

**BAD FAITH**

*"THE CASE FOR A PROMPT INVESTIGATION  
AND EXPEDITIOUS SETTLEMENT OFFER"*

BEST PRACTICES FOR AVOIDING EXTRA-CONTRACTUAL LIABILITY

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BAD FAITH  
BEST PRACTICES FOR AVOIDING EXTRA-CONTRACTUAL LIABILITY

**INTRODUCTION**

- What is Bad Faith?
- Avoiding Bad Faith Claims





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**WHAT IS BAD FAITH?**

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 Dept.: enforcement and gate-keeping

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### WHAT IS BAD FAITH?

- **STANDARD**-based upon reasonableness/totality-of-the-circumstances.
  - Breach of Contract
  - Negligence (or more than)
- **CONSEQUENCES:**
  - Judgment in excess of policy limits
  - Punitive damages
  - Attorneys' fees and expenses



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### AVOIDING BAD FAITH

- Communications/Documentation
- Investigation/Evaluation
- Negotiations



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### AVOIDING BAD FAITH

#### 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.



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BEST PRACTICES FOR AVOIDING EXTRA-CONTRACTUAL LIABILITY

**AVOIDING BAD FAITH**  
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.

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**AVOIDING BAD FAITH**  
INVESTIGATION AND EVALUATION

- 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.

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**AVOIDING BAD FAITH**  
INVESTIGATION AND EVALUATION

- 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.

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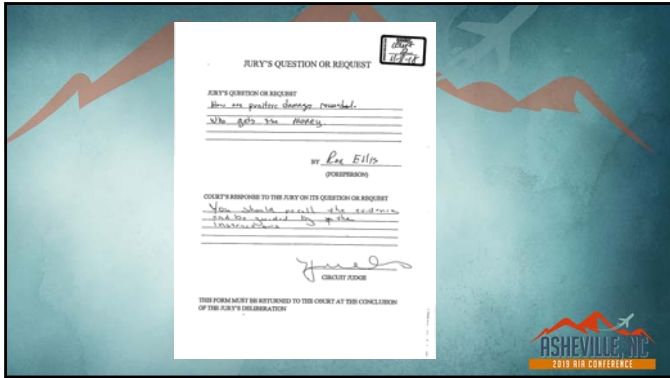
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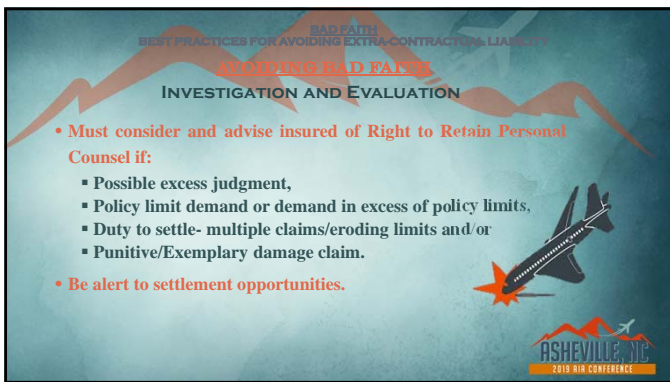
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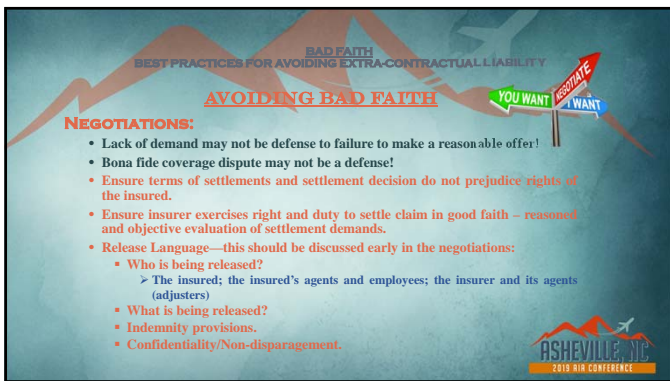
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