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What to Do When the Bottom Falls Out

By Ken Brownlee

For many years, I labored in the "food services" division of the claim industry, dealing with pickles and jams, and helping to prepare crow for those who must dine upon that feathery black bird. Having written extensively on the subject of adjuster Error & Omission loss prevention, bad faith claims, and miscellaneous other mud puddles into which adjusters often step, I am aware of most of the mistakes we who handle claims can make.

Back when this was more vocation than avocation I would receive a frantic call from some adjuster or manager who had screwed up, and who wanted to contact the victims and apologize. No, I would suggest. Confession is good for the soul, but it can be hell on the wallet. Better wait until we see just how sour the pickle is before we squeeze the juice out of it. After all, neither the courts nor any potential plaintiffs that I know of grant absolution.

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Often, after analysis, the mistake is less severe than initially anticipated, or a variety of remedies less costly than immediately draining the bank account may be available. Ethically, we must assume responsibility for our misdeeds and wrong actions but, ethically, we also owe ourselves the duty of finding the resolution that is best for all of the involved parties, including ourselves.

Sometimes, the jams we get ourselves into seem to have no solutions. Several situations that I have been asked to examine recently have had that appearance. Money, and lots of it, may be the only way out.

That is not always the case, however. Before rushing out and paying a bundle, it is often best to stop and analyze the situation, being certain that all – and I do mean all – of the facts are clear and confirmed, and exploring every possible option. A rule for worriers is often applicable: consider all the possible bad results, pick the worst, assume that might happen, then figure out how to improve on that result. Chances are that the worst will not happen, and whatever happens will be a lot better than had been feared.

Too often, when we consider torts, we forget to include all the possible defenses that might be available. These are not limited to "comparative liability" or "last clear chance," although those are often good ones. In professional actions in which "bad results" occur, the results might have happened regardless of the screw-ups.

'Who's Afraid of the Big Bad Faith?'

That Big Bad Wolf of bad faith claims who occasionally knocks at the door, huffing and puffing and threatening to blow our houses down, comes along for a variety of reasons, far too numerous to fully identify here. But, let's look at a few:

- **Failure to comply with the state's Unfair Claim Settlement Practice Act** Under the terms of the acts, claims must be settled "in good faith" fairly, promptly, and equitably whenever liability is reasonably clear. (A dozen similar requirements exist, as well.) However, only two or three states (most notably West Virginia and Kentucky) allow third partes to bring claims alleging such violations, so count this one as just a gentle sneeze from the wolf.
- **First party claim bad faith** Surprisingly, this is rare, although, when it does occur, it is often expensive, as in some recent mold claim cases. This sort of claim usually arises when the insurer or its representative misinterprets coverage and denies a claim that is clearly owed, but it also can occur when the insurer elects to take charge of a situation and screws it up, making the matter worse.
- **Third party bad faith** Forget it. With the exception of those rare cases under the Unfair Claim Acts cited above, most courts have held that a third party has no legal standing to bring a bad faith claim directly against an insurer that has no contractual duty to the third party. Ahh, but there is an exception in states where the courts allow insureds to assign such rights to third parties.
- **Breach of duty to the insured in a third party claim** This is the pickle, the jam that insurers seem to slather themselves with on a fairly regular basis. Although some state courts have ruled that the duty of an insurer to its insured is not totally a fiduciary duty, that really is what it is.

Under a liability policy contract, the insurer has the "right and duty" to defend and settle as it, the

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insurer, deems appropriate, and to investigate to the extent that it feels necessary. The insured, only at his own peril, can get directly involved in the settlement process, unless the insurer so requests. Thus, the insured leaves the claim to the insurer, and the insurer exercises its right to act on the insured's behalf. If it decides to go to trial on issues of liability or damages, and the jury awards more than the amount for which the insured has coverage, the insurer, by virtue of that fiduciary principle, is responsible. It cannot simply say, "Sorry, Mr. Insured, you'll have to pay the difference," and walk away.

There are exceptions, however, such as when the insurer has issued a reservation of rights or excess letter because it recognizes that the case potentially has more value than the insured's limits, or that there are damage or liability aspects to the case that may not be covered by the policy, despite an obligation to defend. The duty to defend is greater than the ultimate duty to pay.

Of course, some insurers try to do that very thing. They screw up, defending cases that they should have settled, and then try to walk away. That is when insureds, rather than reaching for their wallets and paying the third parties whatever amounts the juries have awarded, either assign their rights to the plaintiffs or hire the meanest lawyers in town to sue the insurers. That is what a bad faith claim is; the wolf will not waste much time huffing and puffing.

Blowout Verdicts

Generally, experienced litigators know what the verdict range of a claim — either a tort claim for liability or damages, or a bad faith claim — is worth. The wise adjuster will try to settle a claim for its probable value, but there can be reasons why a settlement does not result.

Sometimes, it is the plaintiff who is intransigent; other times it is the adjuster who digs in his heels and stubbornly refuses to settle or to request sufficient authority to settle. Perhaps, the insurer thinks that the claim is fraudulent or that the claimant's physician is a quack. Who knows?

Well, the jury knows. It is their job to know. They decide who is right and what the claim is worth and, sometimes, they decide it is worth a heck of a lot more than anyone else thought it was worth — and that's what the verdict will be — especially when there is a count seeking punitive damages.

There are options. First, one can ask the judge to set aside the verdict and rule from the bench. Do not rely on that one; even if it does occur, chances are the other side will appeal. There might also be a motion for re-trial. That, too, is an up-hill battle, and the odds are weak that it will work. Or, there is an appeal possibility, but that has to be based on some technical error in the trial, not just the verdict. Even if an appeal were granted, it is costly and interest will be running on that horrendous award from the first day, requiring a very expensive bond. It may only make the matter worse. If the award is in excess of the insured's limits of liability, the insured is going to be checking the yellow pages for a good lawyer while the insurer fiddles around with an appeal.

Jury Misconduct Motions

At the 2004 ACE•SCLA Conference and Exposition in Chicago last October, Los Angeles attorney Michael M. Pollak, a partner in the firm Pollak Vida & Fisher, proposed that, when an insurer finds itself between a rock and a hard place with an excessively high verdict, it consider another alternative to the appeal process: a new trial based on jury misconduct. Pollak suggested that, as with an appeal or other motions, such a motion may take the plaintiff by surprise and create the opportunity and incentive to negotiate a settlement. If that is possible, he strongly recommends doing it.

A motion for a new trial based on misconduct in the jury room is a difficult and expensive maneuver, Pollak said, but it can be effective in some cases. As with an appeal or award of a new trial, the defense is still faced with the exposures and expenses associated with re-trying

the case if the motion is successful. It s a two-edged sword that might also work for the plaintiff in the event of a defense verdict.

Pollak has successfully used and has written about such motions. He says that contingency plans for such a motion must always be considered in advance. Although nobody has a plan in advance for excess verdicts, he suggested that defendants should plan ahead in a number of ways before the trial begins. Such planning should include getting the names and addresses of all the jurors, and having an experienced investigator who knows the right questions to ask lined up and ready to go. The time limit for filing such a motion may be short. In California and some other jurisdictions, Pollak said, it is necessary to file Notices of Intent prior to the actual filing of the motions.

Jury misconduct within the trial itself (a juror's falling asleep or giving false information during the *voir dire* questioning, for example) may be a basis for appeal or correction by the trial judge. Pollak's suggestions deal with what happened after the closing statements have been made and the jury begins deliberating.

With excessive verdicts that bear little relation to the facts, Pollak suggests the following steps: First, the trial record should already have been protected by using a court reporter. The full identity of each juror also should have been obtained for the investigator. Although jurors are not required to cooperate with the defense or plaintiff, an experienced investigator may be able to convince jurors to cooperate with the investigation.

The jury should be polled when the verdict is first brought in. In many cases, this is done by the judge, but the defense counsel may also try to contact each, as verdicts often are based on final consensus or compromise of an initial vote of eight to four, nine to three, etc. Pollak suggested that the investigator first contact the minority, the three or four who initially voted against the majority.

The investigator should get a declaration (statement or formal document) from the juror(s) as to what was said and done, but not necessarily what was thought, in the jury room. Only a juror's actual comments or actions can be a basis for a motion.

The interview with each juror is to seek out any actions or statements that might be considered misconduct under the court's rules in the jurisdiction. These are more subtle situations than a criminal act, such as jury tampering or payoffs, and include:

- The jury's considering "everything but the evidence." The verdict is to be based solely on testimony given in the trial by both sides, not sympathy, anger, or other emotions.
- Having a pseudo-expert (a juror who tells the other jury members of his personal experiences or knowledge of some factor of the evidence) in the jury room. (Pollak cited an actual example in which a juror who had some special knowledge of seat belts explained what he knew to the other jurors, that being contrary to the presented evidence in the trial.)
- Prejudicial opinions based on personal knowledge, rather than on the presented evidence (a juror's statement such as "I had a similar injury once, and ...").
- The jury's considering that the plaintiff's attorney will get a percentage of the award, hence inflating the award to cover the attorney's fee when that is not an element of damages being claimed by the plaintiff.
- Awarding non-recoverable or non-alleged damages, such as lost income when no wage-loss was alleged in the trial.
- A juror who already had made up his mind before hearing the evidence.
- A juror who communicated a concealed bias toward one of the parties or the facts. (Although not mentioned by Pollak, this might include a juror's assumption that the defendant has insurance, if that information is not part of the presented evidence, when a bias against insurance companies might exist.)
- Averaging of the damages, or agreeing on value in advance of review of the evidence.
- The presence of a cellular phone in the jury room, with phone calls' being made in or out.
- Disregard for the court's instructions regarding the case.
- Use of any outside source materials, even dictionaries, in the jury room.
- A juror's explaining the law as he understands it to the other jurors.

Nobody likes a spoiled pickle, and a blow-out verdict is not only green, it's fuzzy, like the crow some adjuster, claim manager, or defense attorney will have to dine upon when that excessive verdict is read to the court. But before rushing to the checkbook, consider the options. Sometimes that crow can be prepared in a more appetizing way. I have even written a cookbook for crow eaters. ▲