settlement demand and/or when the final claim amount may be in dispute even when you are not required to do so in your jurisdiction.
- Determine early in the claims process if there are any excess carriers and keep them informed of all developments.
- Documentation should be clear and concise, with sufficient explanation so that a jury could understand the investigative steps taken and the basis for the insurer's position.
- Respond to all settlement demands within any time deadlines or advise them in writing why the time deadline is unreasonable.
- Send an excess letter to the insured, the insured's personal counsel, or any other person as required by the jurisdiction if 1) the requested damages in the Complaint are in excess of the policy limits; 2) the settlement demand exceeds the policy limits; or 3) the insurer or defense counsel sets the value of the case above the policy limits and the claim cannot be settled.
- Obtain the advice of experienced counsel.

It's impossible to entirely eliminate bad-faith allegations in today's society, but it is possible to prepare an effective defense against any such allegations through good claims file management. If you are careful to document that you did the right thing at the right time, you should achieve the best possible result.

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