

Navigating the SIU Minefield: Strategies for Success

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The Claim – The Challenge

- Fire loss & explosion
- Husband on scene / injured
- Fire Dept. says fire “suspicious”
- House for sale (possible foreclosure)
- Husband and wife finalizing contentious divorce
- Please call agent before contacting insureds



The Claim – The Exposures...

- If you mess this up...



The Claim – **The Exposures...**





Who Decides?

- JUROR PERCEPTIONS AND ATTITUDES
 - Hollywood & Media “conditioning” re the industry
 - How Jurors perceive “fraud”
 - Insured’s / juror’s expectations regarding timing (e.g. to claim resolution)
 - SIU claims are **especially dangerous**

Your “Guiding Lights”

YOU are “Creating Evidence”



The Power of “Please” and “Thank You”



Your "Guiding Lights"

You are a Truth Seeker...



Your “Guiding Lights”

Key Forks in the Road



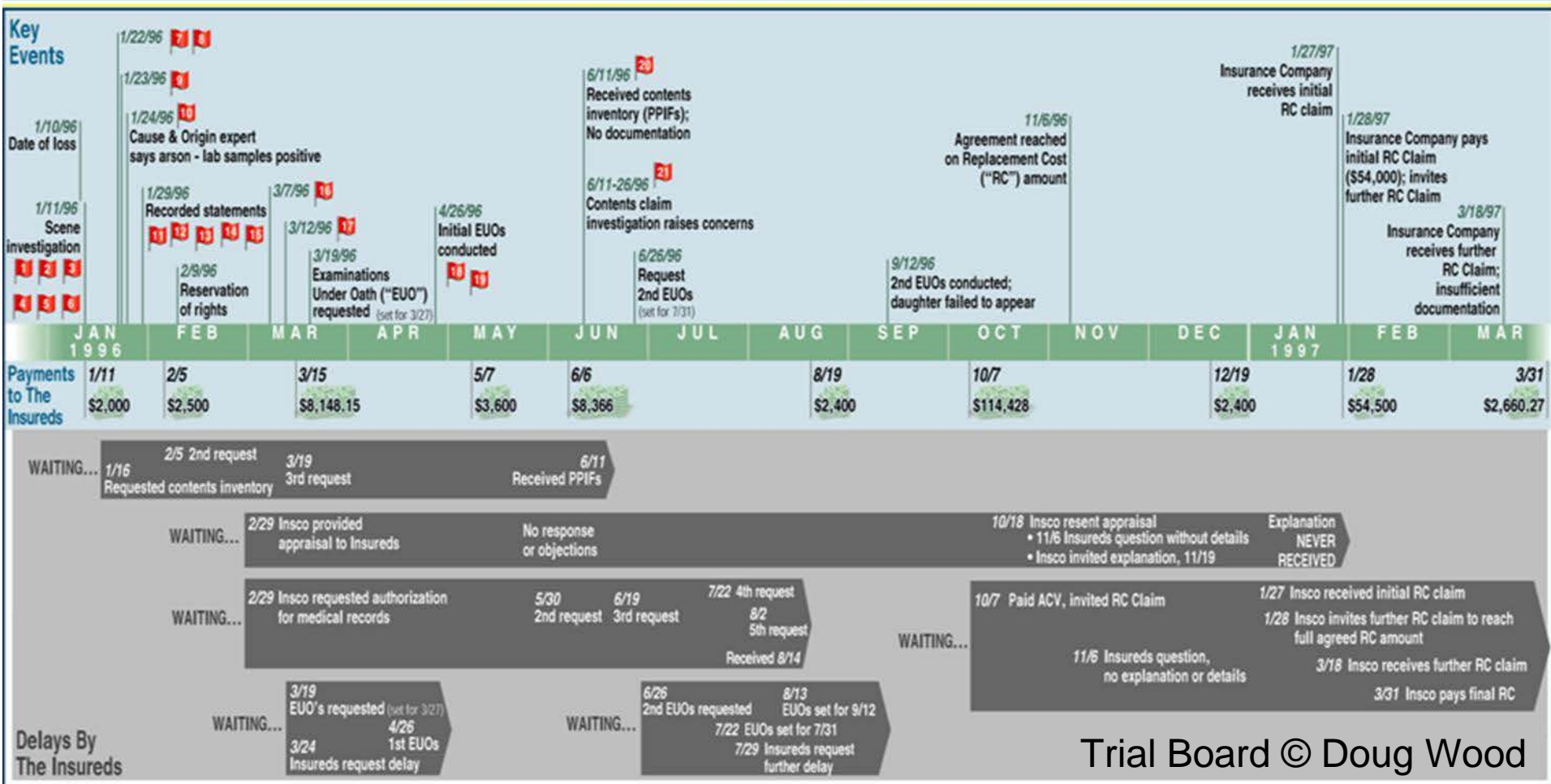
Your “Guiding Lights”

The Insured is In Control
of the Timing



The Insured is In Control of the Timing

WAS INSURANCE COMPANY REASONABLE?





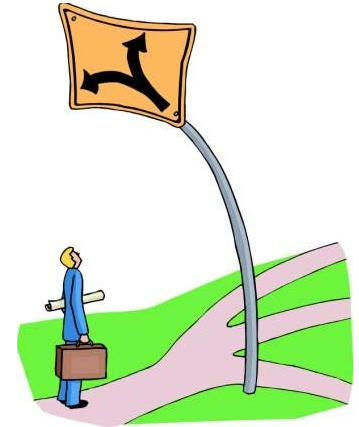
The Agent – Friend or Foe?

- Broker? Independent Agent? Captive Agent?
- Even if an Agent of the company...
- They are also a salesperson (commission)
- The agent as a conduit
- The agency staff person – often a gold mine
- Rescission vs. Concealment or Fraud Condition

Reservation of Rights Letters

"Crossroad"

- **When** should you send a RofR letter?
 - The "test"
 - Why? And, why then?
 - Application of "the test" is a fuzzy continuum
- Content?
- How much detail is required / desirable?



Reservation of Rights Letters

- Another opportunity to communicate effectively (“Creating Evidence”)
 - RofR letters drafted by lawyers / “Pattern letters” - issues
 - “the Frankenstein letter”
 - Tone & substance
 - Lessons apply equally well to non-SIU coverage questions
 - Different jurisdictions / implications





Arson / Fraud Reporting & Immunity Statutes

- Do you know whether, or when, you are required to file a Fraud Report?
 - Does that answer change, depending on what type of claim you are working?
- Do you know who you must report to, and/or who you are permitted to share information with?
- What do you provide, what do you say, and what do you not provide and/or say?
- Do you have “immunity” for filing a Fraud Report?
 - Are all the Immunity Statutes the same?



INSURANCE FRAUDS PREVENTION ACT CIC § 1871 *et seq.*

- "the business of insurance involves many transactions which have potential for abuse and illegal activities...."
- (and see Cal. Penal Code § 550)



INSURANCE FRAUDS PREVENTION ACT

CIC § 1871 *et seq.*

Legislative Goals (of the Act):

- more **effectively investigate and discover insurance frauds,**
- **halt fraudulent activities,** and
- **assist and receive assistance from federal, state, local, and administrative law enforcement agencies** in prosecution of persons who are parties in insurance frauds."



INSURANCE FRAUDS PREVENTION ACT CIC § 1871 *et seq.*

- Created the **Bureau of Fraudulent Claims** (CIC § 1872)
- Mandated filing various kinds of **Suspected Fraudulent Claim Reports**



T – E – C – I...


TRIGGER?

Is the reporting duty **MANDATORY** or **PERMISSIVE**?

ENTITY?

CONTENT?

IMMUNITY?



DOI BUREAU OF
FRAUDULENT CLAIMS REPORT (eFD-1)
(CIC § 1872.4)

T RIGGER?

- “Any company licensed to write insurance in this state that believes that **a fraudulent claim *is being made*** shall,
- within 60 days ***after determination*** by the insurer that the claim appears to be a fraudulent claim. . . .”



eFD-1 T RIGGER?

- INSURERS STRESS AND RELY ON...
- when an insurer “believes that a fraudulent claim is being made”
- “after determination by the insurer that the claim appears to be a fraudulent claim”



eFD-1 T RIGGER?

-
- INSUREDS STRESS AND RELY ON...
 - report shall be made “within 60 days after determination by the insurer that the claim appears to be a fraudulent claim” and
 - when the company “believes that a fraudulent claim is being made”



DANGER ZONE!!

eFD-1 TRIGGER

- CIC § 1872.4 - EXCEPTIONS
- “The insurer’s initial investigation indicated a potentially fraudulent claim **but further investigation revealed that it was not fraudulent**” (CIC § 1872.4(b)(1).)
- “The insurer and the claimant have reached agreement as to the amount of the claim **and the insurer does not have reasonable grounds to believe that claim to be fraudulent**” (CIC § 1872.4(b)(1).)



DANGER ZONE!!

eFD-1 T RIGGER

- **EXPECT THE COURTS TO ...**
- NOT be consistent
- unclear, dangerously ambiguous statute – leads to:
- **INCONSISTENT APPLICATION & UNCERTAINTY...**

Reporting / Info Sharing

CONTENT - DANGER ZONE!!

How do you GUARD AGAINST the dangers?

- “Creating Evidence”
- “Echo” the statutory reporting “trigger” language
 - Apply your facts to that reporting “trigger”
 - TIMING IS IMPORTANT (Assess: Risks vs. Benefits)



Reporting / Info Sharing

CONTENT - **DANGER ZONE!!**

How do you GUARD AGAINST the dangers?

- Carefully draft an **artful cover letter**:
 - Expressly reference and state your **reliance on the mandating statute** and relevant **immunity statutes**
 - **OBJECTIVE FACTS, NEUTRALLY PRESENTED**
 - Include inculpatory AND exculpatory evidence?
 - Avoid overly broad, generalized conclusions
 - Appoint the **right person to sign** the report

CONTENT

*If submitting before
a claim decision has been made:*

- Emphasize **goal** is to reach **fair, reasonable, and appropriate resolution** of the claim
- **Consistent with policy and law**
- Make clear **investigation continuing**
- **No conclusions yet** reached
- Emphasize **intent to objectively collect** and
- **Thoroughly and fairly evaluate**
- **All** relevant evidence



IMMUNITY?

The Immunity Statutes

- Do you have “immunity” for filing the eFD-1?
 - If so, how much?



Immunity for your eFD-1?

- such confidential reports "shall not be subject to public inspection" and
- "shall not be subject to subpoena or subpoena *duces tecum*". (CIC §1872.3)
- the filing of such confidential reports shall not subject insurers to civil liability, provided no malice is involved (at least theoretically....) (CIC §§ 1872.5 and CCC § 47)



Immunity for your eFD-1?

- BUT... **plaintiff's counsel** will:
 - Argue they are not trying to hold the insurer liable “for filing the report...” ..., but that instead they are “only” proffering the **evidence to show the company's state of mind, and unreasonable conduct**, in the “bad faith” case
 - Proffer such reports as **evidence of a “determination”** by the company, as of filing the eFD-1, **that the claim “is” fraudulent**.
 - Argue that the report is evidence that **company had made up its mind** by that point, and all further action on the file was to develop proof to support such a defense (rather than a continuing objective search for the truth).



DANGER! Impact of the CIC § 1872.4 EXCEPTIONS on your Immunity

- Expect plaintiff's counsel to argue those eFD-1 TRIGGER EXCEPTIONS - - Remember the exceptions? You don't have to report IF:
 - “The insurer’s initial investigation indicated a potentially fraudulent claim *but further investigation revealed that it was not fraudulent*” (CIC § 1872.4(b)(1).)
 - “The insurer and the claimant have reached agreement as to the amount of the claim *and the insurer does not have reasonable grounds to believe that claim to be fraudulent*” (CIC § 1872.4(b)(1).)
- They will argue that *there's no point to including these exceptions* in the statute *if the “TRIGGER” was mere “belief” or “suspicion”*...



What are you supposed to report? And, to whom?

- DOI Bureau Of Fraudulent Claims Report (e-FD1, CIC § 1872.4)
- Motor Vehicle Ins. Fraud (CIC § 1874 *et seq.*)
- Arson Fire Report (CIC § 1875.2)
- Worker's Comp Fraud (CIC § 1877.3)
- Mandatory? – or – Permissive?



Permissive and Mandatory Info Sharing

- CIC § 791.13
- To Authorized Governmental Agencies
(CIC § 1873 *et seq.*)
- Mandatory? – or – Permissive?

Working with the “Authorities”

How to Strike an Appropriate Balance

- Remain objective and focused on your goal

- **You Are Not a Cop, You Are a Truth Seeker**



- Prevent even the appearance of collusion or conspiracy
- Expressly insist / rely upon the reporting (and immunity) statutes
- Just doing your civic duty – cooperating per those statutes

How to Strike an Appropriate Balance

- Prevent even the appearance of premature conclusions
- Communicate clearly, carefully, and effectively
- Confirm everything important in writing
- **Remember: You are “Creating Evidence”**





What Do You Do If...

- A public official says / writes something that threatens to destroy that balance?
 - *Examples / Discussion*



BAD FAITH "SET UP" LETTERS

How to recognize when...



...you're being "set up."

- The obvious "set up"
- The more subtle (dangerous) "set up"

Photos courtesy of FCA



Bad Faith “Set Up” Letters

- Set up red flags (letters that question or attack):
 - Your motive(s)
 - Your intentions
 - Your treatment of your insured
 - The basis for why you’re doing what you’re doing
 - How you’re doing what you’re doing
 - The hardships you’re causing the insured...

Bad Faith “Set Up” Letters Crafting the Response

- **REMEMBER YOUR “GUIDING LIGHTS”**
 - 1) You are a Truth Seeker...
 - 1) You are “Creating Evidence” as you Work the File
 - a) The Power of “Please” and “Thank You”
 - 2) Key Forks in the Road
 - 1) The Insured is In Control of the Timing

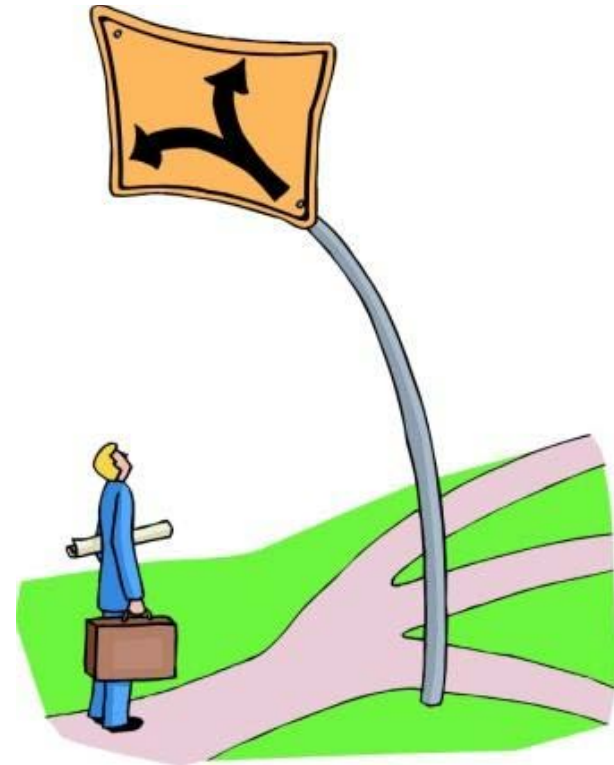


Bad Faith “Set Up”

- Your earlier communications provide the seeds
 - Phone communications / complaints
 - Email communications alleging poor / unfair treatment, etc.
 - Insured direct communications are more dangerous than the lawyer “set up” letters

Bad Faith "Set Up"

- *Am I (is my client, the insured) a suspect?*
- *Tell me why you haven't paid this claim*
 - *i.e. why you are conducting this witch hunt of an investigation...?*



Bad Faith “Set Up” Letters

Crafting the Response

- There’s more to this than a clear substantive response
- YOU HAVE THE UNIQUE OPPORTUNITY TO “CREATE EVIDENCE” AS YOU GO ALONG
 - CAN BE HELPFUL OR HARMFUL...
 - “Please” and “thank you”
 - Clear, effective, non-legal, non-form letter



Crafting the “Good Faith” Response

- “CREATING EVIDENCE” AS YOU GO ALONG
 - Empathetic, truth-seeking-oriented responses
 - Objective, reasonable, articulable basis for why you’re doing what you’re doing
 - Chronology as an affirmative tool
 - Reference prior Good Faith explanations of reasonable basis for investigative actions...





Crafting the “Good Faith” Response

- EXAMPLE:

*Am I
(is my client, the insured)
a suspect?*



Crafting the “Good Faith” Response

Am I (is my client, the insured) a suspect?

- Simple “yes” or “no” hurts you...
- Possible elements of a better answer?

Is the insured a suspect?

Possible elements of a better answer:

- Incendiary fire
- Thus, SOMEONE intentionally set this fire

Is the insured a suspect?

Possible elements of a better answer:

- Policy / coverage provides “x”
 - (referencing “Intentional Act” or “Concealment or Fraud” exclusions / conditions, etc.)
- To resolve this / these coverage question(s) company must determine...
 - Whether any insured intentionally caused this loss
 - Whether any insured intentionally misrepresented...

Is the insured a suspect?

Possible elements of a better answer:

- Therefore must gather facts pertinent to that question
 - w/o regard of where that may lead us
 - Both “inculpatory” and “exculpatory”
- Just the facts

Is the insured a suspect?

Possible elements of a better answer:

- Only reasonable thing to do given the presently known facts is...

(to investigate and resolve these coverage questions...)
- And, in order to move this claim forward we need... (repeat your list of needed docs / info)

Bad Faith "Set Up"

- *We understand that you have been in contact with FD / PD...*

- *Please confirm:*

- *fact of meeting*
- *who was there*
- *what was discussed*
- *what documents provided to them*
- *what docs / info provided by them*
- *what docs reviewed by you but not provided by them*
- *etc.*





Bad Faith “Set Up”

Contact with FD / PD...

- *...what did they tell you?*
 - *What have you learned from them bearing on your investigation?*
- *Please provide copies of all materials you have obtained from the FD / PD...*



Bad Faith “Set Up”

Contact with FD / PD...

- *Please provide copies of all statements (from insured / all witnesses)...*
- *Please provide all docs from other sources that form the basis for your RofR, request for EUO, etc....*
- *Please provide all your investigative reports (O&C, forensic accounting, engineers, etc.)...*



Bad Faith “Set Up”

- *My client has passed a polygraph, no basis to continue...*
- *Copies of all docs received using the client's Authorization...*
- *Copies of all “Claim Related” docs (vs. investigative materials)*

OPEN, OBJECTIVE MINDSET = GOOD FAITH

“It is a capital mistake to theorize before one has data; insensibly one begins to twist facts to suit theories, instead of theories to suit facts!”

Sherlock Holmes



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Questions?

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