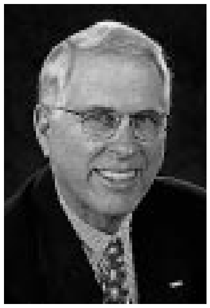
CLEWS

Consulting, Litigation, & Expert Witness Section Quarterly

Vol. 9 No. 2
May 2002

From the Editor

by Donn P. McVeigh, CPCU



We'll miss you, Stan. Along with a handful of other CLEW members, **Stan Lipshultz, J.D., CPCU,** is a major reason for the success of this interest section. Not only has he worked hard at chairing this committee in a very effective manner, he previously was the editor of *CLEWS*—a performance I've tried hard to emulate. Now that Stan will be the sections member of the Board of Governors, I'm sure he'll bring the same sense of talent and responsibility to the Board. But remember, Stan, you're still a member of the CLEW Section, and we all expect your contributions to continue, particularly regarding your very original and entertaining scriptwriting for our annual mock trials. We all wish you the best, and come visit us as often as you can!

Due to the length of the "Bad Faith Liability" article, I've had to keep the other articles and letters brief. **Harry Bordner's** letter to the editor should stimulate other letters—please keep them coming. The "So You're Going to be an Expert Witness" article may seem old hat and fundamental to many of us, but the "tips" provided in this article are accurate and should serve as a reminder to any of us who do a lot of expert witness work.

The CLEW Section Committee next meets in Las Vegas, NV, on May 29, and at the Annual Meeting and Seminars in Orlando, FL, in October. All of us hope to see and meet other CLEW Section members in Orlando. ■

Communiqués from the Chairman

by Stanley L. Lipshultz, J.D., CPCU

Learn from the mistakes of others—you can't live long enough to make them all yourself. –Martin Vanbee

Wherever we are, it is but a stage on the way to somewhere else, and whatever we do, however well we do it, it is only a preparation to do something else that shall be different. –Robert Louis Stevenson

This will be my last "Communiqués from the Chairman" column. I trust the CLEW Section members reading this will indulge me in a few observations from my years on the committee. This is a bittersweet task. I have been thinking about what to say in this farewell missive for several months and found it hard to put into words how I feel since I am leaving the committee after the Annual Meeting and Seminars in Orlando, FL. I have been a member of the CLEW Section Committee since it first convened at the Mid-Year Meeting in New Orleans, LA, in 1994. I recall how thrilled I was to have been selected as a charter member of the section committee[1] and to serve with those whom I believed to be luminaries in the insurance industry. I still feel that way.

When **James A. Robertson, CPCU,** was appointed by then-CPCU Society President **J. Wesley Ooms, CPCU, CLU,** CLEW hit the ground running. I mean Michael Johnson gold medal, world-record running! Our first symposium, cosponsored with the Senior CPCU Section, "Order in the Court!" was presented in San Francisco, CA, in August 1994 and was an instant success. "The Order in the Court!" seminar has been presented several times since it was first introduced, and will be presented again in the future. Besides the seminars CLEW has developed and presented, we have delivered a series of newsletters that can best be described as innovative, informative, well written, and educational. Jim Robertson, in a "Chairman's Corner" column, lauded our first newsletter editor, **Warren G. Brockmeier, CPCU;** "He has given our section good reason to be proud of its

Continued on page 2

Communiqués from the Chairman

Continued from page 1

newsletter. Every issue has contained valuable, balanced, and timely articles. He set a high standard for editorial content, and helped to stimulate discussion of the areas of practice that the CLEW Section intends to serve." When I became newsletter editor with the July 1996 edition of the *CLEWS Quarterly*, I took an exciting step into a domain inhabited by experienced and scholarly industry members. Reviewing the submissions and preparing each edition was a most rewarding exercise. I do recall trying my best to get our chairman, **Eric L. Routman, J.D., CPCU**, to pen a chairman's column so that I could get my picture off the pages of the publication. I was not successful, but at least it made my mother proud.

Donn P. McVeigh, CPCU, took over as newsletter editor when I became chairman of the committee at the Boston Annual Meeting and Seminars in October 1999. Not to say that I did not do a good job as editor, because I did, but Donn has taken the newsletter to another level. I was pleased to leave the newsletter in his capable hands when I became chairman.

One of the most rewarding facets of being a CLEW Section Committee member has been my participation in the mock trials beginning with the New York Annual Meeting and Seminars in 1996. We have all had a colossal amount of fun and I thoroughly enjoyed writing the "scripts" for the New York, Dallas, San Diego, Boston, and Seattle programs. I hope no one forgets Ara N. Omitian, the luckless agent in many of our trials, or Shifting Sands Mutual Insurance Company *(No claim is too small . . . to deny),* or Seymour "Sy" Onara, COO of Sousumi Golf, Bowling, and Aerospace Company. Those of you who attended the Boston Annual Meeting and Seminars and who have placed your order for a Robophydeaux® mechanical dog, it is on the way. Unfortunately those of you who ordered Dominator™ golf clubs after the Seattle Annual Meeting will not be receiving them any time soon as the Consumer Products Safety Council has ordered a recall of the entire product line of gyroscopes used in their manufacture. Just as rewarding as writing the scripts was each rehearsal and the participation in the tragicomedy drama with the other "cast" members. The first sexual harassment mock trial presented by the CLEW Section in Dallas, TX, did catch a few of the Society's watchdogs napping, but the audience enjoyed the performance. I know I did.

Not to say that being chairman of the committee was all fun and games. Nosiree Bob! There was plenty of hard work associated with it. For instance, planning those Dutch treat dinners was a major undertaking. Planning the committee meetings so that they could be concluded in the allotted time was another challenge. Our group contains a marvelous mix of insurance professionals, including a number of lawyers. Good ones, too. An oxymoron? don't think so. When I was in law school, they taught me never to say in one word what could be said in 10, then, charge by the word! So, I suppose we have discovered a parallel universe of lawyers, since we concluded our meetings within the assigned time and without the excesses often and inappropriately attributed to the profession.

Looking back over the preceding three years, which, by the way, seems a blur at this point, the CLEW Section Committee can be proud of its accomplishments, of the superb newsletters, excellent symposia such as "Order in the Court!," "The Agent and Broker in the New Millennium," "How to Start a Consulting Practice," and thoroughly entertaining Annual Meeting and Seminar presentations.

I hope that we continue with the symposia and mock trials that have become a CLEW trademark. As I depart, I hope that some ideas that I have initiated will continue and others that we have not yet finalized, see realization in the coming years. The two projects in infancy, a permanent annual seminar or "experts' roundtable" and a compilation of expert witness practice standards, will, in my optimistic view of the world, become another set of CLEW trademarks.

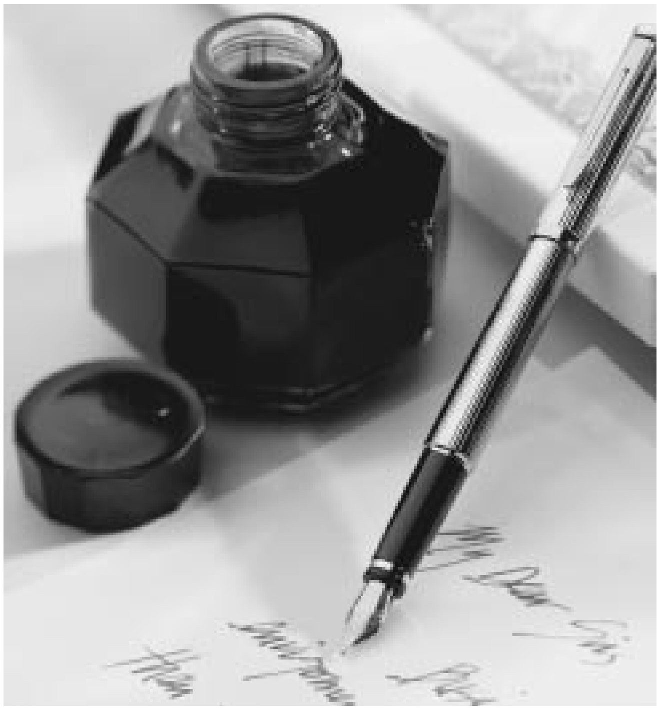
I see nothing but great things ahead for CLEW. My heartfelt "Thank You" to all of the section members who have supported us from the beginning, and to all of the dedicated and hard-working members of the committee. ■

Endnote

1. The other charter members of the CLEW Section Committee are James A. Robertson, CPCU; George M. Gottheimer Jr., Ph.D., CPCU, CLU; Daniel C. Free, J.D., CPCU; Charles R. Shaddox, J.D., CPCU; Steven A. Stinson, J.D., CPCU; and Thomas H. Veitch, J.D., CPCU, CLU, CIC.

Letter to the Editor

This letter to the editor is in response to Stanley's "Communiqués from the Chairman" in the February 2002 issue of CLEWS.



To the *CLEWS* Editor:

It seems to me that there are two ways to solve the problem of terrorism coverage. I'm sure there are more that I can't think of, and I'm sure our members will come up with quite a few other alternatives.

I feel the best approach would be to come up with a cooperative agreement on the part of all insurance companies, reinsurers, and the federal government. However, I realize this is very idealistic, even though I feel most equitable. In this plan, insurance companies would be put into three groupings—small, medium, and large, according to premium volume. Each group would have to insure losses due to terrorism up to a certain dollar amount as respects any one location, any one catastrophe, and any one year. There would be a different maximum for each of the three groups. In setting these figures, actuaries would need to be used in establishing what figures would be safe enough in regard to the financial stability of each group. The reinsurers would do the same thing on an excess basis. Then the federal government would come into play for excess coverage over the insurance companies and reinsurers. These limits would need to be reviewed annually. Insureds' premiums would still be increased somewhat over what they were paying before September 11, 2001, but nothing like they are paying now. The insurance companies need to take a very proactive, consumer-oriented approach, or this won't work. Also, from what I've heard, the terrorism wording would need to be made very clear and uniform. I also feel a uniform deductible approach would need to be established by each of the primary insurance company groups. It is really embarrassing that our industry hasn't done more since that very fateful occurrence.

The other approach that some have already recommended is to come up with a set percent of premium increase that would be borne by every insured, which I feel would still mean large premium increases.

I am looking forward to reading other approaches in the next *CLEWS* quarterly.

Sincerely,
Harry Bordner, CPCU, AMIM

Bad-Faith Liability for Refusing to Disclose Policy Limits

by David M. Beninger, J.D.

Editor's Note: *This article was presented as a handout at the CPCU Society's Annual Meeting and Seminars held in Seattle, WA, and is reprinted here with the permission of the author.*

Issue: Can an insurer be liable for the refusal to disclose its insured's policy limits to a third-party claimant? If so, does its duty, and liability, extend only to its insureds or to the third-party claimant as well?

Summary: It is undisputed in Washington that an insurer owes an affirmative duty to its insured to effectuate prompt, fair, and equitable settlements in a clear liability case. This duty arises by statute, in negligence, in good faith, under contract, and as part of the fiduciary type relationship between an insurer and its insured. As a result, the insurance company has the duty and right to control settlement and negotiations, and the decision to disclose policy limits is part and parcel of that obligation. However, most companies have internal guidelines, often unwritten, that serve as obstacles in the decision to disclose the limits. Those guidelines are designed for its benefit and at times at the risk and expense of its insureds and the third-party claimant, who may have a UIM claim to pursue.

An insurance company's liability for refusing to disclose its insured's liability policy limits in a clear liability case is supported by Washington's strong public policy favoring settlement, the policy mandating disclosure of insurance limits and all documents affecting coverage in discovery, the inherent conflict between an insured's peace of mind in having the case settled quickly and the insurance company's desire to gain a tactical advantage in negotiations by refusing to disclose limits, the policies underlying UIM benefits, as well as the overwhelming legal authority. See *Boicourt v. Amex Assur. Co.*, 78 Ca!. App.4th 1390, 93 Cal.Rptr. 793 (2000); *Powell v. Prudential Property & Cas.*, 584 So.2d 12 (Fla.App. 1991); *Szarmack v. Welch*, 318 A.2d 707, 456 Fa. 293 (Fa. 1974); *Cernocky v. Indemnity Insurance Co. o/No. Amer.*, 216 N.E. 2d 198 (111. App. 1966); 21B Appleman, *Insurance Law & Practice* § 12831, p.431 (1980); 14 *Couch on Insurance* 2d § 51: 11 at 398 (Rev. Ed. 1982). As insurance law expert John Appleman declared over 40 years ago, a liability insurer "is playing with fire" when it refuses to disclose its insured's policy limits because such a refusal "cuts off the possibility of receiving an offer within the policy limits by the company's refusal to open the door to reasonable negotiations." *Boicourt,* 78 Cal.App. 4th at 1392. It can also delay or prevent the third-party claimant from making a timely UIM demand, since the underlying liability policy limits are necessary to determine if the claim is even underinsured.

Insurer's Have an Affirmative Duty to It's Insured to Settle Clear Liability Cases

Washington courts have long held that if liability is likely, then an insurer has an affirmative duty to make a good faith effort to settle claims against its insured. *Burnham v. Commercial Cas. Ins. Co.,* 10 Wn.2nd 624, 631, 117 P .2d 644 (1941); *Truck Ins. Exchange of Farmers Ins. Group v. Century Indem. Co.,* 76 Wn.App. 527,534,887 P.2d 455 (1995); *see also,* WPI 320.05 (pattern instruction for insurer's bad faith failure to investigate and explore settlement). An insurance company's failure to fulfill this common law duty sounds in tort, not contract. *SAFECO Ins. Co. of America v; Butler,* 118 Wn.2d 383, 823 P.2d 499 (1992). The source of the duty is the fiduciary relationship between the insurer and the insured, *Tank. State Farm Fire and Cas.,* 105 Wn.2d 381, 385,715 P.2d 1133 (1986), as well as the contract and statutes.

Because the business of insurance affects the public as a whole, the insurer's duties are found in both the common law and governmental laws. RCW 48.01.030. The statutes and administrative regulations are admittedly "minimum standards" and are designed to supplement, not supplant, the general common law duties. WAC 284-30-300. Thus, it is necessary for the judiciary to flesh out the standard of care and define the particular specifics of the general duties owed.

David M. Beninger, J.D., *is a partner in the Seattle law firm of Luvera, Barnett, Brindley, Beninger & Cunningham and was a panelist in the Point-Counterpoint—Emerging Tort Exposures seminar held at last year's Annual Meeting and Seminars in Seattle.*

Every insurance company is charged with the duty to attempt "in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." WAC 284-30-330(6). These regulations not only set the minimum standard of care in a first-party claim, but also in a third-party claim. *Besel v. Viking Insurance Co. of Wisconsin*, 21 P3d 293 (Div. 3, 2001).

In *Truck Ins. Exchange of Farmers Ins. Group v. Century Indem. Co.*, 76 Wn.App. at 534, the court defined the duty as including an obligation to ". . . diligently investigate and evaluate the claim." If the investigation discloses a likelihood the insured is liable, the insurer then "has an affirmative duty to make a good-faith effort to settle the case." *Truck*, 76 Wn.App. at 534.

A "good-faith effort to settle" includes, at a minimum, the duty to "conduct good-faith settlement negotiations sufficient to ascertain the most favorable terms available and make an informed evaluation of the settlement demand." *Truck*, 76 Wn.App. at 534. The duty is triggered by the investigation on liability, and is not dependent on a settlement demand from the third-party claimant. *Truck*, 76 Wn.App. at 534; ct, *Boicourt v. Amex Assurance Co.*, 78 Cal.App.4th 1390, 1399,93 Cal.Rptr.2d 763 (2000) ("formal settlement offer is not an absolute prerequisite to a bad-faith action"); *Powell v. Prudential Property & Cas. Co.*, 584 So.2d 12, 14 (Fla.App. 1991), rev. denied; 598 So.2d 77 (Fla. 1992) rev. denied, 598 So.2d77 (Fla. 1992) (joining numerous other jurisdictions in rejecting the outdated idea that lack of a formal offer to settle precludes a finding of bad faith); *Cernocky v. Indemnity Ins. Co. of No. America*, 216 N.E.2d 198,205,69 Ill.App.2d 196 (1966) ("fact that no offer was made to settle within policy limits is merely one factor to be considered in light of the surrounding circumstances in determining whether the defendant was guilty of bad faith.")

Insurer's Duty to Make a Good-Faith Effort to Settle Includes Disclosure of Limits

Whether an insurance company's foreclosure of settlement negotiations and delay of UIM claims by refusing to disclose policy limits can serve as the basis for bad-faith liability is an issue of first impression in Washington. However, the other states that have considered this issue have all held that failure to disclose policy limits can serve as a basis for bad-faith liability.

> *". . . failure to disclose policy limits can serve as a basis for bad faith liability."*

The most recent decision comes from the California Court of Appeal in *Boicourt v. Amex Assur. Co.*, 78 Cal.App.4th 1390, 93 Cal.Rptr. 763 (2000). The *Boicourt* case arose from an auto accident that caused catastrophic injuries to 15-year-old Levi Boicourt. Prior to filing suit, Boicourt's attorney requested confirmation of the policy limits from the defendant's insurance company, Amex. The company refused, responding that it had a policy not to disclose. Four months later, plaintiff filed suit without ever making a settlement offer. Amex offered the $100,000 limits five months into the litigation, presumably after disclosing those limits, but plaintiff rejected. He eventually obtained a stipulated judgment in excess of the limits. Defendant paid his policy limits in exchange for an assignment of his rights against Amex and a covenant not to execute.

Plaintiff then sued Amex for bad faith. The trial court granted summary judgment in favor of Amex, but the court of appeals reversed. It held that an insurer's refusal to disclose policy limits before suit is filed is grounds for submitting the issue of bad faith to the jury even if plaintiffs did not make a formal settlement offer. In *Boicourt*, the insurer had a blanket rule of refusing to contact the policyholder for permission to disclose, which the court held to be functionally "the same thing" as refusing to disclose because California has a regulation requiring an insured

Continued on page 6

Continued from page 5

to give permission before disclosure.

The court advanced three main bases for its ruling. **First,** it explained "that the relevance of disclosure of policy limits to the *settlement* of an underlying claim cannot be gainsaid." *Id.*, at 1399. **Second,** refusing to disclose policy limits to an injured claimant creates a conflict of interest between the insurance company and its insured by pitting "the insured's peace of mind" against the "elephantine lethargy endemic to many large organizations, certainly including many insurance companies" that may foreclose the possibility of a quick settlement within policy limits. *Id.* at 1397. **Third,** the insurer gains an unfair "tactical advantage" "by forcing the claimant to make prelitigation offers 'in the dark,' but that advantage is "selfish that is, one that is peculiar to [the insurance company]." *Id.* at 1392, 1398-99.

In reaching its conclusion, the court thoughtfully canvassed other jurisdictions and treatises, including Appleman on Insurance:

> No less an authority on insurance law than John Alan Appleman declared 40 years ago that a liability insurer "is playing with fire" when it refuses to disclose policy limits. Such a refusal" cuts off the possibility of receiving an offer within the policy limits" by the company's "refusal to open the door to reasonable negotiations." (See Johanek v. Aberle (D.Mont.1961) 27 F.R.D. 272, 280, quoting Appleman, Circumstances Creating Excess Liability, at 315, in the 1960 proceedings of the Insurance, Negligence and Compensation Law section of the American Bar Association.)

Boicourt, 78 Cal.App.4th at 1392. The court also found itself in accord with the other jurisdictions that have considered this issue:

> [J]urisdictions which have considered the disclosure problem in the context of bad faith (as distinct from discovery) have said that bad faith liability may indeed be predicated on a refusal to disclose policy limits. (*See Powell v. Prudential Property & Cas.* (Fla.App.1991) 584 So.2d 12, 14 ["liability may be predicated on a refusal to disclose policy limits"]; *Szarmack,* 220 Pa.Super. 407, 289 A.2d 149 (1972) at p. 153 ["An insurance company would violate its obligation to an insured to act in good faith if it did not reveal the existence of low policy limits when such a revelation would serve to protect the insured from a judgment far above the policy limits"]; *Cernocky v. Indemnity Insurance Co. of No. Amer.* (1966) 69111.App.2d 196,216 N.E.2d 198,205 [refusal to disclose policy limits was among factors indicating bad faith].) 78 Cal.App.4th at 1394.

Powell v. Prudential Property relied upon by the *Boicourt* court, was decided in Florida years before *Boicourt. Powell* ruled without equivocation that;

> [L]iability may be predicated on a refusal to disclose policy limits. 14 Couch on Insurance 2d § 51: 11, at 398 (Rev. ed. 1982). The refusal to inform a claimant of the policy limits deprives the claimant of a basis for evaluating the case, thus hindering settlement.

Powell v. Prudential Property & Cas. Ins. Co., 584 So.2d 12, 14 (Fla. App. 1991). Like *Boicourt*, the *Powell* court also ruled that the lack of a final offer to settle does not preclude a finding of bad faith. *Powell*, 584 So.2d at 14.

The court in *Boicourt* went on to eloquently explain the foundation for its reasoning on page 1,398 as follows:

> [T]here is the negotiating advantage an insurer gains for itself (but not for its insured) when it forces a claimant to make any settlement offer either (a) without benefit of knowledge of policy limits or (b) only after incurring the expense of filing litigation and sending out some initial discovery. It is the same sort of tactical one-upmanship that baseball managers try to obtain when they put in a right-handed pitcher to face a right-handed hitter, when chess players elect the white pieces, or when football captains elect to receive the ball after winning the toss. It doesn't always win the game, but it gives the player a slight edge in the competition. In negotiation, unlike chess, there is a slight advantage to the party who receives an offer over the party who first makes one, because the latter operates in a universe with less information: namely, what the other party thinks about the value of the transaction.
>
> One might think that the expense of filing a complaint and sending out a simple interrogatory would mean that the choice to which the insurer puts the claimant is a negligible one. But that is not exactly so. Not every plaintiffs' lawyer is able to take every case to trial. The economics of plaintiffs' work places a premium on being able to settle cases as early in the process as possible. That usually works to the advantage of policyholders as well. They are spared the extra months of having a claim with a potential excess verdict hanging over their heads, with the concomitant stomach-churning uncertainty characteristic of all litigation. [Footnote omitted.] But it does not work to the advantage of insurers, who usually benefit from the additional time value

of any money eventually used to settle, as well as the additional economic pressure that the passage of time puts on the plaintiffs' attorney who, if paid by contingency, must work for free until settlement or collectible judgment. Insurers also know that plaintiffs have the ability to bring only so many of their cases to trial, and know that, over the course of a large number of claims, putting plaintiffs' lawyers as a group to the choice of filing suit before they can find out the policy limits may "finesse" (in the sense of a bridge player skillfully forcing out a card from an opponent) a few settlements below policy limits.

Disclosure of Insurance Limits Not Prevented by Statute, Regulation, or Contract

There is no contract, statute, regulation, or clause in the typical insurance policy that would prevent an insurer from disclosing the policy limits of its insureds. Nowhere is disclosure conditioned on permission of the insured, unless it is part of some internal insurance policy unknown to the insured. In fact, state law requires that all drivers obtain minimum limits of insurance, R.C. W. 46.30.030, and that each insured carry proof of such insurance. WAC 308-106-010. Although proof of the *amount* of insurance is not yet mandated, it is certainly not precluded. WAC 308-106- 020 (provision implementing insurance identification requirements setting for the "minimum" the card must contain and indicating that "if an insurance company issues an identification card containing information in addition to that identified above, the above information shall be printed in such a way so as to be readily discernible.").

As a result, insurers often share insurance limits information with other insurers without the permission of their insureds. This is done to pursue or advise regarding investigation of subrogation claims, UIM claims, to facilitate the handling of PIP or property damage, and for reasons of fostering a "spirit of cooperation" among insurers. Insurers will also disclose limits to finalize a settlement without the permission of its insureds. If an insurance company can settle the claims of their insureds without permission, why can't it disclose the amount of its limits, and thus its authority to settle, during the negotiations that might lead to a settlement? If permission was really required, why can't the insurance company make permission to disclose part of the insurance agreement, or obtain permission when notification of a claim is made, or advise the insured at the beginning of the need to stay in contact for permission?

Insurers are providing notice of intent to disclose other types of defined "private" information in accordance with the federal Gramm-Leach-Bliley Financial Modernization Act of 1999 18 U.S.C. §6801(a), which took effect July 2001. Insurers could do the same to remove this obstacle, if it really exists.

Privacy Arguments Do Not Prevent Disclosure of Limits

The reality is that insurance coverage is not in the same category with the defendant's other assets and private information. Nearly 40 years ago, the court in *Szarmack v. Welch* rejected the very "privacy" argument insurers rely on to justify its refusal to disclose Bryce's limits:

> Basically, [defendant] asserts that insurance coverage is no different from other private financial information which determines the defendant's ability to pay a potential judgment. We cannot agree. Insurance coverage is not in the same category with the defendant's other assets. The worth of such coverage is contingent on recovery by the plaintiff, and its sole purpose from the defendant's point of view is to protect his other assets. This is not to require disclosure of the private financial status of an individual but merely to reveal the extent of protection which was purchased specifically for such eventuality. As we have noted, the defendant (presumably the person whose privacy would be violated) is not the party resisting disclosure since such disclosure would tend to dispose of claims within policy limits and relieve defendant of personal exposure.
>
> Additionally, this state's financial responsibility provision evidences a strong public policy to protect those injured as a result of automobile accidents by encouraging the acquisition of adequate insurance coverage. *See,* Vehicle Code, Act of April 29, 1959, P.L. 58, s 1401 et seq., as amended, 75 P.S. s 1401 et seq. It would be anomalous to require the victim to remain in

Continued on page 8

Continued from page 7

> the dark as to the existence of and extent of coverage until after the entry of judgment.

Szarmack v. Welch, 318 A.2d 707, 710-711, 456 Pa. 293, 299-300 (1974).

Disclosure Is Mandated by the Civil Rules Once Suit Is Filed

Washington's Civil Rules require disclosure of insurance coverage information, including policy limits. CR 26(b)(4). Disclosure is mandatory and not subject to a protective order, privilege, or other judicial protection.

Washington's rule is identical to Federal Rule of Civil Procedure 26(b)(4), which was amended more than 30 years ago to provide discovery of policy limits and other insurance coverage information as a matter of right. The policy underpinning the rule is as applicable to pre-suit disclosure as it is to pretrial disclosure:

> Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation.

Fed.R.Civ.P. 26(b), Advisory Committee Note.

Since pretrial disclosure of policy limits is mandatory and not subject to protective orders, the insurer and its insured gain no additional protection by waiting to disclose until after suit is filed. The same policy underpinning the civil rule of disclosure in lawsuits—to permit the parties to make realistic appraisals of their claims—applies equally to pre-suit disclosures in cases of clear liability. When liability is clear and an insurance company's investigation has revealed that the claimant's damages are likely to approach or exceed their insured's policy limits, all parties benefit by the opportunity to realistically appraise the case at a time when negotiations can occur before the parties incur the expense and aggravation of unnecessary litigation.

Disclosure Promotes Policy on Settlements

Settlements are strongly encouraged in Washington. *Kirk v. Mae,* 114 Wn.2d 550, 554-55, 789 P.2d 84 (1990); *Flint v. Hart,* 82 Wn.App. 209, 214, 917 P.2d 590 (1996). The public is not served by a policy that allows an automobile liability insurer to refuse to disclose its insured's liability limits to someone injured in an accident for which the insured is clearly at fault. The practice delays evaluation and resolution of underinsured motorist claims and promotes the unnecessary filing of lawsuits to discover the amount of the liability policy limits. In contrast, requiring disclosure of liability limits to a third-party claimant protects the motoring public by expediting the evaluation and payment of meritorious underinsured motorist claims.

There is no reason why a tortfeasor's liability limits should remain secret at the discretion of its insurer until the insured has been sued. If settlement is promoted by disclosure of liability coverage limits—a conclusion reached 30 years ago by our Supreme Court when it adopted the federal amendments to Rule 26(b)(2)—then disclosure of limits prior to suit will also promote settlement! The prospects of settlement are likely greater prior to filing suit because the parties have not invested significant time and resources to litigation. A tortiously injured person has a substantial interest in knowing the extent of the tortfeasor's liability insurance coverage both before and after filing suit, so he or she can assess the risks of litigation and his or her need to file a UIM claim. The claimant's interests do not change by paying a filing fee, receiving a cause number, and going through motions to compel and default.

Disclosure of coverage limits necessarily is part of any affirmative and good faith duty to settle a third party claim against an insured driver. When the insured faces excess liability, there is no excuse for an insurer's refusal to disclose limits.

Insurers' Duty to Disclose Should Extend to Third-Party Claimants

Because of the public policy considerations inherent with insurance, there is a general good-faith obligation owed to all interested parties. *See,* RCW 48.01.030.3 ("The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance." RCW 48.01.030) There is also a general duty of cooperation throughout the investigation of claim. See WAC 284-30-370. This is because, unlike most private contracts, insurance policies "abound with public policy considerations, one of which is the risk-spreading theory of such policies should operate to afford to affected members of the public—frequently innocent third parties—the maximum protection possible consonant with fairness to the insurer." *Oregon Automobile Ins. Co. v. Salzberg,* 85 Wn.2d 372, 376-77, 535 P .2d 816 (1975); see also, *People v. Fisher,* 145 N.E.2d at 592-93 ("Liability insurance is not merely a private matter for the sole knowledge of the carrier and the insured, but is also for the benefit of persons injured by the negligent operation of the insured's motor vehicle.")

Insurers often rely upon these provisions to argue for a duty on the insureds and third parties that might help excuse or eliminate the insurers' faults (i.e., comparative bad faith). The insurer is usually quick to argue that these provisions are as limited as a one-way street, with the obligations flowing to the insurer, and not from the insurer to the third party. See *Tank v. State Farm Fire and Cas. Co,* 105 Wn.2d 381, 715 P.2d 1133 (1986a) (third-party claimant does not have per se CPA claim against other parties' insurer).

However, in order for a third-party claimant to make a claim, the claimant ***must*** know the amount of the underlying liability limits. The courts have placed the burden upon the UIM claimant to prove the amount of the underlying liability limits in order to pursue a UIM claim. *Dixie Insurance Company v. Mellow,* 75 Wn.App. 328. Thus, in order to obtain first-party benefits, injured claimants are literally at the mercy of the at-fault driver's insurance company to cooperate with the investigation of their claim and requests for disclosure of the underlying limits. Should an insurance company be able to deprive an injured party of their right to promptly obtain the peace of mind and protection of UIM coverage with impunity? The courts have long made it a policy and strong presumption that there is a remedy for any right that has been harmed, especially statutorily created rights like UIM benefits. Recognition of a duty to disclose the liability limits would serve this policy and presumption.

Presumption of Harm

Washington courts have adopted a presumption of harm once bad faith has been established. *SAFECO Ins. Co. of America v. Butler,* 118 Wn.2d 383, 390-91, 823 P.2d 499 (1992). This presumption of harm applies in a failure to settle a third-party claim when an insured is "deprived of the opportunity to have the claims settled promptly within its policy limits, it was needlessly exposed to litigation, and was forced to submit to a substantial judgment." *Besel v. Viking Insurance Co. of Wisconsin,* 21 P 3d 293. This presumption of harm should equally apply to the assignee of the insured's cause of action against its insurance company because "[a]n assignee steps into the shoes of the assignor and has all of the rights of the assignor." *Besel,* 21 P 3d at 291. It should also apply to a third-party claimant with a *UIM* claim.

The burden of proof to rebut this presumption is still an issue. In *Powell,* the Florida court held that where liability is clear and a judgment in excess of coverage limits is likely, an insurer has an affirmative duty in settlement negotiations that includes a duty to disclose the liability policy limits. When an insurer fails to discharge those duties, "**the insurer bears the burden of proving** that there was no realistic possibility of settlement within policy limits." *Powell,* 584 So.2d at 14. Similarly, the insurer should have the burden of proving that there was no possibility of delay or increased expense in pursuing a UIM claim if it has failed to timely disclose the liability limits. ■

So You're Going to Be an Expert Witness:

How to Prepare for Depositions

by Nelson E. Canter, J.D.

At some point in your career it is possible that you will be asked to serve as an expert witness in the discovery phase of a lawsuit. Because the success or failure of a lawsuit can rest on subtle elements of the expert's testimony, the experience can be intimidating, grueling, and sometimes combative. Whether you are a first-time expert witness or an old hat, the following basic points about depositions and tips will help you be better prepared to serve as a truly expert witness.

Tip #1—Even if you have many years of experience and are the preeminent expert in your field, never underestimate the knowledge of the deposing attorney. A sharp, experienced and prepared deposing attorney will treat the expert's deposition as the tip of the iceberg. Working from the bottom up, the deposing attorney will have read expert materials (including your own) on the subject matter, reviewed pertinent reports, correspondence, and other documents, and will have digested his or her own expert's theories and anticipated your theories. Additionally, some attorneys may deliberately mispronounce certain "words of art" to lull you into a false sense of superiority. Therefore, tread carefully because the opposing parties' experts will most certainly read the transcript of your deposition.

Tip #2—Never hold yourself out to be an expert if you are not. This includes related fields that may be tangentially related to yours. For example, if you are an expert in insurance broker operations, do not hold yourself out as an expert in safety and loss-prevention matters if you lack the qualifications and technical background. Your training and experience will be examined carefully, and any shortfalls or exaggerations can have devastating consequences for the party who retained your services. Stick to your area of expertise, and do not hesitate to advise your client to retain additional experts to work in conjunction with you.

Tip #3—Just as real estate brokers say the three most important things in real estate are location, location, and location, the three most important things for experts are credibility, credibility, and credibility. If you fail to establish credibility, your effectiveness as an expert is very limited. Although everyone casts their professional qualifications and experience in the most favorable light possible, never exaggerate qualifications on your résumé. If you are truly an expert in your field, any exaggerations will only diminish your credibility before a jury.

Tip #4—Remember that an expert's theories and opinions are only as valid as the facts upon which they are based. Therefore, be especially prepared to identify every note, memorandum, statement, report, letter, photograph, transcribed conversation, and document you reviewed in rendering your opinion. Very often an expert will render an opinion at his or her deposition but fail to recall each of the items upon which he or she relied in rendering such opinion. Then at trial the expert will testify about certain facts upon which he or she relied in rendering his or her opinion, which he or she omitted from his or her deposition.

Although the opinions of an expert may be sound, if those opinions cannot be supported by identifiable, admissible evidence based upon facts developed in the case, the expert's theories may be rejected by the jury and even limited by the court.

Tip #5—Always answer the deposing attorney's questions directly and succinctly, and never volunteer information. Unless specifically asked, the expert should not feel obligated to educate the deposing attorney about the subject of the litigation. If the attorney neglects to ask certain questions about specific areas during the deposition, the expert is not precluded from later testifying about those areas. Find the balance between making the attorney work for each answer and providing lucid, direct, and thorough responses to his or her questions.

Tip #6—Prepare for your deposition by re-reading any relevant articles, books, and publications that you have authored as well as any deposition testimony given in other cases. Such information is frequently obtained by the deposing attorney prior to your deposition. There is probably nothing more effective than using an expert's authored publications and/or the expert's deposition testimony in other cases, to impeach his or her credibility.

Conclusion

The deposition of the expert is perhaps the true test of the strength or weakness of a case. Use these observations and tips in preparing for and testifying effectively at deposition. ■

Editor's Note: *This article originally appeared in the February 2002 issue of* riskVue, *the free online magazine for risk professionals, and is reprinted here with the permission of the publisher. See the latest issue of* riskVue *at www.riskvue.com.*

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CLEW Section Quarterly

is published four times a year by and for the members of the Society's Consulting, Litigation, & Expert Witness Section.

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Consulting, Litigation, & Expert Witness Section Quarterly

Vol. 9 No. 2
May 2002