

The Trial Lawyer

May 31, 2000

By Frank N. Darras and David T. Bamberger

## **How to Pick an Insurance Bad Faith Case and Win It**

**It's finally happened. After all these years of fender-bender and collection cases, someone has walked in your door with what appears to be an ironclad bad faith suit. He's told you all about how his insurance company denied a claim that clearly should have been covered, and he wants you to take on the insurance company.**

The prospective client hasn't even finished telling you his story, and your head is already dizzy with visions of a seven-figure judgment against a deep-pocket defendant that a jury is sure to despise. But before you spend your share of the recovery, you may want to ask some hard questions about your potential client and his case. What kind of plaintiff will he be? How strong are his witnesses? Will you be able to get the case to a jury, or will it be shipped to arbitration (or, worse yet, be preempted by ERISA or Medicare)? And even if you're able to keep the case in the courts, can you come up with a trial theme that will inspire a jury to award a substantial verdict?

This article is designed to help you answer these questions and others like them, and to increase the likelihood that your decision on whether to accept or reject the case will be a good one.

### **PRE-SUIT CONSIDERATIONS -SHOULD YOU TAKE THE CASE?**

At the risk of stating the obvious, the first step is to get to know your prospective client. What is your first impression? Do you believe his story? Does he appear to be forthright? Is he honest or evasive? For example, were the representations on his policy application true, complete and accurate? If his answers to medical, occupational or financial questions on the application do not fully comport with the facts, the carrier will argue that he lied to obtain the policy and thus that his claimed injury or sickness cannot be believed either. And the jury may in fact discredit him if he lied or exaggerated when he first dealt with the insurance company.

You also need to evaluate whether your potential client is articulate and likable enough to be an outstanding witness at trial. Even if he is, does he have the emotional stamina to pursue protracted litigation and handle a trial? And does he have the financial wherewithal to litigate and the staying power to survive the appeal process, or is he looking for a quick settlement?