

## **Chapter 8**

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**Key Points to Remember**

**DISCLAIMER:** The following techniques illustrate unfair claims practices. The tactics and techniques outlined in this chapter are unethical, sometimes immoral and usually illegal.

### §800 In General

The claims representative has the checkbook which makes him a power player in settlement negotiations. He knows that the reasonable expectation of either a first or third-party claimant is a fast, fair and friendly conclusion of their claims. When there is a breach of any reasonable expectation by the claims representative, the claimant will often experience anxiety, worry and stress. Unreasonable time delays usually have a negative monetary and emotional impact on a claimant. An unreasonable time delay is a powerful tool when negotiating in bad faith.

The aging of a claim, which is the dragging out of the claim process, usually makes the claimant more receptive to a quick resolution of a claim and for less consideration. Claimants usually don't want to take on an insurance company, due to costly, lengthy litigation. The longer the time span between the injury and the trial, the better it is for the insurer. That is, time usually heals and dilutes the original anger of the claimant. The case loses its original impact and momentum.

This chapter will cover the following "unofficial" settlement techniques:

- Lowballing
- Unreasonable Delays
- Stonewalling
- Intimidation
- Seasonal Settlements

- Bad Faith Inclusion
- Backlog
- Nuisance
- Factoring

### §810 Lowballing

The technique of lowballing is basically, not paying a reasonable sum for damages owed to the claimant. This technique is used in many forms. Some typical tactics include:

- Ignoring the Claimant—Refusing to acknowledge that the claimant has been damaged;
- Omitting Items of Damage—Acknowledging that the claimant has been damaged but failing to include all damages; and
- Omitting Full Value of Some Items—Acknowledging all the damages but failing to compensate the claimant for the full value of all damages.

The California Court of Appeals held (June 5, 1990) that an insurer's deliberate mishandling of a claim supported a *third party* cause of action for intentional infliction of emotional distress. The insurer's insured was clearly liable for the claimant's injuries. The claimant did not have money for medical treatment. The claimant was unable to work because of her injuries. The claimant needed immediate medical attention to reduce the extent of permanent injury.

The insurer refused to pay (advance) any money for the claimant's medical treatment. Furthermore, the insurer delayed offering to settle the claim for nearly a year, knowing the claimant was in desperate financial straits. The insurer purposely delayed settlement in order to obtain a low settlement. *Moukalled v. Fire Ins. Exchange*, Cal. 2d, No.

B4041451, June 5, 1990, by Klein, J. Another interesting case, dealing with intentional bad faith is *Bradshaw v. State Farm Mutual Auto Ins. Co.*, 758 P.2d 1313 (Ariz. 1988) (Feldman, J.). Another classic lowball case is *Thomas v. State Farm Mut. Auto Ins. Co.*, 383 S.E.2d 786 (W. Va. 1989).

### §811 *Lowballing the Claimant*

There are a variety of techniques a claims representative can use when dealing with a claimant to lower the amount of damages that should be reasonably paid to the claimant. The following list outlines some of the possible strategies that may be used by a less than scrupulous claims representative.

1. **Using an Attorney:** The claims representative may use an attorney to write an opinion letter stating that the claim is worth very little, if anything, when the claims representative has not submitted all the known facts to the attorney for the opinion letter. The adjuster can then share this letter with the claimant to influence him to settle for the adjuster's offer.

2. **Geographical Defense:** Claimants living out of state can be forced to compromise the full value of their claims. The inconvenience and expense of taking time away from their job (lost wages, travel and lodging expenses), to litigate their claim may force the claimant to accept a lesser settlement amount. The claims representative knows these facts of life and can offer less than he would offer if the claimant resided in the local jurisdiction of the trial court.

3. **Social Stigma Defense:** Another technique is for the claims representative to consider whether the claimant's social station or lifestyle, such as belonging to the Hell's Angels, would be looked upon favorably by an average juror. If jurors feel that this type of association is negative, then the full value of the claim could be reduced.

4. **Expert Shopping:** Some claims representatives may "shop around" for an expert who will, for a price, testify to anything that will cause the client's claim to be denied or mitigated.

5. **Previous Litigation Experience:** When a claims representative learns that the claimant has been represented by an attorney in a previous matter that took years to settle, and the attorney got half of the settlement (fees and costs), then the use of

that history is a valuable tool to reduce the fair settlement value of the claimant's claim up to 50%. The claims representative may argue that it is better for the claimant to take half of what he is entitled to at this time, rather than hire an attorney, wait years, and then receive half of his damages after the attorney takes the other half.

Also, if the claims representative learns that the claimant has had previous litigation experience that resulted in a defense verdict, it would be advantageous to disclose this information when negotiating with the claimant.

6. **It's Your Fault:** The claims representative may hold the claimant responsible for consequential damages, stating that the claimant did not protect his property after the accident. If the claimant's damaged vehicle left at the scene of the accident was vandalized or personal property was stolen from it after the claimant left the scene (by ambulance), the claims representative will argue that this is an independent act and not related to the accident.

7. **Slow Mitigation Efforts:** The claims representative may hold a claimant responsible for not quickly mitigating his damages. An example would be when the claimant did not seek medical attention fast enough, in the opinion of the claims representative. Hence, the claimant aggravated his own medical problems and the insurance company will not pay.

8. **Keeping Premiums Down:** The claims representative can also explain to the claimant that the settlement of the claim must be kept down in order to keep premiums from going up.

9. **Tax Benefits:** Another technique is for the claims representative to tell the claimant that his claim is being reduced since the general damages that are being paid are tax free. The claims representative is taking credit for that percentage of taxes that the claimant usually pays when earning money.

10. **Attorney Leverage:** If the claims representative can determine that the claimant hates attorneys, then he can offer an unreasonably low settlement, knowing that the claimant will have no other alternative but to accept the claims representative's low offer.

11. **If You Don't Ask, You Don't Get:** There may be no offer to pay for anything not demanded by the claimant. If the claimant does not ask, the claimant does not get. However, an insurer may commit bad faith by failing to disclose the insured's

rights under the policy. *Williams v. Health America*, 41 Ohio App. 3d 245, 535 N.E.2d 717 (1987) (Mahoney, P.J.).

12. **Forced Structured Settlement:** A forced structured settlement of the claimant's injury may be used by the claims representative to avoid a full cash payment of a claim. This will allow the insurance company to avoid payment of the lump sum settlement and to invest this savings for their own financial gain.

13. **No Diminution Value:** Another technique is to refuse to pay for the diminution value of the claimant's vehicle after repairs are completed. On certain makes and models of automobiles, if that vehicle has been damaged, even though it has been repaired, it will have lost market value because it is not factory original. (This kind of case usually involves very expensive vehicles.)

14. **False Settlement Authority:** A claims representative may go to his claims supervisor and secure a memo which states that only X amount of dollars will be paid to the claimant. The claims representative, knowing the case to be worth more, can take that memo to the claimant as evidence of the maximum amount of money that the insurance company is willing to pay in settlement of the claim.

15. **Excessive Depreciation:** Use of excessive depreciation tables or depreciation tables which do not have any reasonable relationship to the particular claimant's case is a tactic employed by some claims representatives.

16. **Free Help:** Another technique is to refuse to accept the claimant's vehicle salvage and force the claimant to dispose of the vehicle salvage at his own expense and without consideration.

17. **Non-Disclosure:** A claims representative may refuse to volunteer damages owed to the claimant. He may not offer to pay for the rental vehicle for the claimant while his vehicle is under repair. Rather, the claims representative will tell the claimant to get a friend to drive him to work.

Likewise, the claims representative may not offer to pay lost wages the claimant has incurred. Rather, the claims representative will explain that the client can use his sick leave time or his vacation time.

The claims representative may also not offer to pay medical bills incurred by the claimant as a result of the accident that involved the insured. He may

tell the claimant to use his own auto medical pay or his employer's accident and health policy.

18. **Professional Time Defense:** If the claims representative learns that the claimant is a doctor, dentist, lawyer, practitioner or a small business person, he may surmise that these categories of people probably can't afford the time to go to trial. Most of the people in the above categories cannot afford to shut down their business for enough time to litigate damages. Their time is too valuable, and therefore, they may accept a lesser sum of money for their claim.

19. **Hardship Defense:** A claims representative may want to determine whether the claimant has been or is unemployed. Usually a lower settlement amount will be accepted if there is an immediate need for money. The principle is also applicable to poor people.

20. **Jury Appeal:** Learning something about the claimant and determining whether he is wealthy or a landlord is advantageous to a claims representative. Usually juries do not like these classes of people and will not award large settlements.

21. **Terminal Illness:** The claims representative might also investigate the condition of the claimant's health and determine if he is suffering from an incurable disease. If he has a catastrophic health problem, would he outlive lengthy litigation and collect damages? It is a general rule that the general damages for pain and suffering die with the claimant. Those damages are personal and cannot be claimed by a survivor (or an heir).

22. **Internal Policy:** Using the lowball technique, the claims representative informs the claimant that the insurance company's internal policy is that certain damages will not be considered. Such a policy is usually a direct violation of good faith claims practices. The following examples highlight some of the damages that the claims representative may insist are not covered.

- **Lost Wages**—Wages lost by the claimant due to having to take time off from work to secure estimates of damage for his vehicle, delivering his vehicle to a body shop for repairs, and picking up the vehicle after repairs have been completed. These are proximate cause damages and should be considered by an insurance company acting in good faith.

- **Transportation Costs**—Transportation costs to and from the claimant's doctor's office and other