THE ROLE OF THE INSURANCE ADJUSTER AND
CORPORATE REPRESENTATIVE AT TRIAL

It is a simple fact of life that as an insurance adjuster, you will likely be involved in litigation at some point in your career. In an insurance bad faith trial, the most important witness (for both the plaintiff and the insurance company) is often the adjuster who handled the insurance claim. In most trials, the adjuster is the "face" of the company, and the jury's perception of the adjuster can make or break the case. While a well-documented claim file goes a long way in defending a bad faith claim, a thoroughly prepared adjuster is crucial to prevailing in a bad faith trial.

I. What Is the Plaintiff Trying to Prove?

The term "bad faith" is often used to describe several extracontractual theories of recovery a plaintiff may pursue on an insurance claim. The most common extracontractual claims are:

(1) breach of the common law duty of good faith and fair dealing ("bad faith");

(2) violations of the Texas Insurance Code ("statutory bad faith"); and

(3) violations of the Texas Consumer Protection - Deceptive Trade Practices Act ("DTPA").

Less-common extracontractual causes of action include fraud, conspiracy, and intentional infliction of emotional distress. Under Texas common law, an insurer breaches its duty of good faith and fair dealing when it denies or delays payment of a claim when it knew or should have known that it was reasonably clear the claim was covered. An insurer is not liable for bad faith when the evidence shows merely a bona fide dispute over coverage. *See Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997). The actual question submitted to a jury on a bad faith claim will typically read as follows:

> QUESTION 1.
>
> Did ____ Insurance Company fail to comply with its duty of good faith and fair dealing to Plaintiff?
>
> > An insurer fails to comply with its duty of good faith and fair dealing by—
> >
> > Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear [or]
> >
> > Refusing to pay a claim without conducting a reasonable investigation of the claim.

Answer: _____

Plaintiffs' lawyers will often name the individual adjuster as a defendant along with the insurance company. While this rarely has the effect of increasing the value of the case, an adjuster is frequently named as an individual defendant to prevent removal of the case to federal court. A plaintiffs' lawyer may also name the adjuster as a defendant in order to secure that adjuster's attendance at trial as a party, or as an intimidation tactic. In general, most of the extracontractual causes of action that can be asserted against an insurance company can be asserted against the individual adjuster, with the exception of the common law duty of good faith and fair dealing, and claims for violation of the prompt payment statute.[1]

During a bad faith trial, it is almost impossible to count the number of times the word "reasonable" is used (by both sides). While the exact wording of questions on the jury charge may vary, the defense lawyer must convince the jury that the adjuster (and therefore, the company) acted "reasonably" in adjusting the claim.

II. The Adjuster's Testimony - Defending the Bad Faith Claims

Almost all bad faith trials will involve testimony from the adjuster, either by way of deposition or by the adjuster testifying live. Some trials involve both. The timing of the adjuster's testimony depends upon the nature of the case and whether the adjuster has previously been deposed. Very rarely will a plaintiffs' lawyer elect not to present testimony of the adjuster in his portion of the case. One exception to this scenario is where the plaintiff has a very week liability case, and attempts to sway the jury by simply focusing on damages.

If the adjuster has been previously deposed in the case (usually by way of a video deposition), and plaintiff's counsel feels the adjuster did not perform well, the lawyer may simply play excerpts from the video deposition in his portion of the case. This puts the burden on the defense to tell its side of the story with live testimony from the adjuster. While telling the insurance company's side of the story can be accomplished with follow up questions in the deposition, rarely will all necessary testimony for the defense be developed in deposition. Oftentimes a defense lawyer will simply "reserve questions until time of trial" at the conclusion of the plaintiff's deposition questions. Whether this is due to tactical considerations (*e.g.*, bringing a quick end to a bad deposition) or lack of preparation, reserving all questions until time of trial can be a gamble if the adjuster subsequently becomes unavailable for trial. Sometimes an intermediate approach is used, where the defense lawyer asks a small number of follow-up questions to drive home a few key points. However, additional testimony from the adjuster may still be needed at trial to present the whole story.

When the adjuster is called to testify live during the plaintiff's portion of the case, the defense attorney may either ask his questions of the adjuster at that time, or recall the adjuster in the defense phase of the trial. If the plaintiff's counsel's examination of the adjuster does not present any surprises, the defense lawyer will often ask his direct questions at that time so that the jury is given the full picture all at once. However, if the examination takes an unexpected

[1] Tex. Ins. Code §542.052-.061 (formerly known as Tex. Ins. Code art. 21.55).

turn, or the adjuster becomes confused or simply upset or intimidated, the defense lawyer may decide to postpone his questions of the adjuster until the defense phase of the case so that additional time can be spent preparing the adjuster for the next round of questions.

Regardless of the timing of the adjuster's testimony, the jurors' perceptions of the adjuster are extremely important, and there is no substitute for preparation. This preparation includes meeting with defense counsel to go over the facts of the case and the key points that must be communicated to the jury. In addition, a certain amount of self-study is required of the adjuster. If the adjuster has previously been deposed, the adjuster should review that deposition transcript several times before trial. In addition, the adjuster should have a working copy of the claims file, or key documents from the claims file, to review before and after meeting with defense counsel. Quite simply, there is no such thing as too much preparation for the adjuster. If the adjuster has a comprehensive grasp on the chronology and details of the particular claim, the adjuster will come across as more competent on the stand, and will be less nervous.

Many of the "rules" of conduct for surviving a deposition will also apply to trial testimony. There are, however, some important differences. While the deposition will usually include many open-ended questions geared towards obtaining information, the plaintiff's lawyer's questions at trial will usually be leading questions (*e.g.*, "Isn't it true that …"). Furthermore, the lawyer will typically know the answer to the question in advance, and will have a "game plan" for the examination. The claims adjuster must prepare not only for the examination by the plaintiff's lawyer, but also for the direct examination by the defense lawyer, where the adjuster will have an opportunity to tell the company's side of the story.

There are a number of general guidelines that defense lawyers will tell adjusters in preparing to testify (either in deposition or trial). The number one rule for a witness testifying is to tell the truth. This is the one rule that is inflexible. Substantial verdicts have been rendered in cases where the jury believes the adjuster has lied, even where the issue involved is irrelevant to the case. Other guidelines given to adjusters include the following: (1) only answer the question asked -- do not volunteer information; and (2) if you do not remember, say so -- do not guess or speculate. While these guidelines appear straightforward, one should be wary of following them to the letter. The well-prepared adjuster should be able to volunteer information necessary to provide a complete answer, rather than allow a simple "yes" or "no" answer to hang in the air and convey a misleading message to the jury. Likewise, answering a question with "I don't remember" is often warranted, but a cunning trial lawyer can formulate a long string of questions designed to elicit a long string of "I don't remember" responses. While the adjuster should not "make up" answers to these questions, there are ways to break up the responses so the testimony does not resemble an excerpt from the Iran-Contra hearings.

There are certain questions that may be outside the adjuster's knowledge, but should not be answered with "I don't remember." Some examples of these are the following:

> Q: Did you make up his mind at the very beginning that this claim should not be covered?

Q: Did your investigation of this claim violate Section 541 of the Texas Insurance Code?

(While an adjuster is not responsible for knowing the exact text of all provisions of the Code, this question is no better than asking "Did you act in bad faith." A response of "I don't remember" or "I don't know" is not the favored response.)

One can also think of a few tongue-in-cheek guidelines, such as the following: (1) if you hear a question that begins "Wouldn't you agree…", do NOT agree; and (2) beware of the word "always" and use the phrase "every claim is different." While these rules have merit in certain situations, flexibility is again the best approach. If the question posed is "Wouldn't you agree that you owe a duty of good faith and fair dealing on every homeowner's claim you handle?", an answer of "no" or "every claim is different" will surprise even the plaintiff's lawyer, and likely cause heart palpitations for the defense lawyer.

Explaining to the jury reasons for the claim decisions is, of course, the central role for the adjuster. But the adjuster also served another important purpose, one that has nothing to do with "evidence" to be considered by the jury. With proper questions from defense counsel, the adjuster "personalizes" the insurance company. Instead of the case being postured as an individual versus an uncaring corporation, the focus is shifter to the adjuster as a person, ideally, a hard-working conscientious person. In this role, it is important for the adjuster not to hide behind procedure when answering questions. Answers such as "That's not required by our internal guidelines," or "I'm only required to call back once" won't come across favorably if the guidelines themselves are shown to be unreasonable or inflexible. If the adjuster comes across as simply a "cog in the machine," the jury will not be sympathetic, and may lean towards a "make the company pay" mentality.

III. Common Themes for the Plaintiff's Case

In order to prove the insurance company or the adjuster acted unreasonably, the plaintiff's attorney will attack the claim handling, and will often use one or more of the following themes:

A. The Predetermined Investigation

A common theme for a bad faith trial is that the company had already made a decision to deny the claim before doing an investigation, and any investigation conducted was goal-oriented. In this approach, the plaintiff's lawyer may attempt to elicit testimony from the adjuster along the following lines:

- The adjuster used a consulting expert (doctor, engineer, etc.) who has been used frequently in the past, and who always renders an opinion supporting denial of the claim;

- The adjuster has handled similar claims in the past, and has almost always denied them;

  Note: This may very well be true and with good reason. For example, if the adjuster has routinely (an correctly) denied similar claims based on an applicable policy exclusion, the "pattern" of denials is understandable (and less problematic than inconsistent positions).

B. The Inadequate Investigation ("You Could Have Done More")

In almost every claim investigation, there is "something more" that could have been done to investigate the claim. Of course, this doesn't mean it should have been done. But plaintiff's lawyers will sometimes develop a line of questioning that strings together a series of "no" responses from the adjuster, to give the jury the impression that the adjuster fell short in the investigation. As an example, the following dialog may take place:

Q: Now Mr. Adjuster, isn't it true that once you got that engineering report stating the foundation damage was due only to environmental conditions, you could have asked the engineer to repeat the study, just to make sure it was accurate?

A: I suppose.

Q: And you didn't do that, did you?

A: No.

Q: And you also could have had a different engineering firm repeat the same study, right?

A: I guess so.

Q: And you didn't do that either, did you?

A: No.

This line of questioning can go on for as long as the lawyer can think up of these "artificial duties." Occasionally, the strategy can backfire for the plaintiff if the questions are not well thought-out:

Q: Now Ms. Adjuster, if you had doubts about my client's medical condition, why didn't you go get medical records to evaluate his claim?

A: I requested medical records from the Plaintiff on several occasions and he never sent us anything.

Q: Okay, but instead of waiting for medical records from my client and putting that burden on him, you could've also retrieved medical records from his doctors, right?

A: Only if we have a signed HIPAA release, otherwise, we can't get any information from the doctors.

Q: But the point is, you never did that did you?

A: I requested a signed release from your client three times, but he told me he was not going to sign it.

Q: Well … I didn't know that. I'll pass the witness.

C. The Overworked Adjuster

The "overworked adjuster" theme is really a subset of the "inadequate investigation" theme, and is often used when the adjuster is no longer with the defendant insurance company. In this approach, the lawyer may attempt to drive a wedge between the adjuster and the company, and convince the adjuster to blame any claim handling problems on the company's understaffing, or lack of mentoring. Assuming the plaintiff's lawyer has already obtained information about workload in a prior deposition, the lawyer will ask questions of the adjuster designed to give the jury an impression that the adjuster was overworked (*i.e.*, had too many pending files) and could not possibly have performed an adequate investigation of the claim simply due to time constraints. Actual caseloads of adjusters will vary depending upon the company and the type of insurance involved. Typically, adjusters handling personal lines will have a higher pending caseload than with commercial claims.

Regardless of the actual number of pending files, any number over 50 will likely sound excessive to a juror unfamiliar with the insurance industry. The number of pending files is often not an accurate representation of how busy the adjuster is, since a large portion of the files may be open but inactive. In addition to establishing the number of pending files the adjuster was handling, the plaintiff's lawyer may go one step further and propose a misleading mathematical calculation as follows:

Q: So, Ms. Adjuster, you've testified that you worked an average of 160 hours per month, and that approximately 140 of those hours were spent actually adjusting claims. You also testified that you were handling around 150 files at the time. If we divide 140 hours by 150 files, that leaves less than one hour per month per individual file, correct?

The question simply asks the adjuster to agree that 140 divided by 150 is less than 1. However, the message conveyed to the jury is that this was the amount of time actually spent on any given file in a month, which will rarely be the case and is misleading to the jury.

IV. Special Considerations for the Corporate Representative

The insurance company will usually have a designated corporate representative at a bad faith trial, who will sit at counsel's table throughout the duration of the trial. The representative may or may not be the adjuster who handled the claim. Regardless, the representative must be prepared to be called to the stand by plaintiff's counsel, even if the representative had nothing to do with the handling of the underlying claim. If the corporate representative is unfamiliar with the details of the underlying claim, care must be taken to convey to the jury that the representative is not at the trial to testify about those matters, but rather, is at the trial to monitor the proceedings and report to the company. The idea is to convey to the jury that the company takes bad faith claims very seriously, and although the representative may not know every detail of the claim, he or she has a general understanding of the claims and the company's position. Some plaintiffs' lawyers may cut short their questioning of a corporate representative once it is determined that no real testimony can be elicited that will contribute to the plaintiff's case. However, some enterprising lawyers will call the corporate representative to the stand knowing full well that the witness has no firsthand knowledge of the claim handling or the facts involved. The lawyer may ask questions (knowing the answer) such as the following:

> Q: Mr. Representative, you are here as a representative of the insurance company, correct?
>
> A: Yes.
>
> Q: So you're here as the one person selected by this billion-dollar insurance company to represent the company in this lawsuit, correct?
>
> A: Yes.
>
> Q: Can you tell me the date on which the insurance company first received notice of the claim or made its final decision on coverage?
>
> A: I don't have that information available.
>
> Q: And yet you are the person, from the company's home office, that has been sent to this trial and appear before this jury as a representative in this bad faith lawsuit?
>
> A: That's correct.

Has any actual evidence been developed from this line of questioning? Of course not. But these types of "cheap shot" questions can often have a significant impact on a jury and paint a picture of an uncaring bureaucrat.

V. The Claim File

When examining the claims adjuster, the plaintiff's lawyer will often introduce portions of the claim file, often projecting and highlighting relevant portions onto a screen. In addition, the lawyer may point out certain documents from the claim file in closing argument. In both scenarios, a poorly documented claim file can act as a "silent witness." Even worse, an ill-advised letter or claim diary entry can put the nail in the coffin in a bad faith case. The "problem" claim file may fall into one or more of the following categories:

A. The Lost Claim File.

When the claim file is lost, the presumption becomes that the information contained within the claim file was not favorable to the insured or the insurance company. The claim diary and any other electronic data could become immediately discoverable. Attorneys love lost claim files because they can say anything they want about what might or might not have been there, and no one can disprove them.

B. The Sanitized Claim File

Never alter the claim file to make it look better. Every so often I hear of files that go out the door with a page or two missing. Besides being unethical, it destroys the record of what was actually done. The deception itself is not hard to find for an adept Plaintiff's attorney. Responses and requests for authority create a paper trail that can be traced. Moreover, the absence of documentation can become a problem.

C. The Intentionally Incomplete Claim File

Rather than "sanitize" a file, occasionally parties agree to just not record or report important events. Sometimes these events are claim conferences, or review conferences. A file may say: "sent for review," however, no review is ever documented. Attorneys will ask, "Did they hold the meeting? What were the results?" Again, lost or missing information is generally construed against the person who "lost" or "never recorded" the information.

D. The Unbalanced Claim File

This occurs when an adjuster only records information favorable to their position in the file, and ignores unfavorable data. The danger here is that an unwarranted denial could be issued, or indefensible offer of settlement could be made.

Hopefully, problems with the claim file will have been identified by defense counsel well before trial. Perhaps more damaging than an incomplete claim file is one that contains inflammatory statements by the adjuster or others involved with the file. Most often, these are contained within the claims diary, rather than correspondence or reports. Regardless of how frustrated the adjuster may be with the claimant, this cannot be reflected in the claim diary. While the adjuster must be thorough in documenting the claim diary, personal opinions or other statements not directly relevant to adjusting the claim are better left to water cooler discussions, not the permanent record of the claim.

VI. Bringing the Message Home

A well-prepared adjuster, a well-documented claim file, and a cohesive trial strategy are all necessary to defeat a bad faith claim. A weakness in any of these three links can make it very difficult to persuade the jury that the company (and the adjuster) acted reasonably throughout the claim. When all three elements fall into place, the defense lawyer's closing argument is made that much easier, and should evoke at least a few head nods from the jury. While there must be solid evidence to counter the Plaintiff's accusations, the adjuster must be aware that the intangible factors are equally important. As long as the adjuster projects an image of confidence, has a thorough understanding of the file, and avoids the common pitfalls set up by opposing lawyer, the jury will be less likely to act out an ending to a John Grisham novel, and the adjuster will have gained valuable "combat" experience.