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Ten Mistakes Plaintiffs Lawyers Make on Insurance Bad Faith Cases

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There are some wonderful insurance bad faith cases out there. Cases where insurance company wrongdoing will allow your seriously injured client a chance to recover fair compensation. However, there are many pitfalls on the road to successfully resolving an insurance bad faith claim.

I should note at the outset that "bad faith" doesn't require bad intent or motivations, but really refers to an insurer's failure to act in good faith. For convenience I will use the term "bad faith" for shorthand purposes in the article. Also, bad faith can occur in both the first and third party context. This article focuses on the third party setting.

After 25 years of handling personal injury cases, and a significant number of insurance bad faith cases, I can identify a number of mistakes in handling bad faith cases. I know about these mistakes because I have made each of them at one time or another. Here is Bob Dawson's "Top 10 Mistakes" that plaintiff's lawyers make on insurance bad faith cases.

Mistake One: Too Short a Policy Limits Time Deadline

The most common insurance bad faith claim occurs when the third party insurer fails to pay a policy limits demand on a case where the damages are substantially greater than the insurance policy limits. One way to trigger the insurer's duty to protect its insured is to give the insurer a chance to pay its policy limits and receive a full release for its insured. The most common way to handle this is to give appropriate information to the insurer, to offer to settle for policy limits, and to put an expiration date on the policy limits offer.

The most common bad faith question I receive from other lawyers is "How long should I give the insurance company to accept a policy limits offer? Some attorneys say two weeks is enough, others say 30 days. There is no absolute answer to this question. I once took a bad faith case where the prior attorney gave the insurer five working days to accept the policy limits offer.

Many attorneys work on a case for months or years and then give the insurer 30 days before the demand expires. Thirty days may be long enough in some circumstances, in others it may not be. But why take the chance? If you give the insurer 30 days the insurer will probably be able to hire an expert who will testify that on your case 30 days was not a reasonable time period. The argument is probably without merit but you will have to spend time and money to defeat it. You may also face an argument that goes like this, "Ladies and gentlemen, the plaintiff's lawyer

worked on the case for 18 months. He gave the insurance company only 30 days. Does that seem honest and fair?"

Consider giving the insurer more than 30 days to consider the policy limits demand. If you do so it will be difficult for the insurer to hire a credible expert to defend its failure to act within the time period. For example, if you give the insurer 120 days, no credible expert will be able to testify that the average time for a policy limits demand is as long as 120 days. By giving more than the average time period I show that my client and I are acting reasonably, something that may be important to the jury who later hears the bad faith case.

Mistake Two: Less Than Full Candor

In an adversarial system lawyers for both side are expected to operate under the rules. In some circumstances a lawyer may ethically shield unfavorable information about a client from discovery and/or use in the underlying tort trial. However, in the bad faith case the information you failed to disclose may come to light. The information will be a part of your file and your file may be discoverable. The bad faith jury may look at the lawyer "who hid information" with suspicion.

In the case where the damages are great and the insurance coverage inadequate, consider providing access to all the appropriate information about your case. I provide releases so that the insurer can obtain the information to evaluate the case. I then write and say, "what other information do you need?" I also tell the insurer how tough a time my seriously injured client is having and ask the insurer to act as quickly as it can. Again, I want to show that my client and I are acting reasonably.

Mistake Three: Nasty Letters

I once saw a jury in a bad faith case return a defense verdict. Although it wasn't my case, I had a chance to interview the jurors. They basically said that the insurance company had not done what it should (i.e. the insurer acted in bad faith under the judge's instructions) but the jurors gave a defense verdict anyway because the plaintiff's lawyer "wrote nasty letters right out of the box". I saw those letters because I was a witness in the case. The letters were what most lawyers would call "firm". I didn't think that they were nasty, but the jury did.

I now write the nicest letters you could imagine. A well documented demand letter. A follow up letter saying how hard a time my seriously injured client is having and asking the insurer to act as quickly as possible on the claim. Another letter asking if the insurer wants any additional information, or a chance to meet my client. When the first offer comes in way too low, and without any explanation, I write and ask the adjuster "What is it in our claim that the insurer disagrees with, the medical bills, the wage loss, the nature and extent of the injuries? Please tell me what so I can explain it to my client." If the client is having trouble paying the mortgage, or thinking of pulling a child out of college because of being off work due to injury, I put that in a letter to the insurer and ask if they could please tell me what is happening, explain their offer or position, or just tell me why it is taking so long to resolve this claim. I want to show that my client

and I are acting reasonably, and the insurer is not.

Mistake Four: Thinking Every Case Involves Bad Faith

We work in an adversarial system where insurers act in ways we do not understand and which are often unfair. It is easy to get mad, write nasty letters, and jump to the conclusion that every insurer is just acting in bad faith. But there may be things going on with a specific claim that you don't know about. One way to ferret out such issues is to write and ask if the insurer needs any additional information, or to ask for an explanation of why the case: 1) is taking so long, 2) why they haven't paid limits, or 3) why are they handling the case so oddly.

Sometimes a case is not settling for a reason. If the insurer will tell you the reason then you might be able to take steps to settle the case.

Mistake Five: Not Watching For Bad Faith

It pays to be aware of when an insurer is acting in bad faith. The most common form of bad faith is where the third party insurer fails to settle a case within the policy limits. However, there are other types of third party bad faith. The insurer might assert an invalid coverage opinion that affects settlement of the claim, or might abandon the defense of its insured. The insurance company might protect one insured to the detriment of another insured. The insurer might fail to disclose its policy limits. There are many ways that an insurance company could act improperly towards its insureds.

Mistake Six: Failing to Appreciate the Costs Involved

Bad faith cases are hard fought. You are saying that the insurance company did something wrong, and they don't like it. The insurers have unlimited resources to fight these claims. In one bad faith case, which we settled in the third week of a five-week trial, there were over 30 depositions, and costs were well over $100,000.

Mistake Seven: Failing to Anticipate That You May Have to Withdraw

There are many reasons that the plaintiff's lawyer in the underlying tort claim might have to testify in the bad faith case. You might have to testify to prove what happened in the case up to the point where the bad faith occurred. You might have to testify regarding conversations that occurred. You might have to testify regarding causation, i.e. that your client would have accepted the policy limits if the insurer had offered to pay the limits. If you have to testify then you probably can't also be an attorney on the bad faith case.

You may be able to reduce the chance that you will have to testify by putting the important facts in writing, both to the insurance company and to your client. You may be able to pin down and prove crucial facts by deposition or requests for admission.

But if you will have to testify then recognize that early and associate capable counsel to handle the

bad faith claim.

Mistake Eight: Failing to Understand the Opponent

The opponent in a bad faith case is the insurance company. They don't like being accused of acting in bad faith. They give their insurance defense counsel large budgets. They fight hard. You may have to try both the underlying tort case and the bad faith case before you are done.

In one of our cases the insurer could have settled the case for the $100,000 policy limits. It took us nine years to fully resolve the case. The tort case was tried and resulted in a $3,000,000 verdict. The insurer appealed to the State Supreme Court. The insurer tried hard to prevent an assignment of the bad faith claim and we detoured off into bankruptcy issues. We eventually obtained an assignment of the bad faith claim. We then filed the bad faith claim. Thirty depositions later we knew what happened and amended the complaint to name the tort defense attorney as a defendant along with the insurance company. More litigation. The bad faith case against insurer settled at mediation. The case against tort defense counsel continued on with major motions, and an interlocutory appeal to State Supreme Court. The case against tort defense counsel finally settled about a month before trial. The final payout on a claim that could have settled for $100,000 totaled 3.9 million dollars.

Another case where the insurer could have settled the case for $100,000 took years of litigation to resolve. We tried the underlying tort case, which was appealed to the State Supreme Court. The insurer engaged in continuing bad faith after the appeal was over, basically offering to "buy" the bad faith claim from its own insured for a proposed amount of about $25,000. This would have left the insured exposed to a multimillion dollar judgment but, perhaps, let the insurance company off the hook. Further delay occurred when we named the bad faith defense counsel in our witness list since he was the best witness to call to prove the continuing bad faith. The eventual payout on a claim that could have settled for $100,000 totaled 2.8 million dollars, and took about four years.

The point is that insurers fight hard and use every procedural defense possible to avoid payment.

Mistake Nine: Thinking Like a Lawyer

Like most professionals, we use jargon and other shortcuts to express ideas. We are offended when the insurer does certain things and are surprised when the jury isn't outraged at the same things we are. We use language that makes sense to lawyers but does not to lay people. For example, we talk about "setting up" the insurance company for bad faith. In an insurance bad faith case I was once deposed for two hours concerning a single entry in my file that said something like "We will set them up for bad faith". The very capable defense attorney knew that language might be troubling to a jury and he did everything he could to make the most of it.

So don't think like a lawyer. Think like a human being. You have a severely injured client who will settle for the policy limits and an insurance company that won't pay. You are going to give the insurer a final chance to settle the case with a policy limits demand with a time limit. You could write your client that you are going to "set up the insurance company for bad faith". Or you could write to your client saying that you will give the insurer another chance to do what is right

and settle this case.

Mistake Ten: Not Thinking the Bad Faith Case Through to Trial

Many cases settle without a trial. But in bad faith cases in particular, it makes sense to think about the bad faith trial while you are handling the underlying tort case.

Think about how you organize your file in the underlying case. It may be discoverable. Think about how you and your client act towards the insurance company. The bad faith jury will be watching. Seek justice and act in a way where you don't care if your file is discoverable, and you don't care if your conduct shows up on the evening news. Make sure your conduct is above reproach so that when the bad faith jury compares your conduct with the insurer's conduct, you look great.

Think about how you will acquire the claim from the insured. Most bad faith cases occur when the insurance company does not act properly toward its insured, i.e. by refusing to pay a policy limits settlement when they should have paid. The claim is possessed by the insured, so how do you acquire it?

One choice is to take a stipulated judgment against the insured and an assignment of the bad faith claims. Another choice is to take the underlying case to trial and get an excess judgment entered against the insured. Then take the assignment. There are complicated benefits and drawbacks to each choice, which are beyond the scope of a short article. But think each option through carefully with an eye towards the eventual bad faith trial. In most cases, I favor taking the tort case to trial and obtaining the excess judgment against the insured.

Consider the dynamic of the eventual bad faith trial. If you take an assignment of the bad faith claim from the third party insured you will be pursuing a claim in the name of your client, under an assignment, against the insured's insurance company, on a claim originally possessed by the insured, for the benefit of your client. Don't be surprised if the jury takes a while to figure that one out.

In some circumstances you may be able to represent the insured for the benefit of your client. This has serious ethical ramifications and you shouldn't us this approach without consulting an ethics expert, and making sure that the insured also has independent counsel. Another option is for the tort lawyer to continue to represent the plaintiff while a new attorney comes in to represent the insured on a claim against his insurance company.

There are benefits and drawbacks to each way of proceeding. The important thing in your case is to early on think the strategy through to the bad faith trial.

Conclusion

This is just a quick overview of insurance bad faith cases. They are some of the most enjoyable cases you will ever handle. There isn't 1 in 10,000 insurance claims where the insurance company files are produced in discovery. In bad faith cases, the insurance company file is crucial evidence

and is discoverable. Where an insurance company acts in bad faith the insurance company files are simply amazing and provide the most powerful evidence you will ever see.

One last thing. Remember that a jury will be looking at both sides in an insurance bad faith case to see who is the good guy and who is not. Make sure that when the jury looks at you and your client that they like what they see.

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