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Defending Against the Reptilian Theory to Avoid Extra-Contractual Damages in Cases Involving Catastrophic Injuries

I. Introduction to Bad Faith

a. Introduction

Most states recognize the existence of an implied covenant of good faith and fair dealing in all insurance contracts although standards may vary from state to state. Bad faith is a breach by the insurer of the implied covenant of good faith and fair dealing. As such, neither party to a contract should do anything to injure or impair the right of the other to receive benefits of the contract.

b. The Standard for finding Bad Faith

The good faith required of an insurer in handling claims against its insured is more than a question of negligence. "[T]he general rule is that an insurer may be guilty of bad faith for failure to settle a lawsuit if, in its handling of a claim against the insured, the insurer does not exercise 'the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his or her own business'."[1] Bad faith is more than mistaken judgment, a failure to comply with terms of the contract, or an erroneous decision on coverage. There must a showing of deliberate, gross negligence or recklessness.

c. The Insurer's Duties in Handling Bad Faith Claims

The insurer has exclusive control over the handling of claims, including all decisions regarding litigation or settlement as such, the insurer has a fiduciary duty towards the insured that requires the carrier to act in the insured's best interest.

Insurers have the duty to act in good faith. This means the carrier should show diligence and care in investigating the facts, evaluating the claim, and considering or negotiating a settlement. To that end, an insurer should do the following: (1) fully investigate the claim; (2) communicate with the insured; (3) determine liability damage; (4) advise the insured of their

[1] *Infinity Insurance Co. v. Berges*, 806 So. 2d 504 (Fla. 2d DCA 2001) (quoting *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980); *Wilson v. 21st Century Ins. Co*., 42 Cal. 4th 813 (Cal. 2007); *Universe Life Ins. Co. v. Giles*, 950 S.W2d 48 (Tex. 1997)

position on liability and damages; (5) correspond with the insured; and (6) timely respond to communications with the injured parties' counsel in writing.

An insurer's duty of good faith extends to matters involving multiple claimants as well. Carriers should fully investigate all claims arising from a multiple claim accident and seek to settle as many claims as possible within the policy limit. In furtherance of that goal, insurers should seek to minimize the magnitude of possible excess judgments against the insured by reasoned claim settlement. Of course, during this process the insurer should keep the insured informed of the claim resolution process.

Insurers also have an affirmative duty to defend the insured. The duty to defend is broader than the duty to indemnify. As such, the insurer must defend the insured whenever the facts alleged in the complaint bring the matter within coverage. Therefore, an insurer may have to defend a claim even though the insurer does not have to indemnify the insured for an eventual judgment.

d. Factors Indicative of Bad Faith

There are certain factors courts consider when determining if a carrier's actions give rise to a bad faith claim. Some examples include the following: (1) the insurer conceals from the insured or misrepresented the facts disclosed by the investigation; (2) conceals the terms of settlement offers from the insured; or (3) when the insurer fails to settle a claim in spite of advice of counsel that a jury verdict in excess of policy limits is likely. Courts have been known to consider the measures taken by the insurer to resolve a coverage dispute promptly or in such a way as to limit any potential prejudice to the insured and efforts made by the insured to settle liability claims in the face of a coverage dispute.[2]

II. The Reptile Strategy

a. Origins of the Reptile Strategy

The Reptile Strategy or Reptile Program was founded in early 2009 by David Ball and Don Keenan. It is a tactic utilized by plaintiff's attorneys to maximize jury verdicts. Since its inception, the Reptile strategy claims to have produced verdicts and settlements amounting to almost 5 billion dollars. Due to the growing popularity of the Reptile strategy, defense attorneys should be well versed on how to recognize, combat, and most importantly prepare witnesses to defeat the "Reptile."[3]

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[2] Ball, Scott, G., "The Right and Duty to Settle Third-Party Liability Claims: A 50-State Survey" available at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_inscle_materials/written_materials/4_1_the_right_and_duty_to_settle_thirdparty_liability_claims.authcheckdam.pdf

[3] Jouben, R. and Klingborg, P., "Reptile Alert!:Employment Lawyers and Claims Personnel Need to Be on the Lookout" CLM Magazine, 2014

b. The "Science" behind the Reptile Strategy

Neuroscientist Paul D. MacLean coined the concept of the limbic system in 1952 and went on to place the limbic system into an evolutionary context. He proposed that the human brain is really three brains in one, or a "triune brain." The triune brain is divided into three categories including the "ape brain," the "dog brain," and the "reptilian brain." The Reptile program attempts to exploit the reptilian brain of jurors, which is the area of the brain responsible fight or flight, fear, danger, anxiety, and overall safety. According to the program's creators, if plaintiff's attorneys successfully appeal to the jurors' reptilian brain, there is a higher likelihood that the jury will deliver high monetary verdicts in their favor.[4]

The alleged "science" behind the Reptile strategy has not gone without scrutiny. Members within the legal and scientific communities have questioned the logic and the science underlying the program. Notably, an argument can be made that the Reptile strategy is nothing more than a means for plaintiff's counsel to violate the "Golden Rule" by showing the jury that the defendant's conduct represents a danger to the survival of the jurors and their families. In addition, according to Keenan and Ball the end game is clear: tear the defendant down in front of the jury by establishing to the jurors that the defendant's acts endanger the community as a whole, and show that the only way to protect the community from the defendant is to render a verdict for the plaintiff.[5]

c. Application of the Reptile Strategy (Generally)

The Reptile strategy is grounded in three main concepts: "Harms and Losses", "Safety Rules", and "Codes". With regard to Harms and Losses, plaintiffs focus on three questions to show the depths the defendant's potential harm to the community: 1) how likely is it that the defendants act or omissions would hurt someone; 2) how much harm could it have done (as opposed to the actual harm); and 3) how much harm could the act cause in other kinds of situations.[6] After eliciting this information plaintiff's then assert to the jury that the proper measure of damages is the potential harm that the defendant could have caused rather than the plaintiff's actual damages.[7]

Reptile devotees also create generalized Safety Rules (rules designed to protect the community) and then propose that the defendant's intentional violation of the Safety Rule led to the plaintiff's injury or caused the plaintiff's damages. Reptile Safety Rules typically have the following attributes: 1) they are designed to prevent danger; 2) protect people in a wide variety of situations; 3) practical and easy to follow; and 4) the defendant must agree with the Rule.

Reptilian Codes are designed to elicit the juror's most basic association with a concept, word, or entity. Codes are simple, and can be positive or negative. For instance, one may associate good health with mobility, or associate a nurse with the idea of caregiving.[8]

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[4] Greeley, Ann T., Ph.D., "A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response," 2015

[5] Id.

[6] David Ball & Don Keenan, Reptile: the 2009 Manual of the Plaintiff's Revolution. Balloon Press, 2009

[7] Ibid.

[8] Ibid.

A primary criticism of Reptile programs use "Harms and Loses", "Safety Rules", and "Codes" is together they create a false legal standard by which the standard of care is to be judged rather than assisting the jury in understanding the baseline standard of care and what the standard requires in a particular case. Reptilian questioning and arguments lure the jury into focusing on community Safety Rules that are a higher or different standard than the standard of care established by law. Consequentially, jurors feel compelled to deliver hefty verdicts for the plaintiff as a means to correct the perceived danger or threat.[9]

Plaintiffs utilize the Reptile strategy throughout all stages of litigation, but it is most commonly employed during discovery. During a deposition, plaintiff's counsel will typically ask a witness generalized Safety Rule questions that lead to yes or no answers. After the deponent commits to the Safety Rule he or she is led down the prim rose path and eventually pinned down to answering more specific questions about the corporation's actions that violated the Safety Rule. During this line of questioning, plaintiffs will seek inconsistent testimony and damning admissions from the witness. Successful utilization of the Reptile strategy by plaintiffs in depositions can lead to early settlements and trial avoidance.

d. How plaintiffs utilize the Reptile Strategy in bad faith actions

Plaintiffs commonly apply the Reptile strategy against insurance carriers in bad faith actions by basing their case on purported "facts" that have little to do the plaintiff's situation and focusing more on defendant's overall failures as a company and the perceived dangers these shortcomings cause to the community. This strategy further aims to bring out fears and prejudices the jurors may have against insurance companies so that they focus on this overlapping sense of protecting the community as a whole. In essence, the end goal is to portray insurance companies as uncaring entities worthy of blame or that they actively seek ways to deny coverage.

In bad faith actions, plaintiffs use common Reptile themes and codes to appeal to a juror's biases against insurance companies. One method is to demonstrate that the adjuster assigned to the claim intentionally failed to follow one or more provisions in the claim file (a Rule violation). The end goal is to show that the errors made by the adjuster were entirely avoidable because they "did not follow the manual." Another method is to employ the "suspicious circumstances theme" by demonstrating that the insurer denied the claim based on strong circumstantial evidence, but there is no "smoking gun." Hence, since no smoking gun existed warranting a denial of the claim, the carrier cannot be trusted to make correct decisions. A third method commonly employed is showing that the insurance carrier has a habit of making low ball offers. The jury can then infer that the carrier's practice of engaging in low ball offers is evidence that they aim to exploit claimants who might give up.[10]

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[9] Jouben, *supra*

[10] Elisson, M. and Dworjanyn P., "Reptile Theory in Insurance Coverage and Bad Faith Litigation" available at http://www.primerus.com/files/2.%20Reptile%20Theory%20in%20Insurance%20Coverage%20and%20Bad%20Faith%20Cases.pptx

III. Defending Against the Reptilian Strategy in Bad Faith Actions

a. Humanizing the corporate client in Bad Faith claim

As the old saying goes "image is everything" and to combat the Reptile strategy humanizing the insurance carrier to the fact finder is necessary. To that end, counsel should find a means to incorporate the carrier's mission statement into the theme of the litigation. It is also important to emphasize that the company is composed of people, families, colleagues, and friends who actively engage in community involvement. Furthermore, counsel should show the carrier's culture of being careful and timely with the insured's claims and emphasize the unique and complex nature of the circumstances surrounding the claim. When possible, counsel should also emphasize that there is no pattern of similar misconduct that would violate one of the Umbrella or Safety Rules. The carrier can contribute by using positive, community service based advertisement campaigns that emphasize the insurance company's good deeds within the community.

b. Combating the Reptile Strategy in bad Faith Actions

i. Realize when the Reptile Strategy is being used

While this may seem like commonsense, in some instances it is not easy for defense counsel to detect when opposing counsel is employing the Reptile. In many instances, defense attorneys will be caught off guard when plaintiff's counsel focuses on generalized Umbrella and Safety Rule questions. For example, during *voir dire* plaintiff's counsel will spend a considerable amount of time indoctrinating jurors with Reptile terminology by using words such as protect, danger, and risk. During an opening statement, plaintiff's counsel may focus on the Safety rule and use persuasion to emphasize that the violation of Safety rule endangers the community while focusing on the conduct of the defendant instead of the plaintiff.[11] These tactics are normally a strong indicator that the Reptile is in effect. Therefore, it is important that defense counsel be cognizant of when plaintiff is laying the Reptile trap throughout all stages of litigation.

ii. Enforce defense Safety Rules and Anti-Reptile themes

Defense counsel should also consider incorporating its own Safety rules and themes to effectively combat the Reptile. Discovery responses can be drafted to incorporate those themes, and the witnesses can be coached to incorporate the rules and themes into their testimony and deposition responses.

Anti-Reptile themes can also be structured so that jurors engage their upper level brain functions to evaluate only the legally significant facts instead of their fears and biases towards insurance carriers. For instance, during *voir dire* and closing arguments defense counsel should heavily emphasize to the jury that their duty is to consider the specific facts and evidence presented in the case. In addition, defense counsel should argue that the plaintiff played fast and loose with the case facts and over simplified them. By showing that the plaintiff oversimplified the case and took

[11] Johnson, D., "What Adjusters and Carrier Counsel Need to Know About Reptile Advocacy" (February25, 2016,) http://www.claimsjournal.com/news/national/2016/02/25/269054.htm

facts out of context, counsel can successfully undermine the plaintiff's credibility with the jury.[12]

iii. Properly select and prepare a witness to defend against the Reptile during depositions and cross examination

Proper witness selection and preparation is essential for defeating the Reptile in bad faith actions. First, defense counsel should designate a spokesperson that can demonstrate the inherent reasonableness of the carrier's conduct and display the carrier's reasonable approach to processing claims. Counsel should also consider hiring a witness coach to help prepare the witness, to wit: have the witness practice answering direct and cross examination questions, or even videotaping the witness. The witness should further be advised to refrain from answering Safety or Umbrella questions with simple "yes" or "no" answers because once the trap has been laid, recovery may be difficult. Instead, witnesses should be prepared to differentiate the facts of the case with the hypothetical Reptile questions or offer caveats to those questions such as "it depends" or "in some circumstances." Witnesses should also take every opportunity to distinguish the case at hand with the hypothetical Safety Rule scenarios posed by plaintiff's counsel. The witness need not disagree with all Reptile questions, but these responses will help them fare better during a line of successive Reptile questions.

iv. Preserve the record

Defense counsel should be vigilant in counteracting the plaintiff's efforts to employ the Reptile throughout all stages of litigation. As such, it may be beneficial to prepare a motion *in limine* linking the use of the Reptile strategy to a violation of the *Golden Rule*. Even if the motion is denied, the court is put on notice and the record is preserved for appeal. Of course, making objections when the opposing attempts to employ the Reptile is also necessary for record preservation. In addition, if there is a verdict for the plaintiff, counsel should consider moving for a new trial. Not only does it preserve the issue for appeal, it gives the court another opportunity to consider the issues raised in the earlier motions *in limine*.[13]

An example of a successful, recent Reptile defense occurred in the case *Brown v. Berkeley Family Medicine Associates Inc*.[14]In *Brown*, a wrongful death action, the plaintiff attempted to liken the standard of care for medical professionals as a "rule". The plaintiff's counsel was admonished upon objections by defense in using the terms "danger' and "dangerous" when referring to the plaintiff's medical condition. The Supreme Court of Appeals found that the lower court could prohibit the use of certain words as they were potentially confusing and misleading to the jury. Hence, the defense in *Brown* won not by arguing that the plaintiff was using the reptile theory, but by focusing on the words the plaintiff used.

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[12] Wilinski J. and Marninaks C., "The Reptile Brain Strategy: Why Lawyers Use it and How to Counter it", http://litigationinsights.com/case-strategies/reptile-brain-strategy-lawyers-how-to-counter/

[13] See *Hensley v. Methodist Healthcare Hospitals*, 2015 WL 5076982 (W.D. Tenn. August 27, 2015)

[14] 2017 W.Va. LEXIS 629

Ⅳ. Additional Practice Tips for Avoiding Bad Faith Claims and Counteracting the Reptile Strategy

1. Respond to the insured's correspondence in writing as quickly as possible
2. Request only what you need to evaluate liability or damages
3. Communicate with the insured often and provide them with updates on the investigation
4. Make a settlement offer as soon as practical. If the adjuster's investigation supports denial, do not delay in sending the denial letter. Do not wait for a demand
5. If the circumstances lead the adjuster to believe there may be no coverage, provide a reservation of rights letter immediately
6. Immediately advise the insured if the claim appears to have a value in excess of the policy limits
7. Remember that all correspondences and log notes with the insured may end up as an exhibit in a lawsuit. As such, do not write anything in a claim file or email that you would not want to jury to see
8. Fully investigate all claims that may arise from a multiple claim accident and seek to settle as many claims as possible within the policy limit
9. Minimize the magnitude of possible excess judgments against the insured by reasoned claim evaluation
10. When in doubt, defend!
11. Do not hesitate to seek advice from counsel
12. Document, document, document!