

HANDLING THIRD PARTY CLAIMS IN GOOD FAITH

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The Implied Obligation Of Good Faith And Fair Dealing

- In every insurance policy there is an implied obligation of good faith and fair dealing that neither Insurer nor its Insured will do anything to injure the right of the other party to receive the benefits of the agreement.



The Implied Obligation Of Good Faith And Fair Dealing

- ❑ To fulfill its implied obligation of good faith and fair dealing, Insurer must give at least as much consideration to the interests of the Insured as it gives to its own interests.

The Implied Obligation Of Good Faith And Fair Dealing

- To breach the implied obligation of good faith and fair dealing, Insurer must *unreasonably act or fail to act* in a manner that deprives its Insured of the benefits of the policy.

The Implied Obligation Of Good Faith And Fair Dealing

- ❑ To act unreasonably is not a mere failure to exercise reasonable care. It means that Insurer *must act or fail to act without proper cause.*
- ❑ However, it is *not necessary for Insurer to intend to deprive the Insured of the benefits* of the policy.



The Duty To Investigate

- ❑ Insurer is required to fully and impartially investigate all claims.
- ❑ Insurer is not permitted to rely selectively on facts that support its position and ignore those facts that support a claim.



The Duty To Investigate

- ❑ Explain reasons for inability to resolve claim within 30 days (unless fraud suspected).
- ❑ Explain reasons why documents/information is being requested (unless fraud suspected).
- ❑ Explain Insured's duty to cooperate.
- ❑ Consider ROR.
- ❑ *Timely update Insured as to status of claim.*



The Duty To Investigate

□ Hiring Experts:

- Goal: to show the expert is truly “independent” of Insurer and not a hired gun.
- Insurer’s practice and procedures for hiring experts should reflect the need to hire reputable experts with the proper background and experience to reach a well-reasoned opinion based upon the evidence.



The Duty To Investigate

- Hiring Experts:
 - Select the right expert.
 - *Avoid using vendor lists and hiring the same experts.*
 - Make sure the expert has the proper background/training.
 - Using the same experts repeatedly to review claims and defend the insurers will likely establish a pattern of bias in the expert's work.



The Duty To Investigate

- The reasonableness of Insurer's investigation will be determined by:
 - What was known to it at time of loss;
 - What was reasonably available to it at time of loss;
 - What other investigation could have/should have been done;
 - Whether it was reasonable not to conduct further investigation.



The Genuine Dispute Doctrine

- *If there is a genuine issue as to whether a claim is owed, there can be no bad faith liability imposed on Insurer for advancing its side of the dispute.*
 - *Existence of a genuine dispute negates the element of unreasonableness.*



What Is Bad Faith—3rd Party

- ❑ Failure to Defend
- ❑ Failure to Settle Within Policy Limits
 - Implies duty to investigate, evaluate claims.



The Duty To Defend

- Duty to defend is determined by:
 - Comparing allegations in the Complaint and other facts known to Insurer (extrinsic evidence)
 - To the policy language
 - If a potential for coverage exists Insurer must defend.
 - *If a question exists, duty to defend is triggered.*
 - *If even one of claims is covered—Insurer must defend the entire action.*



Impact Of B.B. v. County of LA

B.B. v. County of Los Angeles, 10 Cal.5th 1 (2020).

- In August 2020, California’s Supreme Court issued a unanimous opinion and created a significant exception to California Proposition 51 (“Prop 51”) involving an intentional tort.
- *This exception means a single defendant could be responsible for the entire non-economic damages award, even if a jury apportioned more fault to other defendants — and the plaintiff.*



Impact of B.B. v. County of LA

- ❑ This opinion will encourage new strategies for the plaintiffs' bar.
- ❑ We anticipate plaintiffs will begin pleading more intentional tort causes of actions and actively attempting to prove these claims, especially against “deep pocket” defendants, insured defendants, and particularly in multi-defendant litigation.



The Duty To Defend

- The duty to defend must be assessed at the outset of the case.



The Duty To Defend

- Insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender.
- *However, where the information available at the time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise.*



The Duty To Defend

- *If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute establishes a possibility of coverage and thus a duty to defend.*



The Duty To Defend

- If Insurer is obliged to take up the defense of its Insured, it must do so as soon as possible, both to protect the interests of the Insured, and to limit its own exposure to loss.
 - *A belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty.*



Tendering Defense After Denial

- No tender of defense is required if Insurer has already denied coverage of the claim pre-suit. In such cases, notice of suit and tender of the defense are excused because the insurer has already expressed its unwillingness to undertake the defense.

Jury Instruction—Unreasonable Failure To Defend

- ❑ Plaintiff was Insured under policy issued by Insurer;
- ❑ Plaintiff was sued;
- ❑ Plaintiff gave Insurer timely notice of suit;
- ❑ Insurer, unreasonably—that is without proper cause—failed to defend Plaintiff against the lawsuit;



Jury Instruction—Unreasonable Failure to Defend

- ❑ Plaintiff was harmed;
- ❑ Insurer's conduct was a substantial factor in causing Plaintiff's harm.



The Duty To Settle

- The implied obligation of good faith and fair dealing requires Insurer to settle appropriate cases.
- In deciding whether to settle, Insurer must take into account the interests of its Insured and give the Insured's interests at least **as much consideration** as it does to its own interests.



The Duty To Settle

- When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement within those limits, a consideration in good faith of the Insured's interests requires Insurer to settle the claim.



The Duty To Settle

- In determining whether Insurer has given consideration to the interests of its Insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer.



The Duty To Settle

- The only permissible consideration in evaluating the reasonableness of the settlement offer is whether, in light of the victim's injuries and the probable liability of the Insured, the ultimate judgment is likely to exceed the amount of the settlement offer.



The Duty To Settle

- ❑ An unreasonable refusal to settle may subject Insurer to liability for the entire amount of the judgment rendered against the Insured, including any portion in excess of the policy limits.



The Duty To Settle

- *Bad faith refusal to settle requires proof that a reasonable offer to settle within policy limits was made:*
 - The offer must be clear.
 - The offer must resolve all claims.
 - All claimants must join in the demand.
 - A full and complete release must be offered.
 - The time for acceptance must not deprive Insurer of its right to investigate and evaluate its Insured's exposure.



The Duty To Settle

- If Insurer has proper cause to reject a settlement offer, there is no bad faith.
 - Document,
 - Document,
 - Document.



The Duty To Settle

- A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits.
 - *The mere possibility or probability of an excess judgment does not render the refusal to settle actionable.*



The Duty To Settle

- *Where the kind of claim asserted against the Insured is not covered by the policy, Insurer has no obligation to settle. Insurer does not insure the entire range of an Insured's well being outside the scope of and unrelated to the policy.*



The Duty To Settle

- ❑ Insurer will be liable for failure to pursue settlement only when there is evidence that the claimant communicated an interest in settlement or other circumstances exist showing Insurer knew settlement within policy limits was possible.



The Duty To Settle

- ❑ In the absence of such evidence, or evidence that Insurer by its own conduct actively foreclosed the possibility of settlement, there is no “opportunity to settle” that Insurer may be taxed with ignoring.



The Duty To Settle

- ❑ Insurer may make an honest mistake:
 - ❑ If it exercised good faith in all of its dealings with the Insured;
 - ❑ If the settlement was rejected based on a full and fair assessment of all the evidence and advice of counsel;
 - ❑ If Insurer had an honest belief it could defeat the action;
 - ❑ If Insurer had an honest belief it could bring any verdict in for less;
 - ❑ A court should not penalize Insurer for an honest mistake.



Jury Instruction—Bad Faith Failure To Settle

- ❑ XYZ brought a lawsuit against Plaintiff for a claim covered under the Insurer policy;
- ❑ Insurer failed to accept a reasonable settlement demand for an amount within policy limits;
- ❑ A monetary judgment was entered against Plaintiff for a sum greater than policy limits.



Conduct A Jury Will Consider In Assessing Bad Faith

- ❑ California Insurance Code Section 790.03



790—Unfair Settlement Practices

- ❑ **Misrepresenting pertinent facts or insurance policy provisions relating to any coverage issue.**
- ❑ Advise *1st party claimants* or beneficiaries of all:
 - ❑ Benefits;
 - ❑ Coverages/Coverage Limits;
 - ❑ Time limits;
 - ❑ Any other provisions of the policy that may apply to the claim presented.



790—Unfair Settlement Practices

- **Failing to acknowledge or act reasonably promptly upon communications with respect to claims arising under policies.**
 - ***Claimant*** means 1st party or 3rd party claimant.
 - Acknowledge receipt of claim to claimant immediately but no later than 15 days.
 - ***If acknowledgment is not made in writing a notation confirming acknowledgment must be made in the claim file.***
 - Provide necessary claim forms immediately but no later than 15 days.



790—Unfair Settlement Practices

- ❑ **Failing to acknowledge or act reasonably promptly upon communications with respect to claims arising under policies.**
 - Begin investigation immediately, but no later than 15 days after receipt of claim.
 - Respond to *every* inquiry immediately but no later than within 15 days.
 - Update Insured every 30 days.



790—Unfair Settlement Practices

☐ **Inquiries from DOI:**

- Insurer must respond within *21 calendar days* of receipt of inquiry.
 - ☐ Response must address all issues raised by DOI.
 - ☐ Response should include copies of any documentation and claim files as requested.
 - ☐ If in litigation or claim involves suspected fraud, walk in documentation, as materials submitted to DOI are discoverable.



790—Unfair Settlement Practices

- **Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.**
 - Standards must be in writing.
 - Training on DOI regulations must be provided to claims agents.
 - Certification of training on DOI regulations is required annually.
 - Must have SIU screening in place.
 - Must report suspected fraud to DOI.



790—Unfair Settlement Practices

- **Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.**
 - Investigations must be *fair, objective, and unbiased*.
 - Requests for information and documentation must be *material* to the claim and *reasonable*.
 - Insurers cannot request duplicate submissions of the same information.
 - Requests for IMEs must be reasonably necessary to determine liability under policy.



790—Unfair Settlement Practices

- **Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.**
 - *All files must contain sufficient documentation, (notes, work papers, letters, other documentation (records)) including pertinent dates, so claim handling can be reconstructed.*
 - **If it isn't in the file—it didn't happen....**



790—Unfair Settlement Practices

- **Failing to affirm or deny coverage within a reasonable amount of time after proof of loss requirements have been completed and submitted by the Insured.**
 - **40 days** to accept or deny coverage.
 - 40 days extended to **80 days** if fraud is suspected.
 - If claim denied in whole/part need written denial.
 - The writing must:
 - Specify the *factual, legal, and contractual bases* for the denial/rejection of claim.
 - Advise claimant of right to seek review by DOI.
 - Advise claimant of time within which to file suit (1st Party)



790—Unfair Settlement Practices

- **Failing to affirm or deny coverage within a reasonable amount of time after proof of loss requirements have been completed and submitted by the Insured.**
 - If more time is needed, within 40-day period, insurer must advise claimant that more time is needed:
 - Notice shall specify what additional information insurer needs to make determination on the claim.
 - Notice shall specify continuing reasons why claim determination cannot be made—*unless claimant is suspected of fraud.*
 - Updates required on 30 days basis going forward until determination is made.



790—Unfair Settlement Practices

- **Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonable clear.**
- Insurer cannot discriminate in claims settlement based on race, gender, age, income, sexual orientation, etc.



790—Unfair Settlement Practices

- ❑ **Compelling Insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the Insureds when the Insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.**



790—Unfair Settlement Practices

■ ***NO LOW BALL SETTLEMENT OFFERS !!!***

- *Consider all evidence submitted by claimant to support claim.*
- *Consider legal authorities and evidence available to insurer.*
- *Consider advice of claims adjuster re: value of claim.*
- *Consider advice of counsel regarding likelihood of recovery in excess of policy limits.*
- *Consider liability of Insured.*
- *Consider likely jury/arbitration award.*



790—Unfair Settlement Practices

❑ **Misleading a claimant as to the applicable statute of limitations.**

- Notice must be given to all claimants 60 days prior to the expiration date.
- If claim is received with less than 60 days to expiration date, notice must be given immediately.
- UIMC/UMC—notice to 1st party Insureds must be given 30 days before expiration date.

DOES NOT APPLY TO CLAIMANTS REPRESENTED BY COUNSEL



790—Unfair Settlement Practices

❑ **Other Unfair Settlement Practices Defined:**

- Appealing awards as a means to force settlement.
- Failing to settle claim where liability is clear under one coverage to influence settlement under another coverage.
- Advising a claimant not to obtain counsel.
- Failing to advise claimant/beneficiary under which coverage payment was made.



790—Unfair Settlement Practices

□ Subrogation Issues:

- Insurers must advise 1st party claimant of intent to seek subrogation and must include request for Insured's deductible.
- Insurers must share subrogation recovery on proportionate basis with their Insured unless the Insured has already recovered the deductible.
- An insurer cannot deduct attorney fees for assisting the Insured in recovering the deductible.



DOI REQUIREMENT

- ❑ Always advise Insured if they disagree with claims decision (payment/denial/closing) they can seek review by California Department of Insurance and include contact information



Coverage Issues—3rd Party

- Reservation of Rights Letters:
 - *Almost always when you pick up defense.*
 - What they must contain:
 - Facts
 - Policy Language
 - Basis for Reservation
 - Reservation of Right to Reimbursement:
 - *Defense Fees*
 - *Indemnity*
 - General Reservation of Rights



Coverage Issues—3rd Party

- *Cumis* Counsel—when required:
 - ROR creates impermissible conflict (retained defense counsel can control outcome of coverage litigation.)
 - Lack of occurrence
 - Intentional act
 - Known violation of another's rights



Coverage Issues—3rd Party

- When is *Cumis* Counsel **Not Required**:
 - Damages claimed in excess of policy limits
 - Punitive Damages
 - ROR on exclusion—the applicability of which cannot be controlled by defense counsel
 - Filing of DRA to determine coverage issues



Coverage Issues—3rd Party

- Insurer can waive exclusion that would ordinarily create impermissible conflict and retain control of defense.
 - Insurer can even waive Cal. Ins. Code 533.
 - **Make Certain Waiver Is Crystal Clear!**



Coverage Issues—3rd Party

- Cal. Civil Code requires *Cumis* Counsel to be paid at same rate Insurer typically pays its retained counsel.
 - *Remember to state rate in ROR letter and send guidelines.*
 - *Cumis counsel is required to follow guidelines and report—but is not required to report on issues impacting coverage.*



Time Limit/Policy Limit Demands

- *Effective Jan 1, 2023*
- California public policy to encourage prompt settlements of civil actions and claims
- *Applies to pre-litigation settlement offers* to settle claims covered under automobile, motor vehicle, homeowner, or commercial premises liability insurance policies for property damage, personal or bodily injury, and wrongful death claims



Time Limit/Policy Limit Demands

- ❑ Applies only to parties represented by counsel
– not self represented parties [*watch out for Parris Firm tactics!*]
- ❑ Must provide at least 30 days to respond if sent by email, fax or certified mail/ 33 days if sent by regular mail



Time Limit/Policy Limit Demands

- ❑ Must be labeled “time limited demand” or specifically reference CCP 999.1
- ❑ Must be sent to assigned adjuster if known or to the email or physical address designed by the insurer for receipt of such demands if available on DOI website



Time Limit/Policy Limit Demands

- ❑ Must contain specific information including: date and location of loss; claim number if known, description of claimant's known injuries; offer a complete release by claimant of all Insureds; unequivocal offer to settle all claims within policy limits inclusive of liens; "reasonable proof" sufficient to support the claim



Time Limit/Policy Limit Demands

- ❑ *Failure to comply by Claimant's counsel means the demand was unreasonable as a matter of law*
- ❑ Statute did not change existing law other than as it states



Time Limit/Policy Limit Demands

- *Insurer's attempt to seek clarification, additional time, or additional information not "in and of itself" a counter-offer or rejection*
- *If insurer does not accept the demand, must notify claimant in writing and provide reasons before the demand expires, including any extensions provided.*



Time Limit/Policy Limit Demands

- Can a party set time periods of less than 30 (or 33) days to meet conditions (declarations signed by the Insured, declarations pages, etc.)?
 - ***NO. That would violate the statute.***



Time Limit/Policy Limit Demands

- Can a party “renew” or issue a “supplemental CCP § 999 demand which was previously rejected, providing a time limit of less than 30 days?”
 - ***NO. That too would violate the statute***



Time Limit/Policy Limit Demands

- Courts will most likely use case law construing CCP § 998 demands to interpret Section 999.
 - *CCP § 998 says that the demand cannot provide less than 30/33 days to be valid. If a demand expires and a new demand is issued, it doesn't matter if its called supplemental, or renewed, it is still a pre-litigation demand and would be subject to all the requirements of the statute, just as if it was a Section 998 demand.*

What is Social Inflation and Why is it Happening?



Growing anti-corporate sentiment.



The rise of the litigation funding industry.



Use of Phycology and Psychologist.



What is Social Inflation?

- ❖ **Social inflation is challenging the liability environment for business and insurance companies. The impact of social inflation has increased settlement demands, verdicts and in turn the payment of claims by insurers.**



Factors Driving Social Inflation: *Growing Anti-Corporate Sentiment*

- ❖ The 1% movement – Occupy Wall Street, Tea Party
- ❖ Corporate Welfare with bailouts of some but not others
- ❖ Stock Markets favoring the wealthy
- ❖ Tax Benefits
- ❖ Rising Inequality
- ❖ Lack of Diversity



Factors Driving Social Inflation:

A Culture of Fault

The US has developed a culture of fault that has become exceedingly dangerous for business:

- *Why go after the driver who caused the accident, pursue the employer as well*
- *Who has the insurance/deep pockets?*
- *Anti-corporate sentiment*
- *Deep seeded dissatisfaction/resentment/anger with status quo*
- *Social injustice movements:*
 - *Black Lives Matter*
 - *Occupy Wall Street*



Litigation Funding

Litigation funding/ litigation finance—is the provision of capital by a third-party “litigation funder” to a plaintiff. In return, the litigation funder receives a portion of what the plaintiff recovers.



Types of Litigation Funding

- ❑ Commercial: funding for disputes between business
- ❑ Consumer Litigation Funding: for non-commercial claims, such as mass torts
- ❑ Non-Recourse – funding is an investment only and funder is compensated if the “client’s” case is success



Types of Litigation Funding

- ❑ Passive: Lender exercises no control over the litigation funded
- ❑ Substantial: Lender funds cases with credible damages and claims in excess of \$10M
- ❑ Aligned: Lender structures transactions where interests are aligned between the funder, the plaintiff, and the attorneys



Psychology

Some Law Firms Have Psychologists on Staff!

Jury Anchoring: *begins in jury selection—
Plaintiff's counsel primes the potential jurors to
make decisions without realizing they are being
influence*



Psychology

- ❖ Use of group dynamics—
 - ❖ *Millennials*
 - ❖ *Gen Z*
 - ❖ *Consensus seeking—don't be the odd person out*
 - ❖ *Focus on acute disparities—class, position, income*



Psychology

The Goal?

Desensitization to large numbers—if you ask for \$50 million, \$10 million doesn't seem so bad



Psychology

The Reptile Theory



Psychology

The exponential increase in the sophistication of the plaintiffs' bar +

The changing composition of jury pools +

Use of psychology =

Juror Immunity To The Value Of A Dollar.



Practice Makes Perfect

- ❑ 77 court-approved class action settlements totaling \$4.2 billion in 2020
- ❑ The aggregate total settlement value doubled (2019: \$2.1 billion) largely as a result of several “mega” settlements over \$100 million
- ❑ The average settlement amount in 2020 was \$54.5 million representing a 15% increase over the prior nine-year average.



Public Outrage: Dissatisfaction + Easy Money

- ❑ Populist movements that have resulted in eroding the public trust of corporations.
 - ❑ social injustice movements leading to “defund the police.”
 - ❑ litigation against government entities with exponentially large verdicts as “punishment”
 - ❑ Number of class actions and recovery has doubled since 2010



Social Inflation: Hard To Predict

- ❑ Driven by “soft” social movements
- ❑ Driven by public perception of corporate misbehavior
- ❑ Driven by changing demographics
- ❑ Driven by social media



SOCIAL INFLATION: Take Away

- ❑ Jurors distrust of businesses and their lawyers
- ❑ Litigation funding resulting in fewer cost deterrents
- ❑ Increasing sophistication of the plaintiffs' bar
- ❑ Use of psychological tactics



SOCIAL INFLATION: Take Away

- ❑ Active print and electronic advertising by the plaintiffs' bar
- ❑ Changing composition of the jury pool impacts how cases/defendants viewed
- ❑ Prospective jurors are more aware of “blockbuster” verdicts due to social media
- ❑ Medical expenses have increased year over year

QUESTIONS?
