QUINLEY RISK ASSOCIATES, LLC

CLAIMS COACH BLOG
by Kevin R. Quinley, CPCU, AIC, ARM

November 2014 - Recap of ACI "Bad Faith Claims & Litigation" Conference

On November 18th and 19th, I ventured to Orlando, Florida to attend ACI's 29th National Forum bad faith claims and litigation at the Hyatt Regency. Approximately 40- 50 attendees heard two full days packed with interesting perspectives on bad faith litigation, viewpoints drawing predominantly from the defense bar.

Included on day two of the program was a fascinating colloquy by a panel of six judges, a mix of state and federal court judges, regarding their perspectives on bad-faith litigation. Most of the audience was comprised of private practice attorneys defending bad-faith cases. Mixed into the attendance list were in-house counsel for major insurance carriers and claim executives.

What follows is a Baker's Dozen list of random nuggets, thoughts and observations gleaned from the ACI program. This doesn't do justice to the program, and names have been omitted to protect the innocent:

1. Texas pro-business pendulum may be swinging back toward plaintiffs. Since the early 1990s, Texas has "gone red" politically, but the pendulum may be swinging back in favor of plaintiffs.

2. Curbs on institutional bad faith discovery (TX). A recent Texas case involving Lloyd's constrains the extent of discovery plaintiffs can impose on institutional bad-faith claims. The claim involved producing tons of claim files for two TPAs who adjusted claims for an insurer. The plaintiff's bar is trying to narrow the scope of this case.

3. No need to breach policy to find Florida bad faith. A growing trend in Florida is courts saying that insurers need not be in violation of the policy contract to be in bad faith, especially in disputes over appraisal.

4. Assess appeal options in light of adverse impact on whole industry. When deciding whether or not to appeal a bad trial results, consider the risk to the industry that the appeal is lost. You could win for your company, but create that wall for the rest of the insurance industry.

5. Build a second-look process into bad faith appeal decisions. Local defense counsel and the adjuster who handled the "lost" trial may be so invested in that case but they want to "right a wrong." These cases need a second look process to make sure an objective decision is reached.

6. Cultivate a Devil's Advocate inside the company. Claim departments need an internal devil's advocate. "There's a lot of Kool-Aid drinking that goes on when evaluating cases," according to one in-house counsel for an insurance carrier.

7. Be careful in welding a carrier's practice to an entire industry practice, especially when a court repudiates the practices, for example defense in juniors changing their opinion 180° because of an internal "peer review."

8. Be careful in asserting the defense of "advice of counsel." If you plead that, you often waive attorney-client privilege. If you don't have a clean claim file, be careful in asserting the advice of counsel defense, which can waive privilege. For example, are there documents in the claim file that the defense may not want the plaintiff to see?

9. In assessing use of staff counsel for coverage opinions, consider the potential issue of bias and arguments that plaintiff's and policyholders can make.

10. It should be hard to deny a claim. Denying a claim is a big deal in the decision not to defend is one not to be taken lightly. It should not be easy to deny coverage.

11. Adjuster problems are really supervisory problems. According to one in-house claim executive: "I don't have an adjuster problem, I have a supervisor problem. These the people I've entrusted to make quality assurance runs smoothly."

12. Written protocols -- good or bad? On the issue of whether or not to have written guidelines, one claim exec said, "a guideline is never an excuse for doing the wrong thing." Another in-house counsel cautioned companies to "avoid a checklist mentality."

13. "Florida bad faith set-ups? Watchya' talking about?" A plaintiff attorney from Florida insisted, "they set up case is the quickest way for me to find another thing to do for a living. I don't take set up cases."

14. Bad faith attorneys can be pickier about what cases to accept. According to a plaintiff's attorney from California, "unlike defense attorneys, we get to choose our cases. Defense lawyers have their cases assigned to them."

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15. Perspectives from the Bench. Observations from a panel of six judges:

Most jurists are resolution oriented, often due to docket backlog. (Surprise!!)

"There are cases that have to be tried, but those are few and far between."

"There's a reason why only about 2% of all cases filed in federal court go to trial."

"Jurors tend to be predisposed against insurance companies." (Surprise #2!!)

Ask yourself, "Does your trial theory matchup with public opinion?"

16. Washington state is starting to run a close second to Florida in terms of being a challenging bad-faith environment.

If you have a chance to attend any future American Conference Institute forums on bad-faith, I highly recommend you do so. They are packed with engaging speakers, useful information and substantive handouts. There are also breakfasts and lunches that provide networking opportunities.

Coincidentally, the next ACI Bad Faith Claims & Litigation Conference will be in Philadelphia on March 16th - 17th at The Union League and yours truly will be speaking there.

Hope to see you in the City of Brotherly Love (and bad-faith litigation)!

Kevin Quinley CPCU is the founder and Principal of Quinley Risk Associates LLC in Richmond, VA. He consults with law firms and other clients nationwide on matters related to bad faith, adjuster standard of care and ways to effectively market to insurance companies. He can be reached at (804) 796-1939 and at kevin@kevinquinley.com.