Discovery In the Defense of a Bad Faith Case

by E. Kay Fuller
Martin & Seibert, L.C.

Discovery in the defense of a bad faith case has a two-fold impact. Responding to plaintiff's discovery and propounding discovery to the plaintiff, both of which require advance planning and strategy to determine the goal of the litigation before discovery begins. Timing and the stage of the discovery process often dictates the scope and manner of discovery which also requires planning based upon the desired outcome of the litigation.

Due to the abolition of third party bad faith claims in West Virginia, this paper is confined to a discussion of discovery in first party claims and is limited in scope to West Virginia. It also does not discuss administrative complaints since there is no discovery in that process.

1. Responding to Discovery from the Plaintiff

1. Written discovery

Plaintiffs have routine discovery which is filed in almost every bad faith case, the majority of which can be planned for in advance of even receiving the discovery requests and most of which should not be problematic.

It is fair to anticipate plaintiff will request the claim file(s) involved in the litigation, claim manuals or other written policies concerning the type of claim or line of coverage involved in the claim, other guidelines imposed upon claim representatives involved in the claim, financial statements, insurance commissioner complaint logs and reserve information.[1]

In certain cases, broader discovery such as requests for other claim files, company-wide initiatives or programs or institutional discovery is sought which will be separately addressed herein.

- Claim Files

As to the routine discovery requests, production of the claim file of the subject claim is first and foremost. However, depending upon the stage of the litigation and whether the bad faith claim has been bifurcated may dictate what information is produced and when. The West Virginia Supreme Court of Appeals in *Light v Allstate,* 203 W.Va. 27, 506 S.E.2d 64 (1998), held that bifurcation of first party bad faith cases from the underlying claim for contractual benefits is

[1] In federal court, this information is typically disclosed voluntarily in the initial Rule 26(a)(1) disclosure.

discretionary. There are a number of factors that weigh for and against bifurcation when tort and bad faith claims are filed simultaneously including whether the tortfeasor remains in the case (in instances of UIM claims), the stage of the underlying claim, whether the insurer is defending in the name of the purported tortfeasor pursuant to W. Va. Code §33-6-31(d). Furthermore, defense counsel must consider the impact that producing the claim file will have on the ability to defend the underlying case.

If the case is not bifurcated, there must be some consideration given to the scope of production of the claim file since evaluations and other ongoing activities relative to the underlying case could be detrimental if produced before the tort claim is resolved. For example, if a UIM claim is progressing and the trial court does not bifurcate and stay the bad faith claim, there should be some consideration given as to what information about the ongoing tort claim is to be produced. Obviously, the current evaluation of the claim should not be produced since it places the plaintiff at an unfair advantage to learn the work product and mental impressions of the adjuster while the case pends. Likewise, investigation into liability or damages defenses should be protected as it would be improper to turn over defenses during the pendency of litigation.

Assuming bifurcation is granted, upon conclusion of the underlying claim the claim file is then "ripe" for production. Production is still subject to the attorney-client privilege and attorney work-product doctrine. *State ex rel. Allstate v Madden,* 215 W.Va. 705, 601 S.E.2d 25 (2004). Simply because a bad faith claim has been filed, the insurer is nonetheless entitled to shield its privileged communications with counsel pursuant to the traditional attorney-client privilege. This also applies to production, if at all, of defense counsel's file.

Production of the claim file may also be subject to other limitations such as redactions or withholding of documents necessary to protect the privacy rights of others who may have been involved in the underlying claim but who are not parties to the bad faith litigation. Production may also be subject to other limitations based upon specifics of any given case. Too often counsel are hesitant to produce the claim file yet it is the foundation of the case – for the plaintiff as well as the defense. A thorough review of the file is therefore incumbent upon defense counsel well before it is produced in discovery.

An insurer's definition of what encompasses the claim file varies and it is again incumbent upon defense counsel to discuss with the insurer what is classified as the claim file. Depending upon how an insurer's claim system is established and the definition of the claim file, claim related e-mail may or may not be included. Again, depending upon the language of the discovery request, email that may not be captured in the claim file may also be appropriate for production, subject to the same limitations to protect privileged information, etc.

In addition to the claim file, routine initial discovery requests usually seek claim manuals and other written directives. Manuals can take on many different forms and titles and the request should be closely inspected to avoid later discovery dispute, if possible. Moreover, the manuals may contain useful information to the defense of the litigation and should not be considered disadvantageous if produced.

- Claim Manuals

"Manuals" may also include periodic supplements to the document(s) which may take the form of memoranda, bulletins or procedure guidelines. These may be local or national in scope depending upon the issue. The format in which these manuals are maintained must also be considered since traditional storage in binders has evolved to electronic maintenance of these reference materials. While claim manuals *per se* are generally considered fair discovery, often times an insurer's claim manual is comprised of numerous volumes, much of which is extraneous to the present litigation. Therefore, there should be some attempt to restrict the scope of production to that which is at issue in the litigation. Various versions of a manual or other written directive must also be considered appropriate for production and based upon the language of the request depending upon the length of time under consideration in any given case.

- Financial Statements

Financial statements are again routine documents sought in discovery and are a matter of public record available in the Insurance Commissioner's office. However, issues often arise when the request is so broadly written to encompass work papers or other documents beyond the actual financial statement. In addition to the overall financial statement, the statements will include "state pages" that provide information only as to the state in which the statement is filed. This information is usually responsive to sub-requests for financial statements that seek the number of policies in force, premium written, etc. in a given state and is usually much more focused and therefore helpful to plaintiff and defense.

- Complaint Log

Plaintiffs also routinely seek a register of complaints lodged by consumers that insurers are required to maintain pursuant to W.Va. Code §33-11-4(10). While routinely requested, there is some question as to whether it is useful in the prosecution of a bad faith claim. The register(s) may be divided based upon whether the complaint is filed with the regulator or directly with the insurer and must contain specific information such as the total number of complaints, their classification by line of insurance, the nature and disposition of each complaint and the time it took to process each complaint.

A dispute has arisen as to what constitutes a complaint which must be logged on the complaint register. The Code defines a complaint for purposes of this subsection as "any written communication primarily expressing a grievance." Informational Letter 149 clarifies the reference to a Complaint to exclude pleadings. In the Informational Letter, the Commissioner stated: "It is the Commissioner's opinion that the Legislature, when it enacted W. Va. Code § 33-11-4(10), did not intend to include what is traditionally recognized as a complaint used for purposes of initiating a civil proceeding within the purview of this particular subsection. The purpose of subsection ten is to allow the Commissioner's market conduct examiners to conveniently and expeditiously review an insurer's records to determine whether the insurer is responsive to complaints received from the public."

Some members of the plaintiffs bar take the position, however, that any correspondence written during the pendency of a claim that expresses disagreement with an insurer's position constitutes a "grievance" which must then be logged on the complaint register. For example, if during a claim plaintiff's counsel demands policy limits and the insurer rejects the demand and plaintiff's counsel then accuses the insurer of acting in bad faith, the argument would require this correspondence be logged on the complaint register. Such an expansive definition of "grievance" is an unresolved question.

- Reserves

Reserve information is another area of routine discovery the defense can anticipate in a bad faith case. While the issue was addressed in *State ex rel. Erie v Mazzone,* 220 W.Va. 525, 648 S.E.2d (2007), an individual review of an insurer's reserving practices are necessary to determine what, if any, information is discoverable. When individual case reserve are set with the primary intent being to prepare for litigation, then such information is subject to protection from discovery as opinion work-product. Aggregate reserves, however, which are not developed primarily in anticipation of litigation are generally not protected. As with the assertion of other privileges or certain objections, the insurer bears the burden of proof on this issue.

- Personnel Files

Personnel files of the adjusters involved is also a routine area of inquiry. Personnel files, however, are closely guarded because they contain numerous pieces of private information. Health information, beneficiary data, salary information and other sensitive materials are often housed in personnel files. Usually, the parties can reach an agreement to produce only performance evaluations with any private information either withheld or redacted. Whether the performance evaluations are relevant continues to be debated in West Virginia as well.

- *Other information*

With the advent of a new cause of action against insurers based upon violations of the Human Rights Act, certain other statistical information may now also be sought in discovery to an insurer. This cause of action is not a true "bad faith" actions, but nonetheless challenges claim handling practices and seeks damages for a third party directly from an insurer. Per *Michael v Appalachian Heating, LLC and State Auto Ins. Co.,* (No. 35127, filed June 11, 2010), third party claimants may seek recovery for discriminatory claim handling practices when the discrimination is based upon race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status.

- *Institutional Discovery*

Certain bad faith cases also include institutional discovery which encompasses documents and witness testimony on issues broader than the specific underlying case. Responding to such requests takes a different approach and a higher level of scrutiny.[2]

First, much of the information as to company-wide initiatives or programs may seek extra-territorial information which should be stricken or severely restricted pursuant to *BMW of North America v. Gore,* 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003). Often times insurers argue that the information sought will not advance the plaintiff's burden of proving a "general business practice" in West Virginia since the request seeks information beyond the jurisdictional boundaries of West Virginia.

Second, a relevancy analysis is much more critical with respect to institutional requests than in the routine requests and a review of Rule 26 is highly suggested when responding to institutional discovery.

Rule 26 of the West Virginia Rules of Civil Procedure states, in part:

Rule 26. General provisions governing discovery.

(a) *Discovery methods.*—Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examination; and requests for admission.

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[2] There remain a host of outstanding issues as to what documents are properly discoverable in a bad faith case, particularly in West Virginia. Those too must take into consideration privacy, trade secret and attorney-client privilege objections that are involved in each case. Those and other objections which are proper in bad faith litigation are beyond the scope of this paper.

(b) *Discovery scope and limits.* — Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

In general. — Parties may obtain discovery regarding any matter, not privileged, **which is relevant to the subject matter** involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(emphasis added).

While discovery is broad, it is not limitless and it must have some reasonable or justifiable nexus to the issues presented. The West Virginia Supreme Court has held that a "threshold issue regarding all discovery requests is relevancy . . . because [t]he question of the relevancy of the information sought through discovery essentially involves a determination of how substantively the information requested bears on the issues to be tried." *State ex. rel. Erie Ins. Prop. and Cas. Co. v. Mazzone*, 218 W.Va. 593, 625 S.E.2d 355 (2005). When faced with overly broad institutional discovery the defense should consider invoking the inherent limitations of Rule 26 seeking to eliminate superfluous information. Institutional discovery is expensive and time consuming. Before embarking on institutional discovery, the parties should meet and confer as to its scope and attempt to restrict it to information that is necessary or relevant to the issues to be tried. The inquiry should be what is reasonable under the facts and circumstances of a particular case. See, *e.g., Truman v. F&M Bank*, 180 W.Va. 133, 375 S.E. 2d 765 (1988).

In addition to document requests, interrogatories are usually propounded to the insurer. Those often, seek duplicative information of the document request or seek purely legal issues such as an affirmation or denial of a legal principle. Interrogatories also sometimes call for specific identification of materials contained within the claim file and courts take varying positions as to whether the insurer must specifically identify pages within the claim file when it is simultaneously produced. Too often plaintiffs attempt to argue their point of view in interrogatories rather than seeking facts. This usually results in justified objections and the interrogatories are then wasted.

- *Discovery Responses*

The breadth of the insurer's response to discovery requests, whether interrogatories or requests for production, must also be considered. As with other type of litigation, general objections to discovery requests are not usually acceptable. This standard is espoused more often in federal litigation than in state litigation and finds it support in Rule 34(b)(2)(B) of the Federal Rules of Civil Procedure which states:

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

There is no specific counterpart to this Rule in the West Virginia Rules of Civil Procedure.

As with all discovery, when there is no plan from the plaintiff, the discovery tends to be overly broad and meandering. When the defense receives such requests, an early attempt to narrow the scope to that which is relevant and related to the issues should be attempted. Concomitantly, the discovery should be read so as to make production of documents and the answering of interrogatories fair and insurers should closely examine their documents as well as the discovery requests in an attempt to meet the rather broad scope of discovery without waiving valid objections.

2. Oral Discovery

Depositions of claims personnel and insurance experts is often the crux of the success or failure of an insurance bad faith case and its defense. Again, advance planning of the objective of the litigation will shape the manner in which oral discovery proceeds and will also encompass the selection, if any, of experts.

- *Claims Personnel*

Typically, plaintiffs seek to depose the claim representative(s) involved in the day-to-day adjusting of the claim, the supervisor of the claim, a 30(b) witness on claim handling - if not the supervisor – and the defense expert. Depending upon the number of individuals who adjusted the claim, it may be possible to limit the depositions to only those with substantive involvement or adjustment activity.

As with any activity in the defense of a bad faith claim, preparation is key. Witnesses must study their specific involvement in the claim, be able to explain their claim file entries and their thought process behind any decision made or evaluation placed on the file. Insurers use acronyms and abbreviations quite heavily and all such "shorthand" should be explained to avoid surprises. Claim representatives must be conversant with their company's overall claim handling

guidelines - although specific familiarity with claim manual language is not necessary or usually expected. Witnesses must also be aware of claim adjustment activity that preceded their involvement in the claim, if appropriate. Witnesses must also be conversant with the laws and regulations imposed upon them when adjusting the claim, *i.e.*, the West Virginia Unfair Claims Settlement Practices Act, insurance commissioner regulations or specific case law that may be of import to a specific claim.

Supervisors must likewise be familiar with the claim adjustment activity but must also be prepared to testify as to performance of their subordinate, compliance with company procedures and guidelines as well as controlling law. Depending upon the level of responsibility vested with the supervisor, other issues may also be appropriate for deposition questioning of a claim supervisor such as performance of the unit the supervisor manages and performance evaluations of those adjusters involved in the claim.

- 30(b) Witnesses

In addition to those with day-to-day handling of the claim in question, a 30(b) witness may also be deposed. Depending upon the structure of any given insurer, the supervisor of the claim representative may be the appropriate 30(b) witness. If so, clear demarcation between that witness's fact testimony and testimony as the corporate representative must be set forth. Contrary to the fact witnesses, the 30(b) witness speaks for the company. This witness takes on a more global perspective and must be prepared to discuss not only the specific adjustment of the claim but the company's expectations of claim handling, the company's claim handling guidelines and philosophy and related institutional matters. The selection of the appropriate 30(b) witness and the narrowing of the scope of any given witness's testimony is critical to insuring appropriate testimony from the individual best suited to provide this binding testimony.

Rule 30(b) testimony as to financial statements of an insurance carrier have been deemed by state and federal courts in West Virginia to be inappropriate and unnecessary since these documents "speak for themselves" and a corporate witness would not provide information other than that set forth in the statement which is a publicly available document.

Too often the proper procedure for seeking and designating a 30(b) witness is not followed which can cause serious problems during or after the deposition. The specific procedure is set forth in Rule (b)(7) of the West Virginia Rules of Civil Procedure which states:

(7) A party may in a notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall

designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules.

Rule 30(b)(6) of the Federal Rules of Civil Procedure is somewhat different in that it states:

> **(6) Notice or Subpoena Directed to an Organization.**
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> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(emphasis added).

Without proper notice of the areas of inquiry from the party requesting the deposition, the insurer is left to guess as to those areas of inquiry and therefore the appropriate person(s) to designate. This inattention to the requirement is detrimental to both sides of the litigation and it is strongly encouraged that the parties agree in advance as to the areas of inquiry sought so that appropriate designation(s) can be made. Once designated, it is the responsibility of defense counsel to restrict the lines of inquiry to the noticed areas so as to not inadvertently permit binding testimony on areas which may be beyond the designee's area of knowledge or expertise. Complicating the issue is when the information is known to the corporation and thus its 30(b) witness only through privileged or work product protected materials. Whether that then renders the otherwise protected information appropriate for 30(b) deposition questioning is unresolved in West Virginia. However, if the corporation designates counsel as its 30(b) witness and the witness is called upon to testify about matters he or she could only have learned through the attorney-client relationship, then the privilege is waived. *State ex rel. United Hospital Ctr., Inc. v Bedell,* 199 W.Va.

316, 484 S.E.2d 199 (1997).[3] Another unresolved issue in this field is whether the 30(b) witness can give the company's interpretation of legal issues.

In addition to the notice issue, too often institutional discovery is so broad or touches upon initiatives so old there is no one in the company who can properly serve as a 30(b) witness on those topics. When there is no one who "knows what the company knows," a new problem is posed to the defense which again requires an attempt to restrict the notice and the scope of overall discovery to that which is relevant and material to the present litigation. While the Federal Rules recognize and attempt to resolve this issue, the West Virginia Rule is silent on this issue. Under Federal Rule 30(b)(6), a corporation must designate one or more witnesses about information known or reasonably available to the organization. Thus, if the institutional discovery is so broad or so old that it is not known or reasonably available, any such deposition may be restricted or precluded. Demonstration of the absence of a person or persons with adequate knowledge within the organization rests with the insurer.

- *Expert Witnesses*

Usually after company witnesses are deposed, plaintiff then moves to expert testimony although there is no pre-set order to discovery. Whether an expert is even necessary is a decision the insurer should make early in the litigation since that decision may dictate a number of others as to how the case is defended, who may be appropriate 30(b) witnesses and subsequent motions practice. Defense counsel should closely study *Jackson v State Farm Mut. Ins. Co.,* 215 W.Va. 634, 600 S.E.2d 346 (2004). *Jackson* contains principles that are equally applicable in defending and in pursuing discovery and holds that insurance experts may not testify regarding opinions on legal issues. Therefore, any attempt to elicit admissions from the defense expert as to whether an insurer violated the Unfair Claims Settlement Practices Act is inadmissible. It may nonetheless be discoverable but is then subject to a motion *in limine.*

While plaintiffs routinely argue that insurers and their counsel throw up roadblocks to discovery or seek to hide information in discovery, a legitimate defense to a bad faith claim is just the opposite. A legitimate defense to a bad faith claim produces relevant discovery, seeks to restrict or eliminate over-reaching discovery and argues for fair application of the Rules of Civil Procedure. The reality of the situation is that insurers have more paper to produce and more information than does a plaintiff in bad faith litigation, thus making it a target for discovery. It therefore becomes incumbent upon the insurer and counsel to work toward a proper scope of discovery to advance the merits, if any, of the litigation. There must therefore be a concerted effort on the plaintiff's and defendant's part to pursue discovery in a fair and reasonable manner rather than simply seeking

[3] This is not a bad faith case but the principles governing 30(b) testimony equally applies in bad faith litigation.

discovery for discovery sake or to attempt to make the litigation so expensive that the insurer settles the claim without regard to the merits of the plaintiff's claim.

B. Propounding Discovery to the Plaintiff

1. Written discovery

Perhaps the most overlooked tool available to the defense in a bad faith litigation is written discovery. While it is true plaintiffs lack more paper than an insurer, it is the plaintiff who advances allegations and theories of recovery. Defense counsel should thoroughly explore those allegations and theories of recovery in an effort to determine which of the claims, if any, are meritorious.

As is true in other litigation as well, plaintiffs sometimes make sensational statements in their Complaints. However, they often have little to no information to support those statements. Likewise, plaintiffs often do not track statutes or case law in setting forth their cause of action in their pleadings. This lack of evidentiary foundation should be explored in discovery.

- Contention Interrogatories

Interrogatories are a good tool to utilize to call upon a plaintiff to support the various contentions of a Complaint and the defense should insist upon particularity similar to that which is sought when discovery is propounded to the insurer. Specifics as to dates and times of alleged misdeeds as well as identification of the actors involved is important to assess the validity of claims. Demanding those details in early discovery is also a good way to ferret out the true nature of issues which remain in contention.

Requests for production tracking the various allegations of the Complaint are also useful in determining which of the claims can be supported and which can disposed of. In that same vein, more than the cursory request for production as to expert materials should be considered.

- Damages Discovery

A key area which can be effectively explored in written discovery is damages. A bad faith Complaint may allege damages for emotional distress, economic hardship or loss, deprivation of use of settlement monies and damage to credit. A host of other "damages" not recognized in current case law is also often included and should be discovered.

For example, a plaintiff may allege damages for emotional distress. If so, consider the following requests:

Did the plaintiff allege/recover emotional distress damages in the underlying case?
Is this emotional distress different than that previously pled and recovered?
How is this emotional distress different?
Did plaintiff seek treatment for this alleged emotional distress?
Did the plaintiff report any specific claim handling issues to his or her mental or health care professional?

As to economic hardships or deprivation of use of settlement monies, although a collateral source rule objection may be raised, any collateral source which paid some or all of the plaintiff's damages may become relevant and discoverable in the bad faith litigation once the plaintiff places these "damages" at issue. If a property damage claim, the economic loss may be in the form of lost profits or lost income. If so, that must be pursued in depth since proving lost profit is a difficult standard and can not be based upon speculative estimates. See, *e.g., State ex rel. Shatzer v Freeport Coal Co.,* 144 W.Va. 178, 107 S.E.2d 503 (1959); *Cell v Ranson Investors,* 189 W.Va. 13, 427 S.E.2d 447 (1992). If a plaintiff alleges a damage to credit, seek a credit report or other proof of damage and seek the nexus between the claim handling and the alleged damage rather than allowing nebulous claims to go unchallenged always bearing in mind that the lack of responsive information may be just as probative as any evidence the plaintiff may produce.

In addition, the use of tailored requests for admission are often overlooked. If the plaintiff has made allegations which are not then supported in discovery responses, the defense should consider seeking party admissions under Rule 36. Seeking early admission of other points which should not be contested is also a useful way to streamline the litigation before the parties become polarized as often happens in this arena. Moreover, these requests for admissions should be considered in line with a potential motion for summary judgment on those issues which can be eliminated from the case, if possible.

2. Oral Discovery

The timing of depositions taken by the defense is case-specific but often includes the plaintiff, damages witnesses and the plaintiff's expert. Similar to the written discovery, specifics about the allegations made and damages claimed should be a part of any deposition of the plaintiff. In addition to assessing the credibility and appearance of the plaintiff, their testimony as how they allege they were damaged by the insurance company as opposed to what they may have been told is vital.

- Deposition of the Plaintiff

It can not be understated that bad faith litigation is lawyer-driven. That fact is usually developed during a deposition of the plaintiff who may know generally what his or her Complaint alleges but can not give any meaningful testimony as to the basis of their claim or the damages alleged. There will most likely be some testimony given about some "harm" caused by an insurance company but the details of the specific claims made, evidence submitted, evaluations at any given point in the life of the underlying claim is often missing from a plaintiff's knowledge and should be set established on the record in a deposition. A deposition is also an opportune time to learn if offers were conveyed to the plaintiff concerning the underlying case, if appropriate to the issues in the bad faith litigation. Plaintiffs understand the concepts of "lowballing" or "delay" which are the two most common allegations in bad faith litigation. However, they often lack specific facts about their case to support these allegations and the lack of information can be most effectively explored during a deposition rather than through written discovery.

A deposition is also the time to question the plaintiff about any inconsistent statements or positions which may become known via social media. Plaintiffs often assert physical damages in their underlying claims seeking insurance benefits yet post photographs and statements on social media such as Facebook® or "My Space" that belies these alleged restrictions. A search of social networking sites may also reveal statements made by the plaintiff about the bad faith litigation itself.

- Damages Witnesses

Plaintiffs often identify a number of "damages" witnesses. Those witnesses should be analyzed and deposed, if appropriate. These witnesses also can post information on social networking sites that may be contrary to their deposition testimony as to the plaintiff and his or her alleged damages. Moreover, these "damages" witnesses may turn out to have little to no first-hand knowledge about the plaintiff's purported damages and usually have no information about the insurance claim that led to the bad faith litigation. Again, this lack of information may be as probative as any testimony provided.

- Expert Witnesses

Similar to the challenge posed to a defense expert, the *Jackson* principles apply to a plaintiff's insurance expert as well. The plaintiff's expert may not give his or her opinion on the interpretation of the law or an opinion on the legal meaning of terms within the Unfair Claims Settlement Practices Act. Furthermore, the plaintiff's insurance expert may not provide opinion testimony on whether a party committed an unfair claim settlement practice or whether such alleged violations constitutes a general business practice of the insurer.

An expert is permitted, however, to testify as to his or her opinions as to "ordinary" practices of claims adjustment and settlement within the insurance industry and whether the defendant insurer's conduct conformed to those practices. What constitutes "ordinary" practices of claims adjustment and settlement within the insurance industry is a key component of deposition questioning of any plaintiff's insurance expert. Just as important as these opinions is whether the "expert" is even qualified to give those opinions. Exploration of the "expert's" background and involvement with or in the insurance industry is vital and again serves as the basis for future motions if warranted.

CONCLUSION

More time and money is spent in the discovery phase of bad faith litigation than any other step of the process. Insurers in particular devote a significant amount of resources to discovery matters. It is therefore incumbent for both sides of bad faith litigation to assess whether their respective resources are well spent.

From the plaintiff's perspective, plaintiffs and their counsel should consider what is needed in discovery, why it is needed and how then intend to obtain the information sought. From the defendant's perspective, insurers and their counsel should consider what they likewise need in discovery but must also consider why discovery is being propounded upon it and how best to respond. Neither boilerplate requests nor responses yield productive results.