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Past Sins

History of Fraudulent Claims May Be Admissible

By Michael M. Pollak

It is not unusual for a dishonest insured to submit a series of fraudulent claims over the years. Some claims, such as burglaries, arson fires and boat sinkings, can be staged and are difficult for the insurance carrier to disprove.

It is often more cost-effective for insurance carriers to pay mysterious claims, particularly if they are small, than to investigate them thoroughly. There have been instances of insureds submitting more than a dozen claims to the same carrier, all of which were suspicious. At some point, after the claims have mounted, an insurance carrier will say, "Enough is enough." If there is strong evidence that the claim in question is fraudulent, the carrier will deny that claim based on an intentional material misrepresentation. See *Cummings v Fire Ins. Exchange*, 202 Cal.App.3d 1407 (1988).

However, the insured may be persistent. Such a person often can find an attorney to file an insurance bad faith lawsuit against the carrier. In defending a lawsuit brought by an insured with a history of fraudulent claims, the challenge for the attorney representing the carrier is to get those prior claims into evidence. If the attorney is able to introduce evidence of the insured's pattern of fraudulent claims, it will be much easier to prove that the claim that is the subject of the complaint is fraudulent.

There are at least four possible ways to get prior claims into evidence in a bad faith case. The first is through the affirmative defense of offset, pleaded in the answer to the plaintiff's complaint. In effect, this defense is the equivalent of a cross-complaint that does not seek affirmative relief but only seeks to minimize or extinguish the damages sought in the plaintiff's complaint. Code of Civil Procedure Section 431.70 authorizes an offset defense even if the claim that is the subject of the offset would, at the time of filing the answer, be barred by the statute of limitations. The attorney representing the carrier needs to plead the offset defense in detail. This requires knowledge of the facts of the prior claims early in the litigation, when the attorney files the answer.

The advantage of an offset affirmative defense is that evidence of the prior claims becomes admissible for all purposes. Thus, the jury gets to hear not only the fact of the prior claims, but also the

specifics of them in as much detail as can be presented concerning the claim that is the subject of the plaintiff's complaint.

The problem for the carrier's attorney is that if the prior claims were not investigated thoroughly during those claims, with the passage of time, the evidence may be difficult to obtain. If the plaintiff's attorney argues that the carrier should have more carefully investigated the prior claims at the time, the carrier's attorney can point out that a more thorough investigation only would have shown that the prior claims were fraudulent and that the carrier should not be penalized for having trusted its insured in the prior claims.

The second possible way to introduce evidence of prior claims comes from Evidence Code Section 1101. Section 1101(a) states that evidence of a person's character is inadmissible when offered to prove conduct. However, Section 1101(b) states that the section does not prohibit evidence that a person committed an act when relevant to prove a fact, such as motive, opportunity, intent, preparation, plan or knowledge, other than the person's disposition to commit such an act. (Federal Rule of Evidence 404 is to the same effect.)

Although Section 1101(a) is the rule, and Section 1101(b) is an exception, "[t]he cases illustrating the exceptions are so much more numerous than those applying the exclusionary rule that it has been suggested that the true rule could be more realistically stated in affirmative form: that evidence of other crimes is admissible whenever it is relevant to a material issue, and that it should be excluded only where its sole purpose and effect is to show the defendant's bad moral character (disposition to commit crime)." Bernard Witkin, "California Evidence: Circumstantial Evidence," Section 357 (3rd 1999). Witkin also points out that the same rule and exclusion apply equally to civil cases, not just to criminal cases. Witkin, Section 385.

Evidence of a party's prior claims, whether phony or not, is admissible to show motive, intent, means and opportunity to commit insurance fraud. *People v Furgerson*, 209 Cal.App.2d 387 (1962); *People v Foster*, 114 Cal.App.3d 421 (1981); *People v Maler*, 23 Cal.App.3d 973 (1972). In *People v Rainville*, 39 Cal.App.3d 982 (1974), evidence of past welfare fraud was admissible to show that the defendant was willing to engage in dishonest conduct.

The circumstances of the prior claims, not just the fact of them, are admissible. *Rainville*, *People v Thompson*, 27 Cal.3d 303 (1980), disapproved on other grounds, *People v Williams*, 44 Cal.3d 883 (1988).

Also, "The requirement for a distinctive modus operandi does not apply when the prior and charged acts involve the same perpetrator and the same victim." *Rufb v Simpson*, 86 Cal.App.4th 573 (2001).

There are numerous cases outside the insurance area where courts have allowed evidence of prior frauds under Section 1101. See, e.g., *Liberty Bank v Nonnenmann*, 96 Cal.App. 478 (1929); *Janisse v Winston Investment Co.*, 154 Cal.App.2d 580 (1957); *Atkins Corp. v Tourny*, 6 Cal.2d 206 (1936); *Wright v Rogers*, 172 Cal.App.2d 349 (1959). Section 1101(b) is sometimes the best reason to seek introduction of prior claims, particularly where the defense attorney cannot prove that the prior claims were fraudulent: The defense attorney can admit the fact of prior claims without having to prove that they were fraudulent, and the evidence can be used to show more than just the claim representative's state of mind. The insured will then have to explain how he or she happened to have so many mysterious prior claims.

A third opportunity to raise the subject of prior claims arises if the prior claims are relevant to a specific issue in the case. The most common instance is where an insured conceals prior claims on his or her insurance policy application. Concealment of a prior claim, if material, justifies a rescission (*Imperial Cas. and Indem. Co. v Sogomonian*, 198 Cal.App.3d 169 (1988)) or a claim denial (*Resure Inc. v Superior Court*, 42 Cal.App.4th 156 (1996)). If concealment on the application is an issue, it enables the attorney to get into evidence the fact of the prior claims and enough evidence to show that they were material, but usually not the details of the prior claims.

Finally, evidence of an insured's prior claims is admissible in a bad faith action to show the state of mind of the insurance carrier's claims personnel, provided that the information was considered while the claim was being investigated. However, the evidence is limited to that purpose and is not admissible as to whether the claim in question was fraudulent.

The defense attorney can expect that the insured's attorney will seek exclusion of the evidence by arguing that the prejudicial effect outweighs its probative value. While this is an issue with respect to Section 1101, it is usually not an issue as to the other possible means of introducing evidence of prior claims. For example, where offset is an issue, the insured cannot bar evidence of his prior claims to block the carrier's right to prove that it paid a prior phony claim simply because that would prejudice the insured on his complaint.

Michael M. Pollak is a partner of Pollak, Vida & Fisher in Los Angeles.