

BAD FAITH LITIGATION

The essential forum that shapes the future of bad faith litigation strategies for leading outside counsel, in-house counsel and claims professionals in the insurance industry

April 29–30, 2013 | Union League | Philadelphia, PA

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Travelers Insurance

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Will Elkner
ProAssurance

Suzanne M. Ganier
Main Street America Group

Jennifer Arnett Roeblich
Arch Insurance Group

Meg Weist
EMC Insurance Companies

Sarahannah L. McMurry, Esq.
Acceptance Insurance

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Hon. Robert B. Freedman
Superior Ct., Calif.

Sessions include:

- Avoiding bad faith traps and set ups and litigating questionable coverage
- **Time limit demands: timing the appropriate response**, conducting the investigation, and ensuring effective communication with the insured
- **Demand letters**: responding to allegations the investigation was improper and training adjusters to read in between the lines and subtle context
- **Sandy and other catastrophic events (hurricanes, earthquakes, and storms)**: claims handling, dealing with multiple coverages that overlap, properly handling investigations, and beyond
- **Claims management**: implementing best practices to minimize institutional bad faith claims
- **Reservation of rights and using consent judgments**: assigning rights to the plaintiff and ensuring settlement does not result in a bad faith suit
- The scope and limits of **duty to defend and duty to settle**, and initiating settlement negotiations
- Invoking the **appraisal provision** and setting up the appraisal process
- The latest on how policyholders assert bad faith claims and **punitive damages**
- Discovery requests: defining permissible limits within the scope of discovery

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Now in its 24th installment, ACI's Bad Faith Litigation series returns in Philadelphia with a multi-disciplinary, cross-country faculty of renowned jurists, leading in-house attorneys and claims professionals, and counsel for policyholders and insurers.

Bad Faith claims are being filed in record numbers and there's no signs of them slowing down. Hotbed jurisdictions like Florida and California continue to create controversy. And other states are heading towards statutory bad faith laws. Outside counsel, in-house professionals, and policyholders must be prepared with the best strategies for resolving coverage disputes, managing discovery, and gaining the upper hand in bad faith lawsuits.

American Conference Institute's 24th Advanced Forum on Bad Faith Litigation has been fully updated to offer crucial developments and winning litigation strategies to even the most experienced bad faith litigators, and provide in-house counsel and claims professionals with strategic and proactive ways to reduce bad faith claims. Get effective tactics from both the insurers and the policyholders and ensure the best result for your client. This conference will feature:

- *Insurers In-house roundtable:* This specialized in-house panel will focus on 1) best practices in claims investigation and litigation decisions; 2) settling bad faith claims and working with outside counsel; 3) dealing with the insured; and much more
- *Viewpoints from the Policyholders Bar:* Adapt your strategies to the new wave of claims being asserted and hear what key actions (or inactions) could lead your client into litigation.
- *Discussions with distinguished jurists:* Get valuable insight on effective theories and evidentiary issues, from state and federal judges that have presided over bad faith suits.
- *Narrowly tailored panel sessions:* Our narrowly tailored, comprehensive panels will shed light on the most effective ways to recognize bad faith set-ups, properly investigate a claim, litigate questionable coverage, manage discovery, respond to punitive damage claims and much, much more.

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Plaintiff and Defense Attorneys Specializing in:

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Litigation
Personal Injury
Worker's Compensation
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Mold, Asbestos and Other Toxic Torts
Life, Health and Disability Claims

Insurance Industry Professionals, Including:

Corporate Counsel
Defense Counsel
Claims Managers
Adjusters
Compliance Office
Risk Managers

7:15 Registration and Continental Breakfast

8:00 **Co-Chairs' Welcoming Remarks**



David A. Strauss
Member
King, Krebs & Jurgens, PLLC (New Orleans, LA)



Lewis F. Collins, Jr.
Partner
Butler Pappas Weihmuller Katz Craig LLP (Tampa, FL)

8:05 **Point/Counterpoint: The Latest on How Policyholders and Insurers Assert/Defend Bad Faith Claims and Punitive Damages**



Darin McMullen
Of Counsel
Anderson Kill & Olick, P.C. (Philadelphia, PA)



Jason S. Mazer
Partner
Ver Ploeg & Lumpkin, P.A. (Miami, FL)

Christopher E. Strapp
Vice President & Associate General Counsel
Guilford Specialty Group (Hartford, CT)

- How to put together a bad faith claim from nuts to bolts
- Reviewing common bad faith claims
- Facts supporting bad faith awards
- Current bad faith trends
- Trends in punitive damages
- Using mediation as a tool to illustrate bad faith exposure to the insurer
- First party v. third party bad faith suits
- Exploring statutory and common law bad faith

9:05 **Insurers In-House Roundtable: Counsel and Claims Professionals Speak Out on New & Emerging Issues in Bad Faith Claims**

Arthur Gang
Vice President, Associate General Counsel
Partner Re (Greenwich, CT)

Will Elkner
Senior Claims Specialist
ProAssurance (Madison, WI)

Suzanne M. Ganier
Corporate Counsel
Main Street America Group (Jacksonville, FL)

Jennifer Arnett Roeblich
Chief Litigation Officer
Arch Insurance Group (Jersey City, NJ)

Meg Weist
Claim Superintendent
EMC Insurance Companies (Des Moines, IA)

Sarannah L. McMurtry, Esq.
Claims Counsel
Acceptance Insurance (Nashville, TN)

E. F. Mincey CPCU ARM
Manager, Home Office Claims
MetLife Property and Casualty (Irving, TX)

Moderator



J. Mark Langdon
Founding Shareholder
Wall Templeton & Haldrup, P.A.

Settling Bad Faith Claims and Working with Outside Counsel

- Recognizing when and why to settle
- Best practices for reducing the settlement amount
- Managing high risk cases and litigation
 - Tips for managing “must win cases”
- Selecting, supporting and managing outside counsel
 - How and when to use outside counsel
 - Selecting outside counsel
 - How some policyholders object to selection of certain outside counsel
 - How are billable hours/rates determined and can these be negotiated?

Dealing with the Insured

- Best practices for dealing with your insured after the court determines coverage exists
- How to encourage and negotiate settlement
- What to do when your insured won't settle
 - Risks of settling over the insured's objection, especially in the case of a large deductible or SIR

Handling Medicare Issues in Liability Cases

- Exposure to Medicare in large claims
- Medicare liens and set aside agreements
 - Complications that arise in Florida and other time demand states

10:30 Morning Break

10:40 **Hot Topics and Issues on the Horizon in the Bad Faith Context: Emerging Claims, New Risks, Recent Trends and What to Expect in the Second Half of 2013**

James A. Dodrill
Corporate Claims Counsel
Progressive (Charleston, WV)



E. Kay Fuller
Shareholder, Director of Litigation
Martin & Seibert, L.C. (Martinsburg, WV)



John T. Brooks
Partner
McKenna Long & Aldridge LLP (San Diego, CA)



Robert T. Horst
Partner
Curtin & Heefner LLP (Doylestown, PA)



Edward J. Currie, Jr.
Shareholder
Currie Johnson Griffin Gaines & Myers, P.A. (Jackson, MS)

Class Actions

- Identifying certain policy provisions that affects similarly situated policyholders
- What are the new trends in class actions?
- Utilizing institutional bad faith claims as class action suits

Emerging Hotbed Jurisdictions

- Examining states with emerging bad faith statutes

Theory of Bad Faith in the Absence of Coverage

- Findings of bad faith against the insurance company where the court concluded no coverage under the policy
- State responses to the claim that the insurer did something that prejudiced the insured before declaration of coverage

Extra Contractual Liability

- Examining the insurer's liability for retaining independent professionals – lawyers, appraisers, adjusters, etc.
 - Determining whether liability exists for malpractice and negligence

Common Law Bad Faith and Bad Faith Statutes

- Continuing area of evolution of the interplay between common law bad faith and statutory remedies

Stacking Insurance

- Paying out limits under multiple policy years

Reading the Tea Leaves: What Some Recent Cases May Tell Us About What's Next

- Other parallel extra-contractual matters
- Additional available causes of action, remedies or damages
- The independence of the “bad faith” action vis-a-vis coverage
- The attorney-client privilege
- Measure of a reasonable “attorney fee”

12:00 Networking Lunch for Speakers and Delegates

1:00 **Claims Management: Properly Training Claims Handlers, and Implementing Best Practices to Minimize Institutional Bad Faith Claims**

Dan Gerber
Manager National Casualty Claims
Esurance (Rocklin, CA)

James G. Villa
Second Vice-President, Complex Claims
Travelers Insurance Company (Hartford, CT)

Kari Briscoe
Senior Disability Claims Consultant
RGA Reinsurance Company (Minneapolis, MN)

Marjorie J. Thompson
Vice President, Claims
Allied World National Assurance Company
(Farmington, CT)

Beth Howard
AVP Claims
American Modern Insurance Group,
a member of the Munich Re Group (Amelia, OH)



Jay Barry Harris
Attorney
Fineman Krekstein & Harris (Philadelphia, PA)

Best Practices for Claims Investigations

- Analyzing and evaluating the insured's liability
 - Strategies for conducting a quality, efficient, and cost effective investigation
 - Fixing problems related to inadequate investigations before they become bad faith issues
- Challenges that arise in internal claims handling
 - How to recognize questionable claims early on
 - Putting effective in-house policies and training in place
 - Ensuring best practices are in place and followed
 - Implementing a well documented quality control process that supports the diligence of the carrier in ensuring compliance
 - Proper management escalation
 - Effectively handling mass quantities of claims such as asbestos/environmental claims
- Properly training claims handlers to understand how to handle a claim
 - Implementing claims handling guidelines
 - Understanding nuances in different areas of law
 - Minimizing mistakes to avoid cost to policyholders with high deductibles
 - Avoiding exposure for the carrier with best practices

Litigation Decisions

- Crafting a properly documented claims decision
- Allocation of covered and non-covered claims
- The role of the broker in bad faith claims in the D&O, EPLI and E&O areas
 - Involvement of the broker in the underlying policy coverage representation and a potential subsequent bad faith claim
- Splitting the case file
 - When to split a file when a coverage/bad faith issue arises
 - Ensuring an adjuster is making decisions in the best interest of the insured
 - Utilizing a conflict screen in the claims handling process
- How to handle an ongoing claim while in litigation
 - How to staff the claim versus the litigation
 - What information should a claim handler receive?
 - Communication and how to protect privilege
 - How to use early litigation before resolution of a claim to your advantage

Institutional Bad Faith Claims

- Policies, procedures, and best practices to avoid institutional bad faith claims
- Automated claims filing – taking the human element out and exposing the insurer to risk

2:20 **Time Limit Demands: Timing the Appropriate Response, Conducting the Investigation, and Ensuring Effective Communication with the Insured**

Larry R. Levine
Assistant Vice President/Department Head
Corporate Litigation
Infinity Insurance Companies (Birmingham, AL)

Kevin J. Willging
Senior Counsel & 2nd Vice President
Travelers Insurance (Hunt Valley, MD)



Lee Marcus
Founding Member
Marcus & Myers PA (Orlando, FL)



Lewis F. Collins, Jr.
Partner
Butler Pappas Weihmuller Katz Craig LLP (Tampa, FL)

- Handling and responding to the set-up time demand letter
 - Identifying what the letter really says and does not say
 - Identifying the set-up/traps
 - How to find out what you don't know and need to know
 - Seeking clarification of the terms of the demand and how to do it without rejecting the demand or making a counter offer
 - How to respond to the set up time demand letter
- What is the time to respond?
 - Missing a deadline – what do you do?
 - Does this lead to potential bad faith claims?
- Inoculation by providing effective communication to the insured
 - Requesting documents
 - Advising on investigation
 - Seeking input
- Traps of time limit demands – Florida vs. rest of country
- Reviewing recent trend of Federal courts requiring plaintiffs to prove “good faith” in third party claims
 - Placing the onus on plaintiffs rather than insurers to show they pursued their claim in good faith and communicated with the insurer
- The limited liability release and time demands in the state of Georgia

3:30 Afternoon Break

3:40 **Demand Letters: Responding to Allegations the Investigation Was Improper and Training Adjusters to Read Between the Lines and Subtle Context**

Kevin J. Willging
Senior Counsel & 2nd Vice President
Travelers Insurance (Hunt Valley, MD)



Steven P. Cholden, Esq.
Partner
Reilly, Janiczek & McDevitt, PC (Philadelphia, PA)



Craig E. Stewart
Partner
Edwards Wildman Palmer LLP (Boston, MA)



S. Greg Burge
Partner
Burr & Forman LLP (Birmingham, AL)

- Properly responding to demand letters
 - Responding to allegations that investigation was improper
 - Recognizing the cooperation of the insured to provide information in order for the insurer to effectively respond to a claim
 - Appropriately training adjusters to read between the lines and subtle context
- What are the gray areas?
 - What types of demand letters are unclear on how/when an insurer should respond?
 - Dealing with situations where the insurer has to respond/ make an offer without a demand letter
- How some courts are requiring plaintiffs to show good faith in the third party context
 - Plaintiffs must show communication with insurer and follow up for status of investigation
 - Using the plaintiff's failure to provide information to your advantage to negate the duty to defend
- Mixed coverage (property, bodily, and other types of coverage) for time limit demands

4:50 **Understanding the Scope and Limits of Duty to Defend, Duty to Settle, and Initiating Settlement Negotiations**



David J. McMahon
Managing Partner
Barger & Wolen LLP (San Francisco, CA)



Daniel W. Maguire
Partner
Burke, Williams & Sorensen, LLP (Palm Desert, CA)



Mark S. Shapiro
Shareholder
Akerman Senterfitt LLP (Miami, FL)

Robert N. Kelly
Director and Shareholder
Jackson & Campbell, P.C. (Washington, DC)



John B. Drummy
Partner
Kightlinger & Gray, LLP (Indianapolis, IN)

- Duty to defend – *Post v. St. Travelers* (3rd Cir.)
 - Denying coverage based on what is covered as defined in the policy
 - Reviewing exclusions in the policy
 - Assessing whether “dishonest purpose” is bad faith
 - What is the current scope of duty to defend?
 - What is the obligation of the insured?
 - What rights does the insured have to select counsel?
 - What are the conflicts, if any?
 - Analysis of the dissent
 - No duty to defend by Travelers of the sanctions proceeding
- Duty to settle claims – *Du v. Allstate Insurance Company, et al.* (9th Cir.)

- Genuine dispute doctrine to third-party claims
- Insurer's obligation to proactively initiate settlement discussions when liability is reasonably clear
 - Determining whether this is an undue burden
- Liability for failure to settle within policy limits
 - Realizing potential bad faith claims for failing to settle
 - Hiring an independent law firm to review whether settlement is appropriate
 - Establishing a defense to policyholder's argument that settlement should have been occurred within policy limits

6:00 Conference Adjourns

DAY TWO – TUESDAY, APRIL 30, 2013

7:30 Continental Breakfast

8:00 Catastrophic Events (Hurricanes, Earthquakes, and Storms): Claims Handling, Dealing with Multiple Coverages that Overlap, Properly Handling Investigations, and Beyond



Harry M. Baumgartner
Member
Bressler, Amery & Ross, P.C. (Florham Park, NJ)



Jeffrey Winn
Partner
Sedgwick LLP (New York, NY)

- Dealing with voluminous amounts of claim after a catastrophic event
 - Efficiently managing claims
 - Implementing best practices in high volume catastrophic loss when personnel is limited
- Handling claims related to flood, property damages, negligence, contamination, etc.
 - Coordination of coverage between multiple insurers
 - Who pays what and when?

9:00 View From the Bench: Judicial Insight on the Latest Claims, Theories and Discovery Issues

Judges Panel 1 9:00-10:30 (Break: 10:30-10:40)	Judges Panel 2 10:40-12:00
<i>Hon. James Robart</i> U.S. Dist. Ct., W.D. Wash.	<i>Hon. Donetta Ambrose</i> U.S. Dist. Ct., W.D. Pa.
<i>Hon. Fernando J. Gaitan, Jr.</i> U.S. Dist. Ct., W.D. Mo.	<i>Hon. John R. Padova</i> U.S. Dist. Ct., E.D. Pa.
<i>Hon. Janis Graham Jack</i> U.S. Dist. Ct., S.D. TX	<i>Hon. Jeanne Scott (ret.)</i> U.S. Dist. Ct., C.D. Ill.
<i>Hon. Roslyn O. Silver</i> U.S. Dist. Ct., D. AZ	<i>Hon. Robert B. Collings</i> U.S. Dist. Ct., D. Mass.
<i>Hon. George Caram Steeh</i> U.S. Dist. Ct., E.D. Mich.	<i>Hon. Sandra Mazer Moss</i> Phila. Ct., C.P.
<i>Hon. Robert B. Freedman</i> Super. Ct. Cal., Alameda Co.	

Panel 1 and 2 Moderator:

Michael J. Cawley
Partner
Wilson Elser Moskowitz Edelman & Dicker LLP

12:00 Networking Lunch for Speakers and Delegates

1:00 Reservation of Rights and Using Consent Judgments: Assigning Rights to the Plaintiff and Determining Whether the Settlement Could Result in a Bad Faith Suit



J. Richard Harmon
Partner
Thompson Coe Cousins & Irons, LLP (Dallas, TX)



Daniel P. Mitchell
Partner
Barr, Murman & Tonelli, P.A. (Tampa, FL)

Robyn L. Sondak
Senior Counsel
Travelers Bond and Financial Products (Hartford, CT)



Jonathan P. McHenry
Partner
Connell Foley LLP (Roseland, NJ)

Reservation of Rights

- Rejection of defense when offered under reservation of rights
- Rejection of defense after conditional defense has been accepted: change in terms of the defense
- Necessity of unequivocal rejection
- Necessity that insurer be notified and invited to participate in negotiations
- May insurer withdraw reservation of rights and defend unconditionally after rejection?
- Recoupment of costs of substituted defense after rejection

Denials of Coverage

- The rule in *Coblentz v. American Surety Co. of N.Y.*
- Negotiating the Coblentz agreement: Stipulation for Judgment, Assignment, Consent Judgment, and Covenant Not to Execute/Release
- Necessity of arm's length negotiations
- Don't forget to include the agent/broker in assignment of rights!
- Whether it is necessary/advisable to notify insurer of pendency of negotiations
- Timing/sequence of execution of documents – the Cope problem
- Using expert review/opinion to establish *prima facie* reasonableness
- Need for court approval
- Indemnity agreements: vouching in the putative indemnitor in the non-insurance context

Litigating the Consent Judgment/Assignment Case

- The existence of other insurance that defends unconditionally
- Other insurance: contribution
- Indemnity policies with no duty to defend
- Necessity of proving coverage
- *Prima facie* showing of reasonableness: shifting burden of proof to insurer
- Insurer's defenses: lack of reasonableness, fraud, collusion and bad faith
- Where judgment amount exceeds policy limits – necessity of proving bad faith
- Factors to be considered in subsequent bad faith action

2:00 Afternoon Break

2:10 **Invoking the Appraisal Provision, Setting Up the Appraisal Process, and Avoiding Common Pitfalls**



Janet L. Brown
Partner

Boehm, Brown, Harwood, Kelly & Scheihing, PA
(Maitland, FL)



Craig Simon
Managing Principal
Berger Kahn (Irvine, CA)



Rick L. Hammond
Shareholder
Johnson & Bell, Ltd. (Chicago, IL)

- Setting up appraisals for success and avoiding common pitfalls
 - Effective demands and responses
 - Avoiding mistakes in selection of umpires and appraisers
 - Appraising what is appraisable: causation vs coverage
- The mechanics of appraisal and the regional differences in the process
 - Active participation vs “radio silence”
 - The “problem child” participant and how to avoid disruption
 - Appraisals Gone Wild and how to calm or cure
- Special challenges with catastrophe events
- Time: Watching the clock before, during and after appraisal
- Bad faith litigation arising out of the use of appraisal
 - Delay, fights in the process, ambiguous awards and more
 - Depositions and discovery about and from the appraisal panel
- Appraisal during bad faith litigation and how and whether it can be accomplished
- Update of the law: What is new in 2013

3:05 **Discovery Requests: Defining Permissible Limits Within the Scope of Discovery**



David A. Strauss
Member
King, Krebs & Jurgens, PLLC (New Orleans, LA)



Robert D. Allen
Partner
Meckler Bulger Tilson Marick & Pearson LLP (Dallas, TX)



Matthew M. Haar, Esq.
Partner
Saul Ewing LLP (Harrisburg, PA)

- Determining whether requests for claim files spanning years that is unrelated to loss at issue is overly broad and excessive
 - Protecting privileged information in claim files
- How were other policyholders treated?
- Aggressively filing protective orders to defend against overly broad and excessive discovery requests
- What is permissible within the scope of discovery?

4:00 Conference Ends

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BAD FAITH LITIGATION

The essential forum that shapes the future of bad faith litigation strategies for leading outside counsel, in-house counsel and claims professionals in the insurance industry

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Plus, learn from 9 federal and state judges who have presided over bad faith litigation suits.

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