MEALEY'S LITIGATION REPORT
Insurance Bad Faith

Applying The Litigation Privilege In Bad-Faith Cases

by
Brian D. Webb

Butler Pappas Weihmuller Katz Craig LLP

A commentary article reprinted from the August 25, 2011 issue of Mealey's Litigation Report: Insurance Bad Faith

LexisNexis®

Commentary

Applying The Litigation Privilege In Bad-Faith Cases

By
Brian D. Webb

[Brian D. Webb, Esq., is a partner with the law firm of Butler Pappas Weihmuller Katz Craig LLP, which has offices in Tampa, Chicago, Charlotte, Mobile, Tallahassee, and Miami. He is an experienced trial and appellate attorney specializing in extra-contractual and complex coverage litigation. This commentary expresses the author's opinions – not the opinions of Butler Pappas or Mealey's.

Introduction

The litigation privilege is a generally accepted common law doctrine that provides absolute immunity against civil liability for actions that occur during the course of a judicial proceeding.[1] The purpose of the litigation privilege is to protect each party's right of access to the courts by allowing litigants and their attorneys to pursue their litigation strategies without fear of later civil liability for what they say and do during the judicial proceeding.[2] The litigation privilege has been applied to preclude nearly all types of lawsuits that are based on the statements or conduct of a party during litigation, including claims for defamation, intentional infliction of emotional distress, negligent misrepresentation, invasion of privacy, and interference with contracts.[3] Courts, however, continue to struggle in their attempts to apply the litigation privilege to preclude the use of an insurer's prior litigation conduct as evidence of bad faith in first-party bad-faith lawsuits.

Some jurisdictions have adopted a bright-line rule of prohibiting the use of an insurer's litigation conduct as evidence of the insurer's bad faith.[4] Most jurisdictions, however, do not accept a blanket prohibition on the use of litigation conduct as evidence of an insurer's bad-faith claim handling.[5] In those jurisdictions that allow evidence of an insurer's litigation conduct as evidence of bad faith, the courts often apply a balancing test in determining whether litigation conduct should be admissible in the bad-faith case.[6] Under the balancing-test approach, courts hold litigation conduct may be admissible as evidence of bad faith unless the probative value of the conduct is substantially outweighed by its prejudicial effect.[7]

While courts adopting a balancing-test approach typically make it clear that admission of an insurer's litigation conduct as evidence of bad faith should occur only in "rare" cases,[8] the use of such limiting language likely does little more than to provide insureds the incentive to argue that his or her case is precisely the type of "rare" case that warrants the admission of litigation conduct as evidence of bad faith. Thus, the adoption of a balancing test (instead of expressly adopting the bright-line prohibition contemplated by the litigation privilege) creates uncertainty – and challenges – for insurers and their attorneys. This article explores some of those challenges.

Overview of Controversy

Several courts have considered the issue of whether evidence of an insurer's conduct during the litigation of an underlying first-party claim for benefits is admissible in a subsequent bad-faith lawsuit. In those jurisdictions that have addressed this issue, courts generally hold that the duty of good faith does not end when the insured files a complaint against the insurer seeking benefits under the policy.[9]

Recognizing the existence of a continuing duty of good faith, however, is only the first step in the analysis. The more difficult step is determining which type of

conduct (if any) by an insurance company during the course of litigation should be admissible as evidence of bad faith.

There seems to be a general recognition that evidence of settlement offers made by the insurer during the litigation of a first-party claim for benefits may be relevant and admissible in a subsequent bad-faith lawsuit.[10] The typical bad-faith case is based on allegations that the insurer refused to settle the insured's claim for benefits when liability and damages were clear. Thus, evidence of the insurer's settlement offers – even those offers made after litigation commences – would presumably be relevant to the typical bad-faith claim.[11]

The more controversial issue is whether evidence of an insurer's litigation strategies and tactics can be admitted as evidence of bad faith in a subsequent bad-faith lawsuit. Since 1985, courts have used the continuing duty of good faith as a basis for admitting – as evidence of bad faith – a variety of litigation activities, including the following:

- the insurance company's "meritless" appeal;[12]
- the insurer's alleged misrepresentations to the court and the insurer's filing of "abusive motions" during the course of the coverage lawsuit;[13]
- the disability insurer's counterclaim against the insured wherein the insurer alleged that the insured committed fraud in his insurance application;[14]
- the uninsured/underinsured ("UM") carrier's answer and affirmative defenses, and its response to a request for admissions;[15] and
- the UM carrier's alleged attempt (by its trial counsel) to delay an arbitration proceeding by repeatedly requesting documents already in its possession.[16]

Allowing insureds to use their insurer's litigation conduct as evidence of bad faith is controversial because it undermines the insurer's right to defend itself against questionable claims. Courts that reject the use of an insurer's litigation conduct as evidence of bad faith often express their concern that permitting allegations of litigation misconduct in bad-faith cases would have a "chilling effect" on insurer's, which could unfairly penalize insurers by inhibiting their attorneys from zealously representing their clients within the bounds permitted by law.[17] As such, allowing the insured to use the insurer's litigation conduct as evidence of bad faith could impair the insurer's right of access to the courts.[18]

White v. Western Title Ins. Co.

White v. Western Title Ins. Co. is generally recognized as the first appellate decision to expressly adopt the principle that an insurer's post-filing conduct (*i.e.*, the conduct after the filing of a civil action to resolve a claim for benefits) may be admissible to prove bad faith.[19] In *White*, the California Supreme Court held that evidence of the insurer's low settlement offers and other insurer conduct during the litigation of the first-party coverage dispute (including the insurer's filing of an unsuccessful motion for summary judgment) was admissible to prove bad faith.[20]

In reaching its decision, the *White* court acknowledged the insurer's concern that jurors may mistakenly view evidence of an insurer's settlement offer as an admission of liability, or that a jury may place undue significance on certain adversarial litigation tactics used by the insurer during the course of first-party litigation. While acknowledging those concerns, the court stated, "We trust that jurors will be aware that parties to a lawsuit are adversaries, and will evaluate the insurer's conduct in relation to that setting.'[21] Moreover, the court noted that the trial court would retain authority to exclude any evidence of settlement offers or other conduct of the insurer if it concluded that the prejudicial effect of such evidence would outweigh its probative value.[22]

Since *White*, California appellate courts have significantly narrowed the court's holding, as one court concluded that *White* merely "stands for the proposition that ridiculously low statutory offers of settlement may be introduced . . . as bearing on the issue of bad faith . . ."[23] Since *White*, courts in California (and elsewhere) have strictly limited the type of post-filing conduct that may be admitted as evidence of insurer bad faith.[24] Although a few courts have adopted a bright-line prohibition on the use of litigation conduct as evidence of bad faith,[25] most courts have adopted a balancing-test approach.[26]

The 'Balancing Test' Approach

In *Palmer by Diacon v. Farmers Insurance Exchange*, the Supreme Court of Montana reversed a trial court's decision – in a first-party bad-faith case – to allow evidence of an insurer's litigation conduct from the underlying first-party application for uninsured motorist benefits.[27] Most of the insured's evidence in the bad-faith trial consisted of the post-filing conduct by the insurer, including the "strategy and litigation tactics" of the insurer's attorneys who defended the underlying UM case.[28] Although the court was critical of the trial court's decision to admit the post-filing evidence, the court stated it does not "impose a blanket prohibition" on the insurer's post-filing conduct.[29] The court stated the insurer's post-filing conduct would be "rarely actionable in and of itself," but that such conduct "may bear on the reasonableness of the insurer's decision and its state of mind when it evaluated and denied the underlying claim."[30]

In holding that a balancing test should be applied to determine the admissibility of post-filing litigation conduct, the *Palmer* court stated, "[T]he court must weigh its probative value against the inherently high prejudicial effect of such evidence, keeping in mind the insurer's fundamental right to defend itself."[31] When conducting the balancing test, the court stated the proper inquiry should be made into the effect to which such post-litigation conduct "casts light on the reasonableness of the original denial of the policyholder's claim."[32] The court further stated that the "most serious policy consideration in allowing evidence of the insurer's post-filing conduct is that it punishes insurers from pursuing legitimate lines of defenses and obstructs their right to contest coverage."[33] Ultimately, after applying its balancing test, the court concluded that the prejudicial effect of the evidence far outweighed the relevance of the insurer's legitimate litigation conduct.[34]

Similarly, in *Timberlake Construction Co. v. U.S. Fidelity & Guaranty Co.*, the Tenth Circuit Court of Appeals, applying Oklahoma law, essentially adopted a balancing test in holding that the insurer's litigation conduct was not admissible to prove bad faith.[35] In *Timberlake*, the insurer, U.S. Fidelity, appealed a jury verdict in favor of its insured on a bad-faith claim. On appeal, U.S. Fidelity challenged the district court's admission of evidence regarding the insurer's post-filing conduct. Specifically, the insurer argued it was error for the district court to admit the following evidence: (1) evidence of the insurer's counterclaim against the insured; (2) evidence of the insurer's motion to join Wal-Mart as a necessary party; and (3) a letter from U.S. Fidelity's counsel to a Fidelity adjuster. In concluding that the district court erred in permitting "the jury to consider the standard and facially permissible litigation steps as evidence of Fidelity's bad faith," the Tenth Circuit stated:

Allowing litigation conduct to serve as evidence of bad faith would undermine an insurer's right to contest questionable claims and to defend itself against such claims. As a district court in this Circuit aptly noted, permitting allegations of litigation misconduct would have a "chilling effect on insurers, which would unfairly penalize them by inhibiting their attorneys from zealously and effectively representing their clients within the bounds permitted by law." [citations omitted] Insurers' counsel would be placed in an untenable position if legitimate litigation conduct could be used as evidence of bad faith. Where improper litigation conduct is at issue, generally the Federal Rules of Civil Procedure provide adequate means of redress, such as motions to strike, compel discovery, secure protective orders, or impose sanctions.[36]

Thus, the court in *Timberlake* held that "while evidence of an insurer's litigation conduct may, in some rare instances, be admissible on the issue of bad faith, such evidence would generally be inadmissible if it lacks probative value and carries a high risk of prejudice."[37]

Uncertainty With 'Balancing Test'

At first glance, the balancing-test approach may seem to be a reasonable standard for determining the admissibility of an insurer's litigation conduct as evidence of bad faith. Courts adopting the balancing-test approach make it clear that admission of an insurer's litigation conduct as evidence of bad faith should be the exception, not the rule.[38] In *Palmer*, the court expressly stated that courts should "rarely" allow evidence of post-filing conduct.[39] Similarly, in *Timberlake*, the court stated that evidence of post-filing conduct should be admissible as evidence of bad faith only in "rare instances."[40] Other courts adopting a balancing-test approach have utilized similar language indicating that admission of post-litigation conduct as evidence of bad faith would be permissible only in "rare" instances.[41]

The primary difficulty with the balancing-test approach is that it creates uncertainty. The approach encourages insureds to argue that their case is the type of "rare" exception contemplated by the courts that have adopted the rule. As such, the approach may have the unintended consequence of encouraging bad-faith litigation.

In essence, the balancing-test approach is arguably nothing more than a standard relevancy test that any court would apply when determining the admissibility of any evidence. Under the balancing-test approach, evidence of the insurer's litigation conduct is excluded if the court determines that the probative value of the potentially relevant litigation evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."[42] As a result, the approach may afford litigation conduct no greater protection than any other relevant evidence.

Challenges

The uncertainty created by the balancing-test approach presents some important challenges for insurers and their attorneys. The initial challenge is faced during the course of the underlying litigation, when insurers and their attorneys must guard against any chilling effect on their litigation strategies. Because the balancing-test approach does not provide the insurer with an absolute privilege over its litigation activities, insurers and their attorneys may occasionally need to weigh the benefit of a particular litigation activity against the potential cost, i.e., the potential negative manner in which a jury in the bad-faith case may view the activity.

In the event an insured files a bad-faith lawsuit based on an insurer's litigation conduct, insurance companies and their attorneys then face the challenge of convincing the court that the probative value of the conduct is substantially outweighed by its prejudicial effect. Strong arguments can be made that post-filing conduct has no probative relevance to a bad-faith claim. Certainly, in cases where it is undisputed that the insurer had no opportunity to settle the claim after the filing of the underlying lawsuit, the insurer's conduct during litigation should be viewed as irrelevant in the bad-faith failure to settle case. In those cases, the insurer's litigation conduct would be irrelevant because there would be no causal relationship between the insurer's conduct and the failure to settle.

Moreover, even in cases where there is a dispute over whether the insurer had an opportunity to settle the claim after the filing of the underlying lawsuit, an insurer's litigation tactics and strategy would not be probative of insurer bad faith. Once suit is filed, the insurer's attorney has an obligation to zealously and ethically represent the interests of his client. The insurer relies on its attorneys to utilize litigation strategies and tactics to defend a disputed claim. Thus, it cannot be presumed that the insurer's pleadings, discovery efforts, and other litigation activities shed light on the reasonableness of the insurer's pre-suit claim-handling decisions.

Some courts draw a distinction between "legitimate" and non-legitimate litigation activities.[43] The alleged relevance of the insurer's "legitimate" litigation conduct is usually held to be substantially outweighed by the danger of unfair prejudice.[44] On the other hand, where the insured characterizes the insurer's litigation conduct as not legitimate, the admissibility of the evidence becomes a closer issue.

The distinction between "legitimate" and non-legitimate litigation conduct was addressed by the Montana Supreme Court in *Federated Mut. Ins. Co. v. Anderson*.[45] In *Federated*, the court held an insurer's conduct during an appeal could be used to support a claim for unfair settlement practices.[46] In reaching its decision, the court acknowledged that public policy "favors" the exclusion of post-filing litigation conduct because it hinders the insurer's right to defend itself and can impair access to the courts.[47] However, the court said not all litigation conduct was protected – only "legitimate" litigation conduct was protected.[48]

The specific litigation conduct at issue in *Federated* involved the insurer's "inconsistent and conflicting" positions taken throughout the appeal, as well as the insurer's "inaccurate citations to authority, and the lack of support for its claims on appeal."[49] The court acknowledged the question of whether the insurer's appeal was frivolous had already been decided by the court in an earlier decision, and that sanctions were already issued; however, the court said that the question remained whether the insurer's conduct was "part of a continuing course of conduct designed to avoid a prompt, fair, and equitable settlement of a claim in which liability had become reasonably clear."[50] Thus,

the court held the "entire course of conduct between the parties" should be relevant in a bad-faith claim.[51]

Although some courts draw a distinction between legitimate and non-legitimate litigation activities, the distinction logically should make no difference when ruling on the admissibility of litigation conduct as evidence of bad faith. The rules of civil procedure and the rules of professional responsibility govern all litigation conduct – regardless of whether the conduct is deemed legitimate or non-legitimate. These rules provide ample safeguards for protecting insureds who feel an opposing attorney's litigation tactics are not legitimate. If an insurer's attorney files a frivolous motion, or a meritless appeal, or otherwise exceeds the boundaries of what the insured perceives as the legitimate boundaries of litigation, then the insured can ask the judge to impose sanctions against the insurer's attorney, or strike the insurer's pleading and enter judgment for the insured. There is no need to further penalize the insurer by allowing the insureds to sue for bad faith based on the perceived misconduct.

Litigation Privilege

Courts that adopt a balancing-test approach typically hold – at least implicitly – that there is no litigation privilege defense for activities that occur during the course of the underlying first-party lawsuit for benefits. Many of those courts, however, have not expressly addressed the applicability of the litigation privilege.[52] Thus, in those jurisdictions, the applicability of the litigation privilege in bad-faith cases is a largely untested issue.

In other jurisdictions, the applicability of the litigation privilege in first-party bad-faith cases is similarly untested. In Florida, for example, no state appellate court has ruled on the applicability of the litigation privilege in a first-party bad-faith case.[53]

While many jurisdictions have not expressly addressed the applicability of the litigation privilege in first-party bad-faith cases, nearly all jurisdictions have case law establishing a strong litigation privilege affording absolute immunity against essentially all other types of civil liability based on what is said and done during a judicial proceeding.[54] Given the strength of the litigation privilege recognized outside the scope of bad-faith cases, insurers and their attorneys should be encouraged to assert the privilege in bad-faith cases.

The litigation privilege confers absolute immunity against any civil liability for any acts occurring during the course of a judicial proceeding.[55] The litigation privilege protects parties, judges, witnesses, and attorneys involved in the judicial proceeding.[56] Under the litigation privilege, absolute immunity is afforded to any act that occurs during the course of the judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious conduct, provided the act has some relation to the proceeding.[57] The privilege applies to events taking place inside and/or outside the courtroom, including events that take place before a lawsuit is filed.[58]

The purpose of the rule of absolute immunity is that it protects against the "chilling effect" on the adversary system that would result if participants in judicial proceedings had to fear later civil liability.[59] The privilege provides a complete defense to civil liability for any statements made in connection with a judicial proceeding, even statements "uttered maliciously or in bad faith."[60]

The litigation privilege should be applied in bad-faith cases to the same extent the privilege is applied to provide immunity against nearly all other types of civil liability, including defamation, intentional infliction of emotional distress, negligent misrepresentation, and other torts.[61] There is no compelling reason to exclude insurers from the protection offered by the privilege.

Application of the litigation privilege in first-party bad-faith cases would provide a bright-line rule that would help avoid the problems and uncertainty associated with the balancing-test approach. Insurers would be able to pursue litigation activities without concern that their practices and techniques will be second guessed by juries.

Conclusion

Most courts strictly limit the type of litigation conduct that may be used as evidence of insurer bad faith. Many of those same courts, however, do not apply (or even attempt to apply) the litigation privilege – a blanket prohibition on the use of litigation conduct as evidence of insurer bad faith. Instead, courts typically adopt a "balancing-test" approach in which the insured is essentially invited to make the argument that the insurer's litigation conduct is relevant to the claim-handling issue raised in the bad-faith lawsuit.

Although courts applying the "balancing test" approach often hold that the litigation conduct should be excluded, the apparent reluctance of these courts to expressly adopt a blanket prohibition – the litigation privilege – creates unnecessary uncertainty for insurers. Given this uncertainty, insurers and their attorneys face the challenge of guarding against any chilling effect on their litigation strategies.

When an insured files a bad-faith lawsuit based on his insurer's litigation conduct, the insurer will typically have a strong argument that its litigation conduct is not relevant to the bad-faith claim. In addition, insurers and their attorneys should be encouraged to assert the application of the litigation privilege. The challenge will be to convince a court that the privilege should be applied in bad-faith cases to protect insurers to the same extent the privilege is routinely applied in other civil actions to protect all other litigants.

Endnotes

1. 1. *See* Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 649 So. 2d 606, 608 (Fla. 1994); Jones v. Coward, 193 N.C. App. 231, 666 S.E.2d 877, 880 (N.C. Ct. App. 2008).

2. James v. Brown, 637 S.W.2d 914, 917-18 (Tex. 1982).

3. *See* Pacific Gas & Elec. Co. v. Bear Steans & Co., 50 Cal. 3d 1118, 1132, 270 Cal. Rptr. 1, 791 P.2d 587 (Cal. 1990).

4. *See* Parker v. Southern Farm Bureau Cas. Ins., 935 S.W.2d 556, 562 (Ark. 1996); Morris v. J.C. Penney Life Ins. Co., 895 S.W.2d 73, 78 (Mo. Ct. App. 1995); Roussalis v. Wyoming Medical Center, Inc., 4 P.3d 209, 257 (Wyo. 2000).

5. *See* Dakota, Minnesota & Eastern Railroad Corp. v. Acuity, 771 N.W.2d 623 (S.D. 2009); Palmer by Diacon v. Farmers Ins. Exchange, 861 P.2d 895, 914 (Mont. 1993); Timberlake Construction Co. v. U.S. Fidelity and Guar. Co., 71 F.3d 335, 340-41 (10th Cir. 1995) (applying Oklahoma law); Parsons v. Allstate Ins. Co., 165 P.3d 809, 818-19 (Colo. App. 2006).

6. *See, e.g.*, Palmer, 861 P.2d at 914; Timberlake, 71 F.3d at 340-41; Parsons v. Allstate Ins. Co., 165 P.3d 809, 818-19 (Colo. App. 2006).

7. Palmer, 861 P.2d 915.

8. *See, e.g.*, Timberlake, 71 F.3d at 340-41.

9. White v. Western Title Ins. Co., 710 P.2d 309 (Cal. 1985); Knotts v. Zurich Ins. Co., 197 S.W.3d 512 (Ky. 2006).

10. *See* Cal. Physicians' Serv. v. Superior Court, 9 Cal. App. 4th 1321 (Cal. App. 1992) (concluding that "White stands for the proposition that [only] ridiculously low statutory offers of settlement may be introduced in a bifurcated trial, after liability has been established, as bearing on the issue of bad faith of the insurance company").

11. *See* Knotts v. Zurich Ins. Co., 197 S.W.3d 512, 522 (Ky. 2006) (holding that only "settlement behavior" and not "litigation conduct" will be admissible in a bad-faith case).

12. Federated Mut. Ins Co. v. Anderson, 991 P.2d 915 (Mont. 1999).

13. General Refractories Co. v. Fireman's Fund Ins. Co., No. Civ.A. 01-CV-5810, 2002 WL 376923 (E.D. Pa. Feb. 28, 2002).

14. Krisa v. Equitable Life Assur. Soc., 109 F. Supp. 2d 316 (M.D. Pa. 2000).

15. Home Ins. Co. v. Owens, 573 So. 2d 343, 344 (Fla. 4th DCA 1990) (where the court affirmed the trial court's ruling which allowed the insured, during the trial of the bad-faith action, to cross-examine – for impeachment purposes – the insurer's claims manager with evidence of the insurer's pleadings and its response to a request for admissions filed during the first-party action for personal injury protection benefits, med pay, and UM).

16. Cooper v. Nationwide Mut. Ins. Co., No. CIV.A. 02-2138, 2002 WL 31478874 (E.D. Pa. Nov. 7, 2002).

17. Knotts v. Zurich Ins. Co., 197 S.W.3d 512, 522 (Ky. 2006) (quoting Timberlake, 71 F.3d at 340-41).

18. White v. Western Title Ins. Co., 710 P.2d 309, 324 (Lucas, J., concurring and desenting)(quoting Young Redman, 55 Cal. App. 3d 827, 128 Cal. Rptr. 86, 93 (1976) ("Free access to the courts is an important and valuable aspect of an effective system of jurisprudence, and a party possessing a colorable claim must be allowed to assert it without fear of suffering a penalty more severe than that typically imposed on defeated parties.").

19. White v. Western Title Ins. Co., 710 P.2d 309 (Cal. 1985).

20. *Id.* at 319.

21. *Id.* at 317.

22. *Id.* at 317 n.9.

23. Cal. Physicians' Serv. v. Superior Court, 9 Cal. App. 4th 1321, 12 Cal. Rptr. 2d 95, 100 (1992).

24. *See* Dakota, Minnesota & Eastern Railroad Corp. v. Acuity, 771 N.W.2d 623, 633-34 (S.D. 2009).

25. *See* Parker v. S. Farm Bureau Cas. Inc., 326 Ark. 1073, 935 S.W.2d 556, 562 (Ark. 1996); Morris v. J.C. Penney Life Ins. Co., 895 S.W.2d 73, 78 (Mo. Ct. App. 1995); Roussalis v. Wyoming Medical Center, Inc., 4 P.3d 209, 257 (Wyo. 2000).

26. *See* Palmer by Diacon v. Farmers Ins. Exchange, 261 Mont. 91, 861 P.2d 895, 914 (Mont. 1993); Timberlake Construction Co. v. U.S. Fidelity & Guar. Co., 71 F.3d 335, 340-41 (10th Cir. 1995) (applying Oklahoma law).

27. Palmer, 861 P.2d at 916.

28. *Id.* at 901.

29. *Id.* at 915.

30. *Id.* at 915-16.

31. *Id.* at 915.

32. *Id.* at 916.

33. *Id.* at 914.

34. *Id.* at 916.

35. Timberlake Construction Co. v. U.S. Fidelity & Guaranty Co., 71 F.3d 335 (10th Cir. 1995) (applying Oklahoma law).

36. Timberlake, 71 F.3d at 341 (citations omitted).

37. *Id.* at 341.

38. *See* Parsons v. Allstate Ins. Co., 165 P.3d 809, 818-19 (Colo. Ct. App. 2006) (where the court adopted the balancing-test approach described in Palmer and held that the insurer's refusal to submit to a deposition, and the insurer's filing of an answer denying coverage, should not be admissible as evidence of bad faith).

39. Palmer, 861 P.2d at 914.

40. Timberlake, 71 F.3d at 341.

41. *See, e.g.*, Sims v. Travelers Ins. Co., 16 P.3d 468, 471 (Okla. Civ. App. 2000) (where the court followed Timberlake and stated that "litigation conduct should rarely, if ever, be allowed to serve as proof of bad faith").

42. Rule 403, Federal Rules of Evidence.

43. Federated v. Anderson, 991 P.2d 915, 922 (Mont. 1999).

44. Palmer, 861 P.2d at 916.

45. Federated Mut. Ins. Co. v. Anderson, 991 P.2d 914 (Mont. 1999),

46. Federated, 991 P.2d at 922.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 923.

51. *Id.*

52. *See, e.g.*, Timberlake, 71 F.3d at 341-42.

53. There is at least one federal district court case, applying Florida law, holding that the litigation privilege applies in a first-party bad-faith lawsuit. Valenti v. Unum Life Ins. Co. of America, Case No. 8:04-cv-1615-T-30TGW, 2006 WL 1627276 (M.D. Fla. June 6, 2006).

54. For example, the Florida Supreme Court recently expanded the scope of the litigation privilege to all causes of action, including actions in tort, and statutory violations. Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380 (Fla. 2007). In Echevarria, the court stated, "Absolute immunity must be afforded to any act occurring during the course of a judicial proceeding . . . so long as the act has come relation to the proceeding." *Id.* at 384.

55. Levin, 649 So. 2d at 608; Jones, 666 S.E.2d at 880.

56. Levin, 639 So. 2d at 608.

57. *Id.*

58. Hoover v. Van Stone, 540 F. Supp. 1118, 1122 (D. Del. 1982) (holding that "events taking place outside the courtroom during discovery or settlement discussions are no less an integral part of the judicial process, and thus deserving of the protection of the [litigation] privilege, than in-court proceedings"); Pettitt v. Levy, 28 Cal. App. 3d 484, 104 Cal. Rptr. 650, 654 (1972) (holding that the litigation privilege "extends to preliminary conversations and interviews with a prospective witness and an attorney if they are some way related to or connected with a proceeding or contemplated action"); Jones v. Coward, 666 S.E.2d at 880 (holding that an attorney's statement to a potential witness before trial is absolutely privileged, provided the statement is related to the subject matter of the controversy); Delmonico v. Traynor, 50 So. 3d 4, 7-8 (Fla. 4th DCA 2010) (holding that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior).

59. Levin, 639 So. 2d at 608. *See also* Restatement (Second) of Torts § 586 Comment a (1977).

60. Doe v. Nutter, McClennen & Fish, 668 N.E.2d 1329 (Mass. App. Ct. 1996).

61. *See* Pacific Gas & Elec. Co. v. Bear Sterns & Co., 791 P.2d 587. ■

MEALEY'S LITIGATION REPORT: INSURANCE BAD FAITH
edited by Mark Rogers
The Report is produced twice monthly by

LexisNexis®

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1526-0267