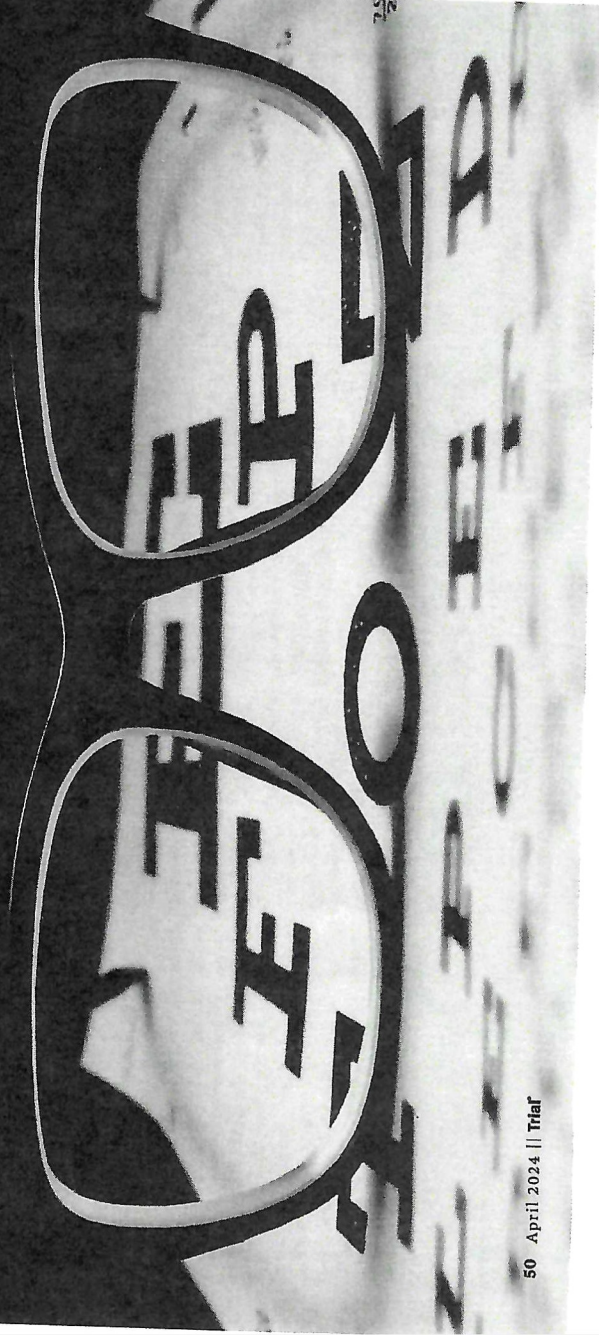


# ADJUST THE FOCUS

By || GUY O. KORNBEUM



Use depositions of  
claims adjusters and  
other insurance  
company personnel  
to home in on  
evidence of bad faith.

The key to a plaintiff's insurance bad faith claim often is the adjuster's deposition. In most cases, this is the first deposition that plaintiff counsel takes. While a claims file outlines the claims handling process, there is more to learn from the testimony of claims handlers and their supervisors.

The adjuster's deposition begins the process of filling in the blanks—that is, developing the "claims story." It is likely the first time the explanation of *what* was done and *why* is on the record. The claims representative's notes are likely to be cryptic or written in an insurer's favor. The deposition should flesh out the full story of the claims handling and decision-making process that is not fully told in these notes. And it will likely guide you toward other insurance company personnel depositions that you need to take to complete that story.

## Start With Written Discovery

I recommend serving written discovery before taking any depositions. The responses should provide you with the basis for a discovery plan of whose depositions to take and in what order. First, request the claims file so you can review it carefully before depositions are taken. You may need to push for a "complete" claims file by bringing a discovery motion. In reviewing the file, look for gaps, such as references to documents or computer entries that are missing. In particular, look for missing entries from managers and upper management who are called on to review decisions regarding the claim.

Once you have the file, prepare a detailed chronology of each date and any claims action that occurred on that date. Also note who was responsible for each claims action and any other activity, such as consultations with managers or contacts with outside investigators. This comprehensive chronology is your road map for your client's case. It will eventually tell you—as you expand on it with information from depositions of claims personnel—what was done, why the action was taken, and who performed the action as the claim progressed.

You then can evaluate the claims decision-making process against the good faith claims handling principles that apply in your

jurisdiction. These principles can be found in the company's claims manuals, industry customs and practices, or state law and regulations applicable to insurance claims.<sup>1</sup> States, not the federal government, regulate insurance, and many jurisdictions have implemented unfair claims practices laws modeled after the National Association of Insurance Commissioners' Model Unfair Claims Settlement Practices Act.<sup>2</sup> Specifics of the law vary from state to state, and they are enforced by individual state insurance departments.<sup>3</sup>

The model act is intended to protect insurance buyers from unjust behavior by insurers in the claims settlement process. It references a variety of specific unfair practices, including misrepresenting facts or policy provisions, unjustifiably delaying investigations into claims, denying claims without a reasonable investigation, delaying payment on claims, and denying claims without an explanation.<sup>4</sup>

Meticulously going through the claims file is a tedious but necessary process to begin understanding how a claim was processed and whether the insurer acted in good faith. If you need help digesting the claims file, consult an expert so that you have the best understanding possible of how a claim was handled before you begin taking depositions.

Know the state law on each coverage issue and defense, and use this to prepare your deposition outline and questions. Be ready to ask if the claims adjuster, claims handler, or other insurance company personnel is familiar with the applicable claims handling principles that arise out of the law and regulations in the jurisdiction in which the claim was processed. You will also need to delve into whether the claims handling process for which that person was responsible met the standard set by those principles.<sup>5</sup>

For example, be prepared to ask the

witness what standard they applied to the claims process and where they obtained that standard. You might even dig a bit more by asking if they are familiar with the standard for claims investigation and decision-making in the state in which the loss or injury that is the basis for the claim occurred. If so, ask what standard was applied. If you do this, be sure to use the terms that are part of the standard.<sup>6</sup>

You also need to be prepared for the likely defense. The claims file tells the story, and the insurance company will attempt to defend the case against it by explaining away and justifying its handling of the claim. Be ready for the defense to cord off questions that get into more important areas regarding the overall claims decision-making process.

If you try to explore with a manager or more senior claims representative whether a decision to deny or limit a certain type of claim is "standard" in the company, the defense may try to distract the questioning by objecting or even instructing the witness not to answer—which may not be proper.<sup>7</sup> But keep pushing: As plaintiff counsel, our job is to question the claims witnesses until someone explains the justification for how the claim was handled and whether this is "policy" or "standard practice" for the insurance company.

And finally, while the claims file will likely identify who was involved, there may be someone in the claims structure—usually someone senior—who was acting behind the scenes to direct the process but whose participation is not revealed in the file's notes.<sup>8</sup> Use an interrogatory to request the identities of all who were involved in the claims handling process. Ask for the identity of each person who was consulted on, gave advice about, or reviewed any document or portion of the claims file, claims file summaries, or reports of consultants or investigators. This inquiry should reveal the identity of any "shadow witness"

whose deposition may be important in obtaining information about how the claim was handled.

### How to Order the Deposition

Normally, I depose the primary claims handler or adjuster first to flesh out the claims handling process, then move on to supervisors and managers and, if appropriate, to senior claims officers. This allows me to first develop the claims handling process and chronology and then test that process with the policies and procedures that apply to the claim. That second step involves asking managers and senior officers what those corporate policies and procedures are, whether they were followed, and whether they comply with the good faith claims handling principles.

There are sometimes good reasons to vary this order. For example, you may be able to "back in" to test the claims process by establishing general claims principles first, and then develop testimony about whether those principles were followed and whether good faith responsibilities were violated. Or you may want to assess to what extent the claims handling structure in the company is controlling lower-level claims handlers—and whether they have little discretion in processing claims. The latter may occur if the company uses computer programs (such as Colossus<sup>9</sup>) to guide or control claims valuations, leaving lower-level claims handlers with little discretion even if assigned serious claims.

Conversely, claims handlers may have been left alone to process a claim that they do not have the authority or perhaps the experience to competently evaluate. This can result in the claim being processed below its true value—and can indicate bad faith for failing to provide competent and experienced claims personnel to handle the claim as required by applicable good faith principles.

### Key Questions & Areas of Inquiry

Next, consider the areas of inquiry for depositions of claims personnel. I recommend exploring five main areas through depositions to get a full understanding of how the claim was managed and how decisions were made:

- Identify all people who were involved in the claim.
  - Determine the actual authority for each person involved in the claim.
  - Determine what investigation was conducted into the claim and why.<sup>10</sup>
  - Figure out who made the final decision regarding the claim. (Keep in mind that the person who made the decision may not be the one who communicated it.)
  - Delve into what assessment was done and by whom for all decisions, including each review or any reconsideration of the claim.
- These areas may also be the subject of other discovery tools, so they are not necessarily limited to inquiry during the deposition process.

**Look for previous allegations of bad faith.** It is important to inquire into those involved in this claim? If so, ask for details regarding those standards were followed for your client's claim.

Also request a list of other lawsuits in which the adjuster has been named as a defendant or has been involved in some way. You can request this information before the deposition takes place, but that might delay the deposition because the insurer is likely to challenge this request. You also can request production with the deposition notice.

I prefer the strategy of requesting information on other lawsuits with

a request for production after the deposition. I want to obtain as much information as I can from the witness and test their recollection and credibility without alerting them to other claims or lawsuits that may involve the same violations, which they could then prepare to be questioned on. I usually request information about other claims after I have completed the claims handlers' depositions and tied them down on the

In any event, you should identify and depose the person who had the authority to pay, limit, or deny the claim and determine the basis for that decision. It is critical to pursue this area of inquiry until you are satisfied that you have identified the ultimate decision-maker, confirmed that decision, and established the basis for it. And all of this must be tested against the good faith claims handling principles in your jurisdiction.



Use an interrogatory to request the identities of all who were involved in the claims handling process.

record about decisions made in other claims.

**Authority levels.** It is important to establish the different levels of decision-making authority among the claims handling personnel. Doing so will help you establish exactly who made the decisions regarding your client's claim. There may be a clear-cut division of responsibility, or it may be disguised. In some cases, those who seem to have a level of authority do not, so they must seek approval from the next level. Even if a claims staff member appears to be the person who made a claims decision, it may be because the authority to do so was provided by someone else.

Alternatively, the decision itself was made by another and the claims person is simply the one who communicated that decision.

Here are some areas of inquiry to pursue:

- Who are the claims handlers, risk managers,<sup>11</sup> and others in contact with the adjuster?
- What is each claims person's background, training, and experience in handling the type of claim at issue? Are they competent to handle the claim at issue?
- What authority does each person have? What are the constraints on that authority?
- What do the claims manuals and written guidelines provide regarding authority levels and the exercise of that authority?
- Are there additional memos regarding authority beyond what is in the claims manuals and written guidelines?

- Are there ambiguities in the authority levels that need to be clarified?
- Who is the ultimate decision-maker?
- Did a committee review the claim and decide or recommend the claims action to take? If so, did the committee really review the claims and make an objective decision, or did it simply rubber-stamp the recommendation of a claims representative?

**Incentives.** Another area of inquiry is the rewards for claims handling that meets the insurance company's expectations. Some insurers have used special programs to reward claims handlers for keeping the average payout per claim below a certain level. They also have measured and tracked indemnity amounts to determine if they were at an acceptable level. These programs may not be overt, but it is still worth exploring whether claims personnel were incentivized or pressured in some way to keep payouts at a certain level.

### Takeaways for Obtaining the Full Story

The overarching approach to deposing claims handlers, adjusters, and other insurance company personnel should be geared toward tying the witnesses down to the claims story. Do not be reluctant to inquire into the bases and explanations of the claims handling and decision-making process. Delve into the "what" and "why" of the claims process.

Be sure to tie each witness down to the role they played (in other words, their assigned responsibility) in investigating, managing, and assessing the claim's merits. Ask follow-up questions to get full and complete answers that help you uncover the full claims story.

While going through the process, listen carefully to the answers and

explanations, and try to process the information into the claims story that an insurer will be telling at trial. Does that story reveal an insurer that is interested in complying with the required good faith claims handling principles? Or does it demonstrate that the insurer is resistant to these principles—or potentially engaged in bad faith?

With careful preparation and use of the claims file, claims manuals, industry guide lines, and your claims experts, you should be able to develop themes to show how the insurer failed to live up to its contractual and good faith responsibilities.



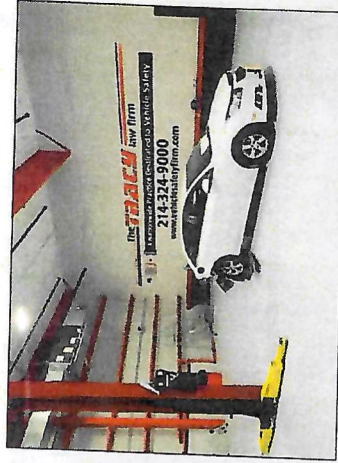
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#### NOTES

- See, e.g., Cal. Ins. Code §990.03(b) (commonly referred to as the Unfair Claims Settlement Practices Act) and its accompanying regulations under Cal. Code Regs. tit. 10 §2695.1 et seq. This statute is originally taken from the NAIC's model act. There are some variations among the states in the standards for a breach of the covenant of good faith and fair dealing in "failure to settle" or third-party cases and in first-party cases. For a survey of the law in the 50 states, see Int'l Ass'n of Defense Counsel, *50 State Insurance and Bad Faith Quick Reference Guide*, 2014, [https://www.iadc-law.org/assets/1/17/50\\_State\\_Insurance\\_Bad\\_Faith\\_Reference\\_Guide.pdf](https://www.iadc-law.org/assets/1/17/50_State_Insurance_Bad_Faith_Reference_Guide.pdf).
- See Greg Daugherty, *National Association of Insurance Commissioners (NAIC) Defined*, Investopedia, July 18, 2022, <https://www.investopedia.com/terms/n/nainurance.asp>; Julia Kagan, *Unfair Claims Practice: What It Is, How It Works, Examples*, Investopedia, Oct. 20, 2021, <https://www.investopedia.com/terms/u/unfair-claims-practice.asp>; Nat'l Ass'n of Ins. Comm'rs, *Model Unfair Claims Settlement Practices Act*, 1997, <https://content.naic.org/sites/default/files/model-law-900.pdf>.
- See id.

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