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Bad Faith Lawsuits: High Stakes With Unclear Guidance

In the area of insurance litgation, there is an essential need for a Model Civil Jury Charge to guide courts and counsel that have bad faith litigations pending, as well as insureds and insurers in the underlying cases.

By Eric S. Poe, Esq., CPA

It's not often when a plaintiff attorney and an insurance company defending one of its policyholders agree in a courtroom. Rarer still is to have a suggested rule change be a "win" for all parties. However, in the case of "bad faith" insurance litigation and the urgent need for clarity for judges, lawyers and litigants, I believe there is such a situation.

Typically, bad faith lawsuits are only initiated when there is a significant, crippling jury award that goes above the policy limit purchased by an insured policyholder. After such a verdict, all of the parties—the policyholder, the injured party, the insurance company and plaintiff attorney—are thrust into what can be years of protracted litigation over the excess monetary award not covered by the insurance policy.

The most common course post-verdict is for the policyholder, now personally liable for the amount of the award above their policy limit, to seek relief for that excess judgment. They do so by directly suing, or assigning to the plaintiff the right to sue, the policyholder's insurance company for failure to settle below the policy limits prior to the excess verdict. In other words, the policyholder, who was the defendant, now becomes the plaintiff in a new lawsuit against the insurance company, but he/she can assign that right to sue to the original injured plaintiff. It should go without saying that the guidelines on how to prevail in such a complex and high-stakes lawsuit should be well-defined for all parties involved.

Surprisingly, the actual guideline for what it takes to win or defend such a case is not set forth in a Model Civil Jury Charge, leaving judges to deliver instructions with little guidance or uniformity. This leaves the insurance company, the policyholder and the injured party in a difficult position when assessing how to proceed. A uniform

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Model Civil Jury Charge—one that outlines what a jury must consider in a bad faith case—will help judges, attorneys and parties properly analyze the probability of success, and perhaps avoid protracted litigation.

As an insurance company executive and practicing attorney, I speak from experience and have seen the results of such ambiguity in the law. Unlike many articles in which I might dive into the legalese of the issue, when it comes to "bad faith" litigation, speaking of real scenarios truly drives home

the importance of defined jury instructions, something in place for so many other more straightforward areas of the law.

Where Does It Begin?

Let's envision a bad faith case arising from a devastating car accident.

In New Jersey, drivers are mandated to carry car insurance but policies and coverage limits differ dramatically. For this purpose, let's say a particular driver carries $100,000 in coverage, and causes an accident that results in another driver alleging soft tissue injuries. During the course of discovery, the severity of these asserted injuries is unclear for several reasons. First, the injured plaintiff had long-standing degenerative lower back disc disease and was treating with a pain management doctor one week prior to the accident. Further, he/she did not complain of an injury at the scene of the accident and failed to go to a hospital until two weeks after seeing a plaintiff attorney. One more assumed fact: the plaintiff was unemployed or did not miss a day of work after the accident.

Using information from the medical records and investigation, along with all "good faith" evaluation factors, the defendant's insurance carrier believes that its policyholder did not truly cause or exacerbate the alleged injuries, and therefore refuses to settle the case for $95,000—an offer within the policy limits of the insured. The matter proceeds to a jury.

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During testimony, the injured party tearfully tells of his/her struggles since the accident, including pain and suffering that has not subsided, and makes for a likable witness on the jury stand. As a result, and after several hours of deliberation, the jury awards the plaintiff $250,000. So, the insurance carrier is obligated to cover $100,000 (policy limit purchased), while the defendant insured is left personally liable for the additional $150,000 of the verdict that is over the insurance policy limit.

Now the Tables Turn

Displeased with the prospect of paying the excess verdict of $150,000, the original defendant now sues the auto insurance company. Now the plaintiff, the driver alleges that the insurance company did not follow the standards of "good faith" or fair dealing when evaluating its decision to settle or not settle the particular claim. The plaintiff's lawyer and defending insurers are then entrenched in litigation that can take years and backlog the courts as they examine if the insurance company used proper methods in determining whether or not to settle.

As attorneys, we all understand that there are no guarantees as to what may lie ahead in the courtroom regardless of how well you assess a case. Another challenge is the possible presence of the injured party at the bad faith trial and the potential prejudicial optical—specifically in light of the fact he/she does not have true contractual rights under the underlying insurance policy. Currently, there are no rules governing the role of the injured party at the bad faith trial.

In 1974, the Supreme Court of New Jersey set the standard for bad faith insurance practices in the state when evaluating an insurance company's decision to settle or not settle a particular claim in the matter of *Rova*

Farms Resort v. Investors Ins. Co. of Am., 65 N.J. 474 (1974). It went on to further review the standards of several states, including California, Idaho and Rhode Island, and crafted its own standard. As the New Jersey "mala fides" law has evolved and been honed over the past several decades, there is understandably confusion amongst the state's trial court judges and attorneys as to how to instruct a jury on such a complex issue. Such lack of clarity on the bench and in the bar undoubtedly leads to misinformed jurors and a wide disparity in jury verdicts.

In California, courts have found a way to balance the unique nature of each case with clearer, more concise guidance for jurors in deciding it based on facts in evidence. Moreover, they have established suggested ratios and mandatory ceilings for damages, which may include policy benefits due to the plaintiff as well as those for economic harm, emotional distress, punitive penalties, attorney fees and prejudgment interest.

Insurance companies do not simply pay all claims. If they did agree to every settlement demand, including unreasonable requests made on the most frivolous claims, policy premiums would skyrocket and be unaffordable.

Empirical Real Evidence

In a matter close to home, the consequences of lack of uniform jury instruction, and fear that jurors would not understand the legal framework of bad faith, became all too clear.

Recently, I witnessed plaintiff counsel explain to a jury that New Jersey essentially has a strict liability scheme for an excess verdict when establishing bad faith. Not only was this highly inappropriate, it was something expressly rejected in *Rova Farms*. *Rova Farms*, 65 N.J. at 496-97. Second, the plaintiff's lawyer presented the excess verdict amount as evidence of bad faith—a fact I believe to be disallowed by New Jersey bad faith case law for more than 50 years. *See, e.g., Radio Taxi Serv. v. Lincoln Mut. Ins. Co.*, 31 N.J. 299, 308 (1960). Third, plaintiff's counsel made the presumption that a plaintiff would undoubtedly settle for policy limits if offered—another point in direct contradiction of *Rova Farms. Ibid.*

Clear in this real life experience is that without a Model Civil Jury Charge—when the court and counsel disagree on what the jury should consider in adjudicating a bad faith case—all parties are placed in a precarious position for complex litigation. This only highlights the importance of creating uniform jury instructions in bad faith litigation.

My Closing Argument

"Bad faith" can mean different things to different people. While this may be okay during dinner conversation, in a courtroom, the stakes are high and there is no room for ambiguity on the rules that govern trial.

Against this backdrop, I respectfully request that the Committee on Model Civil Jury Charges provide guidance and uniformity that is sorely needed by counsel and court alike. The Committee should promulgate a model jury instruction that summarizes the current state of "bad faith" law and litigation in the insurance context but also offers clarity and conformity.

I close with reiterating that in order to ensure consistent application of the laws in this unique and complex area, there is an essential need for a Model Civil Jury Charge to guide courts and counsel that have bad faith litigations pending as well as insureds and insurers in the underlying cases.

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