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DEVELOPING OR DEFENDING A BAD FAITH CASE: SELECTED PROBLEMS

While there are many aspects to developing and defending a bad faith case, this paper will focus on three potential trouble-spots. First, it will explore issues of retention of defense counsel by an insurer, an area rife with potential for bad faith claims. Second it will explore discovery of insurer claims files in bad faith cases. Third and last, it will explore the use of experts in insurance bad faith cases.

Retaining defense counsel when an insurer reserves rights

It is axiomatic that an insurer's duty to defend is broader than its duty to indemnify. Therefore, even though an insurer may be firmly convinced that, at the end of the day, its policy will offer no coverage for an event, the insurer may still have a duty to defend a suit against its insured. This duty to defend is formulated differently depending upon the law of any particular state, but a common formulation simply requires a comparison of the allegations of the petition with the language of the policy. If under any reasonable reading of the petition any of the allegations would be covered (without reference to actual facts), the insurer most likely has a duty to defend the entire suit.

When an insurer undertakes a defense under these circumstances, the insurer normally writes the insured a reservation of rights letter. The insurer explains the problems with coverage, delineating allegations or outcomes that would not be covered. The insurer then offers to nonetheless defend the case for the insured pursuant to its duty to defend. So far so good.

Many jurisdictions recognize that this situation can create a conflict of interest between the insurer and the insured. Bluntly, if there is no coverage, the insurer will ultimately not pay anything. If there is coverage, the insurer may ultimately have to pay for a settlement or judgment. Because of this undeniable fact, most jurisdictions allow

the insured to retain independent counsel whenever the reservations in the case set up a situation where defense counsel could influence the outcome of the coverage issue.

Not all reservations create such a conflict. For example, if the case includes allegations of punitive damages and the policy does not cover punitive damages, a reservation of rights on this ground normally does not create a conflict. The attorney hired by the insurer to defend the insured has no impetus, conscious or unconscious, to steer the case toward an award of punitive damages against his client. But if, as another example, the reservation addresses allegations of intentional acts, an attorney hired by the insurer in theory could benefit the insurer by steering the case toward a finding of intentional versus negligent conduct. If the insured's actions were intentional, and not simply negligent, the intentional act exclusion would apply and the insurer would have no coverage. (Of course, no ethical attorney would engage in such conduct, but conflicts analysis encompasses possibilities as well as probabilities, subconscious influences as well as admitted ones, and appearances as well as actualities.)

The existence of a conflict created by certain types of reservations of rights will entitle the insured to retain counsel independent of that offered by the insurance company with the insurance company paying the bill to fulfill its duty to defend. States vary as to who picks the attorney and how the attorney is to be paid. Many allow the insured to select the attorney, while others require that the decision be made jointly by both the insurer and the insured. A few states limit the fees of independent counsel to those that the insurer traditionally pays its panel counsel, while others set no such limits, mindful of the ethical obligations of all attorneys to charge only such fees as are reasonable.

The law on this issue is most highly developed in the state of California. The landmark case of *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.*, 208 Cal. Rptr. 494 (Cal. 1984) explained several principles which were later codified in California Civil Code § 2860. Louisiana is a comparative latecomer.

The seminal Louisiana case is *Belanger v. Gabriel Chemicals, Inc.*, 2000-0747 (La. App. 1 Cir. 5/23/01), 787 So. 2d 559, *writ denied*, 2001-2289 (La. 11/16/01), 802 So. 2d 612. There the insured, Gabriel Chemicals, was faced with personal injury

lawsuits alleging that the plaintiffs were exposed to harmful emissions from the insured's chlorosulfuric acid plant. The insurer, Lexington, denied coverage and sought summary judgment. Gabriel Chemicals hired its own independent counsel who sought a countervailing summary judgment that Lexington was required to pay his past and future fees. The trial court denied Lexington's motion and granted Gabriel Chemicals' motion, stating that Gabriel Chemicals had a right to be defended by counsel of its own choosing given that Lexington had denied coverage and created a potential conflict of interest.

The First Circuit, in an opinion written by Judge Kuhn, affirmed. While not completely clear, it appears that Lexington had offered two attorneys of its own selection to Gabriel, and Gabriel had rejected these attorneys and selected its own counsel. The court stated:

> In this case, Gabriel Chemicals' action of hiring independent counsel evinces a lack of consent to the representation of the two attorneys offered to them by Lexington. At a minimum, this record establishes that the representation of either of the two attorneys offered to Gabriel Chemicals by Lexington may constitute a breach of Rule 1.7. Such representation would ostensibly "be materially limited by [each] lawyer's responsibilities to another client or to a third person," i.e., each attorney's responsibilities to Lexington inasmuch as Lexington retains/delegates an attorney for its insured, Gabriel Chemicals, whose primary role at this juncture is addressing insurance coverage. Under the jurisprudence and the rules of the Rules of Professional Conduct, separate counsel must be employed to represent Gabriel Chemicals to avoid a conflict of interest. We find no error in the trial court's conclusion that, under the facts presented, Gabriel Chemicals is entitled to select independent counsel.

Id. at 565.

A second important issue addressed by the court was the hourly rate of the independent counsel hired by Gabriel Chemicals. The insurance policy in *Belanger* had a specific endorsement known as a "Cumis endorsement" which stated that in the event the insurer was required to pay for independent counsel selected by the insured, the fee they would pay would be limited to what they would normally pay to counsel the insurer

would retain in the handling of similar claims. The First Circuit found that that endorsement was not ambiguous and was enforceable.

The next case to address the issue in Louisiana was *Smith v. Reliance Ins. Co. of Illinois*, 2001-0888 (La. App. 5 Cir. 1/15/02), 807 So. 2d 1010. This case also involved an alleged toxic release and suits by multiple plaintiffs for damaged caused by noxious odors. The insurer denied coverage to the defendant on numerous grounds and refused to defend. The defendant third partied the insurer to provide a defense and cross motions for summary judgment were filed.

The Louisiana Fifth Circuit agreed that there was a duty to defend because the policy as a whole did not unambiguously exclude coverage for the allegations of the petition. The insurer argued that it could discharge this duty by appointing an attorney of its own choosing. The Fifth Circuit disagreed with this proposition, citing *Belanger*:

> In the recent decision of *Belanger v. Gabriel Chems, Inc.*, 00-0747 (La. App. 1st Cir. 5/23/01), 787 So. 2d 559, 563 cited by appellee, the court found that when the insurer denies coverage, there is a conflict of interest between the insured and the insurer. Further, the court found that the denial of coverage by the insurer is an event which entitles the insured to select independent counsel to represent them at the insurer's expense. *Id*. at 566. In reaching this conclusion, the court relied on Corpus Juris Secundum, 46 C.J.S. 1157, and held that the insurance company must underwrite the reasonable costs incurred by an insured in defending an action with counsel of its own choosing.
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> We agree with the reasoning set forth in the *Belanger* case. In the present case, Reliance vigorously albeit unsuccessfully denied coverage in an effort to avoid providing a defense to the Port. The plaintiffs' allegations and Reliance's claim of coverage exclusions create a conflict of interest between the insurer and its insured which entitles the insured to assume control of the defense of the tort action and to select its own counsel. Reliance must underwrite reasonable costs incurred by the insured.

Id. at 1022.

Finally, a case from the U.S. Fifth Circuit retreats a bit from the ground occupied by *Belanger* and *Smith*. In *Trinity Universal Ins. Co. v. Stevens Forestry Service, Inc.*, 335 F.3d 353 (5th Cir. 2003), the Fifth Circuit held that when an insurer had provided defense counsel, to whom the insured had not objected, the insured was not entitled to be reimbursed for the fees of additional counsel independently hired by the insured to protect its interest due to the insurer's reservation of rights. In a footnote, the U.S. Fifth Circuit distinguished *Belanger* and *Smith*:

> FN3. Stevens points out that two Louisiana intermediate appellate court decisions, issued after National Union, have found that, at least in certain circumstances, an insurer who contests coverage is liable for the attorneys' fees if the insured hires separate counsel. *See Smith v. Reliance Ins. Co.*, 807 So. 2d 1010, 1022 (La. Ct. App. 2002); *Belanger v. Gabriel Chems., Inc.*, 787 So. 2d 559, 565-67 (La. Ct. App. 2001). This, argues Stevens, necessitates the invalidation of National Union. We disagree.
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> These cases are distinguishable from *National Union* and not on point in this case. Both involved an insured who wished to reject the insurer's proffered counsel and instead employ independent counsel. *See Smith*, 807 So. 2d at 1022; *Belanger*, 787 So. 2d at 565-67. Here, as in *National Union*, the insured accepted insurer's counsel, but also wished to receive reimbursement for independent counsel.

Id. at 356. (The *National Union* case referred to by the court is a 1990 U.S. Fifth Circuit case in which the court held that an insured may recover fees for an attorney hired by the insured, as opposed to the insurer, if the attorney provided by the insurer was objectively inadequate.)

Situations involving independent counsel require close attention and sensitive handling by both the insurer and the insured. They tend to raise mistrust on both sides and, if not appropriately dealt with at the outset of litigation, can spiral into claims of bad faith.

Discovery of claims file

In many bad faith actions, the insured must prove that the insurer was "arbitrary, capricious, or without probable cause." While this is a statutory standard in Louisiana,

most jurisdictions likewise require some component of scienter to find that an insurer has acted in bad faith. The contents of a claims file are ideal proof of what the insurer was thinking when it handled the claim. As one court put it:

> [B]ad-faith actions against an insurer, like actions by client against attorney, patient against doctor, can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered, and why the company took the action it did. The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming. The "substantial equivalent" of this material cannot be obtained through other means of discovery. The claims file "diary" is not only likely to lead to evidence, but to the very important evidence on the issue of whether [the insurer] acted reasonably.

Brown v. Superior Ct., 670 P.2d 725, 734 (Ariz. 1983).

This view was echoed by Louisiana's First Circuit in *Lehmann v. American Southern Home Ins. Co.*, 615 So. 2d 923 (La. App. 1 Cir. 1993), *writ denied*, 617 So. 2d 913 (La. 1993). There the court agreed that the claims files represented perhaps the only evidence regarding the insurance company's actions in refusing to settle certain claims. The court asserted that the plaintiffs could not obtain the substantial equivalent of this information by deposing claims personnel, because without the claims file those personnel would have to rely on memory rather than contemporaneous record. Accordingly, the court found that the trial court properly ordered the defendant to produce the entire claims file for *in camera* viewing, so that the trial court could examine the file and pull out only those documents that were subject to privilege. *See also Lewis v. Warner*, 94-1643 (La. 7/1/94), 639 So. 2d 1182 and *Wenck v. Standard Fire Ins. Co.*, No. 91-1617, 1992 WL 193540 (E.D. La. Aug. 6, 1992).

Some significant items that may be found in a claims file include:

- claims notes
- bills and estimates
- documentation of investigation

- internal correspondence (typically e-mail)
- correspondence with defense counsel
- correspondence between the insurer and its reinsurers
- reserve and reserve change information

Claims files are also quite likely to contain materials prepared in anticipation of litigation (work product) and attorney-client privileged communications. However, it would be a rare claims file that consisted only of protected information, and, in certain circumstances, the work product doctrine does not offer complete protection and the attorney-client privilege may be waived.

Ibrahim v. Hawkins, 2002-0350 (La. App. 1 Cir. 2/14/03), 845 So. 2d 471, demonstrates the power of the claims file in proving a bad faith case. Ibrahim was injured in an auto accident in February, 1999. He filed suit against the other driver, Hawkins, and Hawkins' insurer, State Farm, in January, 2000. He later amended to add his own UM carrier, Allstate, when it turned out that State Farm's limits were only $25,000.

Ibrahim suffered a broken rib and a right shoulder injury in the accident which eventually required arthroscopic surgery. He missed time from work and underwent physical and psychological therapy. State Farm paid its policy limits and Ibrahim then dismissed Hawkins and State Farm from the case. Allstate tendered its $5,000 med pay limits and eventually tendered another $29,569 in UM payments. The case proceeded to trial against Allstate for additional UM payments, penalties and attorney fees. Following trial the court found that Ibrahim had proved damages considerably in excess of Allstate's UM limits of $50,000 and awarded a judgment that included the following:

- $20,431 (the remaining balance of Allstate's UM limits)
- $40,862 (penalties calculated at twice the remaining limits)
- $26,527 (attorney fees calculated at 1/3 of the net judgment)

Allstate appealed claiming that the trial court erred in finding that it was arbitrary and capricious and thus deserving of penalties. The court noted that the key facts to be

considered were what Allstate knew about Ibrahim's injuries, when it became aware of the information, and how it responded.

Allstate's claims file contained a letter from the plaintiff attorney sent two months after suit was filed attaching medical records, medical bills and verification of lost wages. In response, Allstate tendered its med pay limits of $5,000 and told Ibrahim's attorney that it felt "no UM tender [was] in order." At trial, Allstate's adjuster testified she gave no credence to the loss of consortium claim of Ibrahim's family members and limited lost wages to the 15 weeks Ibrahim's doctor said he could not work at all. She ignored the fact that, as shown in the documentation in her claims file, when Ibrahim went back to work he could only work 20 hours per week due to limitations imposed by his doctor – a fact also verified by his employer. She also ignored the fact that Ibrahim was expected to incur future medical expenses because he was still being treated at the time and his doctor had recommended arthroscopic surgery. Allstate's claims file included a computerized assessment for general damages dated April 21, 2000, which showed nothing for wage loss incurred or expected and nothing for expected medical specials.

In August, 2000, Ibrahim's attorney sent more information to Allstate showing that State Farm had paid its limits and also providing a second medical opinion showing that Ibrahim was in need of arthroscopic surgery. Allstate updated its computerized assessment and tendered an additional $19,608. This figure was reached by considering only the initial lost wages, the surgeon's fee for the anticipated surgery, past medical bills and a figure of $30,000 for general damages, all subject to a credit of State Farm's policy limits of $25,000 plus the $5,000 med pay already paid. The figure did not include anything for the expected anesthesiology or hospitalization costs and no adjustment for lost wages.

After Ibrahim underwent arthroscopic surgery, Ibrahim's attorney sent more information to Allstate including updated medical records and invoices. The attorney again asked for payment of the full UM limits. Allstate tendered $9,961 which was attributable largely to an increased estimate of general damages, but included nothing more for wage loss and nothing for loss or consortium or continuing medical treatment.

Before trial, Ibrahim's attorney sent updated medical bills which now totaled nearly $22,000 and a report from a psychiatrist who had treated Ibrahim for nervousness and depression beginning in March, 2000. Allstate refused to increase its tender.

The appellate court affirmed the trial court's finding that Allstate had been arbitrary and capricious. The claims file showed that, although Allstate was aware of the need for surgery when it made its first tender, it failed to increase general damages to account for that, failed to include an anesthesiologist fee or a hospitalization fee, and failed to properly account for lost wages. Also, the claims file showed that, according to the psychiatrist's notes, Ibrahim sought treatment for problems stemming from his accident, yet Allstate refused to allow anything for the psychiatrist. The court said:

> [W]e conclude there was evidentiary support for the trial court's findings. Although all payments were made within thirty days from receipt of information, Allstate's estimates conveniently overlooked portions of that information, resulting in unreasonably low payments at each juncture. Moreover, despite receiving additional information regarding psychiatric treatment after its last tender, Allstate made no effort to adjust either its medical specials or general damages to account for Ibrahim's mental problems that were clearly attributable to the accident. Finally, throughout the evaluation process, Allstate totally ignored the claims of Ibrahim's wife and children. Accordingly, we find no manifest error in the trial court's conclusion that Allstate was arbitrary and capricious in its handling of Ibrahim's claim.

Id. at 481.

Ibrahim proved his claim by digging into Allstate's claims file. No other evidence could have so clearly proven what information Allstate had, when it had the information, and what it did with it. (Unfortunately for Ibrahim, the court did reduce the amount of penalties and attorney fees awarded, finding the trial court had incorrectly calculated these amounts.)

Of course, claims files often contain protected information that may not be discoverable such as letters between the insurer and its own attorney containing evaluation and legal advice. In *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.*, 168

F.R.D. 554 (E.D. La. 1996), Magistrate Wilkinson of the Eastern District addressed privileged information contained within a claims file. There, the plaintiff, Dixie Mill, sued its insurers for failure to defend it in numerous asbestos cases. Dixie Mill asserted that its insurers were in bad faith. The insurers logically asserted the defense that they were in good faith. Dixie Mill then argued that its insurers had affirmatively placed at issue their state of mind and their knowledge of Louisiana law, which must have come from their attorneys, by asserting that they acted in good faith in compliance with the insurance policies and their legal obligations.

Magistrate Wilkinson rejected this argument. Louisiana case law does recognize the concept of "at issue" waiver because of the unfairness that would arise from permitting a client to insist on the privilege when he intends to use privileged information at trial. But Dixie Mills' argument swept too broadly. The insurers asserted that they did not intend to raise an "advice of counsel" argument at trial. The focus in "at issue" waiver is on the defendant's need to use the materials at trial, not on the plaintiff's need for the materials to prove their case of bad faith. In Magistrate Wilkinson's view, the reasonableness of an insurer's actions in a bad faith case can be proven by objective facts, which are not shielded from discovery and do not *necessarily* require the production of privileged materials at trial. Thus Magistrate Wilkinson upheld the attorney-client privilege for certain materials in the claims file, although he did allow discovery of certain communications, noting that letters "which do not contain any confidential communications or attorney advice, opinion or mental impressions, are not privileged simply because they are written by or to an attorney." *Id.* at 559.

In contrast to *Dixie Mill*, in *EPCO Carbondioxide Products, Inc. v. St. Paul Travelers Ins. Co.*, No. 06-1800, 2007 WL 4560363 (W.D. La. Dec. 21, 2007), Magistrate Hayes overrode certain claims of privilege in a bad faith case. In *EPCO* the plaintiff sued Travelers as its property insurer for failure to timely pay, failure to timely investigate, and refusal to pay a claim for accidental damage without a valid defense. EPCO sought production of Travelers' entire claim file. Travelers produced parts of its claims file but asserted privilege and work product protection as to other parts.

Magistrate Hayes directed Travelers to provide a privilege log which was to include for each withheld document or entry: the date of the document or entry, the name of its author and recipient, the names of all people given or forwarded copies of the document or entry, the subject of the document or entry, and the specific privilege or privileges asserted.

Once Travelers produced the privilege log, Magistrate Hayes found the log lacking in several respects:

> …Travelers did not adduce evidence to establish that the entries in the claim file were kept confidential. Indeed, some entries suggest that the communications were shared with individuals acting on behalf of other parties. Travelers also did not identify the positions or capacities of the parties mentioned in the documents. The entries refer to staff counsel, but Travelers does not explain counsel's affiliation with the company. If by "staff" counsel Travelers means "in-house" counsel, then the scope of the privilege becomes more difficult to discern because in-house counsel enjoys a higher level of participation in the day to day operations of the corporation. The attorney-client privilege "attaches only to communications made for the purpose of giving or obtaining legal advice, not business or technical advice." While the documents contain some communications by staff counsel that plainly constitute legal advice, other communications with counsel are less discernible without evidence explaining the capacity and extent of staff counsel's employment.

Id. at *2 (citations and references omitted).

Magistrate Hayes went on to explain that work product protects only documents created for the purpose of aiding in future litigation, not documents created in the ordinary course of business. Insurance claims files "straddle" the fence because it is in the ordinary course of business for insurance companies to investigate claims with an eye toward litigation. Travelers failed to establish that the withheld documents were prepared only because litigation was anticipated. Also, Travelers did not show that staff counsel would become involved only in claims where litigation was anticipated. The mere

assertion that materials are privileged does not establish that they are. Accordingly, Magistrate Hayes ordered production of the documents.

In sum, claims files contain essential information to proving a bad faith case because they show day by day what information the insurance company had and what the company was doing with the information. However, claims files may also include materials subject to attorney-client privilege or the work product doctrine. Insureds should seek production of claims files in bad faith cases, and insurers should carefully document any claims of protection in a detailed privilege log. Not all communications between an attorney and an insurance company will be protected – the privilege or protection must be established by the insurer. Insureds should be alert to ways of overcoming privilege and work product, particularly if the insurer asserts an advice of counsel defense.

Use of experts in bad faith litigation

As bad faith lawsuits have become increasingly prevalent, litigants on both sides often seek to introduce expert testimony to support their positions. Courts have reached different conclusions on whether expert testimony is admissible at all, and, if it is, the type of testimony that may be considered and its limits.

In Louisiana, the use of experts in bad faith litigation was first examined in the case of *Marketfare Annunciation, LLC v. United Fire & Casualty Co.*, No. 06-7232, 2008 WL 1924242 (E.D. La. Apr. 23, 2008). There the plaintiff , a grocery store, claimed property damages as a result of Hurricane Katrina. Plaintiff sued its property insurer claiming that the insurer failed to pay the entire amount of the loss due under its policy. The insurer attempted to introduce expert testimony to prove "the obligation of an insurer to determine which part of a claimed loss is covered by flood insurance; the adequacy of instructions given by an insurer to be [*sic*] an adjuster; the rules or codes of acceptable conduct for insurance adjusters; the adequacy of training given to adjusters; and the insurance industry standards for reporting and adjusting insurance claims."

After reviewing cases from other jurisdictions both allowing and excluding expert testimony, Judge Barbier excluded the testimony because the defendant failed to make

clear why expert testimony was necessary for the jury to understand the reasonableness standard in La. R.S. 22:658 and 22:1220. Judge Barbier felt that a jury was capable of deciding the case without such testimony by using their common sense and the legal instructions he would give.

In *Imperial Trading Co., Inc. v. Travelers Property Cas. Co. of America*, 654 F. Supp. 2d 518 (E.D. La. 2009), Judge Sarah Vance considered a similar question of the admissibility of expert testimony. Again, the plaintiffs were commercial businesses who claimed that their property insurer failed to properly adjust their claim following Hurricane Katrina. Plaintiffs sought to introduce the testimony of Peter Knowe. The defendant challenged Knowe's qualifications as an expert and also challenged the substance of his testimony.

Judge Vance found that Knowe was adequately qualified by reason of considerable educational and professional background in the insurance industry, much of which was spent adjusting claims and evaluating complex litigation, including bad-faith litigation. Additionally, Judge Vance noted that he had been previously qualified as an expert in both state and federal courts.

Nonetheless, Judge Vance ruled that Knowe would not be allowed to testify for several different reasons. First, some of Knowe's testimony as outlined in his report had become moot by virtue of the court's rulings eliminating some of the issues in the case. Second, Judge Vance agreed with Judge Barbier that the issue of whether the defendant acted arbitrarily, capriciously, or without probable cause was not unusually complicated and was "well within the comprehension of the average juror." Third, Judge Vance found that although certain aspects of the case were sufficiently technical such that expert testimony would be of some benefit, Knowe's report was simply too conclusory and lacking in methodical analysis to be admitted. She stated:

> The report contains virtually no citations. It provides no basis for many observations and conclusions. The report provides numerous opinions as to the scope of the policy's coverage, but at no point does Mr. Knowe explain his analysis of the policy. In fact, the policy language is not cited in the report at all. Mr. Knowe's report does not

> explain how numerous, repeated conclusions about defendant's conduct – that it was "dishonest," "deliberate," "arbitrary and capricious," "unreasonable," "unfair," "in bad faith" – were reached. In short, it is difficult to discern any method at work in much of the analysis, and the Court cannot determine how the conclusions stated are the result of Mr. Knowe's expertise. While it is clear that Mr. Knowe has considerable experience in the insurance industry, his process for coming to conclusions is opaque.

Id. at 522. Last, Judge Vance found that Knowe's opinions contained legal conclusions which not only were inadmissible but were also legally incorrect. For all of these reasons, Knowe's testimony was excluded.

Judge Africk took a different view of Knowe in *Huey v. Super Fresh/Sav-A-Center, Inc.*, No. 07-1169. 2009 WL 604914 (E.D. La. Mar. 9, 2009). There, he found Knowe's testimony admissible on industry standards for handling claims involving multiple insureds or additional insureds. Judge Africk viewed these issues as adding a layer of complexity not present in the typical post-Katrina property damage case. However, Judge Africk cautioned that Knowe would be "precluded from testifying to any legal conclusions, including whether Commonwealth's conduct rises to the level of bad faith, whether Commonwealth acted in accordance with its duty of good faith and fair dealing, whether Commonwealth's conduct was intentional, arbitrary and capricious, or malicious, and whether plaintiffs constitute additional insureds under the Commonweath policy." *Id.* at *2.

Judge Berrigan sought to reconcile the views of Judge Barbier and Judge Africk when she decided *200 South Broad Street, Inc. v. Allstate Ins. Co.*, No. 07-9237, 2009 WL 2028349 (E.D. La. July 9, 2009). There the defendant moved to exclude the expert testimony of James Greer. Judge Berrigan found that the facts before her fell somewhere in the "gray area" between the *Marketfare* and *Huey* cases. "On the one hand, this case concerns two separate business policies, which may prove more complex than a typical homeowner case. On the other, this case does not involve multiple payees or claims." *Id.* at *1. Judge Berrigan agreed to allow Greer's testimony but cautioned that she would

not permit him to testify to legal conclusions, nor could he give an opinion as to whether the defendant was in bad faith.

Louisiana judges have become very familiar with bad faith litigation in the wake of the 2005 hurricanes and the explosion of insurance litigation that ensued. As these cases illustrate, the courts are only cautiously open to allowing expert testimony about bad faith issues. In run-of-the-mill cases, the courts have not allowed the testimony, instead relying upon the common sense of the jury to determine whether the insurer's conduct was unreasonable. However, in a complex case, expert testimony has been allowed, with the caveat that experts are not permitted to offer legal conclusions or to opine on ultimate fact issues of bad faith.