



***Bad Faith: The Case for a Prompt Investigation And
Expeditious Settlement Offer
(Best Practices for Avoiding Extra-Contractual Liability)***

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AN OUTLINE

Introduction:

What is Bad Faith?

Avoiding Bad Faith Claims

As Defined:

Common Law

- Landmark case: *Comunale V. Traders & General Ins. Company* 328 P.2d 198, 200, 654, 658 (1958) 50 Cal 654, 658, 328 P.2d 198, 200 (There is “an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.”)

Statutory

- First-Party claims
- Third-Party claims
- Insurance Department: enforcement and gate keeping

Standard

- Based upon reasonableness/totality-of-the-circumstances.
- Break of Contract
- Negligence (or more than)

Consequences:

- Judgment in excess of policy limits
- Punitive damages
- Attorneys’ fees and expenses

AVOIDING BAD FAITH:

- Communications/Documentation
- Investigation/Evaluation
- Negotiations

Communications/Documentation:

- Document each step in the investigation as it is undertaken.
- Assume that the claim file will be produced in litigation.
- All information in the file should be relevant to the claim.
- The claims file should not contain:
 - personal commentary;
 - unsupported conclusions or
 - irrelevant material of any kind.
- Acknowledgement of the existence of the claim.
- Timely update the insured on developments in the investigation, particularly those developments that may impact coverage.
- Notify insured of completion of investigation.

Investigation and Evaluation:

- Consider jurisdiction's standard/time requirements – may be more than one jurisdiction to consider.
- Obtain a current/complete copy of the policy.
- Timely request and review information needed to complete investigation:
 - From the insured and
 - From other sources (i.e., accident and incident reports from the FAA, NTSB and news agencies).
- Analyze coverage.
- Determine if the party seeking coverage is an Insured, or an Additional Insured.
- Determine within time permitted if coverage exists for the claim presented.
- Promptly notify insured in writing of preliminary coverage position based on initial investigation.
- Issue ROR or Declination of Coverage, if appropriate.
- Continuously evaluate coverage throughout the life of the claim.
- Determine if outside counsel should be retained.
 - Defense Counsel
 - Coverage Counsel
- Determine if independent adjusters or experts should be retained to assist in investigation
 - Use qualified-objective experts
- Continuously update the insured and/or the insurer on the status of the investigation.
 - Defense counsel reports should be addressed/sent to both the insured and insurer simultaneously.
- Set realistic reserves as early in the life of the claim as possible:

- Document the file to demonstrate the rationale/basis for the reserves.
- Consider triggers that allow termination of the insurer's defense of the insured.
 - Exhaustion of coverage limits;
 - Whether insured's notice was timely or
 - The insured's cooperation.
 - Must consider and advise insured of Right to Retain Personal Counsel if:
 - Possible excess judgment;
 - Policy limit demand or demand in excess of policy limits;
 - Duty to settle- multiple claims/eroding limits and/or
 - Punitive/Exemplary damage claim.
 - Be alert to settlement opportunities.

Negotiations:

- Lack of demand may not be defense to failure to make a reasonable offer!
- Bona fide coverage dispute may not be a defense!
- Ensure terms of settlements and settlement decision do not prejudice rights of the insured.
- Ensure insurer exercises right and duty to settle claim in good faith – reasoned and objective evaluation of settlement demands.
- Release Language – this should be discussed early in the negotiations:
 - Who is being released?
 - The insured; the insured's agents and employees; the insurer and its agents (adjusters)
 - What is being released?
 - Indemnity provisions.
 - Confidentiality/Non-disparagement.



Elizabeth A. Vasseur-Browne concentrates her law practice on aircraft litigation defense, counsels insurance companies on coverage issues and advises aviation business clients regarding compliance issues. Prior to attending Hofstra University School of Law, Ms. Vasseur-Browne had an extensive career in the United States Air Force. For more information, please visit www.coolinglaw.com.