Lowenstein Sandler's Insurance Recovery Podcast: Don't Take No For An Answer

Episode 97:
In Bad Faith: Understanding Bad Faith Claims and Policyholder Protection

By Eric Jesse, Alexander B. Corson

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Eric Jesse: Welcome to "Don't Take No For An Answer." I'm Eric Jesse. I'm a partner at Lowenstein Sandler Insurance Recovery Group, and today I'm pleased to be joined by my colleague, Alex Corson, who an associate in the IRG. Welcome Alex.

Alex Corson: Glad to be here. Thanks, Eric.

Eric Jesse: Yeah, so Alex and I, I know we've paired up for podcasts in the past, but as I tell the audience, we'd like to fight the good fight on behalf of our policyholder clients in claim disputes. One of the things we're going to talk about today is a recent New York Health division decision that really reinforces insurer bad faith and bad faith can take many forms.

So as our listeners may know, or maybe even have experience, if an insurance company refuses to settle a third-party claim, a lawsuit, within policy limits, the insurer can potentially be exposed to the entirety of the verdict even if the verdict exceeds those policy limits. But as we're going to discuss today, the failure to settle is not the only circumstance that can give rise to a bad faith claim and policyholders should also be aware that there are bad faith claims handling claims that might be made just based on the tactics that the insurers employ.

So with that, Alex, so the case you're talking about today, it's the Rockefeller case, so why don't you set the table, tell the audience about it?

Alex Corson: Yeah, sure. So, this was a motion to dismiss opinion, which may seem like it's of limited value, but it has a couple of really key points here. This was a case, sexual abuse claims against Rockefeller University under the 2019 Child Victims Act, which reopened the statute of limitations for these types of claims in New York, and university found itself with a number of claims.

The insurers in this case decided to sit on the sidelines, allegedly ignored requests for coverage, ignored the requests for searching for the copies of the legacy policies that were potentially implicated here and refused even to take a coverage position. They just sat on their hands and sort of did nothing according to the policyholders' complaint.

So, the insurers moved to dismiss on two theories. The first was they argued that the policyholders' bad faith claims were entirely duplicative of their breach of contract claims. Essentially saying this is just another cause of action, trying to get the coverage you allege you're entitled to. Then the second argument was the facts that they allege didn't give rise to bad faith liability, what they did was entirely kosher.

The court rejected both of these arguments, refused to dismiss the complaint. The court noted that the breach of contract claim was different than the bad faith claim, because the breach of contract claim could only get you what you were entitled to under the policy, i.e, was capped at the policy limits, whereas the bad faith claim was seeking consequential damages more than just the policy coverage, but also damages that they had suffered as a result of what the court described as a deceptive wait and see strategy, even above the policy limits.

I thought also interesting, although not apropos outside of New York, the court upheld or refused to dismiss a cause of action under a New York's general business law, it was like a trade practices deceptive act and practices and the conduct, right, they upheld a claim alleging essentially super fraud, so to speak, as I understood it. Yeah, so that was the situation.

Eric Jesse: As you're describing the fashion pattern here, Alex, I love to think, although it's probably a reality that many of our listeners are probably like, oh, a carrier that is taking their time and issuing a coverage position letter, our listeners are probably experiencing that, or carriers that have an issued a coverage position letter. I just feel like we're seeing this unfortunately more and more across the many claims that we work with our clients on. So it's good that the New York appellate division here is finally, I think, really giving some teeth to ensure bad faith. Because my sense is that a lot of times insurers really aren't too concerned or they kind of yawn at these bad faith claims when they come up. And I think that this decision, it is a motion to dismiss decision, but it does show that there is good likelihood that bad faith claims have teeth here and insurers need to conduct their claim investigation in a fulsome, prompt and a proper way.

Alex Corson: Yeah, absolutely. And I think that insurers sometimes yawn, as you say at these claims because the standard is sort of, it's a loose standard. There's not a set bright line rule in every circumstances. We have some brighter line rules like you have to settle when you get a demand within policy limits, or at least the standard usually raises there. But the court in this case acknowledged and quoted case law that says, look, bad faith is a little bit like the obscenity test when you see it. It's a flexible standard that has to take into account all the circumstances. And so what this opinion does that I think is really great is it acknowledges specifically that refusing to search for a legacy policy.

Oh yeah, just ignoring that part of letter, how many times do we get a response to one of our coverage letters that sort of dodges or ignores or doesn't even respond to One of the key questions or points that we've made. The court said, "Look, if you in fact ignored the request to search for these legacy policies that can give rise to bad faith liability, the same as the failure to investigate failure to communicate their coverage position," all these types of things.

Eric Jesse: And as you're saying that, Alex, I'm thinking, nothing's easy anymore. In my experience, asking an insurance company to search their records for policies is a pretty basic request that you don't even have to ask in the litigation setting, carriers would just typically do that. So the fact that these carriers were really being entrenched here again, and it's also nothing easy anymore to get the insurers to do what they're supposed to do anyway. Right? Investigate issue coverage, position letters, take a stand one way or the other.

Alex Corson: Absolutely.

Eric Jesse: Yeah. You touched on it, but I want to put a fine point on it, which is it's a common theme here on Don't Take No, which is choice of law matters. So the bad faith law does really vary across the jurisdictions. The standards matter in Pennsylvania, you have a statute in New Jersey, it was the insurer's coverage position fairly debatable. So this is a New York case, but potentially this is a case that can potentially be persuasive authority in other jurisdictions and maybe can be a forerunner for making law in other jurisdictions. Because the practical reality here is these are the... Again, it shouldn't be this hard to get a carrier to do some of the basics things that they're required to do when a claim comes in.

Alex Corson: Absolutely. And I think that although it wasn't necessarily discussed specifically in this opinion, it's important to remember that this idea of the delay, the wait and see, asking over and over again for more and more and more information, these are all tactics that insurers sometimes use when they're trying to delay. They want to wait and see like the insurers allegedly did in this case, to see if this can go away or if they can come up with some reason why they shouldn't have to defend it. But as you and I know, and our listeners hopefully do, the duty to defend is not a super fact-sensitive inquiry. It does the complaint or the demand or whatever rate gives rise to coverage allege something that's potentially within the policy limit. So putting the insurers to their paces to conduct the investigation of whether there's a duty to defend is a first step that shouldn't take a lot of time or a lot of effort. It's just looking at two pieces of paper and saying, "Do I have to defend here?"

Eric Jesse: I get frustrated when you're seeking a defense from an insurer, then they ask for a bunch of additional information. And so sometimes you're just trying to balance that to try to find the path of least resistance because maybe you give the information and that satisfies the insurer and they're going to provide a defense as opposed to saying, "No, just look at the complaint," and people start to become entrenched. But again, you're touching upon another point which is important here, which is the delay tactics here and the potential negative impact that can have on the policyholder if the policyholder doesn't

act quickly. Because unfortunately, we've seen cases where the coverage lawsuit is filed towards the end of the underlying case after the facts have been developed. And as those facts are developed, they're not so helpful for the coverage argument. And so the insurers will use that in the coverage action.

And unfortunately, judges get distracted by that because those facts should not be relevant under the duty to defense standard, which is all right, I was entitled to a defense on day one for however long into the future based on the allegations of the complaint. And so this, just another practical tip that our clients and policyholders need to keep in mind is evaluating if they need to bring a coverage action early on so that they can file that early duty to defend motion without the insurer being able to present all these extraneous, frankly, irrelevant information to that specific question.

Alex Corson: Absolutely.

Eric Jesse: Yeah.

Alex Corson: And I think that this opinion also is interesting because it touches upon something that I haven't seen in too many New York opinions, although I have seen it elsewhere, which is the failure to issue, take a coverage position. To issue an opinion, right? The insurer's duty to investigate and evaluate coverage is settled, right? They have to look at what you send them. They can't just blow you off, but they also have to tell you, they have to tell you what their position is. They have to explain the coverage. They're the experts, they're the ones that wrote these policies and are supposed to know how they apply to different circumstances. And they have an obligation to tell you--based on the information that's available and the information that they can readily investigate and or reasonably ask for--what are the coverage issues that are in play here?

And so this opinion includes that as one of the allegations that are cognizable as bad faith claims and reinforces that insurers can't hide the ball on their coverage position. And in many states, as you and I know, the insurer will actually be a stop from raising arguments that they could have raised at the beginning but chose not to do anything with.

Eric Jesse: That is certainly the case. And I think that this just on the legal front or the legal analysis front here, this case does raise an interesting issue that we have seen come up in New York, which is one, I guess nuance of the bad faith claim under New York law is can't just be duplicative of the breach of contract, the breach of the policy claim that you have. So there needs to be additional damages that are associated with the bad faith claim. So, this case just highlights or reinforces that you do need to show that your bad faith claim did lead to consequential damages, and, in this case, the court laid out, or presumably the complaint in this case also laid out what those types of damages can be. So, this was a university, so they're claiming loss to investment opportunities, had the carrier stepped up at the right time and not allegedly in this case committed to bad faith.

Coverage counsel or attorney's fees to actually prosecute the coverage litigation. Again, that can be another consequential damage here. So just something to keep in mind when evaluating bringing a bad faith claim, making sure you have additional buckets of damages.

Alex Corson: Yeah, absolutely. And I think that those consequential damages are something that are often overlooked in the early stages of discussing a bad faith claim. As you say, the insurers sometimes are yawning at this and not appreciating, they're just thinking in the box of, "Oh, my limits are my limits are my limits. I can never have to pay more than this." But a strong policyholder advocacy piece should lay out, "Hey, these are the things that your delays and your conduct are how they're harming me."

Eric Jesse: Absolutely. All right, so Alex, take this home and we'd like to be practical here on, Don't Take No. So what are just some things that the policyholder is faced with this type of delinquency delay on the path that the insurers, what should policyholders be doing to really protect themselves? What are some tips?

Alex Corson: Yeah, so I think the first and foremost thing is to create the record. Don't just let the time flow by and let things happen and let these delays happen. Ask the insurers, "Where are you at? What's going on with your coverage position? Where's your investigation?" If they ask you for requests, if they ask for information, push back on that, say, "Why do you need this information? Why do you need that information?" And if you're not sure if something is reasonable, we can get coverage council involved because sometimes we see these laundry lists of 20 things that they need to evaluate their duty to defend. And that's, we just discussed, that's not always the case.

Eric Jesse: Yeah, we see that a lot where, yeah, you have the unending requests for information, and a lot of times the carriers don't even know why they want the information, except that they just know that they want it. And so that's one where it's important to properly evaluate that if they're asking the same thing multiple times. Right? Again, create the record that that information has been provided because look as part of an insurer's duty to investigate, or the insurers have a duty to cooperate, which be making sure that the insurer has information to ultimately evaluate the claim. But even then, the requests become onerous and duplicative, and frankly, the requests become a pretext to avoid issuing a coverage position or having to take a position. So absolutely important to make sure you're creating that record along the way.

Alex Corson: Completely.

Eric Jesse: Anything else? Any other tips?

Alex Corson: Yeah, one other thing that you said earlier about how some of these things that you would expect them to do as a matter of course, as a matter of conducting their business and claims handling that just don't seem to be happening as automatically anymore. I recommend demanding compliance specifically saying, "Hey, search for legacy policies. Hey, are you investigating this? Hey." Ask them to comply with their obligations, because I

think sometimes there's a disconnect between what's required and what isn't.

Eric Jesse: Yeah.

Alex Corson: And lastly, I think that it's important for people to remember, especially for policyholders that are at the beginning of the claim, before the carrier has taken a position. Remember that privilege does not attach, does not attach at the outset carrier, and you need to have a common interest. So if the carrier is still asking questions, so often I see that initial coverage letter come in saying, "We are investigating. Please send us your liability analysis and defense counsel reports." And I go, "Whoa, whoa, whoa. Hold on. You want us to send you an analysis of the underlying claim and break privilege and run the risk that that's going to be discovered by the underlying claimant? Hold the phone. You got to at least give us your defense position in the first place." So super important when we're getting these early stages posturing letters that we're mindful of the attorney-client privilege.

Eric Jesse: Yeah, absolutely. And then one other tip I would just throw in there is for consequential damages to be recoverable, they need to be foreseeable. And so, as you're creating your record with the insurer, if you're losing out on investment income, if you're going to have to incur coverage, counsel attorney's fees, well that should be a foreseeable anyway, but drop that in as you're communicating with the insurer because now, they are on notice, they can't run away potentially from that foreseeability argument. So all good tips. Thanks for bringing this case to the attention of our listeners, Alex, and this was a good discussion. So, thank you to our listeners, and we'll see you next time on Don't Take No For an Answer.

Alex Corson: Thank you. Good to be here.

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