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Don't Call Them a Claims Manual!: The Role that Insurer Claims Guidelines and Best Practices Can Play in Extra-Contractual Claims and Litigation

1. Plaintiffs' use of guidelines and best practices in litigation.

Generally, Courts are skeptical of the relevance of insurer guidelines, manuals, and best practices in a simple breach of contract action arising out of an insurance policy finding that such materials are not relevant to the claims, which are properly guided by the facts and policy. However, Courts are less likely to limit production of such materials when plaintiffs pursue extra-contractual claims, such as bad faith or statutory unfair trade practices. In those cases, plaintiffs argue that the materials may show that insurers deliberately train personnel to minimize claims and elevate the insurer's financial interests above the interests of insureds, or that the insurer in handling the claim at issue deliberately omitted steps otherwise expected to be performed. Plaintiffs' goal is to use the insurer's own words against it to demonstrate a variance of conduct from the standard set by statute or caselaw, or the insurer's own materials.

In *Reid v. Mercury Insurance,* plaintiff used the insurer's guidelines to attempt to demonstrate that the insurer's failure to proactively advise the insured of an opportunity to settle within the limits, even where a demand had not been made, was in violation of company guidelines and, thus, proper grounds for a bad faith action. Reid v. Mercury Ins. Co., Reid v. Mercury Ins. Co., 220 Cal. App. 4th 262 (2013). There plaintiff argued:

> …defendant's adjuster, Mr. Schram, knew defendant's training manual directs its employees to "[c]ontinuously keep [our insured] informed of all exposures and settlement negotiations. [Our insured] may want us to settle a higher exposure separately, particularly in serious injury cases. Bad Faith has been found when the insured contended that he would have wanted the carrier to pay the per person limit to settle the worst case. When the company is faced with multiple claims whose value exceeds the policy limit, communication with the insured is essential. Especially where one claim is significantly worse than the others, the insured should be consulted about the possibility of settling the severe injury claim separately." Mr. Schram did not discuss this possibility with Ms. Huang, but sent Ms. Huang the July 26, 2007 letter notifying her damages might exceed policy limits and of her right to counsel at her own expense.

Plaintiffs also attempt to use the insurer's materials to demonstrate that an insurer trains or incentivizes its employees to act in violation of its duties when the materials include language ripe for manipulation in the context of litigation against the insurer:

- A training seminar that instructed adjusters that the person in control of the money is in a position of power. If the adjuster is in a position of power, they should use it. If they are not in a position of power, they should delay.

- A manual that showed company personnel were assigned goals in the payment of claims and if they achieved those goals, they were rewarded with salary increases and/or bonuses.

- An insurer offering cash prizes, awards, and rewards for those who paid the least in claims.

- Where a guide stated the following regarding documentation of a file: "The claim superintendent should not overlook the opportunity to strengthen his file by creating self-serving correspondence."

- Internal directives that instructed employees to destroy anything that could be used against the insurer in bad faith suits.

- Internal directives to destroy notes within six months.

- A manual that instructed claims personnel to ask embarrassing personal questions of claimants, such as income, debts, domestic problems, the state of one's marriage, and whether infidelity has occurred.

2. Discoverability of claims guidelines and best practices in extra-contractual litigation.

Whether by statute or under common law, extra-contractual claims, such as bad faith and unfair trade practices, focuses on the insurers conduct in investigating, adjusting, and negotiating claims. As a result, Courts across the country have held that material that pertains to instructions, procedures and training given to the adjuster regarding conduct related to investigating, adjusting, and negotiating claims is discoverable. *See Platt v. Fireman's Fund Ins. Co.,* 11-4067, 2011 U.S. Dist. LEXIS 132570, ay *3 (E.D.P.A. Nov. 16, 2011) ("For all of the foregoing reasons, the Court finds that Defendant's claims manuals or other materials used to process Plaintiff's insurance claims may be relevant to the cause of action for bad faith…Defendant is ordered to provide Plaintiff with any material which pertains to instructions and procedures for adjusting claims and which was given to the adjusters who worked on Plaintiff's claim.");*Grange Mut. Ins. Co. v. Trude,* 151 S.W.3d 803, 813 (2004) ("[Insurer's] training and policy manuals are relevant to Wilder's bad faith claim, and absent some sort of privilege or other showing of irreparable harm, they are discoverable."); *Saldi v. Paul Revere Life Ins. Co.,* 224 F.R.D. 169, 177 (E.D. Pa. 2004) ("Garvey's admonition that straying from internal procedures does not establish bad faith does not mean that straying from internal procedures is never probative evidence of bad faith."); *Safeguard Lighting Sys., Inc. v. N. Am. Specialty Ins. Co.,* No. Civ.A.03-4145, 2004 U.S. Dist. LEXIS 26136, 2004 WL 3037947, at *3 (E.D. Pa. Dec. 4, 2004) ("[A]ny material which pertains to instructions and

procedures for adjusting claims and which was given to the adjusters who worked on plaintiffs' claim may be relevant to the action and must be produced."); *Bonenberger v. Nationwide Mutual Ins. Co.,* 791 A.2d 378, 2002 Pa. Super 14 (Pa. Super. 2002)(trial court properly admitted evidence of insurance claims manual where manual was in existence since 1993 and used by insurer's employees as primary guide in evaluating, valuing and negotiating claims); *Robertson v. Allstate Ins. Co.,* No. Civ.A.98-4909, 1999 U.S. Dist. LEXIS 2991, 1999 WL 179754, at *6 (E.D. Pa. Mar. 10, 1999) ("Given the liberal scope of federal discovery and the fact that such information may lead to the discovery of admissible evidence, [the defendant] is ordered to produce claims or procedure manuals setting forth company practices or policies" pertaining to claims such as the plaintiff's); *Vining on Behalf of Vining v. Enterprise Financial Group. Inc.,* 148 F.3d 1206, 49 Fed. R. Evid. Serv. 1026 (10th Cir. 1998) (evidence of insurer's training manual was admissible); *Kaufman v. Nationwide Mut. Ins. Co.,* No. Civ.A.97-1114, 1997 U.S. Dist. LEXIS 18530, 1997 WL 703175, at *2 n. 2 (E.D. Pa. Nov. 12, 1997) ("[T]here may be circumstances when such discovery would be relevant. For example, a claims manual could be relevant if it requires an adjustor to take certain investigative steps before adjusting a claim and plaintiff can show that these steps were deliberately omitted. Although this fact alone would not be enough to establish bad faith, surely it is probative evidence for plaintiff to demonstrate bad faith."); *Glenfed Development Corp. v. Superior Court,* 53 Cal. App. 4th 1113, 62 Cal. Rptr. 2d 195 (Cal. App. 2 Dist. 1997) (insurer's claims manual discoverable); *Ring v. Commercial Union Ins. Co.,* 159 F.R.D. 653, 658 (M.D.N.C. 1995); *Miel v. State Farm Mutual Automobile Insurance Co.,* 185 Ariz. 104, 912 P.2d 1333 (Ariz. App. Div.1 1995) (claims manuals and discussions of claims handling in automobile liability insurer's in-house newsletter found relevant in bad faith action-addressed insurer's approved policies and procedures for handling claims); *State Farm Mutual Automobile Insurance Co. v. Engelke,* 824 S.W.2d. 747 (Tex.App.1992) (no abuse of discretion to require an insurer to provide all documents, manuals and training materials used in training insurer's claims handling personnel); *Champion Intern Corp. v. Liberty Mut. Ins Co.,* 129 F.R.D. 63, 67 (S.D.N.Y. 1989) ("[W]hen dealing with a complicated organization, such as a large insurance company, knowing what the internal understanding was might inferentially have some bearing on what the external manifestation was likely to have been . . . and from a discovery point of view that, it seems to me, is sufficient justification for including these documents.").

3. Drafting guidelines and best practices.

There are several practical considerations related to preparing guidelines, best practices, and other materials potentially discoverable in extra-contractual litigation. Many states require an insurer to maintain written procedures or expectations of their adjusters. Even if a state does not require such materials, one must consider the argument from plaintiffs regarding the lack of appropriate instruction and guidance regarding minimum standards and guidelines. On the other hand, materials that are too details or specific are likely to be manipulated against an insurer in extra-contractual litigation. The degree of specificity and detail is key to developing appropriate standards, while not creating a standard likely to lead to arguments for extra-contractual liability.

Insurers may consider involving adjusters in the drafting process. Claims personnel have firsthand knowledge of company procedures and the way in which those procedures and daily practice fit with what is written in the materials. Should they differ, an insurer can proactively

address either the written material or the day-to-day handling practices that vary from the written procedures.

Insurers may also consider whether to involve corporate or in-house counsel in the drafting process. On the one hand, counsel may offer invaluable advice regarding relevant regulations governing the insurer's conduct in certain states. On the other hand, insurers should recognize that counsel's involvement in the drafting process may lend to an argument by plaintiffs' counsel that counsel for the insurer does more than provide legal advice, thus opening those individuals up to deposition or other discovery in extra-contractual litigation.

4. The training on and accessibility of these documents.

Some states do not require written claims guidelines. *See Hance v. Triton Ins. Co.*, 2007 U.S. Dist. LEXIS 703 (E.D. Okla. Jan. 3, 2007). Despite this fact, one federal district court commented that it is "implausible in the extreme" and "inconceivable" that a "large insurance company which uses many claims adjustors could operate without standards for training the adjustors and without standards guiding the adjustors' work." *White Mt. Cmtys. Hosp. Inc. v. Hartford Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 170012 (D. Ariz. Dec. 8, 2014). Some federal courts have commented that "manuals and other training materials are relevant in bad faith insurance litigation where they contain instructions concerning procedures used by employees in processing claims." *Solano-Sanchez v. State Farm Mut. Auto Ins. Co.*, 2021 U.S. Dist. LEXIS 11738 (E.D. Pa. Jan. 22, 2021), citing *McCrink v. Peoples Benefit Life Ins. Co.*, 2004 U.S. Dist. LEXIS 23990, 2004 WL 2743420, at *8 (E.D. Pa. Nov. 29, 2004). According to these courts, training materials "relevant to processing the claim in question" are discoverable, as they may show "that agents of an insurance company recklessly disregarded standard interpretations of a particular contractual provision in denying coverage or deliberatively omitted certain investigatory steps."

Given the assumption by many courts that claims guidelines and best practices are mandatory and establish procedures that adjusters must follow, it is imperative that insurers seriously consider the training that they provide their claims professionals on these written materials. Indeed, the insurer's training of its claims professionals on claims guidelines is consistently covered in the depositions of those professionals in insurance coverage and bad faith litigation. *See e.g. La Terminals, Inc. v. United Nat'l Ins. Co.*, 340 F.R.D. 390 (C.D. Cal. 2022). Indeed, it is a common argument in bad faith claims that an insurer's failure to its train employees on these guidelines constitutes bad faith. *See Flores v. Monumental Life Ins. Co.*, 620 F.3d 1248 (10th Cir. 2010). Even in states where claim guidelines are not required, evidence of an insurer's training of its claims adjusters is relevant in the bad faith analysis. *See Hance*, 2007 U.S. Dist. LEXIS 703.

In these insurance coverage and bad faith cases, the plaintiff or insured arguments or inquiries on training often focus on:

- The particular guidelines or best practices applicable to the jurisdiction and type of claim at issue;

- Whether and how the insurer made its claims guidelines and best practices available to the adjusters involved in the claim (*e.g.* in new employee orientation, in an email, etc.);

- The format of the claims guidelines and best practices (paper, electronic, etc.);

- Whether the claims guidelines and best practices are accessible to the adjuster even after they were initially distributed;

- Whether and how the insurer trained the adjusters involved in the claim on the guidelines and best practices (*i.e.* verbal, testing, PowerPoint presentations, etc);

- The materials used to train the adjuster on the claims guidelines and best practices;

- Whether any supplemental training or continuing education was provided on the guidelines and best practices; and

- Whether the guidelines and best practices were updated during the course of the claim.

Because these training topics can become the subject of litigation, insurers should be mindful in whether and how they train their employees on claims guidelines and best practices.

5. The use of these documents in claims handling.

Claims guidelines and best practices provide the claims adjuster with invaluable insight and guidance as to how to handle particular claims. As these written materials are often the product of collaboration between various levels of an insurance company's claims professionals, management and counsel, they reflect the general vision of the insurer in handling claims in a fair and reasonable manner. However, many courts see these materials as something more than mere guidelines or best practices.

For example, some courts have recognized that training and policy manuals are relevant in determining whether an insurance company lacked a "reasonable justification" when investigating a claim by misinterpreting, or not abiding by, the written policy provisions. *See Sutter v. Am. Fam. Ins. Co.*, 2022 U.S. Dist. LEXIS 91201, (S.D. Ohio May 20, 2022). Other courts have held that policy and training manuals may assist in answering the question of whether something other than a genuine dispute as to the value of the claim can be attributable to the assessment or denial of the claim. *See United States Roller Works, Inc. v. State Auto Prop. & Cas. Ins. Co.*, No. 3:16-cv-2827, 2018 U.S. Dist. LEXIS 146404, 2018 WL 4095058, at *2 (M.D. Tenn. Aug. 28, 2018). As one court explained, "If, for example, an insurer claims that a dispute existed with regard to the valuation of a certain injury, but its actions are inconsistent with its own procedures for dealing with disputes of the type alleged, a reasonable juror could consider that inconsistency as suggestive of—though not, necessarily, conclusive evidence of—bad faith." *Id.* Likewise, "a claims manual could be relevant if it requires an adjustor to take certain investigative steps before adjusting a claim and plaintiff can show that these steps were deliberately omitted." *Platt v. Fireman's Fund Ins. Co.*, No. 11-4067, 2011 U.S. Dist. LEXIS 132570, 2011 WL 5598359, at *2 (E.D. Pa. Nov.

16, 2011) (quoting *Kaufman v. Nationwide Mut. Ins. Co.*, No. CIV. A. 97-1114, 1997 U.S. Dist. LEXIS 18530, 1997 WL 703175, at *2 n.2 (E.D. Pa. Nov. 12, 1997)). *See also Solano-Sanchez v. State Farm Mut. Auto Ins. Co.*, No. 19-4016, 2021 U.S. Dist. LEXIS 11738, 2021 WL 229400, at *3 (E.D. Pa. Jan. 22, 2021). One court commented: "Although the fact that [the insurance company's] employees departed from established standards in handling plaintiff's … claim would not alone establish bad faith," the insurance company's claims or procedure manuals were nevertheless relevant because such information was "probative evidence for plaintiff to demonstrate bad faith." *Kaufman*, 1997 U.S. Dist. LEXIS 18530, 1997 WL 703175, at *2 n. 2.

Given the emphasis that some courts place on claims guidelines and best practices, it is a wise practice for adjusters to become well-acquainted with their company's guidelines and best practices and attempt to follow them whenever reasonable and necessary in a particular claim. Should the adjuster decide not to follow a guideline in a particular instance because the claim reasonably calls for a different course, the adjuster would be well-served to consider consulting with management or outside counsel as a precautionary measure. Some thought also should be given as to whether the reasonably necessary deviation from the claims guidelines or best practices should be documented in the claim file materials.

6. The preparation of claims professionals and corporate representatives for deposition on these materials.

Plaintiffs and insureds commonly use depositions of the insurance company's adjusters or corporate representatives to try to establish the foundation for hoisting an insurer's own claims guidelines and best practices against the carrier. Opposing counsel will often try to obtain admissions from the insurer's witnesses at deposition that the insurer's training materials establish the procedures that the adjuster should have followed for the claim.

Here is one recent example from *La Terminals, Inc. v. United Nat'l Ins. Co.*, 340 F.R.D. 390 (C.D. Cal. Feb. 2, 2022):

> On November 15, 2021, Plaintiffs took the deposition of Mark DiGiovanni in his capacity as the company's 30(b)(6) witness. (*See* Jackson Decl., Exh. C). DiGiovanni testified that United National provides "the Best Practices Manual to all of our claims examiners, and then we provide additional trainings." (*Id.* at 24). The questioning continued:
>
> Q What are the additional trainings?
>
> A I set up ten trainings a year on a monthly basis, with the exception of July and August, in which panel counsel from a different state will come in and present -- or do a webinar in these days of COVID -- present on a topic of interest.
>
> . . .
>
> Q Do the claims handlers that report to you receive training on the standards to apply when a claim is tendered for a defense?
>
> A Yes.

Q In -- in what form?

A It can be -- usually, it's part of the monthly training that's presented by panel counsel. And then there's in -- they're provided with the Claims Manual. And then they have supervisors who directly work with them and train them.

. . .

Q How about any training specific to California standards that apply when a claim is being tendered for a defense?

A We have annual California insurance regulations training every June. (*Id.* at 25-26).

Q You -- you stated that -- that claims handlers are expected to understand the legal standards to apply when addressing a tender of a claim for defense under California law; correct?

A Yes.

Q What, if anything, does United National do to ensure that they understand those legal standards?

A Provide the training we've been discussing.

. . .

Q. Did Randi Hoffman participate in the training that you've reference regarding the legal standards to apply when addressing a tender of a claim for defense under California law?

A Yes.

Q In every instance? Do you know? Did she attend all of the California trainings?

A As far as I can recall. (*Id.* at 29-30).

Q But there is a -- there is a repository of -- of training materials that claim handlers can reference?

A Yes, on our database.

Q Is that information relevant to claim handlers doing their -- doing their daily duty in -- in handling claims on behalf of insureds? Is that why -- is that why United National keeps the library, because those reference materials may be relevant to a claim handler's job in handling claims?

. . .

THE WITNESS: Well, it's done to ensure that the examiners are up to speed in the jurisdictions in which they handle claims on all pertinent issues which they may face in their claim handling.

Q. And claim handlers rely on those documents?

A They rely on those documents, their training, experience, education; sure.

Once counsel for the plaintiff or insured establishes at deposition that written training materials like claims guidelines establish the procedures that an adjuster must follow, counsel then will proceed to try to obtain admissions that such procedures were not followed, arguably establishing a breach of contract or bad faith. *See e.g. GEICO Indem. Co. v. Whiteside*, 311 Ga. 346 (Ga. 2021).

Once insurance coverage and bad faith litigation commences, insurance companies would be well-served to ensure that their company witnesses are well-prepared for their depositions. Insurers with their outside counsel should review the relevant claims guidelines and best practices and assess their potential applicability to the claim. Insurers with their counsel should investigate their company witnesses' training on these materials and their adherence to them for the particular claim. Insurers with their counsel should discuss how to adequately prepare their company witnesses to respond to questioning on these topics at deposition, such as how to best put the claims guidelines and best practices into proper context given the facts and circumstances of the claim. Additional consideration should be given as to how the company's witnesses should review these materials in advance of deposition.

7. Insurer defenses against guideline-based bad faith arguments.

Although plaintiffs in bad faith and unfair trade practices actions may obtain copies of guidelines, manuals and training material in discovery, several defenses remain available to insurers with respect to the value of the evidence on the issues in dispute in such claims. Plaintiffs and insureds argue that claims guidelines are relevant to help interpret insurance policy language or to show an ambiguity in that policy language, particularly in the first-party context. *See e.g. Certain Underwriters at Lloyd's v. AMTRAK*, 2016 U.S. Dist. LEXIS 64088 (E.D. N.Y. May 16, 2016). A number of courts have embraced this argument, as least for purposes of discovery. *See e.g. United States Fire Ins. Co. v. Bunge North Amer. Inc*., 244 F.R.D. 638, 646 (D. Kan. 2007); *Stonewall Ins. Co. v. National Gypsum Co*., 1988 U.S. Dist. LEXIS 9938, 1988 WL 96159 at *3-4 (S.D.N.Y. Sept. 6, 1988); *Maricopa Cty.*, 2000 Ariz. App. Unpub. LEXIS 6, 2000 WL 35937314, at *7; *Martinez v. James River Ins. Co.*, No. 2:19-cv-01646-RFB-NJK, 2020 U.S. Dist. LEXIS 72911, 2020 WL 1975371, at *3 (D. Nev. Apr. 24, 2020); *Progressive Garden State Ins. Co. v. Metius*, No. CV 18-2893 (WJM), 2019 U.S. Dist. LEXIS 57242, 2019 WL 1468155, at *1 (D.N.J. Apr. 3, 2019); *Rembrandt Enters., Inc. v. Illinois Union Ins. Co.*, No. 15-CV-2913 (RHK/HB), 2017 U.S. Dist. LEXIS 4946, 2016 WL 6997108, at *2 (D. Minn. Jan. 13, 2017); *Champion Int'l Corp. v. Liberty Mut. Ins. Co.*, 129 F.R.D. 63, 67-68 (S.D.N.Y. 1989); *Nat'l Union Fire Ins. Co. of Pitt., Pa. v. Stauffer Chem. Co.*, 558 A.2d 1091, 1095 (Del. Super. Ct. 1989). These courts take this position largely under the theory that the "insurance industry's own interpretation of the contractual language" or "industry practice" is admissible to construe "terms of art" in insurance contacts or "ambiguous agreements." *See American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947-48 (Ind. 1996); *Allstate Ins. Co. v. Dana Corp*., 759 N.E.2d 1049, 1059-60 (Ind. 2001).

One insurer response to these arguments is to focus on the procedural posture of the decisions cited in the last paragraph. Nearly all of these decisions were trial court rulings on whether an insurer had to produce its claims guidelines in discovery. These courts ordered production mainly because the claims guidelines could help resolve ambiguous policy language. However, as other courts have pointed out, claims guidelines and best practices do not constitute

the insurance policy itself and should not override the actual policy language. *See Caldwell v. Unum Life Ins. Co. of Am.*, 271 F. Supp. 3d 1252 (D. Wy. Sept. 21, 2017); *Wade v. Life Ins. Co. of North Am.*, 271 F.Supp.2d 307, 324 (D. Me. 2003). In other words, if the policy language is unambiguous, the court should interpret the language as a matter of law without consulting extrinsic or parol evidence like claims guidelines. Some of the decisions cited above allow claims guidelines to help determine whether there is an ambiguity in the policy language in the first place, but the on the whole, insurers should considering challenging the relevance of claims guidelines in interpreting unambiguous policy language. As one federal district court commented, an insurer's claims guidelines only show the insurer's "own, unilateral interpretation of the policy" and thus should not be used to interpret the policy, particularly when the insured cannot show that it relied on such guidelines when purchasing the policy. *See FDIC v. Bryan*, 2012 U.S. Dist. LEXIS 189743 (N.D. Ga. Nov. 28, 2012).

With respect to claims handling generally, insurers should try to place the role of claims guidelines and best practices in claims handling into context. One of the leading arguments made by plaintiffs and insureds is that insurer claims guidelines and best practices definitely establish the procedures that adjusters must follow when handling a claim. Unless company policy dictates otherwise, insurers should emphasize in pleadings and discovery and at deposition that claims guidelines and best practices are not claims manuals. They do not establish absolute rules that must be followed in all instances. Claims guidelines are just that—guidelines that help adjusters with handling claims. Each claim should be handled according to the facts and circumstances of the particular claim.