

California Insurance Law Coverage Newsletter for Attorneys

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CALIFORNIA INSURANCE CLAIMS HANDLING AND TACTICS

In general

The insurance company resolves claims under its policies by 'adjustment of losses'. See § **A30 ADJUSTMENT OF LOSSES**. The 'adjustment of losses' are performed by either (1) an unlicensed adjuster who is an employee of the insurer [§ **A28 ADJUSTER**] or (2) by an independent adjuster who must be licensed [§ **I23 INDEPENDENT ADJUSTERS**].

An insurer has a non-delegable duty to adjust an insured's loss fairly and in good faith [§ **N23 NONDELEGABLE DUTY, § N23:1 – § N23:4**] The insurer through its adjuster or independent adjuster must make independent inquiry into the facts of any serious accident as soon as practicable after the loss. [*Merritt v. Reserve Ins. Co.*, 34 Cal. App. 3d 858, 882, 110 Cal. Rptr. 511 (2d Dist. 1973)] See § **N23 NONDELEGABLE DUTY [§ N23:1 In general; liability for negligent performance of insurer's duty owed to insured; § A99 AS SOON AS PRACTICABLE]**. With regards to **FIRST PARTY LOSSES**, an insurance company has a duty to thoroughly investigate the circumstances of the claim to determine the cause of the loss. [*Mariscal v. Old Republic Life Ins. Co.*, 42 Cal. App. 4th 1617, 1624, 50 Cal. Rptr. 2d 224 (2d Dist. 1996)] See § **I81 INVESTIGATE: DUTY OF INSURER - FIRST PARTY POLICY. As to THIRD PARTY LOSSES**, liability policies provide that the insurance company has a duty to defend the insured in any action brought against the insured seeking damages for a covered loss. As such, the duty to defend requires the undertaking of reasonable and necessary efforts for that purpose, including investigation. It also requires the incurring of reasonable and necessary costs to that end including investigative expenses. [*Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal. 4th 38, 57–59, 70 Cal.

Rptr. 2d 118, 948 P.2d 909 (1997)] See § **I80 INVESTIGATE: DUTY OF INSURER - DUTY TO DEFEND**.

An insurer is justified in delaying the claims handling process when the insured fails to provide information that is required, in a timely manner. See § **E44 EXAMINATION UNDER OATH [§ E44:12 Sanction for failure to comply with insurer's request for examination under oath]**.

There is no continuous duty to investigate claim or suit made by a third party against the insured after a proper denial is rendered

Extrinsic facts may create a duty to defend. The extrinsic facts must be known by the insurer at the inception of the third party suit. An insurer does not have a continuing duty to investigate whether there is a potential of coverage under a liability policy. If the insurer has made an informed decision on the basis of the third party complaint and the extrinsic facts known to it at the time of tender that there is no potential for coverage, the insurer may refuse to defend the lawsuit. [*Gunderson v. Fire Ins. Exchange*, 37 Cal. App. 4th 1106, 44 Cal. Rptr. 2d 272, 277 (1st Dist. 1995)] The key issue in a duty to defend case is the nature of the facts known to the insurer. [*Mitroff v. United Services Auto. Ass'n*, 72 Cal. App. 4th 1230, 1238, 85 Cal. Rptr. 2d 759 (1st Dist. 1999)] OR facts the insurer might have learned if it had pursued the requisite investigation [*Span, Inc. v. Associated Internat. Ins. Co.*, 227 Cal. App. 3d 463, 482, 277 Cal. Rptr. 828 (2d Dist. 1991)]. See § **E59 EXTRINSIC FACTS — DUTY TO DEFEND; § D85 DUTY TO DEFEND [§ D85:37.9 Right of insurer to bring declaratory relief; timing of; stay]; § D9 DECLARATORY RELIEF [§ D9:11.1 Discovery by insurance company during insured's suit to compel a defense]**

While an insured may not trigger the duty to defend by speculating about extraneous facts regarding potential liability or ways in which the third party claimant might amend its complaint at some future date, a contrary result occurs when the third party complaint contains causes of action when coupled with extraneous facts which could have been discovered by the insurer with a reasonable investigation. These factors eliminate 'speculation' about existing facts and thereby establish potential coverage. [Eigner v. Worthington, 57 Cal. App. 4th 188, 66 Cal. Rptr. 2d 808 (4th Dist. 1997)] See § **S69 SPECULATION [§ S69:1 Speculation about extraneous facts to support duty under third party complaint]**.

Claims handling; wrongful withholding of benefits

A wrongful withholding of benefits occurs as part of improper claims handling. [Progressive West Ins. Co. v. Yolo County Superior Court, 135 Cal. App. 4th 263, 280, 37 Cal. Rptr. 3d 434 (3d Dist. 2005)] See § **B2 BAD FAITH LAWSUIT - FIRST PARTY [§ B2:3.5 Requirement of 'wrongful withholding' in order for 'bad faith' to exist]** This is to be distinguished from an insurer's suit against the insured for REIMBURSEMENT of proceeds pursuant to a reimbursement provision in an automobile policy. See § **R30.04 REIMBURSEMENT [§ R30.04:1 In general]**. CLAIMS HANDLING is covered under the Unfair Trade Practices Act. [Insurance Code §§ 790.03(h)(2), 790.03(h)(3), 790.03(h)(5)(12)] See § **B2 BAD FAITH LAWSUIT - FIRST PARTY [§ B2:18 Unfair Trade Practices Act - Insurance Code § 790.03(h)]** CLAIMS HANDLING is covered under the Insurance Commissioner's Regulations. These regulations state a considered public policy and deserve to be given practical and equitable effect. [Spray, Gould & Bowers v. Associated Internat. Ins. Co., 71 Cal. App. 4th 1260, 1271, 84 Cal. Rptr. 2d 552 (2d Dist. 1999)] See § **B2 BAD FAITH LAWSUIT - FIRST PARTY [§ B2:21 Insurance Commissioner Regulations]**.

ILLUSTRATION: [Bad faith failure to investigate the first party property loss]

Bad faith failure to investigate a first party property loss may be proved by evidence in the form of declarations, deposition testimony and/or documentary material that reflect the

omissions. [Jordan v. Allstate Ins. Co., 148 Cal. App. 4th 1062, 1075, 56 Cal. Rptr. 3d 312 (2d Dist. 2007)] Examples of such proof are:

1. Despite the recommendation of the insurer's own experts that a structural engineer be retained by the insurer to inspect the property, the insurer failed to do so. [Jordan v. Allstate Ins. Co., 148 Cal. App. 4th 1062, 1075, 56 Cal. Rptr. 3d 312 (2d Dist. 2007)]
2. Failure of the insurer to ask its own experts to structurally examine the dwelling after the possibility of structural issues were raised by the insured. [148 Cal.App.4th 1062, 1075]
3. Despite the fact that internal correspondence about the possibility that coverage might apply to the insured's loss, the insurer never communicated anything to the insured about this coverage potential. [148 Cal.App.4th 1062, 1075]
4. Although the insurer recognized that coverage applied [collapse coverage] where there was 'hidden decay', the insurer's adjusters never made any attempt to inspect the inner walls or sub-flooring of the insured's home. [148 Cal.App.4th 1062, 1076]
5. Where an insurer's retained inspector specifically recommends an inspection by a structural engineer because there had not been any demolition of the relevant areas of the home, the insurer failed to do so. [148 Cal.App.4th 1062, 1076]
6. Where an adjuster is told by a supervisor that if the adjuster wasn't 'certain' that [collapse] existed, a structural engineer inspection would be appropriate. Notwithstanding, the adjuster never took any steps to hire a structural engineer until after the insurer's summary judgment motion #1. When the structural engineer was then retained, a review of photographs that had been in the insurer's possession for more than a year

- supports a triable issue of fact for bad faith claims handling. [148 Cal.App.4th 1062, 1075]
7. The insured was never interviewed by any adjuster for the insurer, although the insured was aware from the outset that parts of her home were collapsing. [148 Cal.App.4th 1062, 1075]
 8. The insurer left it completely up to the adjuster to determine if there was [collapse] despite the fact that the adjuster had no credentials or background for making structural engineering decisions. [148 Cal.App.4th 1062, 1076]
 9. Phantom doubts about coverage: A form of ‘not communicating with the insured’ occurs when the insurer throws up PHANTOM DOUBTS ABOUT COVERAGE. [City of Hollister v. Monterey Ins. Co., 165 Cal. App. 4th 455, 496, 81 Cal. Rptr. 3d 72 (6th Dist. 2008)] See § R51:9.1.1 [discussing City of Hollister].

In first party property losses, the insurer has a continuous responsibility to fully investigate the insured's claim; this is so even after litigation commences

The fact that litigation has commenced, does not excuse the insurer from a continuing responsibility to fully investigate the insured's claim. The insurer's duty of good faith and fair dealing does not evaporate after litigation has commenced. [Jordan v. Allstate Ins. Co., 148 Cal. App. 4th 1062, 1076 fn 7, 56 Cal. Rptr. 3d 312 (2d Dist. 2007)] “To hold otherwise would effectively ‘encourage insurers to induce the early filing of suits, and to delay serious investigation and negotiation until after suit was filed when its conduct would be unencumbered by any duty to deal fairly and in good faith ... the policy of encouraging prompt investigation and payment of insurance claims would be undermined ...” [Jordan v. Superior Court, supra, fn. 7, quoting White v. Western Title Ins. Co., 40 Cal. 3d 870, 886, 221 Cal. Rptr. 509, 710 P.2d 309 (1985)]

ILLUSTRATION: [Failure to investigate a claim of collapse]:

An insurer that fails to fully investigate the insured's claim of collapse, can be found to have violated the implied covenant of good faith. The fact that litigation is pending does not excuse such violation. [Jordan v. Allstate Ins. Co., 148 Cal. App. 4th 1062, 1076 fn 7, 56 Cal. Rptr. 3d 312 (2d Dist. 2007)]

COMPARE: Third party claims against the insured: [No continuous duty to investigate THIRD PARTY claim against insured under liability policy]

There is no continuous duty to investigate a third party claim for purposes of determining potential coverage under a policy after proper denial has been rendered by the insurer. [Gunderson v. Fire Ins. Exchange, 37 Cal. App. 4th 1106, 44 Cal. Rptr. 2d 272, 277 (1st Dist. 1995)] Further, the insurer has no continuing duty to read amended complaints to see if some new claim is made. [Travelers Cas. and Sur. Co. v. Employers Ins. of Wausau, 130 Cal. App. 4th 99, 110, 29 Cal. Rptr. 3d 609 (1st Dist. 2005)] See § **I80 INVESTIGATE: DUTY OF INSURER - DUTY TO DEFEND [§ I80:7]**

If an insurer learns of facts or law while the coverage action is pending that render the action when filed ill-founded, the insurer may not properly maintain the action simply because it was tenable when filed. [Dalrymple v. United Services Auto. Assn., 40 Cal. App. 4th 497, 525, 46 Cal. Rptr. 2d 845 (4th Dist. 1995)] See § **K4 KNOWLEDGE OF INSURER AT COMMENCEMENT OF LAWSUIT; REQUIREMENT; DUTY TO DEFEND [§ K4:5.3 Duty to change decision; new facts rendered decision ‘ill founded’]**

ILLUSTRATIONS of bad faith claims practices and tactics

Examples of conduct and tactics for which first-party insurers have been held liable are described in § **B2 BAD FAITH LAWSUIT - FIRST PARTY [§ B2:3.5.3 Illustrations of conduct and tactics for**

which first-party insurers have been held liable]
Bad faith claims practices and tactics may involve the insurer's failure to make timely decisions about payment of a claim which may include pretext created by the insurer as reasons for not paying the claim. See § **B2 BAD FAITH LAWSUIT — FIRST PARTY [§ B2:13 Prompt payment]**

A third party bad faith lawsuit generally involves an insured's suit against his or her liability insurer arising out of the insurer's mishandling of a third party claim against its insured, such as unreasonably refusing to settle within policy limits, or unreasonably refusing to provide a defense in a third party action. See § **B3 BAD FAITH LAWSUIT — THIRD PARTY [§ B3:1 Defined]** Illustrations of bad faith claims practice and tactics are described in § **B3 BAD FAITH LAWSUIT — THIRD PARTY [§ B3:11 Denial of coverage and defense; consistent and inflexible positions - Bad faith]** Factors for the insurer to consider with regards to settlement are discussed in § **S25 SETTLEMENT [§ S25:2 – S25:12]**

Bad faith claims practices and tactics also exist when insureds make claims under its underinsured motor vehicle provisions [§ **U9 UNDERINSURED MOTOR VEHICLE [§ U9:3]** and uninsured motor vehicle claims [§ **U18 UNINSURED MOTOR VEHICLE; [§ U18:13 Forcing arbitration proceeding; insurer bad faith]**

Sloppy or negligent claims handling, but not more, is not bad faith

Sloppy or negligent claims handling does not rise to the level of bad faith. [Chateau Chamberay Homeowners Ass'n v. Associated Intern. Ins. Co., 90 Cal. App. 4th 335, 351, 108 Cal. Rptr. 2d 776 (2d Dist. 2001)] See § **B2 BAD FAITH LAWSUIT — FIRST PARTY [§ B2:3.2]** discussing Adelman v. Associated Intern. Ins. Co., 90 Cal. App. 4th 352, 369–370, 108 Cal. Rptr. 2d 788 (2d Dist. 2001)]; § **U24 UNREASONABLE [§ U24:1 In general; bad faith - first party]; § S25 SETTLEMENT [§ S25:5 Negligence and bad faith, compared]**.

Of course, sloppy and/or negligent claims handling may be a basis for breach of contract. [California Shoppers, Inc. v. Royal Globe Ins. Co., 175 Cal. App. 3d 1, 221 Cal. Rptr. 171, 189 (4th Dist. 1985)]

Similarly, claims practices that are shoddy, at times witless and infected with symptoms of bureaucratic inertia and inefficiency without more is not malice to support a claim of punitive damages. [Patrick v. Maryland Casualty Co., 217 Cal. App. 3d 1566, 1576, 267 Cal. Rptr. 24 (1st Dist. 1990)] See § **P51 PLEADING ALLEGATION - FIRST PARTY [§ P51:2 Strategies]**.

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