Ep. 12: Breaking Down Bad Faith: Insurers' Good Faith Duties and Defending Bad Faith Claims

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Host: Welcome to RumbergerKirk's Legally Qualified podcast, where we answer important questions facing businesses today and discuss hot topics in the legal industry, from employment law to commercial litigation, product liability, and everything in between. We've got it covered.

Brett Carey: Hello everyone. Thank you for joining us for this episode of Legally Qualified. Today we will be discussing bad faith claims, insurer's good faith duties and strategies for preventing and defending bad faith claims. I'm Brett Carey. I'm a partner in RumbergerKirk's Orlando office. In my practice I represent insurance companies in both first and third party coverage matters, also including claims involving extra contractual liability and bad faith disputes.

Candy Messersmith: And I'm Candy Messersmith. I'm also a partner in the firm's Orlando office. Like Brett, I also focus on insurance coverage issues, as well as bad faith claims. To get us started today we're going to discuss why bad faith claims can be such a big deal for insurance companies and why insurance companies want to prevent them. Brett, can you talk a little bit about what's at stake when an insurance company faces a bad faith claim?

Brett Carey: Right Candy. What's at stake for third party claims is essentially a limitless policy. That is a policy has been written with a certain limit for liability. But in a third party

bad faith claim, that would be a claim where a claimant can recover limits in excess of that policy. And then in the world of a first party claim, it would be where an insured can recover damages under the policy that were not considered when that policy was written. So you're recovering damages outside the scope, which is why they're called "extra contractual damages."

And so that's why it's important to understand bad faith law because then it could exposure and insurance company to extra contractual damages. And so I'd like to give just a few examples. The first are what are called actual damages. And so those are damages that are reasonably foreseeable results of an insurer's failure to comply with his good faith duties. So it's basically like a cause and effect, right. So if an insurance company has done something and not complied with its good faith duties and it's led to damage by an insured, that could be something that's recoverable in a bad faith claim.

So a classic example of actual damages in a first party coverage dispute would be something like public adjuster fees. So if an insurance company has acted in a way that has caused an insured to retain a public adjuster and therefore pay a percentage of their claim award to the public adjuster, theoretically the insured could then say that they have been actually damaged by the insurance company's conduct because they had to pay a percentage of their award to the public adjuster. So that's what actual damages are.

Another example are punitive damages, which are specifically allowed for in the Florida Bad Faith Statute, although it's not easy to recover. Initially in Florida we have a statute that permits punitive damages to be awarded, but the conduct at issue has to be considered, quote, intentional misconduct or gross negligence, which are heightened standards. It's not just mere negligence.

In addition, under the Bad Faith Statute there is an extra requirement added. And that is that the acts giving rise to the alleged violation occur with such a frequency

as to indicate a general business practice. And so in addition to showing some sort of gross negligence or misconduct on behalf of the insurance company, the insured would have to establish that it's been happening a number of times so as to be, quote, a general business practice.

The final example I'd like to give in terms of extra contractual damages are, attorney's fees, costs and interest. And so these are basically permitted under the Florida Bad Faith Statute itself. Attorney's fees and costs are recoverable if an insured pursues a claim under the statute and prevails. And then interest is also something that's not typically paid in a contractual claim, but if a court were to find that a claim should have been paid but wasn't, then interest can be added on top of it.

So it's important to understand bad faith law and good faith duties so that insurance companies can avoid having to pay these extra contractual damages. So now that we've gone over the types of damages that insurance companies could potentially face, Candy, why don't you speak to the sources of a company's good faith duties and the types of claims that could arise?

Candy Messersmith: Sure. Going back to the punitive damages example for a second, I think it's important to point out that even if the insurance company is not on the hook for punitive damages, ultimately it really exposes the insurance company to some real invasive discovery, at least that's been my experience. Did you want to speak to that for a second?

Brett Carey: Yeah, I think that's exactly right Candy. And sometimes even the prospect of punitive damages itself can be used a sword for a plaintiff or an insured in litigation to try to get at extensive discovery, that an insurance company might have to produce a number of things. And so in a way a bad faith claim, the cost of defense and perhaps even the settlement value could increase because of the prospect of punitive damages. Because the discovery itself can be so voluminous

and overwhelming and the courts will typically allow plaintiffs to even do the punitive damages discovery before they have a right to assert a claim for punitive damages.

There is one caveat I'd like to mention about punitive damages, discovery in Florida under the Bad Faith Statute. And it doesn't happen a lot, but technically the Bad Faith Statute does say that a plaintiff has to bear the cost of any punitive damages discovery. So it's important for insurance companies to know that if they're in a bad faith suit and they get discovery on punitive damages, they need to consider the cost that it's going to take to incur in responding to that discovery. And they may be able to shift that cost to the plaintiff in the litigation.

Candy Messersmith: Thanks for that Brett. Well, back to the source's bad faith claims and good faith duties, I think we're all familiar with the Boston Old Colony case here, but just to recap it briefly. Way back in 1980 the court held that an insurance company has to use the same degree of care and diligence as a person of ordinary care that would exercise in the management of their own business. And basically the court said that that would include an insurance company's duty to investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the circumstances and if possible, settle what a reasonably prudent person should.

And that really is kind of like the godfather of common law bad faith in Florida. Now subsequent decisions have come out and added onto that, effectively putting more duties on the insurance company. But that's kind of the litmus test in Florida.

Another source of bad faith claims and good faith duties if you will are the Florida statutes. And again, I think we're all familiar with Florida's Civil Remedy Statute 624.155. It again, adds on various duties that an insurance company must undertake—and do so in good faith—in order to not run afoul of the statute. And then another source that plaintiff's attorneys often cite are the ethical rules for

adjusters found in the Florida Administrative Code. So those duties set forth in those sources are what plaintiffs cite to when they're making a bad faith claim. Brett, can you talk a little bit about the difference between first and third party claims?

Brett Carey: Absolutely Candy. So a first party claim involves the parties to the insurance contract itself. So it's the insured listed on the policy and the insurance company that wrote the policy. So first party claim is where an insured is making a claim against the insurance company. So very common first party claims in Florida include property damage cases. So it could be, like a homeowner's policy and the insured has property damage due to a storm. They report a claim to their insurance company for damage to their home. That is a first party claim.

There is also other types of first party claims throughout the insurance industry. So just some other examples, health insurance is first party. You're making a claim from your own health insurer. If you have a claim for benefits, trip to the doctor, et cetera. Disability insurance is another type of first party claims. And even in the auto realm of coverage, uninsured motorist coverage is a type of first party coverage. And so if you're involved in an accident with another party who doesn't have insurance or who perhaps is under insured, you can make a claim if you have UM insurance with your own insurance company involving that accident. And so that would be a first party claim.

Candy Messersmith: I can speak to third party claims. As I noted, that's the majority of the cases I handle. And that's when a stranger to the policy is making a liability claim against the insured. Sometimes we get in situations where there are, quote, friendly cases. Meaning, for example, a daughter-in-law goes over to her mother-in-law's house and slips and falls and makes a claim. And in her mind she's just suing the insurance company and not her mother-in-law. These claims have to involve lawsuits against the actual insured.

And as Brett points out, if you have a bad faith claim, it can result in having a policy with no limits. And sometimes that's what plaintiff's counsels are shooting for. They don't want to settle a claim for the policy limits. For example, sometimes we deal with homeowner's policies that have a low $100,000 limit, and let's say we have a near drowning case, which of course usually involves catastrophic losses. The plaintiff's attorney does not want the carrier to pay that $100,000 and settle the claim. They want to try to set up a bad faith claim so that they can take that $100,000 limits off.

And there are a few things that we want to do to ensure that there are no bad faith set ups and a couple of things in particular that we can do to try to avoid them. As I mentioned earlier, the Boston Old Colony case, one of the express duties that the court found was that the insurance company must investigate the facts. And Florida is in the minority of jurisdictions, where it does not require the plaintiff to make a policy limits demand in order for there to be a bad faith claim.

In Florida an insurance company has to affirmatively investigate the claim and affirmatively engage in settlement negotiations where appropriate. So that's one thing we want to do out of the gate. So, for example, I talked about a near drowning. The carrier gets notice of a claim. They need to proactively investigate that. They need to look at the insured's liability, if any. They need to look at the damages and the magnitude of them. And then if appropriate go out and make affirmative settlement offers. So that's one thing I think is paramount in handling claims in Florida, and right out of the gate you have to start investigating and engaging in settlement discussions.

Equally as important is when you're doing that, you have to communicate with the insured. You can do everything right in terms of evaluating a claim, investigating a claim and responding to settlement demands, making affirmative settlement offers. But if you're not communicating that to the insured, you're in trouble. You

can still have a bad faith claim, like I said, even if you've done everything right if you're not communicating with the insured.

Another pitfall insurance companies are faced with fairly frequently are time limit demands that are made to basically set the insurance company up to fail. The classic one is a ten day time limit demand before a holiday weekend. And they'll require, for example, an affidavit from the insured of no other insurance. Or a financial affidavit from the insured outlining, let's say non-homesteaded property. And they'll require that payment be made within ten days, in their office by 5:00. And the failure to do that, to dot every I and cross every T if you will, results in a rejection of that offer.

Then the plaintiff files a lawsuit against the insured with the hopes of getting an excess judgment. So that's one thing that insurance companies really need to be aware of. And I think by and large the case law that's been coming out shows that insurance companies are getting better in responding to these types of demands. But especially for the newer adjusters coming in, they really have to be aware of these and make sure that every requirement in the demand is complied with if the carrier indeed does want to accept that demand. And again, when you're doing all that you need to communicate with the insured. You always have to remember that.

And what I was talking about generally are applicable in third party claims. But there are some unique aspects to the first party claims. Brett, did you want to talk about civil remedy notices?

Brett Carey: Yeah, let me get into that Candy. Thank you for addressing things that should be done in a third party context. So civil remedy notices, I'm going to talk about the first party context of bad faith claims. Important to know that when responding to a civil remedy notice, an insurance company has 60 days to respond. That's listed in the statute. You have 60 days to respond. And when reviewing a civil remedy

notice, one thing that an insurance company of course can do if they feel like there is some merit to what's listed in the civil remedy notice or they do additional investigation and decide that you know what, we just want to go ahead and resolve this and prevent any bad faith claim from happening in the future.

And insurance company can pay the amount that is alleged to be at issue in the civil remedy notice. And so the timing of that payment is important because an insurance company again, has 60 days to respond. If you want to cure and make payment within 60 days, that doesn't mean on the 60th day you call up the attorney or the insured who filed the CRN and say, we'll agree to pay you this. Or, we'll drop it in the mail on the 60th day.

The case law interpreting the 60 day response deadline, if you want to pay and cure the alleged bad faith says that the check has to be in hand of either the attorney or the insured who filed the CRN by the 60th day. So you'd have to make that determination to pay before the 60th day and make sure you have time to actually get the payment to whoever filed the CRN before the deadline expires. So that's one way if the insurance company feels there's at least some merit to the claim or they just want to cure it and get rid of it, if that payment is made within 60 days then there's no alleged bad faith. It's been cured.

But if an insurance company is not going to make a payment or cure any alleged bad faith, they still need to file a response within 60 days. It's a written response that's filed through the Department of Financial Service's website. But there are some things to keep in mind when doing that response. Of course you want to respond to the factual allegations that are listed in the civil remedy notice, and you want to address or correct any facts that you think are incorrect. And so you want to put it on the record.

But some minor things that you might not think about, you might think that there is a mistake in the CRN, is if the insured or the attorney who filed the CRN lists the

wrong insurance company or the wrong policy or claim number. And so while that might seem like a minor detail, it's important because in Florida statutory bad faith is of course created by the Florida Legislature. And the courts have said that they're going to strictly construe the statute and require that CRNs be strictly complied with.

And so if there is any defect or error in the civil remedy notice, an insurance company needs to point that out in the CRN response. So if the wrong insurance company has been listed, if the wrong policy number or claim number has been listed, you need to point out in responding to the CRN that the wrong information has been included and that the company reserves the right to be served with a statutorily compliant CRN. And the failure to raise what might be called technical defenses in the CRN response could mean that if there's later bad faith suit, you're not allowed to raise those defense in the lawsuit. So you want to be sure to raise those defenses in the CRN response so that one, you're putting the insured or the lawyer who filed the CRN on notice to allow them to correct it. And then two, you have preserved that so-called technical defense if there is a later bad faith claim.

And then I guess the last point I want to make about the first party claims and the bad faith statute in Florida, is that we can get caught up in the facts. The standard, when courts are looking at bad faith claims is, we're going to look at the totality of the circumstances. What is this fact here? What is that fact there? And it's important not to get down into the weeds, and I think it's important for insurance companies to remember, what's the actual jury instruction that a jury is going to hear when a bad faith claim goes to trial?

And so in Florida there's a model jury instruction for bad faith and it says that, bad faith on the part of an insurance company is failing to settle a claim when under all the circumstances it could and should have done so had it acted fairly and honestly toward its insured and with due regard for its insured's interests. So when a jury hears that instruction, they might struggle with what that actually means,

considering all the information that they have just heard in a trial. So I think it's important for insurance companies just to see the big picture when they are defending a bad faith claim. Because while there might be good facts here and there, they want to think about as a whole, how is the case we're presenting to the jury, and how are they going to feel about our case once they're given this jury instruction?

So just a reminder to keep the big picture in mind when defending a bad faith claim. I know that we've covered a lot of information in a relatively short amount of time here on this podcast. First we talked about the importance of considering extra contractual damages and the effect those types of damages can have on increasing the amount of an insurance claim. And then Candy talked about good faith duties and bad faith standards to follow to avoid or mitigate bad faith claims.

I guess in closing, one key takeaway that I would like listeners to keep in mind with respect to first party claims are one, just to keep the claim file well documented and two, to preserve any technical defenses when responding to a civil remedy notice. Candy, you have any final parting thoughts for third party claims?

Candy Messersmith: Yes Brett. Basically to reiterate what I said before. The insurance company has to proactively investigate claims and engage in settlement discussions with the plaintiff's counsel. And if the insurance company does want to settle these time limit demands that we get, make sure every I is dotted and every T is crossed. And importantly, when the insurance carrier is doing all of these things, keep the insured informed. I can't stress that enough.

Brett Carey: Thanks Candy. I think that's a great place to end things. Appreciate you Candy for joining us on today's podcast and sharing your insights. Also want to thank our listeners for sticking with us as we discuss the wonderful world of bad faith law in Florida. We hope that you found today's conversation insightful and helpful. So if you have any questions about bad faith claims or any other insurance coverage

questions, feel free to reach out to us at info@Rumberger.com. And remember, you can subscribe to Legally Qualified wherever you listen to podcasts, so you don't miss an episode. Thanks for listening, and have a great rest of your day.

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