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Winning Bad Faith Claims on the Law: Summary Judgment Strategies for Insurers

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Winning Bad Faith Claims on the Law: Summary Judgment Strategies for Insurers

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Introduction

Why This Topic is Important

Bad Faith Claims

Essential Elements

Bad Faith Generally

- The duty of good faith and fair dealing.
- Common law vs. statute.
- Contract vs. tort.

Jurisdictional Differences

- California – "reasonableness."
- New York – "gross disregard."
- Arizona – "intentional denial with no reasonable basis."

Bad Faith Claims

Essential Elements (cont'd)

Types of Bad Faith

- First-Party Bad Faith
  - Claims handling practices.
- Third-Party Bad Faith
  - Failure to defend.
  - Failure to settle.

Defenses to Bad Faith

- Belief as to noncoverage.
- Advice of counsel.

Bad Faith Claims

Burden of Proof

New York

- Third-Party Bad Faith
  - Gross disregard standard.
  - Proof required.
  - Relevant factors.
  - Defenses to bad faith.
  - Additional issues for insureds.

Bad Faith Claims

Burden of Proof (cont'd)

New York (cont'd)

- First-Party Bad Faith
  - Generally unavailable.
  - Punitive damages limited.
  - Tortious conduct.
  - Consequential damages.

Bad Faith Claims

Burden of Proof (cont'd)

California

- Third-Party Bad Faith
  - Duty to accept reasonable settlements.
  - Scope of the duty.
  - Standard for extra-contractual liability.
  - Attorney's fees.

Bad Faith Claims

Burden of Proof (cont'd)

California (cont'd)

- First-Party Bad Faith
  - Bad faith extended to first party.
  - Genuine dispute doctrine.
  - Proving bad faith.
  - Defenses to bad faith.

Bad Faith Claims

Burden of Proof (cont'd)

California (cont'd)

- Statutory Claims
  - California Unfair Insurance Practices Act (UIPA), Cal. Ins. Code § 790.
  - California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200 et. seq.

Bad Faith Claims

Common Defense Strategies

Bad Faith Defense Theories in General Versus on Summary Judgment

- Grounds More Probable To Raise Issues of Fact
- Grounds More Likely To Result in Summary Judgment

Discovery Planning / Practice

Specific Grounds for Summary Judgment

- Non-Coverage Grounds: e.g. Statute of Limitations

Bad Faith Claims

Common Defense Strategies (cont'd)

Specific Grounds for Summary Judgment (cont'd)

- No Insurance Coverage in First Place
  - No Legal Valid Theory
  - Reasonable Legal Basis To Deny Coverage (Where Available)
  - "Fairly Debatable"
- No Factual Basis for Bad Faith Claim
  - Reasonable Investigation, etc.
  - Claims Handling
  - Settlement Handling

Summary Judgment

Burden of Proof

- *Matsushita Elec. Indus. Co., Ltd. v. Zenith*, 475 U.S. 574, 587 (1986) (Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial).
- *Celotex Corp. v. Catrett*, 477 U.S. U.S. 317, 327 (1986) (Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action.").
- *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986) (To survive summary judgment, the adverse party must demonstrate that "the evidence presents sufficient disagreement to require submission to a jury" . . . There must be "evidence on which the jury could reasonably find for the [nonmoving party].").

Summary Judgment

Burden of Proof (cont'd)

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

Summary Judgment

Burden of Proof (cont'd)

Rule 56. Summary Judgment (cont'd)

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(a) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(b) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Summary Judgment

Burden of Proof (cont'd)

Rule 56. Summary Judgment (cont'd)

(c) Procedures (cont'd).

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Summary Judgment

Burden of Proof (cont'd)

Rule 56. Summary Judgment (cont'd)

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

Summary Judgment

Burden of Proof (cont'd)

Rule 56. Summary Judgment (cont'd)

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

Summary Judgment

Burden of Proof (cont'd)

Rule 56. Summary Judgment (cont'd)

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

Summary Judgment

Current Case Law

- *Georgitsi Realty, LLC v. Scottsdale Ins. Co.*, 2023 U.S. Dist. LEXIS 78292, *9-10 (E.D.N.Y. 2023)
- *PAR Tech. Corp. v. Travelers Prop. Cas. Co. of Am.*, 2024 U.S. Dist. LEXIS 94961 (N.D.N.Y. 2024)
- *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, 2023 U.S. Dist. LEXIS 135028 (D.S.C. 2023)
- *Wash. St., LLC v. Nationwide Prop. & Cas. Ins. Co.*, 2023 U.S. App. LEXIS 24243 (3d Cir. 2023)
- *Beebe v. Ill. Nat'l Ins. Co.*, 2023 U.S. Dist. LEXIS 120296 (E.D. La. 2023)

Summary Judgment

Potential Alternative Relief

- **Motion to Dismiss**
- **Bifurcation**
- **Post-Summary Judgment Proceedings**
  - **Interlocutory Proceedings**
  - **Remaining Fact Discovery**
  - **Expert Discovery**
- **Trial**
- **Settlement**

Conclusion

Questions?

Thank You!

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Defending Against Insurance Bad Faith Claims: Strategies for Summary Judgment in Bad Faith Actions

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Insurance bad faith is a concept unique to the United States, grounded in the principle that every contract contains an implied covenant of good faith and fair dealing. In most jurisdictions, when an insurance company's handling of a claim is alleged to have violated this covenant, the policyholder may bring a tort claim against the insurer in addition to a standard breach of contract action. This tort claim can potentially expose the insurer to extra contractual damages not available for a simple breach of contract, including consequential damages up to the full amount of any verdict against the insured in the underlying litigation, regardless of policy limits and punitive or exemplary damages in particularly egregious cases.

Given these substantial risks, claims adjusters must be aware from the outset of any claim of the issues that could give rise to a bad faith allegation. Both adjusters and coverage counsel share responsibility for positioning the claim so that, in the event of a bad faith lawsuit, the insurer will prevail. Summary judgment is a critical procedural tool that allows courts to resolve claims as a matter of law without the need for trial, and successful use of this mechanism requires careful planning from the moment a claim is first made.

I. UNDERSTANDING BAD FAITH CLAIMS

To develop a successful summary judgment strategy for bad faith claims, it is critical to first understand the nature of these claims. Bad faith claims, which are sometimes described as violations of the duty of good faith and fair dealing, seek to impose liability in excess of policy limits (extra-contractual liability) for an insurer's failure to honor the terms of its insurance contract. These claims can arise under either common law or statute, depending on the jurisdiction. Where bad faith claims arise under common law, courts may classify them as either tort claims or contract claims.

A. Significant Jurisdictional Differences

The particular theory of bad faith adopted by the courts of a given jurisdiction can impact the nature and extent of damages, the applicable statute of limitations, and the types of defenses available. A majority of jurisdictions that have considered this issue have determined that the cause of action for breach of the implied covenant of good faith and fair dealing sounds in tort. New York, where first-party bad faith claims generally sound in contract, is a notable exception.

The elements of a bad faith claim are difficult to describe broadly because they differ significantly from one jurisdiction to another. Each jurisdiction generally recognizes that a bad faith claim arises out of the relationship between an insurance company and its policyholder, and such a cause of action lies where an insurer wrongfully fails to provide its insured with a recognized right under the policy. However, the standard of conduct that constitutes bad faith differs considerably between jurisdictions.

California, for example, arguably applies a reasonableness standard, or at least something akin to one, while New York requires a showing of "gross disregard" for the insured's interests or other egregious conduct. Other jurisdictions, such as Arizona, require proof of an "intentional denial without a reasonable basis." These differences underscore the importance of determining the particular standard applied in the relevant jurisdiction and tailoring the defense strategy accordingly.

B. First-Party and Third-Party Bad Faith

In most states, bad faith claims can arise under either first- or third-party coverage. First-party coverage refers to situations where the insurer owes benefits directly to the insured, such as fire, property, medical, disability, and life insurance. Third-party coverage refers to situations where the insurer agrees to indemnify the insured for liability to a third party, such as automobile and professional liability policies.

Under a first-party insurance policy, an insurance company generally has a fiduciary duty to promptly and adequately investigate claims, to promptly pay any covered claim, and to resolve disputes in good faith. When an insurance company breaches these duties, the insured may have a first-party bad faith claim against the insurer. Courts have found that conduct giving rise to such claims may include denying a claim for an inadequate or improper reason, failing to explain the basis for a denial of coverage, failing to conduct an adequate investigation, offering to settle a claim for an unreasonable amount, failing to adequately communicate with the insured regarding the status of the claim, delaying settlement negotiations or raising unreasonable obstacles to settlement, and delaying or failing to pay the settlement amount.

Third-party bad faith claims under liability insurance policies generally arise when an insurer breaches the duty to defend or the duty to settle. Under liability insurance policies, the insurer generally owes a duty to defend the insured (or in some cases to advance defense costs incurred by counsel selected by the insured) when any part of the underlying lawsuit is potentially covered by the policy. A claim by the insured for a defense under a third-party liability policy is technically a first party claim. However, because the duty to defend arises under a third-party liability policy, many courts apply the third-party standards to alleged bad faith in connection with a failure to defend.

The insurer also may owe a duty to indemnify, meaning the duty to pay any covered loss up to the limits of the policy. In many states, this also gives rise to a duty to settle a claim where the liability of the insured is reasonably clear and there is an opportunity to settle the claim within policy limits. That duty also involves an obligation to promptly and adequately evaluate claims from the outset.

C. Common Defenses to Bad Faith

Many defenses are available to an insurer against a bad faith claim, but two are particularly common. The first is a defense based on the insurer's belief that the policy does not afford coverage for the claim. In general, an insured does not have a claim for bad faith if there is no coverage under the policy, even if the claims handling was questionable. In most states, an insurer's legitimate belief that the policy does not afford coverage is also a defense to a claim of bad faith. The standard for determining whether the insurer's belief is legitimate varies by state and includes, for example, where coverage is "fairly debatable" (Illinois), where the insurer has an "arguable basis" for denying coverage (New York), and where there is a "genuine dispute" as to coverage (California).

The second common defense is reliance on the advice of counsel. In most states, an insurer has a complete defense to a bad faith claim where it relies on the advice of counsel in making its coverage determination. However, it is relatively rare for insurers to invoke this defense because doing so waives the attorney-client privilege, often quite broadly, as to the insurer's communications with counsel.

II. JUDICIAL APPROACHES TO BAD FAITH

As noted, the elements and standards for bad faith claims vary significantly by jurisdiction, and those differences can dramatically affect an insurer's exposure and defense strategy. To illustrate the breadth of this variation, two jurisdictions represent somewhat opposite ends of the spectrum: New York, where bad faith claims are extraordinarily difficult for policyholders to establish, and California, where the bar is considerably lower. Understanding the approach applied by the courts in a given jurisdiction is essential for adjusters and coverage counsel operating in multiple jurisdictions, or litigating in venues where forum selection may be contested, because the same conduct that results in summary judgment for the insurer in one state may expose it to significant extra-contractual liability in another.

A. The New York Standard: A High Bar for Policyholders

In New York, which represents one end of the spectrum in bad faith litigation, it is extraordinarily difficult for a policyholder to establish a claim for bad faith. Accordingly, New York is generally viewed as one of the more insurer-friendly venues in the country. In the landmark case of *Pavia v. State Farm Mutual Automobile Insurance Co.*, the New York Court of Appeals established the standard for third-party bad faith as a "gross disregard" of the insured's interests in considering an offer of settlement. Under this standard:

> [I]n order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a "gross disregard" of the insured's interests – that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer. In other words, a bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted.[1]

The court explained that this intermediate standard "strikes a fair balance between two extremes by requiring more than ordinary negligence and less than a showing of dishonest motives."[2] Requiring only ordinary negligence "would remove the latitude that insurers must be accorded in investigating and resisting unfounded claims," while requiring dishonest motives "would be all but impossible to satisfy and would effectively insulate insurance carriers from conduct that, while not motivated by malice, has the potential to severely prejudice the rights of the insured."[3] In the Court of Appeals' view, the gross disregard standard "accomplishes the two-fold goal of protecting both the insured's and the insurer's financial interests."[4]

In *Pavia*, the Court of Appeals also addressed the sufficiency of proof required in a bad faith claim, holding that the plaintiff must show that the insured lost an actual opportunity to settle a claim at a time when all serious doubts about the insured's liability were removed. This burden can only be satisfied when liability is clear and the potential recovery against the insured far exceeds the insurance coverage. However, an insurer is not necessarily obligated to accept a settlement where injury is severe and the policy limits are significantly lower than a potential recovery. Rather, "[t]he bad faith equation must include consideration of all the facts and circumstances relating to whether the insurer's investigatory efforts prevented it from making an informed evaluation of the risks of refusing settlement."[5]

Under New York law, courts consider numerous factors in evaluating bad faith claims, including:

(1) whether the insurer properly investigated the facts and circumstances of a claim to determine the potential liability of the insured and damages[6]

(2) whether the insurer engaged in timely settlement negotiations, which includes assessing whether, when a demand is made that is within policy limits, the insurer made a fair, reasonable, and timely counter-offer[7]

(3) whether, based on its investigation of the claim, the insurer should have recognized the potential for a substantial excess verdict against the insured[8]

(4) whether the insurer adequately responded to requests from the insured regarding the progress of settlement negotiations[9]

(5) whether the insurer inappropriately insisted upon contribution from the insured[10]

(6) whether the financial risk of not settling was substantially greater for the insured than for the insurer[11]

(7) whether the insurer had a reasonable belief in non-coverage[12]

(8) whether the insured played a role in delaying or frustrating settlement negotiations[13]

In practice, however, courts in New York rarely need to engage in extensive analysis of these factors because an insurer is not liable for bad faith if it has an "arguable case" for denying coverage. Consequently, bad faith liability in New York is essentially limited to the most egregious cases, where the insurer's neglect causes it to miss an opportunity to settle within policy limits or where the insurer refuses a settlement within policy limits with no real basis for doing so. Additionally, even where an insurer is found to have acted in bad faith, it cannot be held liable for punitive damages awarded against the insured, as this would violate public policy.[14] An insurer is also generally not liable for the attorney's fees incurred by an insured in the coverage action, even if there is a finding of bad faith, unless it was the insurer who initiated the coverage action.[15]

With respect to first-party bad faith claims, New York law is particularly favorable to insurers. In *Gordon v. Nationwide Mutual Insurance Co.*, the Court of Appeals held that the standard for actionable bad faith does not apply to first-party claims.[16] This is because, under New York law, a first-party claim for coverage sounds in contract, and an insurer's liability is, therefore, generally limited to policy limits.[17] The courts have also recognized that punitive damages cannot be recovered against an insurance company for a private wrong suffered by the insured. Rather, there must be a showing of morally reprehensible conduct directed at the general public.[18] Additionally, the insured must establish that the insurer committed an independent tort.[19] This is a difficult burden to meet in most coverage cases.

One notable exception is *Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York*, where the New York Court of Appeals held that an insured was permitted to seek consequential damages against its insurer in an action alleging a breach of the covenant of good faith and fair dealing.[20] However, that holding may be limited by its facts, which involved a business interruption policy where the insurer's failure to timely pay the claims resulted in consequential damages that were foreseeable at the time that the policy was issued.[21] Accordingly, while there are few cases testing the scope of the decision, the availability of consequential damages may be limited to business interruption or similar coverage.

B. The California Standard: A Lower Standard Approach

California represents the other end of the spectrum, where it is considerably easier for a policyholder to establish a claim for bad faith, at least in the context of third-party coverage. Accordingly, California is generally viewed as one of the lower standard venues in the country.

Under California law, when presented with a settlement offer that is within policy limits, an insurer has a "duty to accept reasonable settlements."[22] "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits."[23] This includes unlimited liability for any subsequent judgment against the insured. The California Supreme Court described the scope of this duty in *Comunale v. Traders & General Insurance Company*, where it held:

> The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. 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 which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim. Its unwarranted refusal to do so constitutes a breach of the implied covenant of good faith and fair dealing.[24]

Additionally, in *Crisci v. Security Insurance Company*, the Court held that, "[i]n determining whether an insurer has given proper consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer.[25] In *Johansen v. California State Automobile Association*, the Court further noted that "the only permissible consideration in evaluating the reasonableness of the settlement offer becomes 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."[26] Factors, such as policy limits, a desire to reduce future settlements, or a belief that the policy does not provide coverage should not affect the decision as to whether the settlement offer is reasonable.[27]

The focus in California case law on the reasonableness of any settlement offer implies a negligence standard. However, several California Court of Appeal decisions have held that the test is bad faith, not negligence, and that conduct must rise to the level of unfair dealing.[28] Other courts have held that negligence is the appropriate standard.[29] Thus, the appropriate standard remains somewhat unclear. At least one court has noted that an insurer's rejection of a settlement offer based on an erroneous belief that the policy does not afford coverage may constitute bad faith *per se*.[30]

Under California law, an insurer held liable for bad faith is further liable to pay the attorney's fees incurred by the insured in the coverage action, often called *Brandt* fees.[31] The rationale is that when an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, the insurer should be liable for that expense.

California has also extended the concept of bad faith to first-party cases. In *Gruenberg v. Aetna Insurance Company*, the California Supreme Court held that in every insurance contract there is an implied covenant of good faith and fair dealing, and this duty applies whether the company is attending to claims of third persons against the insured or the claims of the insured itself.[32] When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.

In first-party bad faith cases, California applies the "genuine dispute" doctrine, which serves as a limitation on insurer liability.[33] Under this doctrine, an insurer that denies or delays the payment of policy benefits due to the existence of a genuine dispute with its insured — as to the existence of coverage liability or the amount of the coverage claim — is not liable in bad faith, even though it might be liable for breach of contract.[34] While the reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact, it becomes a question of law where the evidence is undisputed and only one reasonable inference can be drawn from the evidence.[35] Additionally, the "genuine dispute" doctrine extends beyond purely legal issues.[36]

Although sloppy or negligent claims handling does not rise to the level of bad faith under California law,[37] a bad faith claim may proceed where the insurer is alleged to have "ignored evidence of significant costs of repairs and replacement, ignored the evidence generated by its own consultants, misrepresented the available remedies under the policy, misrepresented testing results and the efficacy of proposed remedies, misrepresented policy benefits and [the insured's] rights under the Insurance Code and applicable regulations, and failed to conduct an adequate investigation of the damage."[38]

Courts have also held that "delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters seeking to reduce amounts legitimately payable, and numerous other tactics may breach the implied covenant because [they] frustrate the insured's primary right to receive … prompt compensation for losses."[39] Conversely, an insurer may insulate itself from bad faith liability by establishing a record that it relied on reasonable evidence in making its coverage determination and paying all benefits not in dispute.[40]

California also provides statutory protections for policyholders through the Unfair Insurance Practices Act,[41] which defines numerous unfair claims settlement practices. These include denying policy benefits without reasonable cause, failing to provide a clear reason for denial, failing to communicate with the policyholder about the claim, misrepresenting facts or policy benefits, refusing to pay the full value of the claim, failing to conduct a prompt and fair investigation, failing to respond promptly to a claim, failing to establish reasonable standards for claim processing, failing to approve or deny a claim in a reasonable time once all proof is submitted, and forcing the claimant into litigation by failing to make a settlement offer.

While only the insurance commissioner has the authority to prosecute direct claims against an insurer for violations of this statute, a private cause of action under California's Unfair Competition Law[42] can still be based on conduct proscribed by the statute if that conduct is also independently actionable under another statute or the common law.

III. DEVELOPING A SUCCESSFUL SUMMARY JUDGMENT STRATEGY

To be successful, planning for summary judgment must begin well before the motion is filed. It starts at the inception of the claim and continues through litigation. The foundation rests on rigorous discovery planning and practice, which requires insurers to quickly identify key decision-makers and relevant documents, limit discovery to the single claim at issue to prevent policyholder counsel from expanding the case into a broader pattern-of-conduct inquiry, and methodically collect the claims file, underwriting file, and custodian materials that will support the insurer's position.

Building on this evidentiary foundation, insurers must also identify and develop defense theories that are well suited for summary judgment, such as lack of coverage, a reasonable legal basis to deny coverage, and the advice of counsel defense, while recognizing that other defenses, such as conformity to industry standards or the insured's breach of contract, are more inherently fact-dependent and likely to raise jury questions that are not appropriate for summary judgment.

An understanding of the burden of proof and summary judgment standards under Rule 56 of the Federal Rules of Civil Procedure (and similar state rules) is essential, as is awareness that, while the plaintiff technically bears the burden of proof, the practical burden in bad faith cases often falls on the insurer. Finally, insurers should consider alternative relief strategies, including early motions to dismiss, bifurcation of coverage and bad faith issues, and negotiated resolutions through mediation, all of which can avoid or mitigate the risks and costs associated with protracted bad faith litigation.

A. Discovery Planning and Practice

A successful summary judgment motion requires facts to support the insurer's arguments, which typically require discovery. Discovery in a bad faith case can be intense, as policyholder lawyers typically seek to make it so. Potential witnesses could include not just the claims adjuster but anyone who had anything to do with the coverage determination, along with their supervisors up to the highest levels of the company. Depending on the claim, the same might be true for underwriters.

There will also be voluminous document requests, often seeking not just the claim file and underwriting file but also company policies, claims manuals, and other training materials. Policyholder lawyers will also likely seek discovery regarding similar claims and how the insurer treated them. Both outside counsel and the claims department must quickly identify all the important players and documents that may be the subject of discovery.

While most bad faith cases involve allegations concerning a single claim, the insured's counsel will often try to expand the scope of discovery to establish a course of misconduct. An institutional pattern of denying or delaying payment of claims in bad faith can increase the damages available, including punitive damages and attorney's fees. Accordingly, the first priority for an insurer is to limit the scope of discovery to the single claim that is the subject of the bad faith action. This often requires that the insurer seek a protective order from the court.

The next step is identifying all the decision-makers on both sides of the case. The claims adjuster is central to this effort because he or she will know best who the important players are: those who made decisions and know the most about the case. This will help determine who has documents relevant to the case (to the extent they are not already in the claim file) and who may be required to sit for a deposition.

Lastly, all documents and materials that may be the subject of discovery must be identified and collected. These will include the claims file and underwriting file, although the insured may be granted broader discovery including claims manuals and possibly the claim files for other cases. Even though nearly all claims adjusters save the relevant documents and emails to the claim file, it will probably be necessary to collect copies of hard drives, shared drives, and full email files for all relevant custodians. This may require the engagement of outside e-discovery vendors. Accordingly, the earlier the identification of available documents begins, the better.

B. Defense Theories on Summary Judgment

In addition to discovery planning, it is important to think about the specific defenses an insurer may have from the outset of the litigation and how they relate to a potential summary judgment motion. Certain defenses are particularly well-suited for summary judgment, such as non-coverage grounds, like the statute of limitations and any defenses that rely on the interpretation of policy terms, which are matters of law for the court to decide.

These defenses include lack of coverage, as there generally can be no bad faith if the insured's claim is not covered by the policy in the first place, even if the insurer's handling of the claim was questionable. Similarly, whether an insurer's coverage determination is at least "fairly debatable" can often be determined as a matter of law, particularly if there is favorable case law discussing the particular policy provision at issue. In those rare instances when carriers invoke the advice of counsel defense, the validity thereof can often be decided as a matter of law on summary judgment. For example, it would seem hard to dispute this defense if the case was reviewed by outside counsel that issued a coverage opinion that the carrier followed. However, the insured's lawyer may try to raise a fact issue regarding whether the carrier actually relied on that opinion.

Other defenses are more inherently fact dependent and, therefore, more likely to require a trial. If the insurer's actions align with common industry practices, they can argue they were not acting unreasonably or in bad faith. However, whether something is a common industry practice is likely to be the subject of expert testimony with each side's expert taking the opposing view. In duty to settle cases, a demand within policy limits is necessary before an insured can bring a claim for bad faith, but if the alleged demand was made verbally, the issue may present a fact question. In the case of so-called "setup demands," which are made early in the case and are only open for a brief period, whether the insurer was given a reasonable time to evaluate the claim and respond is likely to be deemed a jury question. If the insured violated the terms of the insurance contract, the insurer may have grounds to deny coverage and argue they were not acting in bad faith, but these types of claims almost always present questions of fact for the jury.

C. The Burden of Proof and Summary Judgment Standards

For most coverage cases, particularly bad faith cases that survive a motion to dismiss, summary judgment is often outcome-determinative. It is a matter of black letter law that the plaintiff bears the burden of proof and must produce evidence to establish a question of fact for trial on each of its claims. However, because summary judgment is so important in coverage litigation, in practice that burden can often fall on the insurer.

Although the criteria, timing, and procedures, vary by jurisdiction, most follow something akin to Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, meaning there is no genuine issue for

trial.[43] Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the civil rules as a whole, designed to secure the just, speedy, and inexpensive determination of every action.[44] To survive summary judgment, the adverse party must demonstrate that the evidence presents sufficient disagreement to require submission to a jury, meaning there must be evidence on which the jury could reasonably find for the nonmoving party.[45]

Under Rule 56(a), any party can move for summary judgment on all or part of their claims or defenses. Generally, both the plaintiff and defendant will each file their own summary judgment motion, and courts typically decide them all at once. Summary judgment must be granted where there is no genuine issue of material fact, and courts generally have considerable leeway to interpret evidence in determining whether an asserted issue of material fact is genuine. The best way to impugn witness credibility at the summary judgment stage is to elicit contradictory testimony from a witness during his or her deposition.

The default timing under Rule 56(b) is that a party has until 30 days after the close of discovery to file a summary judgment motion, but the timing varies by court and by judge. In some courts, a party can move for summary judgment multiple times, while in others a party cannot. This varies not just by state but also within the federal system and sometimes by judge within a particular district. For example, in the New York state courts, there is one chance at summary judgment but often multiple opportunities in the Southern District of New York.

Under Rule 56(c), the evidence that can be used on summary judgment includes depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. The evidence relied on must be admissible at trial, with deposition testimony being a notable exception since courts generally use it on summary judgment as a proxy for how a particular witness will testify. The court is free to examine the whole record. Even if an opponent misses a key fact in their favor, the moving party may not be safe. Affidavits and declarations can be used as long as they are from someone with personal knowledge. If there is something needed that is not in the record, this is how to get it in. In federal court, expert reports are generally done as by declaration for this reason.

Pursuant to Rule 56(d), a party can avoid summary judgment by convincing the court that more discovery is required. That is why summary judgment is generally filed after the close of discovery. Rule 56(e) also gives the court broad discretion to supplement the record or the briefing. Similarly, Rule 56(f) permits the court to grant summary judgment on a ground nobody asked for, to a party that never asked for it, or even if nobody moves for it.

D. Alternative Relief Strategies

1. Motion to Dismiss and/or for Judgment on the Pleadings

The best alternative to seeking summary judgment on a bad faith claim is never needing to litigate the issue in the first place. A motion to dismiss or for judgement on the pleadings seeks adjudication of coverage issues at the outset of the litigation, as a matter of law, generally based on matters determinable solely from the face of the complaint and the policy. In most states, a genuine coverage dispute will preclude a finding of bad faith as a matter of law. Many courts, however, are reluctant to dismiss claims at the pleading stage and will often find fact questions requiring discovery.

2. Bifurcation

Under the law of most states, an insurer is not liable for bad faith unless the policy does, in fact, provide coverage for the claim. Accordingly, an insurer may attempt to bifurcate the coverage issues and bad faith issues both for the purposes of discovery and/or trial.[46] Regarding the former, courts have, in recent years, been less willing to bifurcate discovery due to concern that it will extend the life of the case.

3. Settlement

The most common alternative to a motion for summary judgment is a negotiated resolution, either as part of a court-sponsored mediation program or through private mediation. Private mediation is far more common in coverage cases and is an effective tool for avoiding the costs of discovery, which can be extensive in a bad faith case. It is extraordinarily rare for insurers to agree at mediation to a settlement in excess of policy limits, even where bad faith claims remain. However, within limits, the presence of such claims may ultimately increase what the insurer views as a reasonable settlement amount.

4. Trial

In the event that, following full discovery, the court finds genuine issues of material fact that preclude summary judgment, there is generally no other judicial option but to try the bad faith claim. However, trials are fairly rare in coverage cases for many reasons. Mostly, the fact that contracts are generally interpreted as a matter of law means that there is often very little left for trial, even when there are allegations of bad faith. Also, if a coverage case makes it to trial, there generally have been rulings antagonistic to the insurer's position, which increases the insurer's incentive to settle. Insureds are also typically paying their own way in coverage litigation, and legal costs reduce the amount the insured recovers, so they may not be willing to see the case all the way through even if they think they have a strong one.

IV. CONCLUSION AND KEY TAKEAWAYS

Bad faith litigation presents insurers with substantial challenges, including protracted proceedings and the potential for extra-contractual liability far exceeding policy limits. Successfully defending against these claims requires careful attention from the moment a claim is first made, through the discovery phase, and ultimately to the summary judgment motion. By understanding the applicable legal standards in the relevant jurisdiction, maintaining thorough documentation of claims-handling practices, limiting the scope of discovery where possible, and developing defense theories suited for summary judgment, insurers can significantly improve their chances of resolving bad faith allegations favorably as a matter of law.

To effectively implement these strategies, adjusters and coverage counsel should keep the following key takeaways in mind:

1. **Know the jurisdiction**. Bad faith standards vary dramatically, from New York's "gross disregard" standard, which is highly favorable to insurers, to California's "duty to accept reasonable settlements," which is more favorable to policyholders. It is important to tailor the defense strategy to the specific legal framework that applies.

2. **Position the claim from day one**. The groundwork for summary judgment begins at claim inception, not when litigation commences. Maintain thorough documentation, conduct adequate investigations, communicate clearly with insureds, and ensure coverage determinations are well-reasoned and supported.

3. **Control the scope of discovery**. Policyholder counsel will seek broad discovery to establish a pattern of misconduct, which can increase exposure to punitive damages and attorney's fees. Limit discovery to the single claim at issue, identify key decision-makers early, and collect relevant documents promptly.

4. **Identify defenses suited for summary judgment**. Certain defenses, such as lack of coverage, a reasonable legal basis for the coverage determination, and reliance on advice of counsel, are particularly well-suited for summary judgment because they present legal questions for the court. Defenses that raise factual disputes, such as conformity to industry standards or the insured's breach of contract, are more likely to require trial.

5. **Consider alternative relief strategies**. Summary judgment is not the only path to resolution. Early motions to dismiss, bifurcation of coverage and bad faith issues, and private mediation can all reduce litigation costs and exposure, often before extensive discovery is required.

By integrating these principles into both claims handling and litigation strategy, insurers can minimize their exposure to extra-contractual liability and maximize their chances of resolving bad faith allegations favorably as a matter of law.

Endnotes

1 *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 453–54 (1993).
2 *Id.* at 454.
3 *Id.*
4 *Id.*
5 *Id.*
6 *See Brown v. United States Fidelity & Guar Co.*, 314 F.2d 675 (2d Cir. 1963).
7 *See State v. Merchants Ins. Co. of New Hampshire*, 109 A.D.2d 935 (3d Dep't 1985).
8 *See Knobloch v. Royal Globe Ins. Co.*, 38 N.Y.2d 471 (1976).
9 *See Id.*
10 *See Brockstein v. Nationwide Mut. Ins. Co.*, 417 F.2d 703 (2d Cir. 1969).
11 *See Brown, 314 F.2d at 678-79.*
12 *See Dawn Frosted Meats, Inc. v. Ins. Co. of North American*, 99 A.D.2d 448 (1st Dep't 1984).
13 *Pavia*, 82 N.Y.2d at 455.
14 *Soto v. State Farm, Ins. Co.*, 83 N.Y.2d 718 (1994).
15 *See Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12 (1979).
16 *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427 (1972).
17 *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308 (1995).
18 *See, e.g., DiBlasi v. Blue Cross of Western New York, Inc.*, 156, A.D.2d 986 (4th Dep't 1989); *Royal Globe Ins. Co. v. Chock Full O'Nuts Corp.*, 86 A.D.2d 315 (1st Dep't 1982).

19 *New York Univ.*, 87 N.Y.2d at 316.
20 *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187 (2008).
21 *See, e.g., Panasia Estates, Inc. v. Hudson Ins. Co.*, 10 N.Y.3d 200 (2008) (permitting a claim for consequential damages that were "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting").
22 *Crisci v. Security Ins. Co. of New Haven, Conn.*, 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173, 177, (Cal. 1967).
23 *Hamilton v. Maryland Cas. Co., 27 Cal. 4th 718, 725, 117 Cal. Rptr. 2d 318, 41 P.3d 128 (Cal. 2002).*
24 *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 659, 328 P.2d 198 (1958) (internal citation omitted).
25 *See Crisci*, 66 Cal. 2d at 429, 426 P.2d at 177.
26 *Johansen v. California State Automobile Association Inter-Insurance Bureau*, 15 Cal. 3d 9, 123 Cal. Rptr. 288, 538 P.2d 744 (Cal. 1975).
27 *Id.*
28 *See, e.g., Shade Foods, Inc. v. Innovative Prod. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 879-80, 93 Cal. Rptr. 2d 364, 386 (2000) ("Though some authority tends to equate … bad faith … with negligence, the better view appears to be that it must rise to the level of unfair dealing.").
29 *See, e.g., PPG Indus. Inc. v. Transamerica Ins. Co.*, 49 Cal. App. 4th 1120, 56 Cal. Rptr. 2d 889, 894 (1996).
30 *See Griffin Dewatering Corp. v. Northern Ins. Co. of N.Y.*, 176 Cal. App. 4th 172, 206, n.38, 97 Cal. Rptr. 3d 568 (Cal. Ct. App. 2009).
31 *See, e.g., Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 806 (2004).
32 *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566 (1973).
33 *Safeco Ins. Co. v. Guyton, 692 F.2d 551 (9th Cir. 1982).*
34 *Chateau Chamberay Homeowners Ass'n v. Associated Internat. Ins. Co.*, 90 Cal. App. 4th 335 (2001).
35 *Id.*
36 *Id.*
37 *Id.*
38 *Pollock v. Fed. Ins. Co.*, No. 21-cv-09975-JCS, 2022 U.S. Dist. LEXIS 57686, *19–20 (N.D. Cal. Mar. 29, 2022).
39 *Fraley v. Allstate Ins. Co.*, 81 Cal. App. 4th 1282, 1292 (2000).
40 *Id.* at 1293.
41 Cal. Ins. Code § 790.
42 Cal. Bus. & Prof. Code §§ 17200 et. seq.
43 *Matsushita Elec. Indus. Co., Ltd. v. Zenith*, 475 U.S. 574, 587 (1986).
44 *Celotex Corp. v. Catrett*, 477 U.S. U.S. 317, 327 (1986).
45 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986).
46 *See, e.g., Devito v. Grange Mut. Cas. Co.*, 2013-Ohio-3435, ¶ 12, 996 N.E.2d 547, 550 (Ohio Ct. App.) (requiring bifurcation of bad faith issues).

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