

Discovery and Depositions in the Bad Faith Case: What You Need to Know

by Bill Daniels

I. Introduction

Insurance bad faith cases are usually hard fought and can be bitter. Generally speaking, when we take on a carrier for acting contrary to its insured's interests and allege those actions are malicious justifying punitive damages, the folks on the defense side tend to take it personally.

So, the first rule of discovery in the bad faith case is, assume you are in for a tough fight. Which, in turn, leads to the second and third rules: know your adversary and be prepared.

The bad news that the general practitioner faces in prosecuting a bad faith case is that the defense team will usually be much better schooled in the fine points of insurance than an attorney who does not work with insurance matters on a daily basis.

The good news that the general practitioner can take heart from is – the purpose of bad faith law is to act as an equalizer between the powerful carriers who adjust claims for a living and the ordinary insured who probably never wanted to have a claim and, with luck, will never have another. Insurance regulations require that insurance companies keep a record of all material claims decisions. So, where there is wrongdoing, there is almost always a record of the bad acts waiting to be uncovered.

The key discovery strategy in defending bad faith cases is to deny the plaintiff information. However, if you know where and how to dig, it's not that difficult to get the evidence you need to put on your successful case.

II. Know your adversary.

People spend their lives learning about the insurance business, which itself represents a huge, multifaceted, globally diverse industry devoted to making money by spreading risk. Generally, you do not have a lifetime to learn each and every nuance of the insurance world. So, don't try. But do make sure you know everything you can about the facts and circumstances of the insurance business as it applies to your case.

Understand that the defendant or defendants in your prospective case may not be obvious from the face of the insurance materials your clients hand you. For example, it is not unusual to have a client provide letters on letterhead from the "Farmers Insurance Group of Companies." Some practitioners will put this name in their complaint. Only, there is no such creature that can be sued. "Farmers Insurance Group of Companies" is simply the trade name for a collective of entities organized as inter-insurance exchanges. Usually, the proper defendants in a Farmers claims case are Farmers Group, Inc. (the management company), Farmers Insurance Exchange (the claims handling entity) and the insuring exchange (ie., Fire Insurance Exchange, Truck Insurance Exchange, etc.). See, *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202 (rev. den. Mar. 26, 2003).

So, when laying out your case, always make sure you closely review the original insurance policy and declarations pages prior to determining who to name in your complaint. When in doubt, consult with experienced practitioners about who the proper parties are and why. Getting the defendants right at the beginning can save tremendous amounts of time during the case.

Also, make sure you understand who has standing to sue under the insurance

policy. A business owner may not be able to sue for bad faith if the named insured is a corporation or limited liability company. On the other hand, the owner may have standing as an additional insured. The question is important where there is a potential for emotional distress and other general damage to the owner. Again, look to the policy and declarations pages for the answer.

III. Getting to the Heart of Your Case in 60 days or less.

Once you have the parties clear in your mind and have filed suit, you can prepare your initial round of discovery for service once the defendants answer or, as is more typical, demur.

I seldom use interrogatories during my initial bad faith discovery. I find it is much more productive to immediately demand the claim file(s) and, if warranted, the underwriting file(s), since these are the basic documents necessary for preparing any bad faith case for trial.

Because these files are key evidence in the case, and in order to discourage potential mischief in discovery, I ask for the documents in multiple requests, simultaneously, using a formal request for production of documents, along with a custodian of records deposition notice and notice of deposition of the person most qualified. By utilizing this process, I find I am able to exert maximum pressure on the defense to produce the *entire* record all at once. This process also insures that I will be able to either establish foundation for the insurance files either by direct testimony or stipulation, so that they are admissible later in the case. Do not assume that a claim file or any other document will be admitted at trial under the business records exception to

the hearsay rule. Nail down the foundation as you go, it will save much grief later on.

It is also important to make sure that the *original* files are available during any depositions. Copies of files don't do the originals justice – often information about file handling can be gleaned from handwriting on the file folders themselves or how the files are organized. It is much easier for insurance adjusters and other key witnesses to evade answering key questions if the original files are not in front of them. Copies of file materials are okay as part of a document production and, in fact, are easier to handle as you organize your case. But make sure you request to see the originals and insist they be produced.

Person most qualified depositions under Code of Civil Procedure section 2025.220 are the fastest way to gain general information about the basic handling of the claim or other insurance matter that lies at the heart of your case. I typically notice the person most qualified to testify regarding the identities of each and every individual who performed work or made a decision in the matter. Generally, the witness will be the primary claims adjuster, which is fine. However, the PMQ deposition helps avoid wasting time meeting and conferring over boilerplate objections and incomplete responses typical when interrogatories are served.

Also, try to determine whether or not the defense will be allowing on advice of counsel as a defense by serving a simple Request for Admission that is on point. Carriers generally do not like using the defense since it opens up areas that would otherwise be privileged. But don't assume it won't be used. Ask up front.

I've attached a number of sample deposition notices, discovery requests and

requests for admissions to this articles for your convenience. Please note, the forms I've provided use the old Code of Civil Procedure sections, so if you should update them before using them in your case.

IV. Focusing Depositions.

Once I know who was involved with the claim or other insurance matter I am concerned with, I typically depose everyone who touched the file in any way. Even if the deposition lasts only fifteen minutes, absent a stipulation, getting the testimony is the only way to insure that all the potential holes in your cases are filled.

I prefer to videotape all key depositions, particularly the adjusters and claims personnel. The best insurance bad faith cases are generally morality plays where the attitude and demeanor of the witnesses are just as important as their precise testimony. A picture, as the saying goes, is often worth a thousand words.

When deposing insurance professionals, I almost always begin by getting them to agree with me as to basic principles such as "an insurance carrier must give its insured's interests equal weight with its own," "an insurer is obligated to conduct a thorough, fair and objective investigation into the facts of a claim," etc. Once I establish the common framework of duty, I use those basic principles to tie down the witness while going through the claim.

Lists of duties and obligations can be gleaned from the case law, jury instructions and your experts. Make one up that works for your case and use it from day one.

In deposing witnesses, utilize the insurance files you obtained at the beginning of the case as both a guide to questioning and evidentiary support for your case.

Adjusters will have diary notes, these should be analyzed and authenticated by the witness. If it is unclear just what notes or materials were created by the witness, don't be afraid to ask. Unraveling how a claim was handled is often like piecing together an intricate puzzle. Be thorough with each witness and you will not need to fear missing pieces when your discovery is concluded.

Also, just as in any case, don't be afraid to lead adverse witnesses as allowed by Evidence Code section 776. Leading questions are the best way to focus an adverse witness, especially one that might be inclined to waste your time with irrelevant insurance technicalities and side issues.

V. Conclusion.

There's no magic to conducting bad faith discovery. Just preparation, study and hard work.

While the basics outlined in this article should help you get going, don't forget that there is a strong community of insurance bad faith practitioners available who can help answer particular questions or give guidance on technical issues.

In my mind, there is no nobler endeavor than fighting for deserving individuals who have been legitimately wronged by powerful institutions. Hopefully, you are of the same mind. So, go get'em!