

# Thoughts for Discovery in the Bad Faith Case

By Stephen C. Kaufman, Esq.

This article is written to give the practitioner some thoughts concerning areas for inquiry in a bad faith case involving a delay or failure to pay uninsured motorist or personal injury protection benefits. In this regard, the focus here will be on questions to ask in interrogatories and documents to request for production.

Because these are complicated cases and there is much the insurer would like to hide, it is suggested that a motion first be made to ask for unlimited discovery. It can be expected that the insurer will disclose next to nothing in making its Rule 26 disclosures, so whether discovery can be extended to whatever is relevant or reasonably calculated to lead to the discovery of admissible evidence may make all the difference in the world to the ultimate outcome of the case.

Begin by reviewing the pattern discovery and utilize whatever is applicable to your case. You will then want to know the legal relationship of all the defendants and the identities of certain people. This would include all adjustors, supervisors and other personnel involved in any way with respect to the claim – handling, decision making or otherwise – at the local, regional, national or home office level or any other level. Get your client's file as well. Don't just get the claims file and be happy that you have it all. Be sure they give you every document relating to this particular claim, regardless of what the insurer calls the file. Make sure

they include, but do not limit it to, all notes, log entries, correspondence, internal memos, e-mail, evaluations and investigations. You will also want to know the names of the CEO, the person in charge of claims at each level and who is in charge of marketing, advertising, public relations, customer service, management and supervision of agents and policy content.

Discovery should also be directed at other complaints and court cases, both prior and subsequent to your claim. Find out whether the insurer has a depository where it keeps documents relating to bad faith litigation and whether there is an index of the documents contained in the depository.

If possible, find out if the insurer has violated standards. Look toward obtaining claims manuals, training manuals and any other guidelines, instructions, memos, protocols and handbooks issued to claims personnel, supervisors and management personnel, whether on paper or in video, audio or other form or stored on computer, diskette or other electronic media.

Other places to look for statements that might place the insurer in a bad light are the insurer's own slogans, television, radio, newspaper and magazine advertising, materials distributed to their agents, materials distributed to insureds in general, and your client in particular, and documents distributed to schools or the public for educational purposes. In this regard, it might be

helpful to do a copyright and trademark search. Request with specificity whatever the insurer has protected, including intracompany newsletters, manuals and magazines. These materials are the insurer's own representations as to how a claim should be handled and the failure of the carrier to act in conformity with them is evidence of its violation of its own standards.

More specifically, ask the insurer if the claim was handled in a routine manner for that type of claim. If the answer is no, it indicates that the insurer did something wrong by treating your client differently. If the answer is yes, it is evidence of a pattern of bad faith conduct relevant to exemplary damages. As to treating doctors and IME doctors whose opinions are favorable to your client, ask whether the insurer had reason to believe they were incompetent, whether their exams or evaluations were insufficient or whether they rendered opinions based on ulterior motives. If the answer is no, it discredits the delay or denial of payment of benefits. In this same vein, ask how the insurer considered the records and opinions of these physicians in making decisions with respect to the claim.

Seek out information showing that action taken on the claim was unjust, such as finding out whether adjustors or supervisors

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receive payment or bonuses based on how little they pay out on claims in total amount or as a percentage against reserves. On this point compare what is happening in your

ing medical personnel to evaluate the claim. Ask whether under such circumstances the insurer believes it is proper to compel its insured to undergo an IME for

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client's case to how the insurer has treated others by asking about the number and percentage of other claims in which there is a denial of benefits or where less than the full amount of bills submitted are paid. Inquire about the average length of time between offers to settle from insureds and the insurer's counteroffer and the number and percentage of times insureds have been to arbitration or trial and received an award that was greater than the insured's last offer. In addition, try to determine if anyone has been disciplined or criticized with respect to the manner in which the claim has been handled, and concomitantly, ask if anyone questioned the fairness of the decisions made on your client's claim or suggested alternative ways in which to handle the claim. Along these same lines ask about discipline the company has received from the Colorado Division of Insurance and from the insurance divisions of other states.

Get the insurer to establish the standards for handling claims. In interrogatories ask whether the insurer believes that it is reasonable to have an insured undergo an IME when it already has sufficient and credible information and documentation from treat-

ing medical personnel to evaluate the claim. Ask whether under such circumstances the insurer believes it is proper to compel its insured to undergo an IME for the sole purpose of obtaining an opinion contrary to opinions of treating physicians in order to utilize the opinion of the IME doctor against your client in litigation. Depending upon the answer, the insurer either establishes a standard by agreeing or casts itself in a bad light by disagreeing.

Another way to have the insurer establish standards is to ask it whether it agrees as a general principle with statements of law set forth in the unfair practices statute, C.R.S. 10-3-1104(1)(h)(I)-(XV). For example: "Please state whether you agree as a general principle that an insurer is not obligated to attempt in good faith to effectuate prompt, fair and equitable settlements of uninsured motorist claims in Colorado in which liability has become reasonably clear." How can an insurer disagree with something like that? Although the insurer can be expected to agree, it would maybe even be better if it did not insofar as jury appeal goes. Again, look at the statute and ask the same type of question as it relates to investigations, coverage issues, responses to communications from insureds, compelling insured's to institute litigation, settlement and the like.

The same carrier on a UM claim will in most cases be the insurer which handled PIP benefits. Use this to your advantage. Find out how much in PIP benefits the insurer has paid, the reasons for payment and the basis for any apportionment. Then use this information against the insurer when it attempts to take an inconsistent position while litigating the UM claim.

Delve into the insurer's mind set. Ask it to set forth all of its reasons for its delay or denial and to produce all documents relating to its decision in this regard or supporting the position taken. Find out whether the insurer has a policy of forcing insureds to fully litigate certain kinds of cases (e.g. soft tissue cases which include little visible property damage) regardless of whether liability is clear and the carrier knows that its insured sustained injuries as a result of the collision. If it is obvious that the insurer knows your client is entitled to benefits in some amount, but has refused to offer anything in settlement because the carrier thinks the insured's offer is too high or simply due to mean spiritedness, ask interrogatories that get to the heart of the matter. Determine if the insurer is contending that your client is not entitled to any UM benefits, and if not, ask the carrier to set forth its reasons why no offer has been made. Ask it to indicate on what authority it is relying for the proposition that an insurer has no duty to make an offer to settle until the insured makes a reasonable offer (or what the carrier considers to be reasonable). Ascertain what reserves the insurer set, whether there were any changes to the amount reserved and the reasons therefor. Ask why an offer was not made in the amount the insurer had reserved. If the defense seems to be "we need more information," require the insurer to set out with specificity what else it has to investigate and what other documentation is needed before an offer can be made. Have the carrier explain why all this was not done earlier.

Try to figure out the approach the insurer had in handling the claim as well as the approach it will take in litigation. Have the carrier list all publications it or anyone involved with the claim, subscribes to, including publications relating to bad faith litigation. See what training or instruction, apart from that provided by counsel with respect to the instant case, each person you plan to depose has been given as it relates to testifying at depositions, arbitrations and

trial. Furthermore, we know that some insurance companies engage in dishonest tactics when it comes to producing documents. So ask the carrier about documents that have been destroyed and the reasons why. Ask that documents be produced in their original, unaltered state, and ask if any have been altered, rewritten or otherwise changed. Ask for the names of those involved with the destruction or alteration of documents and the reasons therefor. Insist that any sticky notes or other notes that were clipped, stapled or otherwise attached to the document be produced and, if they cannot be, find out why they were destroyed or discarded and at whose direction.

Obviously discovery in any given case has to be tailored to the specifics of that case. However, I hope the foregoing may aid the practitioner in forming discovery relevant to his or her own case. In closing I wish to leave attorneys representing insureds in bad faith actions with the following interrogatory. It best sums up an insurer's obligations towards its insureds, and in the asking, it capsulizes why the insurer's non-conforming treatment of your client has landed it in court:

Please state whether you agree as a general principle that it is and has always been your policy that the handling of a claim is not a game and that your role as an insurer is to pay claims on a just and fair basis according to the terms of the policy, rather than to utilize gamesmanship in an attempt to pay out as little as possible on a claim. If you disagree, please set forth your basis for disagreeing and list the authority upon which you are relying.

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
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