I. EMERGING ISSUES AND CURRENT LAWS

A. Recent legislation affecting bad faith actions – Venue

Prior to 2005, it was possible for a Plaintiff suing an insurance carrier for tortious and/or bad faith handling of a claim to select any county in the state to file the direct action, as long as the carrier issued policies in that county. Predictably this led plaintiffs to choose counties with poorer, more rural and less educated populations, i.e., jury pools considered more traditionally liberal with respect to awarding damages in civil cases.

This changed significantly in 2005, as that year saw both a landmark South Carolina Supreme Court opinion and the enactment of a new venue statute passed as part of broad tort reform legislation referred to collectively as the Economic Development, Citizens, and Small Business Protection Act of 2005 ("the Act").

In Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286 (Feb. 2, 2005, rehearing denied March 10, 2005), the South Carolina Supreme Court "overturned several previous cases and held that 'own[ing] property and transact [ing] business' within a county is insufficient to establish the residence of a corporate defendant for venue purposes."[1]

Several months earlier the South Carolina legislature had passed 2005 S.C.L. Act 27 (H.B. 3008), a multi-faceted tort reform bill that included "the first significant changes to the state's general venue statute in over a century."[2] The Act became effective July 1, 2005.

Under Whaley, The "owns property and transacts business" test is no longer the correct test for determining whether venue is proper. Although quickly superseded by the Act, Whaley still has a potentially significant effect on South Carolina venue law.

> The supreme court decided Whaley on February 2, 2005, and the legislature did not enact the new venue statute until July 1, 2005. Therefore, Whaley governs venue for all civil actions filed during that five-month interval. Whaley's invalidation of the "owns property and transacts business" test also substantially reduced the number of potential venue options available to plaintiffs suing corporate defendants. The decision immediately reduced the potential for forum shopping and provided better protection of a corporate defendant's right to be tried in the county where it truly resides. However, Whaley could potentially have an adverse effect on certain foreign corporations. Because Whaley narrowed the definition of "resides" for venue purposes, fewer foreign corporations

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[1] Steven B. McFarland, A One-Two Punch To Forum Shopping: Recent Judicial And Legislative Amendments To South Carolina's Corporate Venue Jurisprudence, 57 S.C.L. Rev. 465 (Spring 2006).

[2] McFarland, *supra*, at 466, citing Daniel B. White, et al., Where Do We Go From Here? Recent Changes in South Carolina's Venue Laws, S.C. Law., May 2005, at 27, 30.

> will meet the residency requirements in South Carolina counties. Therefore, during the five-month period in which Whaley controls venue, more foreign corporations will qualify as non-residents and will be subject to the pre-2005 statutory provision, allowing plaintiffs unfettered discretion to select a county in which to sue non-resident foreign corporations.[3]

The new section 15-7-30. Unlike the previous venue statute, the new section 15-7-30 contains detailed definitions for all essential terms. Among the significant changes are the time considered to determine venue – it is now "at the time the cause of action arose" rather than "at the time of the commencement of the action."[4]

The most significant change in the new venue statute concerns the bases upon which courts determine proper venue. "The pre-2005 version of the venue statute established venue in any county where a corporate defendant 'resides.' In contrast, the amended statute provides specific, well-defined, and limited bases for establishing proper venue for both foreign and domestic corporations. The amended statute establishes separate and distinct bases for determining venue depending on the nature of the corporation."[5]

B. New Case Law Development – What State And Federal Courts Are Ruling Regarding Bad Faith And Related Issues

1. Fraudulent Inducement To Sign Release

Gaskins v. Southern Farm Bureau Cas. Ins. Co., 354 S.C. 416, 581 S.E.2d 169 (2003), rehearing denied.

Randy ("Randy") and Lisa Gaskins (collectively "Gaskins") sued Southern Farm Bureau Casualty Insurance Company ("Southern Farm") for fraudulent inducement to sign a release. The Gaskins alleged that Randy was accidentally shot by his father in a hunting accident, and as a result he suffered injuries and accrued medical bills. It was further alleged the insurance provider, Southern Farm, for the father informed Randy's father the policy limit was $9,000 when it was actually $100,000.

The Gaskins alleged the only reason they accepted $9,000 from Farm Bureau was due to the erroneous information they received from a Farm Bureau agent as to the policy limits. As a result, the Gaskins sought to recover in tort for fraudulent inducement to settle a claim.

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[3] McFarland, *supra*, at 478.

[4] Id. at 479.

[5] Id. at 480.

The South Carolina Supreme Court held that, while the Court of Appeals correctly reversed the trial court, it did so on a misunderstanding of the Hopkins decision. Here, the injured parties could still sue the insurer in tort for fraudulently inducing them to sign a release provided that they allege and prove that the insured was negligent in the underlying tort. To establish the materiality element for a claim against an insurance company for tort of fraudulently obtaining a release, the plaintiff had to demonstrate that the insurer had an obligation to pay by alleging and proving the liability of the insured tortfeasor.

While noting parenthetically that the Claims Practice Act, S.C. Code Ann. 38-59-20, does not create a private cause of action, the court cited the pertinent part of the statute which prohibits an insurer from knowingly misrepresenting to third-party claimants "pertinent facts or policy provisions relating to coverages at issue or providing deceptive or misleading information with respect to coverages" and stated that this was "instructive of legislative intent to prohibit such practices as complained of in this case." Gaskins, 354 S.C. at 419, 581 S.E.2d 170.

2. Insured's right to select or reject counsel / Insured's duty to cooperate

Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co., 336 F.Supp.2d 610 (D.S.C. 2004).

The insured corporation's officer was entitled under general commercial liability policies to separate representation in sexual harassment actions against him and corporation, where policies covered only officers' actions within scope of their duties, thereby giving corporation an interest in demonstrating that any sexual harassment or retaliation was result of officer acting outside course and scope of his employment.

The insured was not justified in rejecting attorney designated by insurers to conduct defense in employment discrimination action, even though insured claimed that attorney had conflict of interest because of insurers' notice of reservation of rights with regard to several claims, where insurers proposed compromise whereby insured would be permitted to select independent attorney to work alongside attorney, with insurers paying for both attorneys under certain reasonable conditions.

As predicted by the district court, there was no per se disqualification rule giving insured right to retain independent counsel of its own choosing at insurer's expense where only potential for conflict of interest existed because reservation of rights notice had been given.

The insurer's obligation to provide independent counsel is not based on insurance law; rather, it is based on lawyer's duty of loyalty which prohibits him or her from representing conflicting interests.

The insured substantially failed to comply with provision of general commercial liability policies requiring it to cooperate with insurers in settlement of claims, and thus was not entitled to reimbursement for attorney fees and costs expended in defending employment discrimination charges, where insured rejected attorney selected by insurers after insurers gave notice of reservation of rights, rejected compromise proposed by insurers, and failed to obtain insurers' approval of attorney it retained.

The insured substantially failed to comply with provision of general commercial liability policies requiring it to cooperate with insurers in settlement of claims, and thus insurers had no duty to indemnify insured for sums paid in compromise settlements in sexual harassment actions, where insured rejected attorney selected by insurers after insurers gave notice of reservation of rights, rejected compromise proposed by insurers, and failed to obtain insurers' approval of settlement.

3. Bad faith refusal to pay

University Medical Associates of Medical University of S.C. v. UnumProvident Corp., 335 F.Supp.2d 702 (D.S.C. 2004).

Dr. Deborah F. Stanitski ("Stanitski") is a surgeon employed by the Medical University of South Carolina ("MUSC"). MUSC requires its physicians to join University Medical Associates ("UMA"). As a member of UMA, Stanitski was insured under a group disability policy. UNUMProvident Corporation ("UNUMProvident") is the holding company of Provident Life and Accident Insurance Company ("Provident"), which is the company that issued the group disability policy to UMA.

Stanitski suffered a severe brain injury, and filed a claim with UNUMProvident seeking long-term disability. UNUMProvident was provided with information that Stanitski would be returning to work in very limited capacity. As a result of this information, UNUMProvident informed Stanitski that final payment would be made and the claim file would be closed. UNUMProvident informed Stanitski that she could appeal the decision to close her file. The appeals department informed her the claim was not appropriate for appeal.

The defendants' motion for summary judgment was granted in part but denied as to consequential damages, interest, attorney's fees, bad faith, and punitive damages. Genuine issues of material fact existed as to whether disability insurer closed insured's file based on erroneous belief that she had agreed to advanced pay, and whether insurer unreasonably delayed making payments, precluding summary judgment. The fact that the disability insurer had paid all amounts due under policy at time suit was filed did not bar insured's bad faith claim against insurer, where insured allegedly suffered mental and emotional distress created by insurer's delay and bad faith refusal to pay, had to hire counsel to pursue claim, incurred costs and expenses in bringing action, and lost interest on money owed by insurer due to its refusal to timely honor claim.

Helena Chemical Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004).

Helena Chemical Company ("Helena") is in the business of formulating, distributing, and selling agricultural chemicals to the farming industry. By letter, the EPA encouraged Helena to voluntarily cleanup polluted soils at three sites. Helena removed and disposed of pesticide-contaminated soil. As a result, Helena sought reimbursement from for the environmental clean-up costs. The insurers denied coverage for these cleanups.

The South Carolina Supreme Court reversed the trial court's finding that the environmental cleanup costs were not damages contemplated under the insurance policies. As to the pollution exclusion, the Court held, the contamination in question was caused by the insured's routine business operations and was thus not unexpected or accidental. Therefore, the insured's claims did not fall within the exception to the pollution exclusion and the insurers were not liable for the clean-up costs. Accordingly the insurer had reasonable basis to deny claim; the denial did not constitute bad faith. Cleanup costs did not fall under exception to pollution exclusion for "sudden and accidental" pollution in policy.

Hansen ex rel. Hansen v. United Services Auto. Ass'n, 350 S.C. 62, 565 S.E.2d 114 (Ct. App. 2002), rehearing denied, certiorari denied.

Automobile liability insurer's payment of the $30,000 minimum did not constitute bad faith in case in which benefits were sought under policy written in Ohio for deaths of insured driver's children; although insured contended he paid premiums for liability coverage in amount of $200,000, policy's "family exclusion" promised only the minimum amounts and types of coverages required by law if insured's accident occurred in another state.

Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 562 S.E.2d 659 (Ct. App. 2002), rehearing denied, certiorari denied.

An insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under particular facts of case.

4. Reasonable ground for denial

Myrick v. Prime Ins. Syndicate, Inc. (C.A.4 (S.C.) 2005) 395 F.3d 485 (4th Cir. (S.C.) 2005).

An inland marine insurer did not deny insured equipment owner's claim for fire loss in bad faith, where equipment that burned was not listed in policy due to misdescription in application not definitely traceable to insurer's error; absence of listing provided reasonable ground for denial, and insurer adequately investigated claim, after being alerted to possibility that burned equipment might not be same as that listed, by hiring independent adjuster to investigate, who concluded that listing in policy did not match lost equipment. A reasonable ground for contesting claim precludes finding of bad faith against the insurer.

5. Naming non-diverse adjuster or adjusting company as defendants to avoid removal to federal court

Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Ins. Co., 355 S.C. 614, 586 S.E.2d 586 (S.C. 2003).

This case addressed a plaintiff's attempt to name an insurance adjuster, who was a South Carolina resident, as a defendant in an effort to destroy diversity jurisdiction and prevent removal to federal court. The corporate defendants removed the case anyway, asserting fraudulent joinder.

A fire occurred at the business premises of Charleston Dry Cleaners & Laundry, Inc. ("Dry Cleaners"). The fire destroyed its contents and fixtures. At the time of the fire, the Dry Cleaners was insured by both Zurich American Insurance Co. ("Zurich") and Allstate Insurance Co. On July 20, 2001, Dry Cleaners requested that Zurich pay losses sustained by its customers. Zurich retained GAB Robins North America, Inc. ("GAB") to adjust the Dry Cleaners' claim. GAB then assigned the adjustment to R.S. Townsend to adjust the fire claim. While Zurich made partial payments to Dry Cleaners, it ultimately, through GAB and Townsend, decided to reject Dry Cleaners' proof of loss statements. Dry Cleaners brought a negligence cause of action against GAB and Townsend.

The South Carolina Supreme Court held, as a matter of first impression and following the majority rule, that neither GAB or Townsend, as independent adjusters, owed a general duty of care to Dry Cleaners, although their alleged bad faith could be imputed to the insurance companies. Accordingly, removal was proper and Townsend, individual adjuster and his employer, GAB, the adjusting company, were dismissed.

This ruling applies to adjusters only. A plaintiff may still be able to destroy diversity by naming a resident sales agent if the facts permit. See Carolina Bank and Trust Co. v. St. Paul Fire and Marine Co., 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983).

6. Punitive Damages -- The post-Campbell environment

a. South Carolina

Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 604 S.E.2d 385 (2004).

The prior owners of home purchased by the Bert and Stephanie Atkinson (collectively "Atkinsons") had maintained a termite bond from Orkin Exterminating Co. Inc. ("Orkin"). The bond included a lifetime termite damage guarantee, which provided up to $100,000 in recoverable repair costs for termite damage, and a transferability provision. Orkin then refused to transfer the bond under the same terms to the Atkinsons. Instead, Orkin offered them a new contract, which was less desirable. The Atkinsons rejected this termite bond and obtained coverage from Terminix. After the expiration of Orkin's termite bond but before the expiration of the Teminix bond, the Atkinsons discovered termites and termite damage. Terminix denied coverage, claiming that most of the damage occurred during the time Orkin provided coverage on the home.

The South Carolina Supreme Court held that while Orkin's breach of the transferability provision in the contract supported an award of punitive damages, that certain evidence unfairly inflated the amount of punitive damages the jury awarded. Due to the disparity between the punitive and compensatory damages that were awarded, there was a presumption that the punitive damages were unconstitutional. The Court reached its conclusion on the excess award of punitive damages based on the U.S. Supreme Court opinion in State Farm v. Campbell, which was issued after the parties in this case submitted their briefs. Lastly the Court held that the proceeds the Atkinsons received from their settlement with Terminix was a collateral source, and Orkin was not entitled to any set-off.

b. Punitive damages post-Campbell: National view

Two decisions by United States Supreme Court over the last decade, BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) "have clarified the substantive due process limits on punitive damages. While preserving punitive damages to punish bad faith conduct, the Supreme Court has eliminated excessive punitive damages that are not reasonably related to the legitimate goals of deterrence and retribution." [6]

i. The Three Guideposts of BMW: Reprehensibility, Ratio, and Comparable Penalties.

"In BMW v. Gore the Supreme Court established a framework for analyzing whether a punitive damages award violated substantive due process. The Court in BMW offered three 'guideposts' to gauge whether a punitive damages verdict violates substantive due process: First, the degree of reprehensibility of the misconduct; second, the relationship between the punitive award and the actual harm; and third, the relationship of the award to other civil or criminal penalties imposed for comparable conduct." [7]

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[6] John N. Ellison, et al., Bad Faith And Punitive Damages The Policyholder's Guide To Bad Faith Insurance Coverage Litigation - Understanding The Available Recovery Tools. Part of American Law Institute - American Bar Association Continuing Legal Education Sixth Annual Advanced ALI-ABA Course of Study, 345-56 (June 16, 2005). Available on Westlaw at SK095 ALI-ABA 251.

[7] Id. at 345.

ii. Campbell Refines BMW Guideposts

"On April 7, 2003, in a 6-3 decision, the United States Supreme Court ruled that the Utah Supreme Court erred in reinstating a jury's $145 million punitive damages award against State Farm Insurance Company, finding that the award violated substantive due process. The Campbell case refined the BMW guideposts, but raised as many questions as it answered. Perhaps the most controversial aspect of Campbell is the reference to a 'single-digit ratio' of punitive damages to compensatory damages . . . Single digit multipliers are more likely to comport with due process, while still achieving the legitimate goals of deterrence and retribution. Higher ratios will be more likely to be permissible when compensatory damages are smaller."[8]

iii. Campbell factors for evaluating constitutionality of a punitive damages award:

A. Absent Physical Harm Or Risk Thereof, High Ratio As Justifiable By Extreme Reprehensibility or Extraordinarily Low Damages

Significant post-Campbell cases:

Hollock v. Erie Ins. Exch., 842 A.2d 409 (Pa.Super. 2004), *en banc*

Williams v. Conagra Poultry Co., 378 F.3d 790 (8th Cir. 2004)

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 720 (7th Cir. 2003)

Romanski v. Detroit Entertainment, LLC, 428 F.3d 629, 645 (6th Cir. 2005)

Roth v. Farner-Bocken Co., 667 N.W.2d 651 (S.D. 2003)

Bains LLC v. Arco Prods. Co., 405 F.3d 764 (9th Cir. 2005)

B. High Ratio Where Compensatory Award Is Substantial

Significant post-Campbell cases:

Stogsdill v. Healthmark Partners, L.L.C., 377 F.3d 827 (8th Cir. 2004)

Eden Electrical, Ltd. v. Amana Co., 370 F.3d 824 (8th Cir. 2004)

Goddard v. Farmers Ins. Co., 120 P.3d 1260 (Or. Ct. App. 2005)

C. Recidivism

[8] Id. at 348.

Significant post-Campbell cases:

Willow Inn, Inc. v. Public Service Mutual Insurance Co., 399 F.3d 224 (3rd Cir. 2005)

D. Hypothetical Harm or Potential Harm To Persons Other Than the Plaintiff

Significant post-Campbell cases:

Williams v. Conagra Poultry, *supra*

Bains, *supra*

Johnson v. Ford Motor Co., 113 P.3d 82 (Cal. 2005).

Simon v. San Paolo U.S. Holding Co., 113 P.3d 63 (Cal. 2005).

E. Defendant's Wealth As A Basis To Enhance a Punitive Damage Award

Significant post-Campbell cases

Mathias, *supra*

Clark v. Chrysler Corp., 436 F.3d 594 (6th Cir. 2006)

Simon, *supra*

Romanski, *supra*

7. Other trends reflected in recent extrajurisdictional case law

a. Discovery in bad faith actions

In Allstate Indemnity Company v. Ruiz, 899 So.2d 1121 (Fla.2005), the Florida supreme court receded from its 1989 decision of Kujawa v. Manhattan National Life Insurance Co., 541 So.2d 1168 (Fla.1989), which had created a distinction with regard to the discovery applicable to statutory first-party and third-party bad faith actions.

b. Responding to reservations of rights and non-waiver agreements

"The law obligates insurance companies to respond quickly to claims to avoid waiving their rights later to assert policy defenses. Therefore, an insurance company may reply to a policyholders' notice of claim by sending a "reservation for rights," listing defenses to the policyholder's claim for coverage. Alternatively, insurance companies may propose that policyholders sign so-called non-waiver agreements. Policyholders should carefully consider the possible ramifications before agreeing to a non-waiver agreement and should act to preserve their rights.” [9]

“A policyholder's response to a reservation of rights may be particularly important given decisions in some courts that give insurance companies an argument for seeking to recoup defense or even indemnity costs that insurers have paid to the policyholder. E.g., Buss v. Superior Court, 939 P.2d 766 (Cal. 1997). As a result of these cases, an insurer may be able to recoup moneys paid to the policyholder for claims later found not to be covered if the insurer reserves the right to do so, and the policyholder does not object. Responding to reservations of rights may become imperative in such a situation.”[10]

Other courts have enforced the insurance companies' duty to defend and duty to indemnify promised in general liability insurance policies. Such courts thus have specifically rejected insurers' efforts to recover moneys paid to defend a policyholder after obtaining a declaratory judgment of no coverage with regard to some, but not all, of the underlying claims against the policyholder. E.g., General Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co., 828 N.E.2d 1092 (Ill. 2005).[11]

c. McGregor: Attorneys' Fees Incurred on Appeal; Now Recoverable Under Brandt[12]

“For the first time, the Ninth Circuit has held that attorneys' fees incurred on appeal are recoverable in a bad faith insurance case. In its groundbreaking three-page decision, the court examined Brandt v. Superior Court, 37 Cal. 3d 813 (1985) and concluded that where there has been a finding of insurer bad faith, "[W]e are convinced that if the California Supreme Court were to address this issue, it would hold that Brandt fees are recoverable for fees incurred in defending against an insurer's appeal." The court rejected the insurers' argument, based on the holding in Burnaby v. Standard Fire Ins. Co., 40 Cal. App. 4th 787 (1995), that because Brandt was silent concerning attorneys' fees on appeal, no fees were due. Instead, the court reasoned that Brandt "supports the opposite conclusion.’” The court also rejected the insurers' argument, also discussed in Burnaby, that “appellate fees should not be available because an insurer's prosecution of an appeal is not itself tortious conduct[,]" holding instead that "on appeal, the relevant

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[9] Lorelie S. Masters, Current Issues In Cgl Claims Handling And Bad Faith, Practising Law Institute (May 2006). Available on Westlaw at 742 PLI/Lit 7.

[10] Id.

[11] Id.

[12] Ray Bourhis, et al., Practice Tips--Two New Landmark Insurance Bad Faith Decisions, ATLA Annual Convention Reference Materials, Vol. 1, Bad Faith Insurance (July 2005). Available on Westlaw at 1 Ann.2005 ATLA-CLE 301 (2005) (citations omitted).

tortious conduct at issue is still the same wrongful denial of benefits, not the act of prosecuting an appeal . . . .”

“Although decided in the context of a disability case, the court's opinion reaches all insurance bad faith cases. Clearly the court considered the issue so important that it published its opinion even though it chose not to publish its decision in the underlying case, which affirmed the jury's bad faith verdict totaling $1.1 million, plus fees, including $616,000 in emotional distress.” Thus it is now established in California that if an insured wins an appeal on a bad faith verdict, he or she will be entitled to an additional award of attorney's fees.

d. Hangarter: Ninth Circuit Issues Landmark Decision On Bad Faith In Disability Insurance Context[13]

“In affirming a $7.7 million verdict against the nation's largest disability insurer, the court's June 25, 2004 unanimous ruling in Hangarter v. Provident Life and Acc. Ins. Co., 373 F.3d 998 (9th Cir. 2004) (Hangarter) immediately became the most comprehensive and important bad faith insurance disability opinion since Moore v. American United Health Ins., 149 Cal. App. 3d 843 (1984). Since California's bad faith insurance law often is cited for its persuasive value in opinions throughout the country, Hangarter also has nationwide implications.

Hangarter addresses some of the most common tactics used by disability insurers in the claim handling and litigation context. The Ninth Circuit rebutted common insurer arguments to avoid a finding of total disability, such as failed attempts to return to work, performance of incidental duties, and production of some income by insured. The Court also reaffirmed accelerated benefits, held that expert testimony was appropriate to prove bad faith, and further ruled that there is no bright line rule for calculating punitive damages under State Farm v. Campbell.

[13] Id. (citations omitted).