Avoiding Bad Faith

Claim Practices
Use of Experts in Claim Investigation
Punitive Damages

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I. Introduction

A. An extra-contractual (bad faith) verdict against the insurer can be measured not only in judgment dollars – perhaps reaching into the millions – but also in the tangible negative publicity and loss of goodwill and premium dollars of its customers.

B. Bad faith is a fluid concept – defined primarily by court decisions and case law. Examples include

1. undue delay in handling claims; inadequate investigations; refusing to defend a lawsuit or to make a reasonable settlement offer; or making unreasonable interpretations of an insurance policy.

C. In the absence of national standards, and according to varying standards independently set by each state, **unfair insurance claim settlement practices** are generally defined as "**if the Insurer knowingly commits or performs with such frequency as to indicate a general business practice**" according to the following:

1. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

2. failing to acknowledge and act with reasonable promptness upon communications with respect to claims arising under insurance policies;

3. failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

4. refusing to pay claims without conducting a reasonable investigation based upon all available information;

5. failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

6. not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

7. compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

8. attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

9. attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

10. making claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made;

11. making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

12. delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

13. failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

14. failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; or

15. using as a basis for cash settlement with a first party automobile insurance claimant an amount which is less than the amount which the insurer would pay if repairs were made unless such amount is agreed to by the insured or provided for by the insurance policy.

II. From the Defense Perspective

A. Failure to properly or adequately investigate an insured's claim before denial is most common in establishing extra-contractual (bad faith) liability.

1. **Ensure that the investigation is tailored to the particular facts of the claim.**

(a) Example: property destroyed by arson. No one would doubt the insurer's right to investigate issues of motive. The initial investigation plan to conduct a credit and financial record search would be entirely supportable. If, however, the search revealed that the insured was not under any imminent financial pressure, it would be problematic to rationalize an investigation strategy that involved a forensic audit of all of the insured's bank accounts for several years prior to the accident.

B. Improper or intrusive investigative techniques employed by the insurer may also give rise to bad faith.

1. An insurer may be liable when it knows that its position regarding a claim is groundless or when it fails to undertake an investigation sufficiently adequate to determine the correctness of its position.

2. **Separately identify and record in the claim file each specific fact that reasonably warrants investigation without appreciable delay upon presentation of the claim.**

   For each fact, determine and then document the least intrusive method by which the claim handler will conduct (or out-source) the investigation and document an ongoing process of evaluating results as they are received.

   (a) Claimant counsel will attempt to present evidence to infer that the insurer has not been fair or prompt in its claims handling.

   (b) Example: a fire of "suspicious origin" may be a claim file entry. Document why the fire is of suspicious origin – time of day, removal of personal items, pet away from the property, etc.

C. The quality as well as the quantity of an insurer's investigation is relevant to the issue of bad faith.

1. An investigation not justified on the facts which delays the insurer's processing of the claim may be considered a breach of the insurer's obligation to investigate fairly and promptly.

   (a) Example: unexplained delay, particularly where the insured is under financial hardship, is capable of supporting bad faith.

2. **Memorialize a reasonable time frame for completing each method of investigation. Communicate the time frame to the insured.**

(a) Again, the claim file should not only record what is being done – <u>but why</u>.

(b) **If the insured has some role to play in the investigation – providing documents, opening property for inspection, completing a written or oral statement – make this clear in writing.**

(1) Otherwise, it may appear that the insurer's motive for pursuing a line of investigation was not legitimate claims handling, but an effort to delay to the disadvantage of the insured.

(2) If the claim is denied, communicate to the insured that the company is open to re-visiting same upon submission of additional or different information.

III. <u>From the Plaintiff Perspective</u>

A. The fact that each state has its own system for overseeing insurance companies poses a great problem for policyholders particularly in those states where recent legislative changes and court decisions favorable to the insurance industry may actually **serve to encourage** bad faith conduct.

B. Claim professional's **attitude and demeanor** are often a starting point for a claim of bad faith.

1. Evidence of a claims professional's attitude and demeanor typically derives from **oral comments or admissions** made by the claims professional to the claimant. Such evidence can

be found in the claim file.

2. **Any notation in the activity log is potentially discoverable and could make its appearance as a trial exhibit**. The following are reported "lapses in judgment" as taken from the activity log notes of actual files:

   (a) "The house is filthy and unsafe for habitation. I told the insured that before I would inspect the damage, she had to clean the place up and call an exterminator."

   (b) "I denied coverage for the extensive damage to the floor as the cause of loss is unknown. The insured requested an expert identify the source of water. I told her that I am the expert and the damage is not covered."

   (c) "The insured is stupid and does not speak English very well. I mailed him a denial letter in hopes he can read better than he speaks."

   (d) "It appears the damage is caused by foundation movement. The insured has hired an engineer who concluded the foundation damage is caused by a plumbing leak in the bathroom. The bathroom is about 40 feet away from the worst damage. A leak in the bathroom could not be causing this damage. No coverage extended."

   (e) "After reviewing the insured's inventory form, it is obvious she is lying. No one living in a house like hers could ever afford contents she is claiming. The insured stated she inherited most of her belongings from her mother who died last year. I don't believe this. If the insured can't produce purchase receipts, I will deny claim."

(f) "My inspection of the roof indicated extensive damage. I do not know what caused the damage, so I won't cover this loss."

C. Claim practices and procedures:

1. Over the past several years, insurers have adopted new claims handling guidelines in certain circumstances to address many of the issues raised by the challenge that claims adjusters had failed to properly investigate or process claims.

(a) Such procedures, practices and policies cannot be enacted in a vacuum; they should only be enacted "**when the procedures have been adopted after a due diligence review which concludes that the practice fulfills the insurers' contractual obligations and is otherwise in conformance with state law**."

(b) The individuals charged with the drafting of claims-handling policies, practices and procedures must be educated to the manner by which courts interpret existing policy language; they must clearly understand the impact of current and proposed statutory law.

(1) Furthermore, the insurer should be vigilant about proposed legislation and the sentiment expressed by the various state legislatures. After considering the impact of these variables, the insurer can determine whether to redraft its practices, policies and procedures and, in the right case, whether to redraft policy language. If an insurer does not develop its claims-handling and billing guidelines in this fashion, it is setting its own trap.

IV. Use of Expert in Claim Adjustment

A. Integral to many claim handling strategies is the necessity to consult with experts to assist the insurer in making factual determinations before resolution of the claim.

1. The steps the insurer has taken, or not taken, in identifying the need to utilize and expert to assist in its claim decision as well as how the insurer has conducted itself in the use of the expert are a source of inquiry in bad faith litigation.

2. **Rigsby v. State Farm Mutual Insurance Company** [1]

(a) Material participation in a conspiracy to defraud the United States by providing false or fraudulent engineering reports at the request of the insurer;

(b) direction by the insurer to the expert to reach a specific conclusion as to cause of loss favorable to the insurer (storm surge and flood as opposed to wind); and

(c) assigning block claims to specific engineering firms known to produce favorable reports to the insurer and canceling engineering reports from firms which reached a different cause of loss conclusion (wind as opposed to flood).

V. Use of Expert - Defendant Perspective

A. **FIRST** – Identify the need for and retain the expert

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This is a "False Claims Act" case brought to recover damages and civil penalties on behalf of the United States arising out of alleged false claims presented for payment by the defendant insurance companies under the National Flood Insurance Program following Hurricane Katrina. It remains pending in the Southern District of the U.S. District Court in Mississippi (1:06cv433-LTS-RHW). Its allegations are quite similar to multiple claims brought for bad faith and fraud against insurers along the southern Gulf Coast following Hurricanes Ivan and Katrina for denial of windstorm claims.

1. The first level of inquiry for the insurer should be an analysis of whether an expert is reasonably required to assist in the evaluation of the claim. Unnecessary use of experts could be characterized as unfair to the insured, particularly if this results in significant delay in processing of the claim.

   (a) On the other hand, failing to utilize an expert where one is reasonably required to evaluate the issue may also be characterized as unfair to the insured.

   (b) **There should be evidence that the insurer has addressed itself to whether experts are required or not. Since the duty of good faith requires the insurer to respond to a claim in a timely fashion, it is important that the insurer's file reflect that if experts are reasonably required, there is no undue delay in retaining the experts.**

   This is particularly important where the nature of the expert analysis will require a significant time to complete – forensic accounting issues, cause and origin issues, and lengthy waiting times for medical examinations.

B. **SECOND** – Choice of expert

1. Choice of experts can be an integral component to the insurer discharging its duty to assess the merits of the claim in a balanced and reasonable manner. Selection of an expert that is not appropriately qualified not only undermines the insurer's chance of succeeding on the merits of the contractual claim, but also has potentially significant ramifications in bad faith litigation.

   (a) **Adapt Rule 702, Federal Rules of Evidence, to claim handling. "If scientific, technical, or other specialized**

knowledge will assist the [claim adjuster] to understand the evidence or to determine a fact in issue, [an expert] qualified by knowledge, skill, experience, training, or education [should be retained].

2. Retaining an expert that is known to have a particular bias will undoubtedly be characterized as evidence that the insurer was not interested in an objective assessment of the claim, but only in developing evidence to deny the claim. The plaintiff bar is well-organized and connected and tracks experts that have a particular bias and are able to come to court well-prepared to expose that bias.

   (a) The situation becomes particularly acute if the insurer regularly uses the biased expert and the report is seen as pre-textual to the claim denial.

   (b) **Be careful in assigning a single expert to a "block" of claims or all claims of same or similar nature. Any bias of the expert will be magnified over the totality of claims. Do not select any expert based on a known or perceived bias. If the claim handler perceives a bias by the expert – whether the bias has validity or not – be cautious in using the expert.**

   The insurer must be able to justify its selection of expert. The time for the insurer to address its mind to that issue is at the time of retaining the expert, rather than trying to come up with a justification months or years after the fact when the matter is in litigation.

C. **THIRD** – Retaining and communicating with the expert

1. Assuming the expert retained is appropriate in the circumstances, it is critical that the expert be given access to

all potentially relevant information. As seen from the case law, keeping evidence favorable to the insured from the expert can be very damaging to the insurer in bad faith litigation. There is simply no excuse for not making all relevant evidence available to the expert.

(a) This includes evidence that may be acquired after the expert has provided an initial report. It is quite common for an insured who is being served with an expert report to provide information why they believe the expert's report is flawed. The expert retained by the insurer should know about this information and be able to rationally explain it in the context of their opinion.

(b) The expert's opinion must be seen as truly objective and not influenced by the insurer that is paying the expert's bill.

(c) **Letters of instruction to the expert must be neutral, otherwise plaintiff counsel will be able to use the letter to suggest that the insurer's motive for retaining the expert was to develop evidence to support a denial. Letters of instruction which are capable of being interpreted as if the insurer has prejudged the case can be used as evidence of bad faith.**

Statements such as, "It is our position . . . " are suggestive that the insurer had prejudged the matter and is subtly trying to influence the expert into writing an opinion supportive of the insurer's theory.

2. Care must also be taken when summarizing facts in the letter of instruction. It is critical that any factual summary be absolutely accurate.

(a) **Do not assume that the expert will independently verify these facts and if the summary provided by the insurer is inaccurate, the expert's opinion may be worthless. Moreover, inaccurate summaries will allow plaintiff counsel to suggest that the inaccuracy was no mistake, but a deliberate attempt to influence the expert's opinion.**

It is preferable if the expert is provided with the actual evidence – statement transcripts, medical reports, etc., rather than a summary prepared by the insurer. If there are specific factual issues to which the insurer wishes to draw the expert's attention, same can be done in a neutral manner, such as "In preparing your opinion can you please comment on what significance, if any, there is to fact . . .”

3. Another area where insurers are likely to be questioned at trial with regard to their experts is whether there have been any meetings or conferences between the insurer and the expert prior to preparation of final report.

(a) Where such meetings have occurred, plaintiff counsel will be attempting to suggest some form of collusion between the insurer and the expert. It is certainly troubling where the expert has cited in the preamble of his opinion that there has been a meeting between the insurer and the expert, yet there is no record of what was disclosed.

(b) **If it is necessary for a meeting to take place, it should be for the sole purpose of providing evidence to the experts. The nature of the meeting should be logged and confirmation sent to the expert outlining what information was provided.**

It is critical that the insurer not discuss any preliminary views or concerns that it might have with the expert. There is no such thing as an "off the record" discussion with the expert. Communications with the expert, prior to rendering an opinion, must be transparent – communicate in writing and avoid disclosing to the expert either expressly or inferentially any opinion the insurer is hoping to obtain.

(1) The expert may paraphrase the discussions and record same somewhere in their file and when this is disclosed at trial months or years later, the comment may be potentially embarrassing to the insurer's position.

(2) For example, a statement made to the expert that "We think the claim might be fraudulent because" might be paraphrased and recorded by the expert as "thinks the claim is fraudulent."

D. **FOURTH** – Review of the report

1. While the insurer is certainly not obligated to go into the expert's realm and second guess its own expert, there is a positive duty upon the insurer to evaluate and provide appropriate weight to their expert opinion.

(a) **The insurer should carefully scrutinize their report to make sure the expert has not made any errors outside of the realm of their expertise.**

(b) For example, has the expert misinterpreted the law or perhaps given an opinion in an area where they are not appropriately qualified? Is the analysis consistent

with accepted scientific principles and methodology? Have the expert's theories been tested in court or the subject of peer review? Has the expert made an error in reciting the facts or failed to address significant facts in the report? If there is an obvious error or inadequacy in the expert's report this should be drawn to the expert's attention for explanation or, if need be, correction.

(c) **Under no circumstances should the original report be altered other than simply dealing with obvious typographical errors. If the original report is altered, the perception is that the insurer is dictating how the report is written rather than simply having the error corrected or the issue explained further. It is preferable if the original report is accepted in its entirety and supplemented with an addendum as need be.**

E. **FIFTH –** Failure to re-evaluate

1. Even if the insurer has acted diligently in identifying, retaining and using an expert and has received an expert report which supports the denial of the claim, the insurer may still be exposed to a punitive damage claim if it fails to evaluate its position in the face of changing circumstances.

2. A distinction needs to be made between a situation where the factual premise of the case has changed to the point where the denial is no longer reasonably viable from a case where, notwithstanding the change in factual circumstances, the insurer's position remains viable. In the latter situation, the insurer is entitled to continue to contest the claim. In the former situation, however, the insurer's obligation would be to withdraw the denial and make prompt payment.

(a) **It is tempting, when the factual basis for the denial crumbles, not to withdraw the denial and embark upon a course of settlement negotiations with the insured in hopes of reaching a compromise position. Proceeding in this fashion is fraught with problems from the insurer's perspective. Courts have observed that it is bad faith for an insurer to deny a claim without a reasonable factual foundation for the purpose of leveraging an insured into a compromise settlement position. The best strategy to adopt where the factual circumstances change and the denial is no longer viable is to first communicate to the insured that the denial is being withdrawn and then move promptly to resolve valuation issues in the usual course.**

VI. Use of Expert - Plaintiff Perspective

A. An expert is a person with specialized knowledge, skill, experience, training, or education which qualifies that person to form helpful opinions for a party in anticipation for litigation or preparation for trial.

1. The court must find, however, in addition to the expert's qualifications, that the opinion evidence will be relevant to the issues in the case, that it is reliable, and that it will be helpful to the trier of fact.

(a) It is the specialized knowledge or skill, or other attribute listed above, which permits a person to form and offer opinion evidence, rather than fact evidence, and it is the ability to offer opinion testimony which distinguishes the expert witness from fact witnesses.

B. Three common mistakes:

1. **Relying only on information provided by the claim adjuster**

(a) It is the expert's first responsibility to ensure that he or she has a full knowledge of all the underlying facts (at the very least those which impact the area of the opinion solicited) and full access to all relevant records.

(b) The claim adjuster may have a tendency to present or color possibly negative or harmful facts in a light which makes them seem better than they are. The adjuster may attempt (overtly or possibly even subconsciously) to mold or restrict the retained expert's work in order to ensure a favorable opinion. Instead, that adjuster is only ensuring disaster – for himself and for the expert.

2. **The expert as an advocate**

(a) An expert witness must be objective. The jury will quickly detect any specialized agenda the expert may have, and the expert's credibility is directly proportional to the extent of the jury's belief, i.e. its perception, in his or her objectivity.

(b) An objective expert views all facts and underlying data unemotionally and without regard to how the client or adjuster wants them viewed. It is not the expert's job to be an advocate for the insurer, only for the objective truth. Trying to fit an opinion into a preconceived objective or goal will be the death knell of the expert's credibility, and, therefore, the claim.

3. **Putting too much in writing**

(a) Without an extreme amount of discipline and

self-denial, we all have a tendency today to send a quick e mail, or maybe a "memo," instead of picking up the telephone and calling, to discuss a point or make a statement or reveal a doubt or weakness about a position. And things written leave records for all the world to see.

(b) If a report is not required, do not do one. If you do not do one, it cannot be discovered. Only the court, by direct order or by inserting the requirement in a case scheduling order, can make the expert prepare a written report.

VII. "New Round of Criticism Hits Windstorm Insurer"

By PURVA PATEL Copyright 2009 Houston Chronicle

Newly uncovered internal e-mails from the Texas Windstorm Insurance Association underscore an emerging pattern of arrogance and intentional bad faith claims practices, consumer advocates say.

"As more becomes known about how TWIA handled claims after Ike, it becomes more and more apparent that there is a lack of professionalism at TWIA and that there is a culture that does not respect policyholders," said Alex Winslow, head of Austin-based consumer group Texas Watch.

TWIA, whose handling of claims from Hurricane Ike has drawn scrutiny from regulators, maintains that its practices are fair and that its e-mails are being misinterpreted by policyholder attorneys. The insurer sells coverage to property owners in coastal counties and a sliver of Harris County that

private companies consider too risky.

According to the consumer group and policyholders who have read the e-mail correspondence, it would appear that managers at the state-created but privately run insurer knowingly skirted consumer protection laws.

In one e-mail exchange, TWIA management discusses an engineering report submitted by an independent firm the insurer hired to help determine the extent of damage on a home. The engineer had concluded unsealed shingles on the home were damaged and needed replacement. But TWIA disagreed.

In a subsequent e-mail, TWIA's head of catastrophe claims noted that the agency couldn't tell an engineer what its opinion should be — but could use another company in the future if the “issue” was lifted roof shingles.

Steve Mostyn, an attorney whose firm obtained the e-mails as part of litigation filed on behalf of policyholders, says the e-mails show TWIA threatened to cut off work from those who disagree with the agency. Hiring engineers that only agree with the insurer means the outcome of the report is predetermined, which is illegal, Mostyn said.

Jim Oliver, general manager of TWIA, said the e-mails have been misconstrued. The home in question had wind-related cracking in some shingles, he said, but the roof was old and showed long-term deterioration, meaning there's

no proof Ike caused the damage. TWIA has said it shouldn't have to pay roof claims where Ike didn't cause the damage.

"TWIA has a right to expect that engineering firms will issue reports that are clear and well-supported," Oliver said.

VIII. Punitive Damages

A. Punitive damages are recoverable in most jurisdictions in bad faith cases, but proof of bad faith does not by itself establish the plaintiff's entitlement to punitive damages. Despite proving that an insurer unreasonably delayed or withheld payment of a claim, the plaintiff must prove the additional facts showing entitlement to punitive damages.

1. One normally may not collect punitive damages on an ordinary breach of contract cause of action. But most jurisdictions treat the cause of action for bad faith as a tort, and those that treat it as both a tort and breach of contract permit the insured to elect to proceed in tort and preserve the punitive damages remedy.

B. Jurisdiction:

1. **Alabama:** An insurer may be subject to punitive damages if it has exhibited a conscious or reckless disregard of the insured's rights. An insurer is not liable for punitive damages if there was an arguable reason for its denial of benefits. A showing of bad faith may be sufficient for punitive damages. Punitive damages may be available for an inadequate investigation and for a first party insurer's failure or delay in making payments. The availability of punitive damages (or lack thereof) may be affected by statute.

2. **Florida:** An insurer may be subject to punitive damages where its position was not taken fairly and in good faith, or where its position was part of a continued course of dishonest dealing. A breach of contract alone does not support a claim for punitive damages. Punitive damages may be available where a liability insurer's refusal to settle was part of a course of conduct of concealment and misrepresentation, but punitive damages are not available against a liability insurer for failure to settle without such concealment or misrepresentation. Punitive damages are not available solely for a liability carrier's refusal to defend.

3. **Georgia:** Punitive damages may be available against a liability carrier for failure to settle, where such failure exhibited legal willfulness and a reckless disregard of the insured's rights, including failure to settle where liability was clear.

4. **Mississippi:** An insurer may be subject to punitive damages where it has acted with malice, gross negligence or reckless disregard of the insured's rights. Punitive damages are not available where the insurer had a legitimate basis for refusing benefits. Punitive damages are not available solely for breaches of contract, unless they are accompanied by an intentional wrong or gross negligence so as to amount to an intentional tort.

5. **North Carolina:** An insurer may be subject to punitive damages where it has acted with reckless disregard of the insured's rights or its actions assume the character of a tort. Payment of benefits does not necessarily preclude a claim for punitive damages.

6. **South Carolina:** An insurer may be subject to punitive damages where it has acted fraudulently or with reckless disregard of the insured's rights. Certain courts have held that punitive damages are available against third party insurers,

but not first party insurers, whereas other courts have suggested that punitive damages may be available against a first party insurer for wrongful failure or delay in making payments. Punitive damages may be available for a breach of contract accompanied by fraudulent intention and accompanied with a fraudulent act.

7. **Texas:** An insurer may be subject to punitive damages where it has acted with gross negligence or conscious disregard of the insured's rights. Punitive damages may be available for an inadequate investigation where there was no reasonable basis for denying benefits, or the insurer failed to determine whether there was a reasonable basis. Punitive damages may also be available where an investigation is a pretext for denying benefits. Punitive damages are not available solely for breaches of contract, and a failure to defend does not alone establish a claim for punitive damages. Punitive damages are not available for negligent failure to settle, but may be available where the failure displayed a conscious indifference of the insured's rights. To establish punitive damages, a showing beyond bad faith is required.

C. **Pre-trial challenges:**

1. Raising and preserving legal and evidentiary grounds for challenging a bad faith award in pre-trial motions, the pre-trial order, and at trial is critical. There are several opportunities before and during trial for an insurer to challenge the viability of the plaintiff s bad faith and punitive damages claims and to build a strong record against a punitive damages claim.

(a) **<u>Dispositive motions</u>**

(1) As demonstrated by the summary of state approaches to punitive damages, there are

numerous potential legal challenges to punitive damages claims. For example, some states may not recognize the availability of punitive damages for breaches of contract, such as an insurer's failure to settle. In addition, alleged conduct may not rise to the legal threshold to justify a punitive damages award. These legal issues provide an insurer with the opportunity to strike or dismiss claims for bad faith and punitive damages. This can be achieved through motions to dismiss at the beginning of a case, motions for partial summary judgment as the case develops, and in limine motions before trial.

(2) An attempt to dismiss punitive damages claims can present difficult strategic issues. Because punitive damages claims are based upon an insurer's alleged misconduct, making such a motion, especially early in the case, has the potential of placing the insurer in a bad light before the court. In addition, if an insurer makes such a motion and loses, such a loss may create certain negative presumptions about the insurer as the case proceeds through litigation. Moreover, such a loss may weaken the insurer's settlement leverage and may embolden the policyholder. Accordingly, if an insurer makes such a motion, it should be clear that the law and facts are on the side of dismissing the bad faith and punitive damages claims.

(b) **Defensive depositions**

(1) Perhaps the most critical pre-trial events in defending against claims for bad faith and

punitive damages are depositions of the insurer. Such testimony often forms the sole basis for a bad faith and punitive damages claim. Accordingly, the necessity of adequate preparation for such depositions - both by the attorney and the witnesses - is crucial to the defense of the insurer.

(2) For example, a prevalent principle throughout the country is that an insurer should not be liable for punitive damages if it has an arguable basis for its position, even if it later turned out to be wrong. If the facts support such an argument, an attorney should spend considerable time helping to prepare the witness to present all available elements of this defense. The attorney should also take all appropriate steps to prepare the witness for a contentious deposition, including mock questioning and videotaping portions of the mock testimony.

(c) **Bifurcation**

(1) An insurer and its counsel should consider moving the Court to bifurcate coverage claims from bad faith and punitive damages claims. This may have several strategic advantages to the insurer.

(2) First, it may lessen the possibility that the jury's decision on coverage will be impacted by passion and prejudice from alleged bad faith facts. Second, if there is a finding of no coverage, then most likely there will be no basis for bad faith and punitive damages. Third,

bifurcation highlights the fact that most states require separate showings for breach of contract, bad faith and punitive damages.