

## **BAD FAITH INSURANCE CLAIMS IN ILLINOIS**

National Business Institute

June 12 and 13, 2008

By: Howard L. Lieber  
FISHER KANARIS, P.C.  
200 South Wacker Drive  
22nd Floor  
Chicago, Illinois 60606  
312/474-1400

### **Gathering Information Critical To Your Case.**

Like any other case in which an attorney represents a client, a bad faith insurance claim requires the attorney to assess what are the elements of the cause of action, whether from the perspective of the insurer or the insured, what is the evidence that the attorney will need to establish the elements of the claim, and how does the attorney go about locating and obtaining the information critical to establishing the elements needed to present or defend a bad faith insurance claim. The principles applicable to gathering information essential to presenting a bad faith insurance claim as discussed below, are applicable in the insurance setting, but also are equally applicable in other aspects of an attorney's practice. The concepts and methodologies discussed in these materials, while focused primarily upon bad faith insurance claims, are equally applicable to the presentation of, and defense of, other types of claims that an attorney can be expected to encounter in his or her practice.

#### A. **Information The Attorney Will Need And Where To Find It.**

As a threshold point, an attorney involved in the representation of an insurer or an insured, in the context of a bad faith claim must understand the elements of the cause of action

being presented or defended. Unless the attorney understands the elements necessary to present or defend the case, the attorney will have difficulty determining what information is necessary to maintain his or her case.

In Illinois, bad faith insurance claims may take the form of fraud claims, negligence claims, breach of contract claims and statutory breach claims generally falling under 215 ILCS 5/155. See for example Cramer v. Insurance Exchange Agency, et al., 174 Ill. 2d 513, 675 N.E. 2d 897 (Ill. 1996) and Gaston v. Founders Insurance Co., 365 Ill. App. 3d 303 847 N.E. 2d 523 (1<sup>st</sup> Dist. 2006). In addition to recognizing what must be alleged to maintain a bad faith insurance claim, it is also necessary to recognize that in order to successfully present, or defend against, such a claim courts have recognized that the conduct forming the basis for such bad faith claims must also be analyzed in certain cases. See Cramer, supra. In such a context, courts have noted that the totality of the circumstances surrounding an insurer's conduct should be analyzed and an assessment made of whether a bona fide coverage dispute actually exists. Gaston, supra.

With the foregoing principles in mind, it becomes apparent that the information an attorney needs for purposes of presenting or defending such a claim in large measure, is encompassed within the elements necessary to establish, or undermine a fraud claim, a negligence claim brought against an insurance carrier, a breach of contract claim asserting that an insurer's purported bad faith conduct constitutes a breach of the insurance contract, and that under a statutory action, i.e., Section 155 of the Insurance Code, the insurer acted in a vexatious and unreasonable manner in connection with a claim.

As with virtually all other types of claims, the natural starting point to locate information that is necessary to advance or defend such a bad faith claim is with the attorney's client. Whether the "client" is a representative of an insurance carrier or whether the client is an

insured, those individuals represent the most efficient and appropriate sources to begin gathering the facts and evidence which support the presentation or defense of a bad faith insurance claim.

In interviewing a client, it is appropriate to explore who the client spoke with regarding the claim, what documents and correspondence were exchanged in connection with the claim, and, of greater significance currently, what e-mails or other electronic communications occurred and with whom. In such a situation, the attorney should allow the client to educate him or her regarding the facts surrounding the claim, the individuals involved in the claim process, and the exchange of information that has occurred between the insurer and insured.

Secondly, “outside sources” constitute another avenue for generating information to support or defend against the claim. Often names of individuals provided by the client, or documents provided by the client, represent a valuable resource which will lead the attorney to such “outside sources” of information. Thus in the context of bad faith claims, an insured may seek information from his opponent’s attorney for purposes of pursuing an insurance claim. Additionally in cases where there may be multiple individuals covered by an insurance policy, such as board members of a condominium association, it is often helpful to speak with multiple individuals who are all covered by the insurance policy at issue.

Typically, where an insured is pursuing a bad faith claim against an insurer, the insured will seek to obtain a copy of the insurer’s claim file in an effort to determine whether there are any notes or other materials in the claim file which support a bad faith insurance claim.

B. Eliminate Headaches When Drafting And Using Interrogatories And Related Documents.

A cardinal rule related to the preparation of interrogatories is that the attorney propounding the interrogatories must have a clear understanding of what he or she is attempting

to achieve through the interrogatories. As a general rule, there are three purposes for propounding interrogatories:

- 1) To gather information that will assist in posturing the litigation for a successful motion for summary judgment or trial;
- 2) To reduce the likelihood of surprise to the attorney and his client at deposition or trial; and
- 3) To assist the attorney in examining witnesses at trial or deposition.

In order to maximize the potential benefit of interrogatories, several practical points should be followed:

- a) In order to reduce the potential that your opponent will avoid providing a substantive response to interrogatories the practitioner should include a definitions section at the beginning of the interrogatories with definitions tailored to the terminology that is presented by the claim involved;

- b) Avoid, where possible, phrasing the interrogatories to elicit a narrative response; and

- c) Weigh the benefits and detriments of attaching documents as exhibits to interrogatories, as opposed to using a document as an exhibit for the first time at the deposition of a witness. When documents are attached to interrogatories, the element of spontaneity/surprise which may accompany use of the document at a deposition is eliminated and the witness often has been prepared in advance as to an appropriate response to questions concerning the document involved. The appropriateness of attaching a document to interrogatories, as opposed to using the document for the first time at a deposition, often must be

resolved on a case by case basis based upon multiple factors including the volume/number of documents produced, and the prior use of documents by the parties to the case.

C. Cover All Your Bases When Requesting Documents.

Just as with interrogatories, it is critical that an attorney preparing and propounding a request for production of documents know what he or she is attempting to achieve in the case and how the documents which are being requested for production will materially assist the attorney in achieving the desired end for the litigation.

Typically, in a bad faith insurance claim setting, the insured will seek to obtain a copy of the insurer's claim file, and potentially a copy of the underwriting file as well, while the insurer will oppose production of those file materials. From the insured's perspective, a production request directed to the insurance carrier must be designed to obtain documentation which will provide a factual basis to allegations of bad faith or other improper conduct by the insurer. Thus any documents, including e-mails, inter-office memos or other internal communications, which reflect unreasonable or vexatious conduct by an insurer will be helpful to an insured's bad faith claim. Alternatively, an insurer's request for production of documents will often seek information which reflects the existence of a bona fide coverage issue, including the existence of facts supporting exclusions under the policy, facts reflecting untimely or improper notice of a claim to the insurer, facts reflecting that the claim does not constitute a "loss" within the definition of the insurance policy, or facts reflecting knowledge on the part of the insured of a potential claim, prior to the issuance of the insurance policy thereby supporting a recession argument.

Of course other sources of documentation often exist besides those maintained by the insured and the insurer. In such situations the use of subpoenas is appropriate and encouraged. Where an insured has been named as a defendant in an underlying action along with co-defendants, and the insurer has questioned the applicability of insurance coverage for that claim, it may be appropriate for the insurer to issue a subpoena to the underlying plaintiff's attorney in an effort to obtain unprivileged documents which support the existence of a bona fide coverage dispute.

D. Utilize Requests For Admission And Save Time.

Attorneys often overlook the useful device of requests for admission of fact pursuant to Illinois Supreme Court Rule 216 as a means for eliminating/narrowing issues in a case and posturing a matter for summary judgment or trial. Often a request to admit can be prepared based upon an interview with the client and materials available to the client. In such a scenario, the request to admit can be submitted early in the case and because of the rigid requirement of responding within 28 days, the opposing party may be placed at a disadvantage in terms of preparing a response to the request to admit.

In addition to simply seeking an acknowledgement of a fact by your opponent, a request to admit can also be used with respect to documents. Thus in many cases where a client has a copy of a document available the document can be attached as an exhibit to the request to admit for purposes of seeking an admission from the opposing party that the exhibit is a true and accurate copy of the document itself.

Propounding a request to admit often is an effective time saver as if the party to whom the request to admit is propounded, admits certain facts the matter may then become the subject

of a summary judgment or, in the case of a trial, certain issues may not actually need to be proved at trial as the request to admit eliminates the facts from contention during the course of trial. Once again, it is essential in the preparation of the requests to admit that the attorney preparing the requests have a clear understanding of the elements of his or her case and use that knowledge in order to craft the request so that the issues critical to presenting or defending the case are addressed and potentially resolved by the response to the request to admit.

E. Your Obligation To Produce And Respond To Discovery.

As a general rule, a practitioner's initial analysis of a written discovery request should be to analyze whether the discovery request is objectionable, in whole or in part. At times an appropriate initial response to a written discovery request is an objection to an individual interrogatory or production request. Often attorneys will serve interrogatories or requests for production of documents which are overbroad, pose questions that are seeking a narrative response or assume a fact which may not be completely accurate. In such cases, by timely providing an objection to the inappropriate interrogatory or production request an issue may be narrowed and an appropriate response can then be made to the written discovery request.

In the context of written discovery requests directed to insurers, there is a little known and little construed statute, which impacts the insurer's obligation to respond to a discovery request served upon it. Section 2-1003(e) of the Illinois Code of Civil Procedure provides that:

No person or organization shall be required to furnish claims, loss or risk management information held or provided by an insurer, which information is described in Section 143.10(a) of the "Illinois Insurance Code".

By its terms, Section 2-1003(e) provides that claims, loss or risk management information that is being held by an insurer is not subject to production in discovery. Interestingly, the language of Section 2-1003(e) arguably applies to individuals and entities, in addition to insurers, which have in their possession claims, loss or risk management information that is also in the possession of an insurer or has been provided to them by an insurer, as that information is described in Section 143.10(a) of the Illinois Insurance Code.

Section 2-1003(e) has not been the subject of substantial case interpretation, although it was referred to by the court in Leeson v. State Farm Mutual Automobile Insurance Co., 190 Ill. App. 3d 359, 546 N.E. 2d 782 (1<sup>st</sup> Dist. 1989). Additionally, the District Court in the case of Neuberg v. Michael Reese Hospital and Medical Center, 1992 U.S. Dist. Lexis 366 addressed Section 2-1003(e) and noted that Section 143.10(a) of the Illinois Insurance Code dealt with information on open and closed claims, such as dates and descriptions of occurrence, total amounts of payments and total reserves. In Neuberg the court concluded that although the information sought in discovery was relevant, the information was not subject to production as the plaintiffs were requesting copies of the notices of claim advising Michael Reese's insurers of their claims, as well as the first notices received advising the insurers of any problems in connection with cases similar to the one being brought by Neuberg. The court in Neuberg concluded that notices of claim would seem to fall within the privilege for information provided an insurer in Section 2-1003(e). Thus an insurer, as well as individuals and entities who have received information arguably protected pursuant to Section 2-1003(e) may appropriately object to the production of such information and/or present a motion to quash a subpoena served upon them requesting such documentation.

Insurers and insureds must be prepared when objecting to discovery requests to produce a privilege log and copies of the documents for which they oppose production, so that an in camera inspection may take place by the court which will rule on the objection or motion to quash. While some insurance carriers may seek to re-dact identifying information from documents produced for an in camera inspection, often the presiding judge will insist upon seeing the documents in the same order and condition in which they are maintained in the usual course of business without any redaction. In such circumstances, it is appropriate to produce a privilege log to the parties seeking the production so that only the court hearing the motion to quash actually has the unredacted, complete, documents at issue.

Illinois has long recognized the principle that material is not subject to production, and a court should deny a discovery request, where there is insufficient evidence that the requested discovery is relevant or will lead to such evidence. See Leeson, *supra* and Youle v. Ryan, 349 Ill. App. 3d 377, 811 N.E. 2d 1281 (4<sup>th</sup> Dist. 2004). Thus in the context of analyzing a request for production of documents, or interrogatories, the practitioner must make a determination as to whether the documents being requested or the interrogatories have relevance to the specific question presented by the bad faith insurance claim.

F. When And Who To Depose And How To Prepare Witnesses.

The question of which witnesses to depose in a case often turns upon the specific facts of the case. Typically, in a bad faith insurance claims context, the insured will seek the deposition of the claims handler assigned the day-to-day responsibility for the claim, as well as that person's supervisor or claims manager. These individuals may be expected to have information regarding how the insurance claim has been processed/handled, why time has passed between the

presentation of the claim and a determination of whether the claim will be paid and other factual information which can be used to either support or oppose an argument for unreasonable and vexatious conduct by an insurer, as well as other types of conduct which may support or undermine a breach of contract, fraud or negligence claim. From the insurer's perspective potential deponents include the insured and any family members whose knowledge may be relevant to the bad faith issue. A party's answers to interrogatories or responses to requests for production of documents will often supply information which will identify witnesses and provide insight into information that may be available through those witnesses.

Although it is common practice to conduct depositions of fact witnesses following the completion of written fact discovery, there are occasions when where it may be advantageous for deposition(s) to proceed prior to the completion of fact discovery. Often this situation may arise when a witness is in ill health or will be traveling and unavailable in the future. In such situations an effort should be made to preserve the testimony by deposition. Furthermore, this situation may also arise where it is clear from information supplied by the client that an individual has knowledge relevant to the issues in the case and that witness' knowledge may help shape the interrogatories and requests for production of documents that will be propounded.

i. How To Prepare Witnesses For Deposition.

Often the key to preparing a witness for his or her deposition lies in the attorney having a thorough knowledge of the documents, testimony of other witnesses, and elements of the case, so that the attorney may alert the witness to potential areas of questioning that can adversely impact the party's claim. Where the attorney has a thorough knowledge of the case, he or she can

anticipate the opposing counsel's approach to deposing the witness and prepare the witness for potentially difficult areas of inquiry.

In preparing a witness for deposition testimony an attorney must be conscious of whether his communications with the witness are subject to an attorney-client privilege or are discoverable. Where it is the attorney's client being deposed, the attorney can be more detailed and less guarded in the statements made to the witness in preparation for the deposition. However, in those cases where the witness is an independent fact witness the situation is far different. In the later situation, communications between the attorney and the independent fact witness will not be privileged and opposing counsel will likely inquire as to what communications were had between the fact witness and the attorney.

Additionally, in cases where there may have been multiple depositions taken over the period of time prior to a client being deposed, the question may arise as to whether the client should review depositions of other parties in preparation for his or her deposition. In such a scenario, opposing counsel may inquire as to what materials the witness has reviewed in preparation for the deposition. Where the witness to be deposed is the attorney's client, often practitioners will read excerpts of a deposition transcript to the client so the client is aware of certain testimony, however the client has not actually reviewed the deposition transcript and any conversations between the attorney and the client regarding the deposition transcript are privileged communications.

It is imperative that the attorney makes sure that his client is familiar with the facts and issues in the case prior to appearing for a deposition, and that the client understands that he or she must thoroughly listen to the question being presented before answering a question and not guess or speculate in responding to a question.

G. Streamline Your Job With Sample Discovery Forms And Requests.

If the attorney regularly practices in the insurance/bad faith area of practice, he or she can avoid unnecessary expenditures of time by having templates of written discovery requests on a word processing system in which minimal alterations will be necessary to tailor the written discovery to the specific facts and issues presented by a given case. While cases may vary in terms of the facts and present different nuances, the overriding principles are often the same in bad faith insurance type cases and if the practitioner has one or more standard sets of interrogatories or requests for production of documents in this field, it is appropriate and often beneficial to the client to simply make the needed modifications and propound that discovery to opposing counsel

The discussion contained herein was not intended to be all encompassing on the topic of Bad Faith Insurance Claims and gathering information relating to such claims. Should you have any questions regarding the points discussed in this presentation, or a point that was not addressed herein, please feel free to contact Howard L. Lieber at FISHER KANARIS, P.C.