

Five Fatal Bad Faith Mistakes and How to Avoid Them

By Bill Daniels

Breach of the implied covenant of good faith and fair dealing in an insurance contract, or "bad faith" in the vernacular, is a tricky critter.

Ten years ago, bad faith was a staple for consumer lawyers; today, some will tell you it's a dying area of the law. Don't believe the doomsayers. While there is no question that bad faith litigation is not a practice area for the faint of heart, bad faith law remains a powerful tool to obtain justice for consumers.

With all that in mind, this is not an area for the unprepared. Here are five fatal mistakes you should take care to avoid:

1. Not looking for the "mean" in your case.

"The mark of a good bad faith case is meanness," one of my mentors once told me. He believed that for a bad faith case to fly, there had to be conduct beyond something irritating or just maddening.

What you need to look for is conduct that is mean, insensitive or unfeeling. If you're just uneasy or have some vague notion the world should be different, be sympathetic, but take a careful look at the law before diving in.

2. Forgetting to make sure there's coverage.

No policy, no bad faith is the simple rule. Though there are areas where the simple rule won't apply, that doesn't mean you shouldn't pay coverage close heed right from the get go.

The lesson here is, never take coverage for granted. Make sure you understand the carrier's reasoning for doing what it did in every intimate detail. Study the correspondence, collect the key cases, gather whatever articles you can find on point. Also, bone up on the genuine dispute doctrine whenever coverage is in dispute. See, e.g., *Chateau Chamberay Homeowners Ass'n v. Associated Intern. Ins. Co.* (2001) 90 Cal.App.4th 335.

3. Not gathering all the facts during your investigation.

There's a temptation to seize on one or two key documents or bits of evidence that seem to show outrageous conduct and try to ride those through to the end, ignoring everything else. Resist that temptation.

The insurance regulations require carriers to keep records on everything material that takes place during

a claim. Get copies of all that stuff and make sure the defense brings the originals to deposition so you can do your own inspection. If there's an underwriting issue, get all those files as well.

Make sure your client gives you every scrap of paper connected with the claim, whether they think it is relevant or not. If the client is a poor record keeper, worry about that. It is amazing how a small, stray piece of documentation can rise up and bite you in a bad faith case.

A little paranoia is probably a good thing here. Remember, the law right now is probably as favorable for carriers as it's been in several generations. Conduct yourself accordingly.

4. Not preparing for trial.

Don't work up the case for settlement or to win on summary judgment. Prepare the darned thing for trial. Anticipate the worst and then if something better happens, celebrate. Only, do not ever under-prepare a bad faith case.

Remember what insurance companies do for a living. They sell promises on paper, pay some claims, deny the rest and defend their decision-making process to the death. You may have a great bad faith case in your file cabinet, but if you aren't experienced in the area, beware, because the folks defending will be.

So, put in the time and gather the knowledge. Then put everything together as if you will go to trial.

5. Not facing reality.

There's a difference between being a believer and being a fool. Believers understand their cases, warts and all, but know in their hearts they can steer the client through the system and get justice. Fools don't understand what they have in their file cabinet, but bull ahead anyway.

As you litigate, make sure you constantly study, analyze and evaluate.

Go get'em.

When you choose to litigate against a carrier, go in smart. Consult an experienced practitioner where you have questions. Remember to avoid the five common mistakes and, good hunting!

Bill Daniels regularly publishes a variety of articles and videos to keep you abreast of legal developments and case law that affect our society.

For related information see:

[Practical Tips on Genuine Dispute and Advice of Counsel](#). How to head off two insurance company defenses.

[Discovery and Depositions in the Bad Faith Case](#). Bad faith basics.

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