Going on the Offensive in Defending Bad Faith Claims

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Effectively Limiting and Eliminating Bad Faith Claims by Leveraging Offensive, Aggressive Written Discovery

Insurance bad faith claims are one of the most contentious and hardest fought types of lawsuits in all of civil litigation. In particular, a great deal of time, effort and costs are expended by insurers in the defense of bad faith lawsuits. And in most cases, more time and money is spent by the insurer in the discovery stage of a bad faith lawsuit than in any other phase of the litigation. One of the unique aspects of bad faith litigation is the extraordinary lengths that claimants will go to force insurers to defend arduous, burdensome and seemingly endless written discovery requests, a maneuver that is geared specifically at gaining leverage and compelling a settlement out of the insurer. Over time, insurers have become quite adept at effectively defending against these discovery tactics.

However, perhaps the most overlooked aspect to bad faith litigation defense is the insurer's own written discovery requests. As part of an effective, comprehensive litigation plan, the implementation of an offensive, aggressive discovery strategy involving the insurer's own written discovery requests can turn the tables on a claimant and serve as a vital tool in limiting or, ideally, completely disposing of a wide variety of bad faith claims early in the litigation process.

More so than in other types of civil litigation, plaintiffs in bad faith cases oftentimes weave elaborate, exaggerated and unfounded tales of woe and injustice in their complaints, with little or no information or documentation to support their claims. This lack of evidentiary support should be developed and refined through the use of discovery. Oftentimes, discovery can unearth a significantly different factual picture than that presented by the plaintiff at the outset of the lawsuit. Here, the primary objective in utilizing an aggressive, offensive approach to bad faith discovery is to lay the groundwork for an early dispositive motion that will terminate the bad faith claim. In order to achieve this goal, all aspects of written discovery must be utilized – interrogatories, requests for production of documents, and requests for admissions. Combined, successfully showcasing the claimant's lack of evidentiary support for its claims through discovery will allow the insurer to demonstrate to both the claimant and the court the fatal deficiencies in the bad faith claim that necessitate an early termination of the lawsuit in the insurer's favor. In addition, effectively developed discovery requests that highlight the glaring weaknesses in a bad faith claim oftentimes has the effect of persuading a claimant and his attorney that it is not worth the time and effort to pursue a losing claim, thus prompting early termination of the litigation without the need for the filing of any dispositive motion.

First, a note on the timing of the insurer's discovery requests. There is no reason for the insurer to wait to issue written discovery. In fact, it is to the insurer's advantage to immediately go on the offensive and wield its discovery sword by

propounding discovery requests at the first opportunity, especially when a determination has been made that the bad faith claim is potentially meritless. In most instances, interrogatories and requests for production should be served with the insurer's answer, which has the effect of putting the claimant on the defensive at the very outset of the litigation. Moreover, responses to the insurer's initial discovery requests can be used to develop specific, focused requests for admission that will allow the insurer to collect the necessary key evidentiary support for a winning summary judgment motion.

While many litigators view interrogatory requests as nothing more than a mere formality, in reality this particular discovery tool serves as a potentially game-changing weapon if used properly. Much more than simply another routine discovery pleading, artfully crafted interrogatory requests can be utilized to build a robust foundation upon which the insurer's entire bad faith defense is built. And combined with the proper timing, skillfully constructed interrogatories can not only help the insurer begin to fortify its defense, but can force the plaintiff back on its heels and into a defensive position, putting the claim on the direct path for early resolution.

Very early in the litigation process, and when the evidence is first being developed, the insurer should focus on determining whether the plaintiff possesses adequate evidence to satisfy his burden of proof sufficient to warrant a finding of bad faith. Here, interrogatories should be used to assess the merits of the plaintiff's bad faith claim. In this regard, interrogatories should seek a detailed statement of the basis for the bad faith claims being asserted. In addition, regardless of whether the claim is grounded in statute or common law, the insurer's interrogatories should inquire about the elements of the cause of action. For example, if the jurisdiction requires a certain level of culpable behavior—such as "arbitrary" or "capricious" conduct in the handling of a claim, as is the standard for "lack of reasonable justification" evidencing bad faith in Ohio—the insurer will need to ask for a description of any acts or omissions evidencing that specific type of liability-triggering conduct.

Interrogatories can also be brandished to significantly limit the scope of the plaintiff's allegations against the insurer and establish parameters for the bad faith claim. Oftentimes, a plaintiff will assert a litany of elaborate, aggrandized claims in his complaint. On the flipside, other plaintiffs will provide little information, making only broad, general, and extremely vague allegations that the insurer's investigation or handling of the claim violated bad faith statutory or common law, without providing any specific references to any particular conduct on the part of the insurer, and without any other form of support for the claims being made. In both cases, interrogatory questions can be used to force the plaintiff to provide evidentiary support for these otherwise bare conclusory allegations. Commonly referred to as "contention interrogatories," these requests that require the plaintiff to support the claims that have been made in the complaint are essential in defending bad faith claims and must be implemented as part of an insurer's discovery strategy. Contention interrogatories should be utilized to require the plaintiff to provide the evidentiary foundation for all allegations that have been laid out in the complaint with specificity. In addition to seeking every act or omission of bad faith, these questions should compel the plaintiff to provide specifics as to dates and times of alleged misdeeds, identification of the actors and witnesses involved, an overview of any communication or correspondence involved, and whether there are any documents in existence related to the event.

Damages are another essential aspect of any bad faith claim that must be addressed in

interrogatories. Interrogatories must require the plaintiff to describe all elements of his or her damages claim. Damages in bad faith lawsuits can come in many forms—mental anguish and psychiatric pain and suffering, economic hardship or loss, and adverse consequences resulting from an inability to use settlement proceeds—among many others. For all damages interrogatories, the insurer should seek specifics regarding each individual element of special and general damages, the basis for each separate item of damages, the amounts being claimed, and how the damages have been calculated. In addition to compensatory damages, the insurer's interrogatories should also focus on punitive damages. In almost every case, the bad faith plaintiff will seek punitive damages in connection with his claim. This issue should also be explored fully in the insurer's interrogatories, as it is vital to have an intricate understanding as to what specific instances of conduct the plaintiff claims entitles him to an award of punitive damages.

While interrogatories play a central key role in successfully limiting and defeating bad faith claims, additional information and documentation beyond written interrogatory answers is needed to effectively defend and dispose of the case. As such, requests for production are also essential in providing the framework for the insurance company's defense, and must be employed as part of a comprehensive offensive discovery strategy. Importantly, unlike interrogatories, there is no explicit restriction on the number of requests for production that can be propounded. Accordingly, when the insurer can request documents in lieu of an interrogatory, it should pursue the documents and hold onto the interrogatory for another issue.

Many of the issues addressed in interrogatories also need to be covered in the insurer's requests for production. Document requests that mirror the allegations contained in the plaintiff's complaint are almost always necessary in order to evaluate the merits of the bad faith cause of action, and whether the claimant can meet his burden of proof in establishing the elements necessary to warrant a finding of bad faith. In this regard, requests for production must require the plaintiff to produce all documents that form the basis of the bad faith claim. Moreover, these document requests must also require the plaintiff to produce all documentary support for the damages aspect of his claim as well.

By far the most underutilized aspect of bad faith discovery is the insurer's requests for admission, which can be brandished to obtain key admissions from the plaintiff as to relevant facts and opinions. This discovery tool serves several essential functions in the defense of bad faith claims, including providing the insurer with the crucial factual framework for a successful dispositive motion. Accordingly, any effective discovery plan must incorporate this device.

Known as "RFAs," these requests can be used to streamline a case by narrowing and eliminating issues in the litigation and posturing the lawsuit for summary judgment disposition. Insurers can take advantage of this aspect of discovery towards the outset of a lawsuit to help explore the deficiencies and defects of a plaintiff's bad faith claim and cement preliminary facts. In this regard, gaining admissions on uncontested points is beneficial for significantly narrowing the scope of the lawsuit at an early juncture in the litigation. In particular, because in many jurisdictions a finding of bad faith is precluded where coverage did not exist, factual admissions establishing that a plaintiff was not entitled to coverage are potential game-changers that often result in early termination of a bad faith lawsuit.

With that said, because specific information and documentation is usually required before effective, targeted admission requests can be drafted, RFAs are typically utilized further down the road in the litigation process, during the latter portion of the discovery phase when

evidentiary needs and tactical considerations become more apparent. Here, requests for admission are an extremely valuable instrument that can be used to establish the key facts that are essential to a successful dispositive motion. Importantly, if the plaintiff has put forth allegations that he is subsequently unable to support with his discovery responses, the insurer should pursue written admissions on this issue. This specific type of admission request should be crafted with a focus on the elements of the bad faith claim and the plaintiff's inability to produce sufficient evidence to satisfy those elements. In many cases, preventing the plaintiff from being able to establish just a handful of key facts will cause the bad faith claim to collapse under the weight of plaintiff's own burden of proof, setting up an easy win for the insurer on summary judgment.

After utilizing targeted discovery to flesh out and develop the critical flaws in the plaintiff's claim, the next step is to move for summary judgment. Armed with the evidence (or lack thereof) obtained through effective offensive discovery practice, the insurer should be able defeat the bad faith claim with its dispositive motion.

In all instances, insurers must make it a top priority to carefully scrutinize the allegations made by the plaintiff and fully probe whether there is actual liability and damages resulting from alleged bad faith claims handling practices at the outset of a lawsuit. There is a significant difference between the genuine bad faith liability suit, and the leveraged claim that in reality lacks merit. After it has been determined that there is no genuine merit to a bad faith claim, an aggressive, offensive discovery strategy should be employed to completely dispose of the claim. And even where a potentially reasonable basis for bad faith exists, offensive discovery can nonetheless still serve to significantly limit the scope and extent of the claim. Employed properly, an insurer's use of offensive discovery in the defense of bad faith litigation can serve as a dynamic, forceful tool in limiting or eliminating extra-contractual exposure and liability in a wide variety of lawsuits.

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