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10 Big Mistakes Made by Insurance Companies

An attorney for policyholders points out common carrier missteps

By William G. Passannante

No one doubts that insurance companies are formidable adversaries. They play a long game and wear policyholders out while keeping the float.

Yet often, their efforts are counterproductive. As an attorney who only represents policyholders in insurance-coverage disputes, I periodically see insurance companies and their attorneys shoot themselves in the foot. Here are 10 common mistakes made by insurance companies or their counsel:

1. Ignoring Exposure to Attorneys' Fees

A majority of states permit the recovery of attorney fees by a prevailing policyholder in a coverage dispute, on the understanding that insurance disputes are fundamentally different from other disputes. Findings that an insurance company breached the "litigation insurance" promise or acted in bad faith can be very costly—and are not uncommon. Some jurisdictions will award fees if a policyholder prevails; some require a showing of excessive misconduct on the part of the insurance company.

2. Moving All Claims Activity to Attorneys

Some lines of the insurance business seem to have forfeited all claims activity to attorneys, both inside and outside counsel. This risks loss of attorney/client privilege. One court observed, "Most courts have adopted a rebuttable presumption that neither attorney-work product nor attorney/client privilege protects an insurer's investigatory file on an insured's claim from discovery before a final decision is made."

3. Failing to Comply with the Non-Renewal and Cancellation Law

Cancellation and non-renewal is regulated by state law. The rules are arcane and often strictly enforced against non-renewal or cancellation. To stay in compliance, get a copy of Christine G. Barlow's "2012 Cancellation & Non-Renewal" from the National Underwriter Co. Book Store.

4. Delaying Inexplicably

Unexplained delay on the part of the claims department creates an unwelcome inference for the court and fact-finder and can have a preclusive effect on certain claims. In an age of email and Twitter, jurors no longer forgive a 45-day claims-calendar response.

5. Forgetting that the Adversary in a Claims Situation Is Your Customer

Policyholders are the customers of insurance companies. In a serious claims situation, that relationship is sacrificed. Should it be?

Many claims disputes escalate because of the policyholder's perception of extreme mistreatment at the time of a significant claim. I have heard too many variations on the lament, "Isn't a time like the present exactly why I purchased this insurance?"

6. Failing to Notify Underlying Plaintiffs in Bodily Injury Cases

Some statutes and regulations require an insurance company disclaim "as soon as is reasonably possible." A failure to meet the requirements of the statute can have dramatic effects. In one case, the New York Court of Appeals held that a delay of two months in disclaiming liability was, as a matter of law, unreasonable under New York law.

7. Asserting "Prejudice" on Account of Late Notice Without Basis

When an insurance company denies coverage on grounds of "late notice," most states require there be a showing that the delay prejudiced the insurance company. In one case, the insurance company asserted that: 1) it lost the opportunity to interview employees; 2) it never was provided the names of certain witnesses; 3) it was denied access to the premises; and 4) certain witnesses were dead.

At trial, the policyholder presented evidence that: 1) the insurance company did not seek to interview any employees; 2) the policyholder provided information containing the names of certain witnesses; 3) the policyholder did not deny access to the premises; and 4) some of the alleged dead witnesses were not, and testified.

8. Denying a Claim Your Company Is Advertising as a Covered Claim

In one notorious case, an insurance company's advertisement for a D&O product stressed that it "eliminates the industry-standard 'insured-versus-insured' exclusion, instead omitting coverage only in the exceedingly rare event that a claim is made by the organization against an individual insured." In a claim affecting that very policy, the insurance company asserted a stricter view of the exclusion than appeared in the policy or in their advertising. The policyholder saw advertisements depicting its claim as an example of a covered claim.

9. Neglecting Rules Regarding Right to Independent Counsel

The rules regarding independent counsel are intertwined with attorney-ethics rules. In the event of a conflict—caused, for example, by a reservation-of-rights letter—the insurer may have a duty to inform the policyholder about its right to independent counsel.

10. Exposing Yourself to Bad-Faith Claims

With surprising frequency, insurance companies deny a claim on grounds undercut by a paper trail documenting what they want policyholders to think a policy covers and what their employees and agents say it covers. Sources of proof for a bad-faith claim can include claims and underwriting manuals; the insurer's own reinsurance policy and communications; advertisements; other communications; and many other documents.

About the Author

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