

Discovery and Depositions in the Bad Faith Case: What You Need to Know

By Bill Daniels
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I. Introduction

Insurance bad faith cases are usually hard fought and can be bitter.

Generally speaking, when we take on a carrier for acting contrary to its insured's interests and allege those actions are malicious justifying punitive damages, the folks on the defense side tend to take it personally.

So, the first rule of discovery in the bad faith case is, assume you are in for a tough fight. Which, in turn, leads to the second and third rules: know your adversary and be prepared.

The bad news that the general practitioner faces in prosecuting a bad faith case is that the defense team will usually be much better schooled in the fine points of insurance than an attorney who does not work with insurance matters on a daily basis.

The good news that the general practitioner can take heart from is that the purpose of bad faith law is to act as an equalizer between the powerful carriers who adjust claims for a living and the ordinary insured who probably never wanted to have a claim and, with luck, will never have another. Insurance regulations require that insurance companies keep a record of all material claims decisions. So, where there is wrongdoing, there is almost always a record of the bad acts waiting to be uncovered.

The key discovery strategy in defending bad faith cases is to deny the plaintiff information. However, if you know where and how to dig, it's not that difficult to get the evidence you need to put on your successful case.

II. Know your adversary.

People spend their lives learning about the insurance business, which itself represents a huge, multifaceted, globally diverse industry devoted to making money by spreading risk. Generally, you do not have a lifetime to learn each and every nuance of the insurance world. So, don't try. But do make sure you know everything you can about the facts and circumstances of the insurance business as it applies to your case.

Understand that the defendant or defendants in your prospective case may not be obvious from the face of the insurance materials your clients hand you. For example, it is not unusual to have a client provide letters on letterhead from the "Farmers Insurance Group of Companies." Some practitioners will put this name in their complaint. Only, there is no such creature that can be sued. "Farmers Insurance Group of Companies" is simply the trade name for a collective of entities organized as inter-insurance exchanges. Usually, the proper defendants in a Farmers claims case are Farmers Group, Inc. (the management company), Farmers Insurance Exchange (the claims handling entity) and the insuring exchange (ie., Fire Insurance Exchange, Truck Insurance Exchange, etc.). See, *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202 (rev. den. Mar. 26, 2003).

So, when laying out your case, always make sure you closely review the original insurance policy and declarations pages prior to determining who to name in your complaint. When in doubt,

consult with experienced practitioners about who the proper parties are and why. Getting the defendants right at the beginning can save tremendous amounts of time during the case.

Also, make sure you understand who has standing to sue under the insurance policy. A business owner may not be able to sue for bad faith if the named insured is a corporation or limited liability company. On the other hand, the owner may have standing as an additional insured. The question is important where there is a potential for emotional distress and other general damage to the owner. Again, look to the policy and declarations pages for the answer.

III. Getting to the Heart of Your Case in 60 days or less.

Once you have the parties clear in your mind and have filed suit, you can prepare your initial round of discovery for service once the defendants answer or, as is more typical, demur.

I seldom use interrogatories during my initial bad faith discovery. I find it is much more productive to immediately demand the claim file(s) and, if warranted, the underwriting file(s), since these are the basic documents necessary for preparing any bad faith case for trial.

Because these files are key evidence in the case, and in order to discourage potential mischief in discovery, I ask for the documents in multiple requests, simultaneously, using a formal request for production of documents, along with a custodian of records deposition notice and notice of deposition of the person most qualified. By utilizing this process, I find I am able to exert maximum pressure on the defense to produce the entire record all at once. This process also insures that I will be able to either establish foundation for the insurance files either by direct testimony or stipulation, so that they are admissible later in the case. Do not assume that a claim file or any other document will be admitted at trial under the business records exception to the hearsay rule. Nail down the foundation as you go, it will save much grief later on.

It is also important to make sure that the original files are available during any depositions. Copies of files don't do the originals justice; often information about file handling can be gleaned from handwriting on the file folders themselves or how the files are organized. It is much easier for insurance adjusters and other key witnesses to evade answering key questions if the original files are not in front of them. Copies of file materials are okay as part of a document production and, in fact, are easier to handle as you organize your case. But make sure you request to see the originals and insist they be produced.

Person most qualified depositions under Code of Civil Procedure section 2025.220 are the fastest way to gain general information about the basic handling of the claim or other insurance matter that lies at the heart of your case. I typically notice the person most qualified to testify regarding the identities of each and every individual who performed work or made a decision in the matter. Generally, the witness will be the primary claims adjuster, which is fine. However, the PMQ deposition helps avoid wasting time meeting and conferring over boilerplate objections and incomplete responses typical when interrogatories are served.

Also, try to determine whether or not the defense will be relying on advice of counsel as a defense by serving a simple Request for Admission that is on point. Carriers generally do not like using the defense since it opens up areas that would otherwise be privileged. But don't assume it won't be used. Ask up front.

IV. Focusing Depositions.

Once I know who was involved with the claim or other insurance matter I am concerned with, I typically depose everyone who touched the file in any way. Even if the deposition lasts only fifteen

minutes, absent a stipulation, getting the testimony is the only way to insure that all the potential holes in your cases are filled.

I prefer to videotape all key depositions, particularly the adjusters and claims personnel. The best insurance bad faith cases are generally morality plays where the attitude and demeanor of the witnesses are just as important as their precise testimony. A picture, as the saying goes, is often worth a thousand words.

When deposing insurance professionals, I almost always begin by getting them to agree with me as to basic principles such as an insurance carrier must give its insured's interests equal weight with its own," an insurer is obligated to conduct a thorough, fair and objective investigation into the facts of a claim," etc. Once I establish the common framework of duty, I use those basic principles to tie down the witness while going through the claim.

Lists of duties and obligations can be gleaned from the case law, jury instructions and your experts. Make one up that works for your case and use it from day one.

In deposing witnesses, utilize the insurance files you obtained at the beginning of the case as both a guide to questioning and evidentiary support for your case. Adjusters will have diary notes, these should be analyzed and authenticated by the witness. If it is unclear just what notes or materials were created by the witness, don't be afraid to ask. Unraveling how a claim was handled is often like piecing together an intricate puzzle. Be thorough with each witness and you will not need to fear missing pieces when your discovery is concluded.

Also, just as in any case, don't be afraid to lead adverse witnesses as allowed by Evidence Code section 776. Leading questions are the best way to focus an adverse witness, especially one that might be inclined to waste your time with irrelevant insurance technicalities and side issues.

V. Conclusion.

There's no magic to conducting bad faith discovery. Just preparation, study and hard work.

While the basics outlined in this article should help you get going, don't forget that there is a strong community of insurance bad faith practitioners available who can help answer particular questions or give guidance on technical issues.

In my mind, there is no nobler endeavor than fighting for deserving individuals who have been legitimately wronged by powerful institutions. Hopefully, you are of the same mind. So, go get 'em!

SAMPLE DISCOVERY DOCUMENTS FOLLOW

1 William A. Daniels, Esq. (SBN 172042)
2 **DANIELS LAW**
3 Mail to: 15021 Ventura Boulevard, 883
4 Sherman Oaks, CA 91403
5 Tel: 818/907-8073
6 Fax: 818/332-1284
7 Bill@DanielsLaw.com

8 Attorneys for Plaintiff,
9 #####

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN DIEGO**

12 #####

13 ,

14 vs.

15 #####,

16 Plaintiff,

17 Defendants.

) Case No: #####

) **NOTICE OF TAKING DEPOSITION OF**
) **##### PERSON MOST**
) **QUALIFIED AND REQUEST FOR**
) **PRODUCTION OF DOCUMENTS**

) Assigned To: Hon. #####
) Dept : ###

) Complaint Filed on: #####

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21 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

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23 PLEASE TAKE NOTICE that Plaintiff ##### will take the following
24 deposition on ##### at **9:00 a.m.** at Daniels Law, located at 16133 Ventura
25 Blvd., Penthouse Suite A, Encino, CA 91436, (818) 907-8073:

28 **NOTICE OF TAKING DEPOSITION OF #####'S PERSON MOST QUALIFIED**
AND REQUEST FOR PRODUCTION OF DOCUMENTS

1. The #####'s Person Most Qualified to testify regarding underwriting ### Policy # #####.
2. The #####'s Person Most Qualified to testify regarding #####'s claims for insurance benefits from 2017 to the present under ### Policy # #####.

REQUEST FOR PRODUCTION OF DOCUMENTS

PLEASE TAKE FURTHER NOTICE that pursuant to Code of Civil Procedure §2025.220(a)(4), Plaintiff requests that the deponent produce for inspection and copying at said deposition the originals of the following documents:

DEFINITIONS

1. The terms "YOU" or "YOUR" as used herein shall mean #####.
2. COMMUNICATION(S) refer to the transmittal of information, including facts, ideas, inquiries or otherwise, including oral statements, letters, memos, e-mails, texts, and notes of conversations, whether handwritten or transmitted by telephone, other personal or business devices, facsimile, computer, or any other means.

ITEMS TO BE PRODUCED:

1. The complete original underwriting file for ### Policy # #####, including all notes, diaries, electronic mails, COMMUNICATIONS of any kind, folders and notations.
2. The complete original claims file for #####'s claims for health benefits from 2017 to the present under ### Policy # #####, including all notes, diaries, electronic mails, COMMUNICATIONS of any kind, folders and notations.
3. A complete copy of YOUR claims handling manual as utilized by YOU from 2017 to the present.

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4. A complete copy of YOUR underwriting manual as utilized by YOU from 2017 to the present.

DATED: DANIELS LAW

By: _____
William A. Daniels, Esq.
Attorneys for Plaintiff
#####

1 William A. Daniels, Esq. (SBN 172042)

2 **DANIELS LAW**

3 Mail to: 15021 Ventura Boulevard, 883

4 Sherman Oaks, CA 91403

5 Tel: 818/907-8073

6 Fax: 818/332-1284

7 Bill@DanielsLaw.com

8 Attorneys for Plaintiff,

9 #####

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **FOR THE COUNTY OF SAN DIEGO**

12 #####,

13 Plaintiff,

14 vs.

15 #####,

16 Defendants.

Case No: #####

**PLAINTIFF #####'S
REQUEST FOR PRODUCTION OF
DOCUMENTS, SET NO. ONE TO
#####**

Assigned To: Hon. #####
Dept : ###

Complaint Filed on: #####

21 **PROPOUNDING PARTY: PLAINTIFF, #####**

22 **RESPONDING PARTY: DEFENDANT, #####**

23 **SET NO.: ONE**

24
25 Plaintiff #####, hereby requests that ##### responds to his First
26 Request for Production of Documents as follows:

1 type (e.g., letter, memo, etc.) and specify the precise grounds upon which the immunity
2 of privilege is claimed.

3 The use of a verb in any tense shall be construed as the use of the verb in all
4 other tenses and singular form shall be deemed to include the plural and vice versa.

5 The items demanded to be produced are believed to be in your custody, control
6 or possession, are non-privileged and relevant to the subject matter of this action or
7 are reasonable calculated to lead to the discovery of admissible evidence.

8 The answers to these requests must be verified, dated and signed.

9 **DEFINITIONS FOR USE IN THE BELOW REQUESTS FOR PRODUCTION**

- 10 1. "DOCUMENTS" means a writing, as defined in Evidence Code § 250, and
11 includes all written, graphic matter, handwriting, typewriting, audio or video tape
12 recordings, however produced or reproduced, of every kind and description,
13 including but not limited to, the original and each copy thereof, which is non-
14 identical by reason of any mark, change, or other cause or reason whatsoever,
15 of all correspondence, records, reports, memoranda, notes, telegrams, telexes,
16 facsimiles, e-mails, messages and message books, telephone logs, memoranda
17 of telephone conversations, publications, books, brochures, booklets, manuals,
18 flyers, leaflets, contracts, memoranda of agreement, books of account, ledgers,
19 journals, working papers, records or summaries of personal interviews or
20 conversations, appointment calendars, diaries, receipts, invoices, billing
21 statements, microfilm, microfiche, files, tapes, magnetic tapes, discs, drives,
22 data cards, films, data processing files and all other computer-readable records
23 or programs, including any and all drafts or no identical copies thereof.

24 DOCUMENTS in the form of any magnetic tapes, discs, drives, data, cards, data
25 processing files and other computer-readable records or programs must be
26 produced in reasonably usable form (e.g., by printing or "downloading" such
27 documents onto paper). In addition, such DOCUMENTS must also be produced
28 in their computer-readable format (e.g., on CD or DVD).

2. The terms "YOU" or "YOUR" as used herein shall mean #####.

1 3. COMMUNICATION(S) refer to the transmittal of information, including facts,
2 ideas, inquiries or otherwise, including oral statements, letters, memos, e-mails,
3 texts, and notes of conversations, whether handwritten or transmitted by
4 telephone, other personal or business devices, facsimile, computer, or any other
5 means.

6 **DOCUMENT REQUESTS**

7 The following DOCUMENTS or tangible things shall be produced:

8 **DEMAND FOR PRODUCTION NO. 1:**

9 The complete underwriting file for ##### Policy # #####, including
10 all notes, diaries, electronic mails, COMMUNICATIONS or DOCUMENTS of any kind,
11 folders and notations.

12 **DEMAND FOR PRODUCTION NO. 2:**

13 The complete transfer of coverage file for ##### Policy # #####,
14 including all notes, diaries, electronic mails, COMMUNICATIONS or DOCUMENTS of
15 any kind, folders and notations.

16 **DEMAND FOR PRODUCTION NO. 3:**

17 The complete underwriting file for ##### Policy # #####, including
18 all notes, diaries, electronic mails, COMMUNICATIONS or DOCUMENTS of any kind,
19 folders and notations.

20 **DEMAND FOR PRODUCTION NO. 4:**

21 The complete claims file for ##### claims for insurance benefits from 2017
22 to the present under ##### Policy # ##### including all notes, diaries,
23 electronic mails, COMMUNICATIONS or DOCUMENTS of any kind, folders and
24 notations.

25 **DEMAND FOR PRODUCTION NO. 5:**

26 A complete copy of YOUR claims handling manual as utilized by YOU from
27 2017 to the present.

1 **DEMAND FOR PRODUCTION NO. 5:**

2 A complete copy of YOUR underwriting manual as utilized by YOU from 2017 to
3 the present.

4 DATED: DANIELS LAW

5
6
7 By: _____
8 William A. Daniels, Esq.
9 Attorneys for Plaintiff
10 JAMES LIEBERSON
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1 William A. Daniels, Esq. (SBN 172042)
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5 Tel: 818/907-8073
6 Fax: 818/332-1284
7 Bill@DanielsLaw.com

8 Attorneys for Plaintiff,
9 #####

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN DIEGO**

12 #####,

13 Plaintiff,

14 vs.

15 #####,

16 Defendants.

Case No:

17 **PLAINTIFF #####'S REQUEST FOR**
18 **ADMISSIONS, SET NO. ONE TO**
19 **DEFENDANT #####**

Assigned To: Hon. #####
20 Dept : ###

Complaint Filed on: #####

21 **PROPOUNDING PARTY: PLAINTIFF, #####**

22 **RESPONDING PARTY: DEFENDANT, #####**

23 **SET NO.: ONE**

24 Plaintiff ##### hereby requests that ##### respond to his
25 First Set of Requests for Admissions pursuant to *Code of Civil Procedure* section
26 2030.010.

1
2 **DEFINITIONS**

3 1. The terms "YOU" or "YOUR" as used herein shall mean #####.

4 **REQUEST FOR ADMISSIONS**

5 **REQUEST FOR ADMISSION NO. 1:**

6 Admit YOU are not relying upon advice of counsel as a defense in this matter.

7 **REQUEST FOR ADMISSION NO. 2:**

8 Admit YOU followed your standard claims handling practices in adjusting
9 ##### claims for ##### from 2017 to the present.

10 **REQUEST FOR ADMISSION NO. 3:**

11 Admit YOUR claims decisions regarding ##### claims for health benefits
12 from 2017 to the present were unreasonable.

13 **REQUEST FOR ADMISSION NO. 4:**

14 Admit YOU owe ##### insurance benefits reasonably related to his
15 ##### from 2017 to the present.

16 DATED:

DANIELS LAW

17
18
19 By: _____
20 William A. Daniels, Esq.
21 Attorneys for Plaintiff
22 #####