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INSURANCE AND REINSURANCE

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IN THIS ISSUE

Insureds who are filing COVID-19 lawsuits to recover their business interruption losses are also suing their insurance carriers for bad faith damages. Karen Karabinos and Eric Mull, partners of Drew Eckl & Farnham, discuss how insurance companies can prepare and possibly avoid bad faith claims being asserted against them in COVID-19 related first party property lawsuits.

Preparing for Possible Bad Faith Claims in COVID-19 Related First Party Property Lawsuits

ABOUT THE AUTHORS

Karen K. Karabinos is a partner with Drew Eckl & Farnham in Atlanta, Georgia. She has been litigating cases for more the 33 years, with the last 22 focused on the complexities of first party property insurance law, including cyber insurance. She partners with her clients in their investigation and adjustment of property claims and in defending them in coverage, bad faith, arson, fraud and property damage cases in State and Federal Courts throughout Georgia and the Southeast. She can be reached at kkarabinos@deflaw.com.

Eric R. Mull has been practicing for 13 years in insurance defense litigation, with a focus in the areas of construction defect, professional malpractice, and first party property insurance matters. He represents his clients in their investigation and adjustment of large scale property claims and in defending his clients in coverage, bad faith litigation and arson, fraud, and property damage cases in State and Federal Courts in Georgia and the Southeastern United States. He can be reached at emull@deflaw.com.

ABOUT THE COMMITTEE

The Insurance and Reinsurance Committee members, including U.S. and multinational attorneys, are lawyers who deal on a regular basis with issues of insurance availability, insurance coverage and related litigation at all levels of insurance above the primary level. The Committee offers presentations on these subjects at the Annual and Midyear Meetings. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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As observed from the numerous COVID-19 first party property cases that have already been filed, insureds are claiming insurers have denied their business interruption claims in bad faith. Whether the applicable jurisdiction limits bad faith damages via statute or allows such damages consistent with punitive damages, insurers must ensure their adjusters are handling these COVID-19 claims in good faith.

In a recent COVID-19 related case, a bad faith claim was asserted along with a breach of contract claim in *Big Onion Tavern Group, LLC, et al. v Society Ins. Co*. (No. 120-cv-02005), filed in the United States District Court for the Northern District of Illinois. The plaintiffs in *Big Onion* are separate businesses that operate in the Chicago area and had in place business interruption insurance from Society Insurance. The basis of the plaintiff's claims in *Big Onion* originate with Illinois Governor J.B. Pritzker's March 15, 2020 order closing all restaurants, bars, movie theaters, etc. to help stop the spread of COVID-19. The suit seeks coverage under the plaintiffs' commercial business insurance policies, "which provide coverage for losses incurred due to a 'necessary suspension' of their operations, including when their business are forced to close due to a government order." Further, the suit asserts that the Society Insurance policy promises to cover their losses when the government forces closure interruption of their businesses and does not exclude contamination due to communicable disease and/or viruses.

Concerning their bad faith claim, the plaintiffs in *Big Onion* allege that Society Insurance issued blanket denials of their claim for business interruption losses that resulted from the governor's closure order "often within hours of receiving Plaintiffs' claims – without first conducting any meaningful coverage investigation, let alone a 'reasonable investigation based on all available information' as required under Illinois law." Further, the suit provides that Society Insurance COE Rick Parks issued a memorandum to "agency partners" providing that under Illinois law, the Society Insurance policies would likely not cover such stoppages. The memorandum provides (in pertinent part):

> *Whether it be a full shutdown of business, a partial suspension of operations or an alteration in business operations that remain open, Business Income coverage must be due to a suspension caused by direct physical loss of or damage to covered property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. Extra Expense coverage also requires the same coverage triggers. In general, a quarantine of any size, or brought about by a governmental action without a Covered Cause of Loss, would likely not trigger Business Income or Extra Expense coverages under our policies.*

Similarly, in *Treasure Island, LLC v. Affiliated FM Insurance Company*, (No. 2:20-cv-

00965), filed in the United States District Court for Nevada, the insured, a casino and resort, alleges that its insurer denied its claim for business interruption losses in bad faith by failing to conduct an adequate and proper investigation. Central to the bad faith claim is a copy of "Talking Points" that AFM reportedly prepared for its adjusters "to ensure that AFM's adjusters reach the same conclusion for all COVID-19 claims." Treasure Island alleges that the "Talking Points" failed to include all of the different "triggers" of coverage that might be involved in responding to COVID-19 claims.

At the outset of the memorandum, the "Talking Points" dispels any notion that memorandum will address all coverage issues. The memorandum provides that it "will not deal with all the issues associated with [COVID-19 claims], but will be helpful in providing responses to basic questions as it relates to the coverage provided by [AFM's] policies." The document goes on to list sample questions and answers to general coverage questions. Treasure Island claims that the answers contradict the specific coverage provisions contained in its policy as interpreted by Nevada law.

Finally, bad faith allegations are also asserted in *Mace Marine Inc. v. Tokio Marine Specialty Insurance Co. (*4:2020-cv-10044), which is pending in the United States District Court for the Southern District of Florida. In *Mace Marine*, the insured, a dive shop, filed a claim with its carrier asserting that it suffered a direct physical loss to property due to the potential presence of the coronavirus on its premises. After the claim was denied, the insured filed suit seeking coverage and bad faith damages, alleging that its carrier "formally denied the claim on March 30, 2020 without conducting any substantive investigation into the claim. The insurance company did not attempt to inspect the premises, nor did they request any photographs or send out any experts or field adjusters to evaluate the claim." As such, the insured alleges that these actions constituted "willful, wanton, immoral, unlawful, malicious and/or deceptive claims handling practices."

The claims-handling and bad faith allegations in *Big Onion, Treasure Island,* and *Mace Marine* illustrate the importance of conducting a diligent investigation into each claim, regular communication with insureds, and the implications of preparing blanket statement suggesting the lack of coverage prior to receiving and reviewing actual claims.

An insurance company will have a difficult time defending a bad faith claim if the coverage decision is made quickly and without any investigation. The insurer's investigation must be a reasonable one, but what does a reasonable investigation look like? The investigation must include an interview of the insured, gathering the facts of the claim, and a request for documentation, if needed. The facts of the claim must be evaluated in light of the applicable policy provisions, and the claim file should document the details of that evaluation. The bad faith allegations in

Treasure Island demonstrate how even an internal memorandum prepared for an insurer's adjusters can be misconstrued as an effort by the carrier to systematically deny coverage without specifically investigating the facts of an insured's claim and applying the particular coverages afforded under the insured's policy.

Having defended numerous bad faith claims over the years, we have found that practicing good customer relations is one of the keys to avoid bad faith. Insureds want to be kept in the loop of what is going on with their claims. Return an insured's call, even if there is no new information to provide. Customer service, however, is not the only key to avoiding bad faith.

Insureds also want someone who is knowledgeable of the provisions of their policy. Adjusters must know the applicable policy inside and out. This is especially true in connection with any COVID-19 related claims that may be filed. The insureds likely do not understand how the provisions of the policy might or might not cover any business interruption claims. Any confusion on the part of the adjuster or misinterpretation of the policy provisions will be seen by insureds as an attempt by the insurer to deny their claim in bad faith.

Following these pointers will not prevent an insured from filing a bad faith claim, but these pointers, if followed, may prevent a jury from assessing bad faith damages against the insurance company.

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