

BAD-FAITH LITIGATION: WHAT IT IS AND WHAT YOU CAN DO TO IMPROVE YOUR POSITION

by Stefanie G. Field

Insurance coverage is like having an attorney. Everyone wants to have the protection, but no one ever wants to actually use it or to pay the bill. When someone buys insurance, they are betting on a calamity happening that would have cost more to resolve than the price of the premium. Thus, insurance provides a security blanket that is supposed to put the mind of the insured at rest because the insurance carrier will handle the calamity. The carrier is betting on the opposite result – that no calamity will occur. The insurance policy provides the terms of the bet.

An insurance policy is a contract, and the normal rules of contract interpretation apply. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265.) However, the law favors finding coverage, due to the special nature of an insurance contract. Thus, coverage clauses tend to be broadly interpreted in favor of the insured, and express exclusions are strictly construed against the carrier. (*Interinsurance Exchange v. Flores* (1996) 45 Cal.App.4th 661, 670.) If the language is ambiguous, the court attempts to resolve the ambiguity by interpreting the policy in the manner in which the carrier believed the insured understood it. (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822.) If the language is still ambiguous, the ambiguity is resolved in the insured's favor. (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 912.)

Although these rules of interpretation provide a framework for analyzing coverage, that initial determination is made by the insurance carrier. The carrier is in the business of making money. The more claims that are paid, and the higher the amounts paid, the less revenue generated by the carrier. To protect their bottom line and to advance the interests of their shareholders, carriers carefully review any claims that are made. They are looking to ensure that claims are genuine and fall within the parameters of the coverage afforded by the policy. This is where the conflict between carrier and insured arises and provides the genesis for bad-faith claims.

Bad-faith claims arise when there is a dispute between the carrier and the insured regarding what coverage is afforded when a claim is made. In the case of a duty to defend against a claim, the carrier is in a much more vulnerable position. Basically, if the facts asserted in a complaint or provided by the insured indicate that there

is any potential that the claim may be covered under the policy, regardless of the causes of action actually asserted, then the insurer must provide a defense. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) If the carrier refuses to provide a defense and there was a potential for coverage, the insured will likely be able to assert a claim for bad faith and to seek damages, possibly including any verdict or settlement amount, as well as punitive damages.

In terms of payment of a claim, bad faith arises from a carrier's improper investigation or valuation of the insured's claim. Thus, refusing to investigate a claim or low-balling the damages suffered by an insured can result in liability arising for breach of the covenant of good faith and fair dealing, i.e., bad faith. Likewise, unjustifiably delaying payment on a claim can also provide grounds for a bad-faith claim.

From the perspective of an insured, this means that the insured should carefully review the policy to determine coverage and consider retaining an expert in coverage when there is a significant dispute. Likewise, the insured should carefully review the carrier's analysis and proposed resolution of a claim. If the insured disagrees, the carrier should be informed of the disagreement in writing and provided with supporting documentation, if there is any. Because bad-faith claims can be costly for the carrier, the potential for a bad-faith claim is a tool for an insured to attempt to obtain coverage. From the perspective of an insurance carrier, the carrier should utilize outside coverage counsel if there is any uncertainty regarding coverage, carefully investigate claims, including documenting the investigation, and keep the insured informed of what is happening with the claim. This may mean that the carrier needs to hire an outside adjuster to investigate or evaluate a claim. However, the added cost of such an expense, particularly when there is a large dispute or the insured has provided evidence contradicting the carrier's determination, is minimal compared to the potential liability if a jury determines that the carrier inadequately investigated a claim.

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