



DON'T BE THROWN OFF BALANCE

The Role of Coordinating Counsel in Bad Faith Litigation

By Peter A. Schmid

Imagine you are a property and casualty claims manager for an insurer and have been selected to serve as the company's corporate witness for a deposition in an extra-contractual bad faith lawsuit. Fortunately, you have excellent panel counsel, and after a series of well-

briefed and well-argued discovery motions before an astute judge, plaintiff's counsel's attempt to obtain a grab bag of unduly burdensome and sensitive business documentation has been denied as calling for information that is irrelevant, confidential, proprietary, and privileged.

In advance of the deposition, you reviewed the entire claims file in great detail with your litigation counsel and are comfortable discussing the company's claims handling, which was unassailable. However, shortly after the court reporter swears you in, plaintiff's counsel lays out the



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company's unredacted claims manual on the table in front of you, a list of other bad faith suits made against the company by other policyholders, and your own personnel file from years ago. Your defense counsel objects, threatens a motion for sanctions, and instructs you not to answer questions about these confidential materials, which the court has prohibited the plaintiff from obtaining in discovery. But the point is that plaintiff's counsel somehow already has the documentation in their hands and will now use it to throw you off balance. How could this scenario happen, and how can it be prevented?

Extra-contractual bad faith litigation involves unique litigation hazards that go beyond the mere risk of a financial judgment. Often at issue are paralyzing discovery requests for sensitive and voluminous corporate documents that have nothing to do with the claim. Yet gathering and disclosing these documents, if ordered by the court, can tie up innumerable hours of employee and attorney work time, affect the defense of multiple suits, hinder the company's operations, and subject its employees and even other policyholders to further harassment by adverse counsel.

For this and other reasons that will be set forth, extra-contractual bad faith litigation warrants two layers of attorney-client protection, through use of coordinating counsel in addition to local panel counsel of record. For our purposes, "coordinating counsel" means an outside attorney or law firm retained by the insurer to advise it in coordinating among multiple extra-contractual litigations in a way that is cost efficient, consistent, and maximizes the confidentiality protections to which the insurer is entitled by law. Coordinating counsel can assist in assuring the maximum protections of the attorney-client privilege and work-product doctrine, as well as protections against undue burden against unwarranted disclosure of trade secrets or

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information belonging to private individuals.

Risks that coordinating counsel can help mitigate include the following:

Risk of the wrong kind of coordination. The example given at the outset of this article, though somewhat dramatized, illustrates a very real scenario resulting from two distinct coordination issues.

First, different law firms representing the same insurer in different lawsuits typically are not in touch with one another, which is how it should be in most cases since each suit is based on unique parties, facts, and legal rules of the jurisdiction. Yet in any extra-contractual bad faith suit, it can never be assumed that the scope of discovery will be restricted to the claim in litigation. Bad faith suits routinely involve requests for general corporate documentation that potentially affect multiple suits. Without a discovery coordination mechanism, local panel counsel are vulnerable to being blindsided by discovery events taking place in other suits.

Second, plaintiff-oriented law firms can form networks of coordination with one another, particularly in jurisdictions where catastrophic events affect a large swath of the population. Under those circumstances, such networks may develop into a regional cottage industry suing insurers and sharing

boilerplate pleadings and discovery requests known to put undue burden on insurer defendants. Adverse counsel from multiple law firms may even share actual discovery production that they have obtained from the company if not prohibited from doing so by a protective order with sufficient teeth.

In this way, due to adverse coordination, a group of coordinated plaintiff-oriented law firms may end up with a shared dossier that they can use and reuse against insurers and their employees. Implementing a coordinating counsel program is a countermeasure that can mitigate adverse coordination risks by helping to manage discovery production in a consistent, predictable, and trackable manner across cases and jurisdictions.

Risk of inconsistency and surprise.

Most jurisdictions protect against discovery fishing expeditions by fully recognizing the attorney-client privilege, the work-product doctrine, and the avoidance of undue burden, as well as protection of trade secrets. But not all jurisdictions do so. Assuming that every court will apply these doctrines to the full extent as every other leaves the door open to an unpleasant surprise.

If a particular jurisdiction has undeveloped law on this topic or otherwise does not recognize that such protections apply, coordinating counsel can assist the company and panel counsel in identifying required materials in properly redacted form ready for prompt production under an agreed protective order. This helps assure that document production is consistent from case to case and that the documentation is kept confidential and returned at the end of the case. Coordinating counsel also can track what types of discovery the company has been required to produce in the past and what types of requests have been successfully resisted in a variety of cases and jurisdictions. Though no one can assure the company will win every discovery motion, coordinating counsel can militate against the surprise of previously produced materials surfacing in a later case.

Risk of panel counsel's file becoming discoverable. “We already have hired a law firm to defend the company. Isn't that enough?” It ought to be, but it's not always the case. Hopefully the jurisdiction does not recognize “continuing bad faith,” i.e., bad faith that allegedly continues after the filing of suit. And hopefully the jurisdiction fully recognizes attorney-client privilege and work-product doctrine in insurance matters.

However, the breadth of discovery that some jurisdictions will allow even encompasses panel counsel's settlement conduct on behalf of the company. This can even include mediation of the “underlying” suit if the mediation is not confidential by law or contract. Having coordinating counsel involved from the outset, purely in assessing the extra-contractual and discovery litigation risks, allows the company an additional privileged layer of review, which is more likely to be protected from invasive discovery attempts. In some instances, depending upon the jurisdiction and the case, it may be desirable to have coordinating counsel or other local extra-contractual defense counsel enter a separate appearance in the litigation to advise the company and defend solely the bad faith claims.

Risk of missing overall litigation trends and best practices. An insurer defendant may have the best local panel counsel available in each jurisdiction in which it is litigating. Yet would any one panel counsel law firm be in a position to recognize commonalities and trends in the ways that plaintiffs' complaints and discovery requests are being directed against a company nationally? Coordinating counsel can observe broader commonalities, distinctions, and trends in the law and work with the company to formulate a consistent approach nationally, regionally, and within states. Coordinating counsel also provides insurers with not only the ability to increase consistency and predictability, but also the flexibility to use a variety of approaches carefully tailored to particular jurisdictions.



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Risk of missing opportunities to develop the law. Coordinating counsel also can be helpful in recognizing, based on broader trends, where there may be an opportunity to extend, modify, or reverse the law in a particular jurisdiction. Not all jurisdictions have a well-developed bank of case law on the myriad topics that arise in the insurance context. This becomes evident particularly when a court system is overwhelmed with a new catastrophic

event, leading to a multitude of litigated claims. Coordinating counsel can help identify bodies of highly persuasive case law from related jurisdictions, which can then assist panel counsel in arguing for the development of appropriate law. In situations where there are numerous relatively small suits against the same company, yet which pose a significant collective risk, coordinating counsel also can assist in identifying representative suits that would be appropriate for an appeal to extend, modify, or reverse existing case law to bring it into conformity with a general trend or majority rule.

Coordinating counsel can be of great benefit in assisting insurers in mitigating the risks associated with the no-holds-barred discovery common in bad faith litigation—including the risks of adverse coordination, inconsistency, and surprise; discovery directed against panel counsel; missing litigation trends; and missing opportunities to develop the law. In short, better coordination prevents a bad faith defense from being thrown off balance. ■