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How to Use the Insurance Adjuster as Your Bad Faith Expert

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How to Use the Insurance Adjuster as Your Bad Faith Expert

To begin, a policyholder does not always need a bad faith expert in order to prove violations of the Texas Insurance Code or breach of the duty of good faith and fair dealing. Expert testimony is required only when an issue involves matters beyond jurors' common understanding. *See Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 119-20 (Tex. 2004). Proof other than expert testimony will constitute some evidence of causation when a layperson's general experience and common understanding would enable the layperson to determine from the evidence, with reasonable probability, the causal relationship between the event and the condition. *Id.* In most cases, it is well within a juror's common understanding to decide whether an insurance company and/or an adjuster acted reasonably or misrepresented the policy or some other material fact related to a claim.

To prove improper claims handling (bad faith) the key is the reasonableness of the investigation of the claim and whether misrepresentations were made to the policyholder. The Texas Supreme Court has held that bad faith is a question of fact, and longstanding case law in Texas holds that reasonableness is a question of fact. *State Farm Fire & Casualty Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex.1998); *Universe Life Insurance Company v. Giles*, 950 S.W.2d 48, 56 (Tex.1997). *See, e.g., Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 456 (Tex.1972); *Blanks v. Southland Hotel*, 229 S.W.2d 357, 360 (Tex.1950); *Lang v. Henderson*, 215 S.W.2d 585, 587 (Tex.1948); *McAfee v. Travis Gas Corp.*, 153 S.W.2d 442, 447 (Tex.1941); *Weingarten, Inc. v. Brockman*, 135 S.W.2d 698, 699 (Tex. 1940).

The jury questions for a case alleging violations of the insurance code would be, for example:

- Did Defendants cause confusion or misunderstanding as to the policy;

- Did Defendants represent that the policy involved rights or remedies which it did not have or involve;
- Did Defendants represent that the policy had or would have characteristics that it did not have;
- Did Defendants represent that was or would be of a particular quality if it was of another.
- Did Defendants make or cause to be made any statement misrepresenting the terms, benefits, or advantages of an insurance policy;
- Did Defendants make, or directly or indirectly cause to be made, an assertion, representation, or statement with respect to insurance that was untrue, deceptive, or misleading;
- Did Defendants refuse to pay claims without conducting a reasonable investigation of the claim;
- Did Defendants fail to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when their liability has become reasonably clear.

See TEXAS PATTERN JURY CHARGE 102.1, 102.2, 102.3, 102.4, 102.5, 102.14, 102.16, 102.18. The PJC question for the common law duty of good faith and fair dealing asks whether an insurance company failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when its liability has become reasonably clear or whether it refused to pay a claim without conducting a reasonable investigation of the claim. *Id.* at 103.1. In summary, expert testimony is not always necessary.

Whether an expert is necessary, by using some basic insurance principles, an insurance adjuster can become the policyholder's bad faith expert and even provide the road map for the jury to find the bad faith was committed knowingly. Below are some reasonable insurance principles that can be fashioned into deposition and/or trial questions.

INSURANCE PRINCIPLES

1. An insurance company has exclusive control over the evaluation, processing and denial or payment of claims.
2. An insurance company must treat its policyholders' interests with equal regard as it does its own interests. Filing claims is not an adversarial process.
3. Part of an adjuster's job is to assist the policyholder with the claim.
4. An insurance company has an obligation to conduct a full, fair and prompt investigation of the claim at its own expense.
5. An insurance company must have a reasonable basis for resolving factual issues in its favor and against its insured.
6. An insurance company must diligently search for and consider evidence that supports the claim.
7. An insurance company may not make unreasonably low claim payments.
8. It is bad faith for an insurance company to knowingly ignore or under-scope damage.
9. It is bad faith for an insurance company to hire biased experts and to conduct an outcome-oriented investigation of a claim.
10. When an insurance company acts in bad faith, it may result in an inequitable settlement for the policyholder.

After proving up the adjuster's knowledge, training and experience, the idea is to ask reasonable questions so there is no way the adjuster can disagree without looking unreasonable.

Here are some examples:

- The Insurance Code requires insurance companies to give an accurate, fair, and prompt assessment of the claim. Would you agree with that?
 - Agree Adjusters have same duty under the Insurance Code?
 - Agree Adjusters have a duty to conduct a reasonable investigation of the damages?
- The duty of good faith and fair dealing requires giving the policy holder the benefit of the doubt. Would you agree with that?
- And would you agree that filing a claim is not supposed to be an adversarial process?
- Would you agree that part of an adjuster's job is to assist the policyholder with the claim?
- Would you agree that an insurance company has an obligation to conduct a full, fair, and prompt investigation of the claim *at its own expense*?
- Would you agree an insurance company must pay what it owes?

Most adjusters will agree, and you will get your “standard of care” for adjusting a claim to provide to the jury – from the defendants themselves. The insurance company certainly cannot argue that its own adjuster is not an expert when it comes to adjusting claims; otherwise, it would be admitting bad faith in that it failed to send a qualified person to adjust the loss. Most depositions will be this easy:

Q. I want to talk to you about some basic insurance principles. Would you agree with me that the duty of good faith and fair dealing, the insurance code requires adjusters and insurance companies to give an accurate, fair, and prompt assessment of the claim?

A. Yes.

Q. Would you agree with me that the duty of good faith and fair dealing requires giving the policyholder the benefit of doubt?

A. Always.

Q. Would you agree that filing a claim or giving notice of loss is not meant to be an adversarial process?

A. I agree with that.

Q. Would you agree that an adjuster must diligently search for and consider evidence that supports a claim, as opposed to evidence that's against a claim?

A. Yes.

Q. Would you agree that if an adjuster knowingly ignores damage or under scopes damage in order to allow the insurance company to pay a lower amount on the claim, that that's a failure to conduct a reasonable investigation?

A. Correct.

Q. (BY MS. LOYD:) And if an adjuster took such action, you would agree that that would result in an inequitable settlement for the policyholder?

A. Correct.

If the adjuster disagrees or fights on the answers, it may take longer to get the answers you need.

However, such responses look bad for the adjuster and insurance company:

Q. (BY MS. LOYD:) And then I'm going to go into some other insurance principles, because, Mr. Hauer, I don't often have an adjuster with as many years of experience as you have, and so I especially want to ask you these questions. The duty of good faith and fair dealing requires giving the policyholder the benefit of the doubt, would you agree with that statement?

A. If there's a questionable -- that one is kind of tough to answer with a yes or no answer, is the problem on that.

Q. (BY MS. LOYD:) Okay. Tell us why.

A. If an insured and an insurer have a -- I kind of lost my train of thought. I'm sorry. Could you ask that question again?

Q. That's okay. The duty of good faith and fair dealing requires giving the policyholder the benefit of the doubt, would you agree with that?

A. The duty of good faith in that case would be to provide the insured with the contractual obligations, as outlined in the policy. The -- with a doubt, if there's a question, I think that the insurer has a duty to provide a policy interpretation

that is as close to the contract as possible. You know, it's just -- I would have to have a specific example, maybe, to answer yes or no.

Q. Would you agree that an insurance company must treat its policyholder's interests with equal regard as it does its own interests?

A. Again, I would just -- my answer to that would be the insurer has the obligation to provide any coverage available to the insured under the terms of their policy.

Q. (BY MS. LOYD:) Would you agree with me that filing a claim is not supposed to be an adversarial process?

A. In my experience, it's not supposed to be, as long as we try to have -- reasonable people can have a reasonable disagreement on things, but as far as being an adversarial relationship, I mean, I view my job as -- not as an adversarial, but I don't ever get to deal with folks unless they've had, you know, an injury or a loss to their property or persons, and, you know, we're trying to provide them the benefits for which they paid for under the terms of their policy.

Q. Do you agree that the insurance company has the obligation to conduct the investigation of the claim at its own expense?

A. I believe the policy -- most policies have some stipulations on who is responsible for what, as far as claims investigation. All I can say is, from my perspective, as an independent adjuster, we conduct the investigation as clearly and factually as we can, and, you know, I expect my expenses to be paid for by our client.

Q. (BY MS. LOYD:) Would you agree with me that it would be improper for an insurance company to deny a claim based on speculated or guessing information?

A. As I stated on some of the other questions, I would say the insurance company has a duty to base any decision on a factual investigation and basis.

Q. (BY MS. LOYD:) So then it would be improper if they denied the claim based on speculation?

A. I would say *probably*, yes.

Q. (BY MS. LOYD:) And would you agree with me that it would be improper for an insurance company to deny a claim based on knowingly biased information?

A. I certainly don't think that that's the case on this particular case, but -- and I try never to provide, on any adjustment I do, any biased opinion. But as a

direct answer, if they knowingly were using a -- had a biased opinion, and they knew it was a biased opinion, then that would not be a proper basis to make a decision on.

Using these principles with the defendant adjuster or even the corporate representative can also provide support for the argument that the defendants knowingly acted in bad faith. In other words, they knew better but did it anyway.