

Chairman's Corner

by Daniel C. Free, J.D., CPCU, ARM



■ **Daniel C. Free, J.D., CPCU, ARM**, is president and general counsel of Insurance Audit & Inspection Company, an independent insurance and risk management consulting organization founded in 1901 by his great-grandfather. He is past president of the Society of Risk Management Consultants (SRMC), an international association of independent insurance advisors.

Free is also a founding member of the CPCU Society's CLEW Interest Group.

Summer is now in full swing, so this will be my last chance to remind you that the deadline for submitting your nomination for this year's Gottheimer Award is August 20.

The award is named in honor and memory of our friend and CLEW

founding member, **George M. Gottheimer, CPCU**. It is presented annually to a CLEW Interest Group member who has made an outstanding contribution to the field of insurance, insurance litigation, risk management consulting, or service as an expert witness. The 2008 Gottheimer Award will be announced and presented at the CPCU Society's Annual Meeting and Seminars in Philadelphia.

Please e-mail your nomination, which should describe the nominee's contributions in detail, to **Donn McVeigh, CPCU**, at dmcveigh@crcinternational.net. All submissions will be reviewed by Donn, **Jim Robertson, CPCU**, and yours truly; we look forward to having a good number of candidates from which to choose.

Late breaking news — the CLEW Interest Group won Gold with

Distinction this year under the 2008 Circle of Excellence recognition program! As we move forward, one of our many ongoing challenges will continue to be finding out about the activities you have participated in with your local chapters.

As you complete each one of your activities, please contact **Vincent "Chip" Boylan, CPCU**, at vincent.boyland@hrh.com, and let him know what you have been working on. We'll need everyone's input for the 2009 Circle of Excellence submission by June 30, 2009.

Your collective efforts have helped us win Gold status in the past, and we need to keep the momentum going. Special thanks to Chip for compiling the information and submitting the paperwork. The results speak for themselves. ■

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Mea Culpa, Mea Culpa, CLEWa Culpa . . .

by Vincent “Chip” Boylan, CPCU

October 8, 1871: Mrs. O’Leary’s cow kicks over the oil lantern she left in her barn, starting the Great Chicago Fire that devastated much of the city.

July 17, 1938: Doug “Wrong Way” Corrigan misreads his compass and flies from New York to Ireland instead of to his intended destination — California.

April 3, 2008: The discussion board on the CLEW Web site (established a year earlier by ~~Chip Boylan~~ an unnamed CLEW committee member) assaults CLEW members with a bombardment of unwanted e-mail.

Wikipedia defines the perfect storm as “the simultaneous occurrence of events which, taken individually, would be far less powerful than the result of their chance combination.” The calamities cited above are excellent examples of such storms. (For those who are tempted to suggest an Irish pattern to these mishaps — O’Leary, Corrigan and Boylan — please see Thomas Cahill’s *How The Irish Saved Civilization*.)

The subject of this article, and the source of considerable embarrassment to the CLEW Interest Group, centers on the most recent of these three “storms.” First, on behalf of CLEW’s Interest Group committee, sincere apologies go to all CLEW members for the inconvenience (havoc?) created by our discussion board in early April. We will work hard to avoid any reoccurrence of our Web site meltdown.

The following explanation details what happened and discusses our next steps:

The Background

The discussion board was installed on the CLEW Web site in early 2007 to give CLEW members the opportunity to query their peers and the benefit of sharing ideas and opinions. All CLEW members were automatically enrolled (mistake #1) and selected to receive individual e-mails each time there was a new posting (mistake #2).

Regrettably (or so it seemed), initially the response of CLEW members was underwhelming. There was virtually no traffic on the discussion board for the first year — until less than two weeks after the Ides of March 2008.

Then, in late March a question was posted on the discussion board regarding professional liability insurance for expert witnesses, which generated more than a dozen responses. We were finally off and running. Unfortunately, we’d soon be sprinting and gasping for breath.

April 3, 2008 — Timeline

8:42 a.m. A builder’s risk question is posted on the discussion board, our second activity of the week. Things are looking up!

8:57–9:57 a.m. Two responses are posted to the builder’s risk question; now we’re in business.

12:38 p.m. Hallelujah, our second question of the day arrives. This question pertains to the general liability workers compensation exclusion and generates three responses in the next 30 minutes and three later in the day. Now we’re really humming along! (Of course, each of the questions and each of the responses went to every CLEW member. See mistakes #1 and #2)

2:03 p.m. The first request to be deleted from the discussion board arrives. Who is this party pooper? (Again, this response also goes to all CLEW members.)

2:05–2:35 p.m. Danger Will Robinson! Fifteen requests to be removed from the discussion board pour in over a 30-minute span, with each going to everyone!

2:35–7 p.m. The levee has broken! A tide of more than 35 additional demands for relief flow in (and out to everyone)! The mob is growing ugly. Choice comments include:

- “Can someone get control of this thing?”

- “Please remove my name as well. I am being inundated with e-mails!”
- “There is absolutely no excuse for the CPCU Society to subject members to this abuse! Straighten it out or lose members!”
- “Whoever created this mess should fix it. I cannot find my real mail.”

From 3 p.m. until well into the evening, the CLEW webmaster removes understandably disgruntled members from the discussion board. Unfortunately, this process can only be accomplished one member at a time. The requests arrive faster than the relief effort, and the webmaster has become the web slave!

By the end of the day, a slight reversal of misfortune — postings begin to arrive actually praising the CLEW discussion board and encouraging its use. An excerpt from one follows:

I thought the whole idea of CPCU and joining a group like CLEW was to have a network of peers with whom we could discuss ideas, ask questions, and gain knowledge ... I look forward to the next question from any CLEW member. Don’t you DARE remove me from this list!

In the end, however, such sentiments represented the minority view, and on Friday morning, April 4, the Society closed down the CLEW discussion board, and the crisis was at an end.

The Future of the CLEW Discussion Board

While a number of CLEW members wish to have access to, and participate in, a discussion board, the lesson of April 3, 2008, is abundantly clear — many other members do not want these options. Therefore, by the time you receive this edition of the CLEW newsletter:

- All CLEW members will have received an electronic invitation to subscribe to the reincarnated CLEW discussion board. No automatic enrollment this time (avoiding mistake #1). Unless you

subscribe, you will never receive an e-mail via the CLEW discussion board.

- CLEW members must choose among the following options with regard to how discussion board postings will be delivered (avoiding mistake #2):
 - E-mails each time there is a new posting.
 - Daily full-text digests (meaning one message a day from the discussion board).
 - No e-mail messages; members must visit the CLEW Web site to view postings.

The more members who participate, the more useful the discussion board will become. So please consider giving it another chance, even if you were shell-shocked on April 3.

Conclusion

Again, please accept our apology for the discussion board troubles of April 3. We believe that the discussion board is an extremely valuable resource — the thoughts and ideas of fellow CLEW members. We encourage you to consider enrolling in the new discussion board in one of the three ways that works best for you.

If any CLEW member wishes to talk about the discussion board site further, please catch up with me at the Society's Annual Meeting and Seminars, September 6–9, in Philadelphia. I'm easy to spot; look for a guy who is:

- Five feet two inches tall. (No, don't listen to anyone who tells you I'm about six feet tall.)
- 350 pounds (not 165 lbs.).
- Bald (no grey hair).
- Always blissful and serene (not wide eyed and constantly shrieking, *Lions and tigers and Web sites! Oh, my! Lions and tigers and Web sites! Oh, my! Lions and tigers and . . .*) ■

Mock Trial: | The Truth Revealed about Noah Omitian and the Liberty Bell

8 – 11:35 a.m. • September 7, 2008 • Philadelphia, PA
Philadelphia Marriott Downtown

The 2008 edition of the mock trial will feature a property and liability loss involving both first- and third-party coverages. It will be alleged during the trial that the broker was negligent in failing to place insurance for the property risk at issue. Attendees can view the aftermath of the trial at a companion seminar presented by the Claims and Agent & Broker Interest Groups on Tuesday.
Filed for CE credits.

Developed by the Consulting, Litigation, & Expert Witness Interest Group.

Presenters: Stanley L. Lipshultz, J.D., CPCU, Interisk Limited; Nancy D. Adams, J.D., CPCU, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; Gregory G. Deimling, CPCU, Malecki Deimling Nielander & Associates, LLC; Robert L. Siems, J.D., CPCU; The Mighty CLEW Players

The mock trial is being generously sponsored by the Philadelphia Chapter.



Mark your calendar today, and make plans to attend this exciting event!
Online registration is available at www.cpcusociety.org.



Photo courtesy of the Philadelphia Convention & Visitors Bureau and Jim McWilliams.

Editor's Notes

by Jean E. Lucey, CPCU



■ **Jean E. Lucey, CPCU**, earned her undergraduate degree in English and graduate degree in library science from the State University of New York at Albany. After a brief stint as a public school librarian, she spent six years at an independent insurance agency outside of Albany, during which time she obtained her broker's license and learned that insurance could be interesting.

Serving as director of the Insurance Library Association of Boston since 1980, Lucey attained her CPCU designation in 1986. She is a member of the CPCU Society's Consulting, Litigation, & Expert Witness Interest Group Committee.

For the latest in CLEW Interest Group news, I hope you read "Chairman's Corner" by **Dan Free** and the article by **Chip Boylan** (otherwise known as "unnamed CLEW Committee member") on the CLEW discussion board.

The Consulting, Litigation, & Expert Witness Interest Group certainly is lucky to have **Donald O. Johnson, J.D., CPCU, LL.M.**, as a member. And as you will discover from his member profile, Johnson's background and education have prepared him well for his specialized insurance practice.

We all benefit from his thoughtful observations on what is right and what is wrong in the insurance and legal fields, and from his insightful consideration of special concerns, such as deposing a non-English speaking witness, which may arise during litigation. And Johnson's presentation "Leveling the Playing Field: Deposition Preparation for CPCUs" has been extremely well received by grateful CPCU Society chapters in Maryland, Virginia and Pennsylvania.

Thomas E. Peisch and **Christina M. Licursi** give careful thought to the immunities available (and not available) to witnesses, especially expert witnesses, in an article that originally appeared in the March 2008 issue of *For the Defense*, a publication of the Defense Research Institute. The "EW" part of the CLEW Interest Group may gain important perspectives from their discussion, which provides a balanced approach to the theoretical and practical concerns for practitioners.

An interesting Massachusetts case revolving around a parent corporation's liability (or lack of same) for an environmental contamination caused by a subsidiary is artfully described and discussed by **Jennifer Sulla** of the law firm Mintz, Levin, Cohn, Glovsky and Popeo P.C. You never know when a precedent in one court may show up in your court!

Barry Zalma's advice to insurance companies on how the competent retention and use of expert witnesses may defuse claimants' allegations of bad faith should be heeded. Those insurers who are cognizant of the "genuine dispute" and "fairly debatable" doctrines, and who respond to claims with these doctrines firmly in mind, will not only protect themselves against bad faith awards, but also will establish important "best practices" guidelines in the claims adjustment arena.

We are very fortunate to have another question and answer piece from CLEW Committee member **Donald S. Malecki, CPCU**. He is the first person I turn to when questions arise on a variety of subjects; however, questions relating to additional insured issues fall into one of his distinct specialties.

Again, speaking of people on "the outside" of our industry, who among them would possibly know that a whole book entitled *The Additional Insured Book* (5th edition, 2004), published by the International Risk Management Institute (IRMI), is regularly consulted by patrons of the Insurance Library Association of Boston and many, many others? Unquestionably, it is a world of specialization! ■

Member Profile

Donald O. Johnson, J.D., CPCU, LL.M.



■ **Donald O. Johnson, J.D., CPCU, LL.M.**
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Position

Johnson represents insurance companies in insurance coverage litigation and provides insurance coverage counseling at McKenna Long & Aldridge's Washington, D.C. office. Typical clients are insurance companies that generally hire his firm to litigate disagreements involving catastrophic property damage claims, potentially large liability claims, and bad faith claim handling cases.

Education

- Pennsylvania State University, B.A. in political science.
- Temple University, B.B.A. in marketing, summa cum laude.
- Temple University, Certificate in Latin American Studies (program conducted in Spanish).
- University of Miami School of Law, J.D., cum laude.
- Temple University School of Law, LL.M. in trial advocacy, cum laude.
- CPCU, 2005.

Career Background

Johnson began his insurance coverage legal practice at McKenna & Cuneo LLP in 1999, primarily representing policyholders. From 1999 to 2004, he represented clients in a variety of property damage, business interruption and liability insurance litigation cases, including Y2K and World Trade Center disaster-related property damage and business interruption claims and various duty to defend and duty to indemnify cases under CGL, D&O, and other primary and excess liability insurance policies.

In 2005 McKenna & Cuneo merged with an Atlanta firm, becoming McKenna Long & Aldridge LLP, which changed the nature of the firm's insurance practice and Johnson's focus. Since that time he has represented insurers in a variety of catastrophic property damage, business interruption and bad faith cases, including litigated claims arising from Hurricanes Katrina, Rita, Ivan and Francis. He has also represented insurers in insurance coverage litigation involving bodily injury claims and in matters involving claims handling.

CPCU Society Involvement

- CPCU Class of 2005.
- Member of CPCU Society's Diversity Committee; International Interest Group and Consulting, Litigation, & Expert Witness Interest Group.
- Director of the CPCU Society's District of Columbia Chapter.
- Authored "The Business Case for Diversity at the CPCU Society" (viewable at the Society's Web site by clicking on Members, Diversity Committee, and Diversity Resources).

Family

- African-American born and raised in Philadelphia, Pa.
- Father, a blue-collar worker from King William County, Va., and mother, a blue-collar worker and homemaker from Washington, D.C.
- Now resides in Silver Spring, Md., with his wife, Aida, and their two-year-old twins, Kevin and Katherine.

Hobbies and Interests

- Professional basketball, football and boxing fan.
- Foreign languages: Spanish and Portuguese.
- International travel.
- Computer technology (former computer programmer and computer systems analyst).
- Editor of the National Bar Association's Commercial Law Section newsletter.

What is the most interesting aspect of your job? The most frustrating?

The most interesting aspect of my job is uncovering evidence to support my team's theory of the client's case. The most frustrating is dealing with opposing counsel who try to evade or unduly delay fulfilling their evidence production obligations during discovery.

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Member Profile

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What was the most fascinating problem/case you have been involved with? The most challenging?

The most fascinating matter that I have been involved with was the counseling of a client whose building was significantly damaged during the World Trade Center disaster. The eyes of the world were focused on the terrible events that led to our client's loss, and our representation of the client gave our team access to information that was underreported. The same claim also was the most challenging matter that I have been involved with because of the magnitude and complexity of the claim and the fact that it involved the unforgivable loss of so many lives.

What person (or event) had the most influence on your career and why?

My parents have had the most influence on my career because they taught me the value of hard work and how to shrug off adversity.

What is good about the insurance industry? What is bad?

My involvement in the CPCU Society has shown me (former policyholder counsel) that the people who work in the insurance industry exemplify what is best about the industry. What is bad about the insurance industry is its reputation (much like that of attorneys). The CPCU Society can help improve the insurance industry's reputation by spreading the word about its members' ethics and by increasing the number of CPCUs employed in leadership positions in the insurance industry.

What is good and bad about the legal industry?

What is good about the legal industry is that it is a "learned profession." It provides an infinite number of opportunities for people who work in it to learn new, interesting and valuable information. What's more, the legal industry requires continued learning in order to provide quality legal services to clients. More importantly, though, the legal industry provides an opportunity to attorneys and others to help people and organizations in need.

One thing that is bad about the legal industry is that the price of legal services is unaffordable for the great majority of people in this country. This is very unfortunate because attorneys are the keys to the courthouse. Another unfavorable aspect

about the legal industry is the long-standing failure of large- and medium-size law firms to promote diversity among the ranks of their attorneys. Too many firms still seem to be living in the 1950s.

What mistakes do you see carriers, agents, attorneys, witnesses, etc., commonly make?

A mistake that some insurance carriers make is not providing their legal departments with a thorough understanding of the scope and location of the claim and the underwriting information that is available on their computer systems. Under the current Federal Rules of Civil Procedure (and likely under all State Rules of Civil Procedure), all litigants, including insurance carriers, have an obligation to produce certain electronically stored information during discovery.

Legal departments cannot fulfill their obligations if they do not understand the scope and location of the claims and underwriting information on their company's computer systems. Given that discovery is taken in every litigated case, carriers could reduce their litigation costs and avoid production problems during discovery in many cases by bridging the knowledge gap between their IT departments and their legal departments.

Another mistake that insurance carriers and attorneys sometimes make when deposing a witness who will not be testifying in English is using an attorney who does not speak the relevant foreign language to take or defend the deposition. This is especially problematic when the opposing counsel does speak the relevant foreign language. In these situations, the attorney who does not speak the witness's language is completely dependent on an interpreter for a complete and accurate understanding of the witness's testimony.

One problem is that the interpreter does not have a law license and may not grasp all of the nuances in the dialogue between the examining attorney and the witness (or between counsel for the parties). Consequently, the risks of misinterpretation and misunderstanding, which are separate risks, are increased. Another potentially more significant problem is that the opposing counsel who speaks the relevant foreign language may correct misinterpretations and misunderstandings when they hurt his or her client and may not correct them when

they hurt the insurance carrier. Although from an ethical standpoint this shouldn't happen, in practice it can happen.

A mistake that witnesses often make is underestimating the need for thorough deposition preparation. Witnesses assume they know the facts of the case better than the attorneys on either side of the case. What they don't realize is that the examining attorney's superior knowledge about the law and the rules governing depositions usually give the attorney a decided advantage over the witness. In my experience, there is no substitute for thorough deposition preparation.

In an effort to mitigate this imbalance in knowledge, I developed a presentation in 2006 entitled "Leveling the Playing Field: Deposition Preparation for CPCUs," which has been accredited for 2 hours of CPD credit (and 2 hours of CE credit in the state of Delaware). The presentation focuses on the following: the rules governing depositions; the participants; the room layout; typical deposition topics; ways to answer questions and to respond after objections have been made; the power of the examining and the defending attorneys; and the ways to correct mistakes in testimony during and after the depositions. To date, I have given the presentation to members of the CPCU Society's Maryland; Tidewater, Virginia; and Brandywine Valley, Del/PA chapters. I look forward to giving the presentation to members of other chapters in the future.

Where are you headed in your career? What are you going to do next?

I seek to continue increasing my knowledge of insurance law and the principles relevant to the issues that underlie the insurance coverage disputes that I handle, such as construction issues, medical issues, and so forth. Doing so will allow me to continue providing high-quality representation to my clients. As time goes on, I would like to include among the matters that I work on cases/claims that involve insurance coverage issues and one of my other personal interests — Spanish and Portuguese languages and computer technology. ■

Suing Friendly Experts

The Case for Witness Immunity in the Post-Daubert World

by Thomas E. Peisch and Christina M. Licursi

■ **Thomas E. Peisch** is a founder and partner of Conn Kavanaugh Rosenthal Peisch & Ford LLP, of Boston, where his practice is focused on professional liability defense, commercial litigation and white collar/regulatory defense. He is a fellow of the American College of Trial Lawyers and a member of the International Association of Defense Counsel and DRI.

■ **Christina M. Licursi** is a graduate of Northeastern University School of Law and an associate at Conn Kavanaugh.

Editor's note: This article is reprinted with permission from the March 2008 issue of *For the Defense*, a publication of the Defense Research Institute.

Traditionally, witnesses who testify in a legal proceeding enjoy complete immunity from claims arising out of their testimony. See generally W. Page Keaton et al., *Prosser and Keaton on the Law of Torts* § 114, at 817 (5th ed. 1984). The same protections are extended to judges and other court personnel. See generally *Imbler v Pachtman*, 424 U.S. 409, 430 (1976) (prosecutors); *Wilson v Sullivan*, 81 Ga. 238, 7 S.E. 274 (1888) (judges). The public policy reasons for this rule are obvious—witnesses should be encouraged to participate in the legal process and should be undaunted by the fear of claims or lawsuits arising out of their testimony.

Unfortunately, witness immunity principles have not always protected expert witnesses from such claims, even though a variety of procedural mechanisms exist to ensure fairness to all participants in a judicial proceeding. This article will consider various aspects of such claims. It will begin by examining the effects of *Daubert* on the availability of expert witness testimony and will cover the leading cases articulating the immunity to which expert witnesses are entitled. Then, the article will examine a phenomenon

related to the dramatic expansion in the availability of expert evidence—claims for negligence or breach of contract (or both) brought by disgruntled litigants against their own retained experts. The article will discuss some of the theories advanced in these claims, as well as some of the available defenses and how best to assert them on behalf of the expert. The article concludes with a recommendation that expert witnesses should be immunized from such lawsuits in the same way that judges, jurors and court personnel are immunized.

Daubert and its Effects on Expert Witness Testimony

As the Advisory Committee's Note to the applicable Federal Rule of Evidence explains, "[a]n intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge." Fed. R. Evid. 702, advisory committee note. Because of the increase in expertise and specialization in so many fields, expert witnesses are increasingly called upon to clarify, explain and assist on many important issues. There can be little doubt that the significance of expert witness testimony in civil litigation has dramatically increased in the nearly 15 years since the Supreme Court of the United States opinion in *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

In *Daubert*, Justice Blackmun's majority opinion overruled the district court's having excluded expert evidence in a product liability case, an order that had been affirmed by the court of appeals. Prior to *Daubert*, expert witness testimony had been analyzed under the cryptic but familiar "generally accepted" standard articulated 60 years previously in *Frye v United States*, 293 F. 1013 (D.C. Cir. 1923). The *Daubert* decision changed all of that by adopting a more flexible inquiry that was rooted in the Federal Rules of Evidence and focused on the reliability and validity of the scientific

evidence. By abandoning the "generally accepted" test in favor of the more flexible "reliability" test, the Supreme Court loosened the previous restrictions articulated in the *Frye* case. While asserting that trial judges were to act as "gatekeepers," who must consider the reliability of expert testimony so as to keep "junk science" away from fact-finders, the Supreme Court actually worked an expansion in the scope and admissibility of expert testimony. The Court listed several factors that a trial judge might consider when determining whether a theory or methodology is scientifically sound, including whether it can be (and has been) tested, whether it has been subjected to peer review and publication, and whether it is "generally accepted" in the scientific community. *Daubert*, 516 U.S. at 591-96.

In *Kumho Tire Co. v Carmichael*, 526 U.S. 137 (1999), the Court again stressed that the reliability test is "flexible" and held that the *Daubert* "gatekeeping" obligation applies to all expert testimony, including testimony based on "technical" or "other specialized knowledge."

In the aftermath of *Daubert*, virtually every civil lawsuit features at least one expert playing a significant role on liability, damages or frequently both. As one court observed, *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v 14.38 Acres of Land Situated in Leflore, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). One prominent study concluded that although the *Daubert* decision has resulted in increased scrutiny of expert evidence by trial judges and a corresponding increase in instances where expert evidence is excluded, it is unclear whether this has led to more reliable evidence as a general rule. See Lloyd Dixon & Brian Gill, RAND Institute for Civil Justice, *Changes in the Standards*

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Suing Friendly Experts

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for Admitting Expert Evidence in Federal Civil Cases Since the *Daubert* Decision, 61 (2002).

Daubert, *Kumho Tire*, and the cases that have followed have emphasized that the dangers associated with admitting untested or unscientific expert testimony into evidence are best addressed by cross-examination and the presentation of contrary evidence. The end result of all of this is that the role of expert witnesses in civil cases, and the correspondingly increased expectations on the part of litigants as to what experts can and should do, has increased. In virtually all lawsuits, the litigation fortunes of a client literally rise or fall with the viability of his or her experts' opinions and their success in front of the judge or jury.

The Traditional Role of Witness Immunity: The Pre-*Daubert* Landscape

The Supreme Court articulated the salutary benefits of the principle of witness immunity in *Briscoe v LaHue*, 460 U.S. 325 (1983). There, the Court addressed two separate appeals that raised the question of whether witnesses are absolutely immune from liability to adverse parties on the basis of their trial testimony. The Court held that immunity is defined by the function of the individual as a witness in the judicial proceeding. *Id.* The Court reasoned that witnesses might be reluctant to come forward to testify, or might shade their testimony, if they could be liable for their testimony. The Court noted that immunity is needed so that judges, advocates and witnesses could perform their functions without fear of harassment or intimidation. *Id.*

There are two significant appellate court decisions pre-dating *Daubert* that specifically discuss the concept of friendly expert witness liability. *Levine v Wiss and Co.*, 97 N.J. 242, 478 A.2d 397 (1984), involved negligence claims by an unhappy divorce litigant against the accounting firm retained by both

parties to value the husband's interest in a closely-held corporation. The couple agreed that the opinion of the firm would be binding, and, after receiving the firm's report, the couple reached a pretrial settlement. Thereafter, both parties had changes of heart and unsuccessfully moved to vacate the settlement. The husband then sued the accounting firm for negligence and alleged that the firm's negligence in valuing his interest caused him to settle the case on unfavorable terms. *Id.* at 245-46.

In one of the earliest and most comprehensive decisions involving witness immunity as applied to an expert, the Supreme Court of New Jersey refused to apply it to absolve the accounting firm of liability. *Id.* at 246. The court declined to hold that the firm had effectively acted as an arbitrator so as to be shielded from civil liability. Rather, the court pointed to the husband's reasonable expectations that the firm would apply reasonably-competent accounting skills. *Id.* at 248. Although the court recognized that arbitrators, like judges, are generally afforded immunity, the court refused to extend liability to shield experts performing limited professional services that involved neither testimony nor the exercise of judicial discretion. Importantly, the court distinguished between the accounting firm's "appraisal" function and its having acted as a type of arbitrator. *Id.* at 248-9. The opinion suggests that the court might have applied witness immunity to protect the firm had its activities been in the latter category.

Five years later, the Supreme Court of Washington decided the seminal case of *Bruce v Byrne-Stevens & Associates Engineers, Inc.*, 113 Wash. 2d 123, 776 P.2d 666 (1989). In a sharply divided opinion, the court held that the doctrine of witness immunity barred an unhappy litigant from suing his retained engineering expert. The majority reasoned that the policies behind the immunity doctrine, including the encouragement of objective trial

testimony, militated in favor of applying the doctrine. The court rejected the proposition that witness immunity applied only to defamation claims. Finally, the court rejected the notion that a privately retained expert was not entitled to immunity by virtue of his status. In the court's words:

The mere fact that the expert is retained and compensated by a party does not change the fact that, as a witness, he is a participant in a judicial proceeding. It is that status on which judicial immunity rests.

Id. at 669. The court went on to say that the immunity to which an expert witness is entitled applies to the "whole, integral enterprise" of preparing and testifying, *Id.* at 672, and that "absolute immunity extends to acts and statements of experts which arise in the course of or preliminary to judicial proceedings." *Id.* at 673. The court concluded that the protections afforded litigants who retain experts — the oath to testify truthfully, the rigor of cross-examination, and the threat of a perjury charge — were all to which the litigants were entitled. *Id.* at 669-70, 673.

The Erosion of Witness Immunity and the Post-*Daubert* Landscape

The *Bruce* court's reasoning has been followed in only one other case, *Panitz v Behrand*, 632 A.2d 652 (Pa.1993), which was decided a few months after *Daubert*. *Panitz*, in turn, was overruled in 1999 by *LLMD of Michigan, Inc. v Jackson Coors Co.*, 740 A.2d 86 (Pa.1999), so *Bruce* is the only currently viable opinion applying the doctrine of witness immunity to claims against experts.

A number of other opinions since *Bruce* have declined to follow it and expressly ruled out applying witness immunity to claims against friendly experts. *Mattco Forge v Arthur Young, Co.*, 52 Cal. App. 4th 820 (1997); *Murphy v A.A. Mathews*, 841 S.W. 2d. 671 (Mo. 1992); *Boyes-Bogie*

v Horvitz, 14 Mass.L.Rep. 208 (Mass. Super. 2001). A detailed discussion of each of these opinions is beyond the scope of this article. Although each opinion is carefully crafted, each fails to come to grips with the necessity of protecting expert witnesses as recognized by the *Bruce* court.

Causes of Action against Expert Witnesses

While it appears that claims against friendly experts will be more common as the post-*Daubert* world develops, there is a surprising lack of authority in the area. There are only a handful of reported decisions, as noted earlier in this article. However, a review of available law, and this writer's experience in handling the defense of one such case, permits some general comments.

The most common claim asserted by the disgruntled litigant is for simple professional negligence, and the trend appears to be to model these claims after those asserted against professionals such as doctors, lawyers or accountants. In any such claims, the plaintiff must prove (1) that the professional breached a duty owed, and (2) the breach of that duty was the cause in fact and the proximate cause of some actual loss or damage. See Prosser and Keaton on the Law of Torts § 30 (5th ed. 1984). The mere breach of a professional duty does not create a cause of action unless the plaintiff can show that he or she has been harmed thereby.

With respect to expert witness testimony and subsequent liability, causation may be the most difficult element to prove. This is particularly true if several experts offered opinions or if the evidence presented required a subjective evaluation by the expert.

A second cause of action may be asserted for breach of contract. Resourceful plaintiffs may assert such claims in order to evade traditional negligence defenses such as statutes of limitation, or contributory or comparative negligence.

Obviously, this will turn on whether there was a meeting of the minds between these parties as to the scope of the expert's engagement. Any writings evidencing this arrangement must be carefully scrutinized.

Finally, there may be claims asserted under various consumer protection-type statutes that are frequently resorted to in professional negligence situations. These claims may be rooted either in an alleged violation of professional standards or in an alleged misrepresentation by the expert as to his or her qualifications.

Defending an Expert Accused of Negligence

In order to fashion a defense, counsel for the expert witness must do a couple of important significant things at the outset. First, counsel must size up precisely what the expert's mandate was in order to make a judgment as to what was his or her legal duty, if any. Was the expert hired by the attorney, as opposed to the client? Was the expert hired only to assist counsel as to one feature of the case? Was the expert retained to advise the litigant as to settlement alternatives? Or, was the expert hired to come to court to give sworn testimony? Was there a writing between the litigant and the expert confirming the scope of the engagement? Was the expert appointed by the court rather than retained? The answer to these questions can have significant bearing on defense efforts.

Once this has been accomplished, the second area of analysis relates to precisely what transpired in the underlying case. Was the expert's opinion ever formulated or disclosed? Was it subjected to a *Daubert* challenge? Did the expert actually render it in court? What was there about the result in the underlying case that the client found unsatisfactory?

Another important aspect to ascertain is whether the complained-of work relates to pre-trial work. The Washington Supreme Court opinion in *Bruce* extended witness immunity to all expert

functions associated with litigation. The court noted that, "Any other rule would be unrealistically narrow and would not reflect the realities of litigation and would undermine the gains in forthrightness on which the rule of witness immunity rests." *Bruce* at 673. Conversely, in *Murphy v A.A. Matthews*, the court held that "witness immunity does not bar suit if the professional is negligent in providing the agreed [litigation] services." *Murphy* at 672. The *Murphy* court held that witness immunity did not apply when the experts were privately retained to provide litigation support. *Id.* at 680. See also *Mattco Forge v Arthur Young*, 52 Cal. App. 4th 820 (1997), where the court held specifically that the immunity "does not protect one's own witnesses."

A related area of inquiry relates to whether the expert might have an indemnity or contribution action to assert. The most obvious source of such a claim is the lawyer or law firm who hired the expert. See generally *Forensis Group, Inc. v Frantz Townsend & Foldenauer*, 130 Cal App. 4th 14 (2005); *Krantz v Tiger*, 390 N.J. Super. 135 (App. Div. 2007). Once again, the precise nature of what transpired in the underlying case will be of great assistance in this regard.

Given the discouraging trend in the witness immunity context, what other defenses can be raised? In addition to the standard causation and standard of care defenses, serious consideration in every expert witness claim should be given to the economic loss rule. That rule, which has been adopted in one form or another in nearly every state, prohibits the recovery of "mere economic losses" in negligence actions unless there has been personal injury or damage to property. See *Fowler v Harper et al.*, The Law of Torts § 25.18A (2nd ed. 1986, regular updates). As Judge Benjamin Cardozo put it, the economic loss doctrine prevents "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v Touche, Niven*

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Suing Friendly Experts

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& Co., 174 N.E. 441, 444 (N.Y. 1931). See also *Aldrich v ADD, Inc.*, 437 Mass. 213 (2002); *FMR Corp. v Boston Edison Co.*, 415 Mass. 393 (1993).

Although the economic loss rule is not discussed in any of the published opinions involving suits against friendly experts, it may provide a formidable legal defense. In most situations, the alleged harm has not been accompanied by property damage or personal injuries. The more difficult question arises in jurisdictions where the economic loss rule is deemed not applicable and the plaintiff alleges the existence of a fiduciary duty. See *Clark v Rowe*, 428 Mass. 339 (1998).

The Case for Witness Immunity

As can easily be seen by the foregoing discussion, claims against friendly expert witnesses raise a host of difficult issues for the defense practitioner. Although there does not appear to have been a dramatic increase in these cases post-*Daubert*, it is not difficult to imagine an increase in the future. This potential “new generation” of claims can be nipped in the bud by expanding the well-reasoned majority opinion in *Bruce* and in holding that all expert witnesses are immunized from claims for negligence or breach of contract. In no particular order of importance, here are some policy reasons why this should happen:

- Expert witnesses are friends of the court who assist lay jurors in understanding scientific, technical or other specialized knowledge. Because of the expertise and specialization in so many fields, expert witnesses are often needed to clarify, explain and assist on many important issues. The judicial system needs this assistance and should protect those who provide it.
- Expert witnesses are, in effect, officers of the court who are granted the special privilege of offering opinion evidence as to contested matters. Accordingly, they should be entitled to the same protections as judges and court personnel.



- Expert witnesses should be encouraged to be free with their opinions and not be shy about expressing them. Allowing them to be sued in event that their opinions are rejected by a “gatekeeper” or a fact-finder discourages such activity.
- Knowing that expert witness testimony is subject to *Daubert* scrutiny creates a disincentive for experts to venture too far from accepted methodologies. A litigant who is unhappy with an exclusionary ruling or an adverse result should not be permitted to blame his retained expert.
- Permitting suits against friendly experts will discourage all but full-time experts from becoming involved in the judicial system. This is not good for the system.
- In jurisdictions where the economic loss rule applies to claims against experts, an unhappy litigant should not be permitted to argue that his expert owed him a fiduciary duty. The proposition that an expert can ever be considered a fiduciary raises troubling issues as to credibility and objectivity.
- Experts should be encouraged to develop new theories and express them. Permitting lawsuits against them discourages this activity.
- Experts are frequently subject to codes of professional conduct and may face sanctions for offering unfounded or otherwise inappropriate opinions. These sanctions are sufficient to deter improper overreaching, and the existence of civil liability will add nothing to this deterrence.
- The law’s interest in insuring finality is undermined by permitting suits against expert witnesses. These suits can perpetuate a cycle of litigiousness that the law disfavors.

Expert witnesses assist the court and the jury in understanding complex issues and provide a basis for decisions that would otherwise be based on ignorance or conjecture. The immunity doctrine was designed to permit the free flow of information on the witness stand without fear of retaliatory lawsuits. The best way to follow the Supreme Court’s directive in the *Daubert/Kumho* line of cases and to expand the universe of permitted expert testimony is to protect experts from civil liability arising from their work. ■

Parent-Subsidiary Liability Issues

Massachusetts Supreme Judicial Court Holds Parent Corporation Not Liable Under Massachusetts Superfund Law for Contamination Caused by Subsidiary and Holds Plaintiff Potentially Liable for Defendants' Attorneys' Fees

by Jennifer Sulla

■ **Jennifer Sulla**, an attorney in the Boston office of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo P.C., is a member of the firm's Environmental Section. Her practice includes both litigation and regulatory compliance.

The Massachusetts Supreme Judicial Court (SJC) has held that a parent corporation is not liable under M.G.L. c. 21E, the Massachusetts Superfund law, for the liability of a subsidiary that the parent did not own or control at the time the subsidiary released hazardous materials and sold the contaminated site. The SJC has also held that plaintiffs are liable for defendants' attorney's fees in a Chapter 21E lawsuit if there is no "reasonable basis" for the claim against defendants. *Scott v NG U.S. 1, Inc.*, 450 Mass. 760, 881 N.E.2d 1125 (March 7, 2008)

In *Scott*, the plaintiff discovered contamination on his property in 2002, allegedly coming from property owned and operated as a gas works by Salem Gas from 1850 to 1890. Starting in 1926 — 36

years after Salem Gas sold its property — a series of stock purchases led to Salem Gas becoming a subsidiary of NEES, the corporate predecessor to defendant NG U.S. 1, in 1947. NEES consolidated the operations of Salem Gas with those of two other gas companies and later sold the stock and assets of the consolidated corporation. Salem Gas was dissolved in 1998.

The SJC followed the United States Supreme Court's decision in *United States v Bestfoods*, 524 U.S. 51 (1998), in which the Court held that CERCLA, the federal Superfund law, does not override the fundamental rule of corporate law that a parent corporation is not liable for the acts of its subsidiaries except in limited circumstances. Nor does CERCLA override the equally fundamental rule that a parent's corporate veil may be pierced when otherwise the corporate form would be misused, e.g., to accomplish fraud. Under *Scott* and *Bestfoods*, a parent is liable under CERCLA, or Chapter 21E, for its subsidiary's contamination only when: (1) The parent "manage[s], direct[s], or conduct[s] operations specifically related to pollution" (direct liability due to the parent's own acts), or (2) The corporate veil may be pierced (indirect liability).

As for direct liability, the Appeals Court in *Scott* had held that NG U.S. 1 and its predecessors could not be directly liable as an operator for the contamination resulting from Salem Gas' operations at the gas works because only present operators are liable under M.G.L. c. 21E § 5(a)(1), and the contamination did not occur on their watch. The SJC agreed.

As for indirect liability, the Appeals Court stretched the concept of veil piercing to hold that NG U.S. 1 and its predecessors should be held liable in order to fulfill one of the primary aims of Chapter 21E — the party that caused the contamination should be responsible for the costs of the cleanup. According to the Appeals Court, even though the release occurred before 1926, the ensuing contamination and



harm to the public and the environment continued for over 100 years, during which time there was "almost overwhelming" evidence of "pervasive control" of Salem Gas by NG U.S. 1 and its predecessors.

The SJC disagreed, stating that "control, even pervasive control, without more, is not a sufficient basis for a court to ignore corporate formalities." Thus, the corporate veil can be pierced to hold a parent responsible for a subsidiary's actions only if the parent exercises "pervasive control" and there is some "fraudulent or injurious consequence;" or there is "confused intermingling with 'substantial disregard of the separate nature of the corporate entities.'" As stated by the SJC, "control, even pervasive control, without more, is not a sufficient basis for a court to ignore corporate formalities."

In *Scott*, NG U.S. 1 and its predecessors had not had any direct involvement in the site during the relevant time period. In looking at whether there is "control" or "intermingling" so as to allow piercing the

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Parent-Subsidiary Liability Issues

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corporate veil, the SJC held that the proper focus is on the events giving rise to liability such as owning or operating a facility at the time of a release of hazardous materials. Because NG U.S. 1 and its predecessors had had no interest in, or control of, Salem Gas or the gas works property at the time of the release, it did not matter whether they had such control after 1926.

The SJC reaffirmed in *Scott* the fundamental principle of parent/subsidiary separateness, although on relatively easy facts. Indeed, in *Bestfoods* and in the state law cases referred to by *Scott*, the parent-subsidiary relationship existed at the time of the subsidiary's acts giving rise to liability. In contrast, in *Scott*, the parent-subsidiary relationship did not exist until long after the subsidiary's acts. So the SJC did not need to address whether the control that NG U.S. 1 and its predecessors did exercise over Salem Gas would have been sufficient to pierce the corporate veil if the release had occurred during that period of control.

It should be noted, moreover, that *Scott* does not absolutely shield corporate parents and successors. For example, although *Scott* makes it very difficult to impose liability on a corporation for a subsidiary's contamination that pre-dates the acquisition, the SJC left open the

possibility that "very special facts" could lead to piercing a parent's veil even if the timing of the parent-subsidiary relationship is as in *Scott*.

Likewise, *Scott* will not protect a surviving corporation in a corporate merger in which the surviving corporation is deemed to be liable for the liabilities and obligations of the constituent corporations.

Scott also addressed another significant issue in Chapter 21E litigation. The defendants sought attorneys' fees under M.G.L. c. 21E § 4A, which requires a court to award fees and costs if a plaintiff does not participate in pre-suit negotiations in good faith or if a plaintiff has no reasonable basis for claiming that the defendant is liable.

In one of the very few reported court decisions involving Section 4A, the SJC held that the standard for determining whether attorneys' fees must be awarded is whether, at the time of filing the complaint, application of the facts to existing law made it "reasonably clear" that defendants were not liable. Because the trial judge had used the wrong standard — the standard governing motions to dismiss, a relatively easy one for plaintiff to meet — the SJC sent the case back to the trial judge.

Thus, not only has the plaintiff failed to find anyone to pay to clean up the century-old contamination on his property, he may find himself paying the defendants' attorney's fees as well. ■

The Use of an Expert

by Barry Zalma

■ **Barry Zalma** is a California attorney, insurance claims consultant and author. His law practice emphasizes the representation of insurers and those in the business of insurance, and stresses first-party property matters, third-party liability coverage situations, and litigation support including expert testimony. His insurance consulting practice, Zalma Insurance Consultants, is available to insurers and insureds to assist in the resolution of insurance disputes or to provide expert testimony or consultation. Zalma is a certified fraud examiner and is a life member of the Association of Certified Fraud Examiners. He serves on the faculty of the Virtual University of the Insurance Agents and Brokers of America, and writes a regular column for *Agent & Broker* magazine and *Zalma's Insurance Fraud Letter*.

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A qualified expert in claim handling practices who is able to credibly explain to a trier of fact why the insurer may, and should, reject an insured's claim can defuse the allegations of bad faith. Many legal decisions definitively hold that an insurer's reliance on an expert in making a coverage determination or deciding a third-party claim will defeat a bad faith claim. Insurers who take advantage of the "genuine dispute" doctrine or "fairly debatable" doctrine to protect themselves from charges of bad faith will save countless indemnity and defense dollars.

"An insurer can successfully oppose bad faith claims by demonstrating it relied upon the expert(s) it retained during the course of the claim investigation to deny coverage." ["Experts in Bad Faith Litigation," by Anthony R. Zelle and John W. Steinmetz, *For The Defense*, May 2003.]

When an insurer is faced with a complex, difficult or fraudulent claim that it believes should be denied, it should provide a complete copy of the file materials — those that support what the insurer believes is a defense and those that support the claim of the insured — to a claims handling expert. The expert should be asked for his or her advice on how to resolve the claim. The expert should not be told the insurer's position. The insurer should advise the expert only that the insurer desires his or her expert opinion with regard to the resolution of the claim.

Every insurer should understand that expert witnesses and consultants can significantly strengthen an insurer's defenses against claims of bad faith.

Rules to Follow When Retaining an Expert Witness

- Never retain an expert you do not know or whose references you have not checked.
- Never retain an expert without a written retainer agreement.
- Never wait until two weeks before trial to hire an expert.
- Never retain an expert on the last day the court allows you to designate experts.
- Never retain an expert who has a conflict or potential conflict with the other party(ies).
- Never retain an expert unless you are ready to send him all the file material needed to properly evaluate the case within his field of expertise.
- Never save a crucial piece of evidence or information until the week of trial since it might, and probably will, change a critical opinion.
- Never send poor quality copies of photographs. Always send original photographs, laser copies, or a CD-ROM or DVID with all photographs in .jpg or .gif format.

- Never send a deposition copy to your expert without the deposition exhibits attached.
- Never set an arbitrary limit on your meeting with your expert.
- Always keep your expert informed of discovery deadlines or trial dates.
- If the expert's opinion is not what you expected or wanted, thank the expert, pay his fee and take him off your expert list.
- Always promptly pay your expert's statement and recognize that he may charge as much, or more, per hour than you do!
- Do not blame your expert when you lose your case.
- Be sure to thank your expert when you win.

The Genuine Dispute Doctrine

If the insurer has done its work properly before denying a claim, it should never be held liable for breach of the covenant of good faith and fair dealing. Tort and punitive damages should be eliminated as a matter of law. The Genuine Dispute Doctrine, sometimes called the "fairly debatable" test, establishes the defense.

It is now settled law in California that an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith, even though it might be liable for breach of contract. (*Fraley v Allstate Ins. Co.* (2000) 81 Cal. App.4th 1282, 1292.)

The California Court of Appeals, in *Chateau Chambrey Homeowners Association v Associated International Insurance Company*, 90 Cal.App.4th 335, 108 Cal.Rptr.2d 776 (2001), extended the "genuine dispute doctrine" to a factual claims dispute. Fraud, by definition is a

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factual dispute. The insured claims he had a covered loss while the insurer, from investigation, believes it established that the claim presented by the insured was false and fraudulent.

It is the duty of a claims person who decides that a loss or defense must be denied to collect sufficient evidence that will establish that the denial of the claim was “fairly debatable.” The evidence must be clear and unambiguous so that a trier of fact (a judge or jury) would conclude that a reasonable and prudent insurer would have made the same decision. If the claims person consults with an independent expert who reaches the same conclusion, a finding of “genuine dispute” or “fairly debatable” will be almost certain.

Establishing the Genuine Dispute

Insurers must recognize, of course, that trial courts review the actions of an insurer when deciding a bad faith claim with 20/20 hindsight. The evidence, therefore, available to the insurer to call into play the “fairly debatable” measure of good faith or the “genuine dispute doctrine,” must be overwhelming. Use of a claims handling expert is the key to the presentation of overwhelming evidence that the decision of the insurer was made in good faith and that there was a genuine dispute between the insurer and the insured.

An insurer’s Special Fraud Investigation Unit (SIU) should be trained to thoroughly, fairly and intelligently investigate every potential fraudulent claim. The SIU’s investigation must be well documented and the decision to deny must be made in good faith with the advice and counsel of an experienced coverage lawyer. If the investigation is thorough, in good faith, and survives the analysis of experienced counsel, the genuine dispute doctrine should defeat any suit for bad faith.

An insurer’s claims department must be trained to thoroughly, fairly and intelligently investigate every claim

where a question of coverage exists. The claims department’s investigation must be well documented and the decision to deny must be made in good faith with the advice and counsel of an experienced coverage lawyer and a claims handling expert. If the investigation is thorough, in good faith, and survives the analysis of experienced counsel and a claims handling expert (if the lawyer does not qualify), the reasonable dispute doctrine should defeat any suit for bad faith.

Every file where a claim is denied should contain, to establish that the “genuine dispute” or “fairly debatable” standard was complied with by the insurer, the following:

1. The loss notice.
2. The wording of the policy.
3. A detailed recorded statement of:
 - 3.1. The insured.
 - 3.2. If a third party claim, the claimant(s).
 - 3.3. Every independent witness to the events.
 - 3.4. The insurance agent or broker who placed the insurance.
 - 3.5. If a coverage issue is involved, the underwriter who made the decision to insure or not insure.
4. All available documentary evidence including, as needed, accounting documents, tax returns, medical reports, police reports, fire reports, deeds, trust deeds, bankruptcy filings and any other relevant document. Detailed photographs of the scene.
5. The advice and counsel of independent experts whose expertise relates to the facts of the loss.
6. The advice and counsel of an independent claims handling expert.
7. The advice and counsel of an experienced insurance coverage lawyer experienced in the issues raised by the claim.

With a thorough and complete investigation, the advice and counsel

of experts and lawyers familiar with the subject matter, even if the decision made by the insurer is wrong, the insured will never be able to establish a bad faith cause of action. The “fairly debatable” or “genuine dispute” standard is merely a means of objectively establishing that the insurer treated the insured fairly and in good faith. The insurer, with a well trained, intelligent and thorough claims department or SIU, will avoid charges of bad faith and, even when charged, will defeat the charges by proving beyond a preponderance of the available evidence that the claim denial was based upon a well reasoned decision where the insurer is allowed to dispute and debate a genuine dispute between it and the insured as to the applicability of coverage.

Charges of bad faith can be avoided if the insurer, before denying a claim, seeks the advice and counsel of an experienced and qualified insurance claim expert or consultant who independently and thoroughly completes:

- Review of claims files to determine if there is a reasonable basis for denial and to avoid charges of bad faith.
- Consultation with insurers on methods to avoid charges of bad faith.
- Consultation with insurers on methods to comply with the Fair Claims Practices Acts and Regulation.
- Consultation with insurers on compliance with mandatory SIU laws and regulations.
- Consultations with insurers on operating effective SIU investigations.

Obtaining the opinion of an independent expert or consultant should allow the insurer, if sued after denial for the tort of bad faith, to defeat that cause of action with a motion for partial summary judgment based on the declaration of the expert that there was a genuine dispute between the insured and the insurer. The expense of retaining an expert will be far outweighed by one bad faith verdict and punitive damages award. ■

Q&A with Donald S. Malecki, CPCU

by Donald S. Malecki, CPCU



■ **Donald S. Malecki, CPCU**, is a principal at Malecki Deimling Nielander & Associates LLC, based in Erlanger, Ky. During his 45-year career, he has worked as a broker, consultant, archivist-historian, teacher, underwriter, and insurance company claims consultant, and as publisher of *Malecki on Insurance*, a highly regarded monthly newsletter.

One of our insureds, a developer, normally purchases a builder's risk policy covering all contractors as named insureds. In one project, the general contractor agreed to obtain this policy. The developer asked to be listed as a named insured, but the contractor's insurer refused to do so. The insurer, instead, added our insured, the developer, as an additional insured. We believe this is an acceptable compromise. Do you agree?

No. Additional insured status in relation to a builder's risk policy generally is not advisable. The primary reason is that the provisions of many builder's risk policies refer to "you" or "your" when referring to the named insured. With no reference made in the policy to the word "insured," there is no opportunity to substitute the additional insured's name, as shown in the endorsement. Thus, if someone is added as an additional insured, the result may be nothing more than a false sense of security.

One would think that an underwriter would not be receptive to issuing an additional insured endorsement to a builder's risk policy that does not reference the word "insured." For some reason, unfortunately, this is sometimes overlooked.

To be frank about it, all parties should be listed on a builder's risk policy as named insureds, so that all parties have an equal standing. More specifically, the reasons all parties should be named insureds are:

- To all have the same coverage.
- To all have the same rights.
- To prevent any subrogation.

It is not necessary that all parties be listed by name. What could have been done in your case was for the underwriter to have listed the general contractor as a named insured with the accompanying statement

that named insureds also include the developer and contractors of all tiers. In fact, this is a better way than listing all named insureds by name, particularly when there are likely to be changes during the period of construction.

Some builder's risk policies treat named insureds as insureds. In other words, the policy may state that all named insureds are hereinafter "insureds" and, instead of referring to the words "you" and "your," will simply refer to the word "insured" throughout the policy provisions. An additional insured endorsement still may not work here because to qualify as an "insured," one must first be considered as a named insured.

All of this can be very confusing. This is why it is always recommended that the builder's risk policy be read very carefully. (Actually, this applies to every policy.)

Unfortunately, however, builder's risk policies are not usually read until there has been a loss. Contractors are too often satisfied with a certificate of insurance and place full reliance on what the project owner or developer promises. This has resulted in a plethora of court cases over the years. Whether project owners or developers place their full reliance on the contractor agreeing to obtain a builder's risk policy is uncertain. Your question, however, appears to reflect that your insured, the developer, did not even read the policy — nor did you, based on your question.

If there are any messages here, it is that:

- Additional insured status should be in the context of liability, rather than property, insurance.
- The project owner, or developer, and contractors of all tiers should be named insureds by name or by reference.
- All parties should review the policy to make sure the proper coverages are being provided for the exposures of the respective parties.
- Do not take any promises of coverage for granted. ■



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