EXPERT REPORTS --- EXCERPTS

[NOTE: HERE ARE SELECTED EXCERPTS FROM SOME EXPERT REPORTS PREPARED BY BILL HIGHT AND DISCLOSED IN RECENT LAWSUITS. MINOR MODIFICATIONS HAVE BEEN MADE TO PROVIDE CONTEXT AND SHIELD IDENTITIES.]

ARSON INVESTIGATIONS

"Scientific advances and more rigorous training programs for fire investigators over the past 25 years or so have improved forensic investigative techniques, but the basic nature of the event and the role of human actors in contributing to fire hazards, ignition and spread continue to pose challenges in answering the key questions of origin and cause. Direct evidence, such as eye witness testimony and/or surveillance cameras, is rarely available to aid the investigator. Instead, he or she must rely largely on circumstantial evidence, applying logic and reason to facts which can be observed or reliably assumed. Thus, fire investigation builds from using scientific methodology to observe and test the fire scene, exploring potential sources of ignition, interviewing witnesses and stakeholders, and gathering background evidence of motive, disposition, and potential involvement.
Proceeding from an open mind, drawing reasonable inferences from the various sources of circumstantial evidence and applying seasoned judgment are the hallmarks of a good fire investigation.

In assessing whether a fire was set, or incendiary in origin, it is important to distinguish between drawing a reasonable inference and inferring reasonable conduct. Arson, of course, is a crime, a dangerous crime. A person who sets a fire cannot be sure how destructive its development may become. Whether the fire is set in an inhabited structure, even if believed to be unoccupied, or in the outdoors, unforeseen fuels or weather may contribute to its unanticipated spread. An arsonist's act or omission can be influenced by factors other than self-interest or pursuit of a tightly conceived and executed scheme. Anger, desperation, fear, panic, a whole

range of emotions as well as unforeseen human intervention can derail the best laid plans. Thus, a presumption (or bias) that no reasonable person would act in such a way - inferring, therefore, only reasonable conduct - is theoretically unsound and contrary to common sense. Depending upon the evidence gathered, it may be entirely appropriate to draw a reasonable inference that the suspect acted in an unreasonable or even self-destructive way."

"The insurer is criticized for failing to take into account consideration of motives or the absence of motives on the part of the insured in causing an incendiary fire. Based upon my review of the declarations and briefs addressing motives, it is my opinion that the factual allegations improperly conflate motive and intent. Having investigated numerous fires of different causes and origins over the years, having worked closely with numerous fire investigators and being generally familiar with fire investigation methodology and protocol, it is my opinion that "motive" in the context of fire investigation is more of a clue than a conclusion. This view is substantiated in authoritative guides and textbooks devoted to the study of fire investigations, particularly those fires suspected of being incendiary. [Citation to NFPA 921]"

DUTY TO DEFEND

"As a matter of public policy the Insurance Commissioner has recognized that depending on the circumstances thirty days may not be realistic and that an insurer cannot conduct a timely, reasonable investigation without the reasonable assistance of those who are in a position (and contractually bound) to cooperate. Absent a conflict of interest, which is not present here, the insureds' counsel is in the best position 'to facilitate compliance with this provision.' In fact, it is common practice for defense counsel, whether personal or appointed, to tender claims to all potential insurers of their clients and to cooperate in providing those insurers key information.

Given the complexity of the complaint with its 10 causes of action and its express reference to a missing exhibit, it was reasonable, even necessary, to try to obtain the complete document for purposes of complying with Washington's strict 8-corner rule (complaint and insurance policy) in determining compliance with the duty to defend. A prudent liability insurer would insist on reviewing a complete copy of the complaint, including exhibits, before determining whether the policy 'conceivably' covers the complaint's allegations. [Citation omitted] Arguing in hindsight that the information within the missing exhibit was not material assumes a standard not of reasonableness but of clairvoyance."

CONFLICTING EXPERT REPORTS

"The expert report, filed on behalf of the insureds, argues that the insurer did not conduct an objective investigation of the loss. This opinion rests on the stated principle that an insurance company must give equal consideration to facts supporting coverage as it gives to facts defeating coverage. The report states that '[w]hen an insurer has evidence that equally supports and that does not support coverage, the industry custom is to extend coverage. In the landscape of insurance, we call this "the tie goes to the runner," meaning the insured.'
There are several flaws in this statement of the principle and in its proposed method of application:

First, the definition of bad faith is unreasonable, unfounded or frivolous. Thus, the test is one of reasonableness, not equal consideration.

Second, even if one applies the principle of equal consideration, that does not translate to a requirement to give equal weight to conflicting opinions. It is not uncommon for an insurance company to receive reports from more than one expert in the same discipline concerning a loss investigation, and where there are two opinions they should be compared and evaluated on their merits. It would be unreasonably simplistic and arbitrary to conclude that one opinion, however

ungrounded or mistaken, offsets a competing, different opinion which displays the hallmarks of careful analysis. Not all opinions are of equal merit.

Third, the analogy to baseball's rule, awarding a tie to the runner, has three strikes against it. One, it is not a recognized custom or practice in the industry because factual investigations hardly ever result in a tie. Two, while there is a legal rule of construction, which favors the insured, involving competing reasonable interpretations of ambiguous policy language, that rule does not apply in factual investigations. Thus, in this instance, it is misapplied. Three, in court the insured has the burden of proving the basic facts of coverage under the policy on a more probable than not standard. It is therefore nonsensical to argue that the standard is lower in the investigative and adjustment phase of a property insurance claim."

UNDERWRITING THE DWELLING

"The core of the insureds' allegations that the insurer acted in bad faith lies in the factual assertion that at the time of the fire and for many years preceding the fire the insureds used the farmhouse and the barnhouse together as their primary residence. They assert that this living arrangement either constitutes a dwelling as defined in the policy or should have been recognized as such in the formation and issuance of the homeowners policy.

The underwriting process for placement of this policy, stretching back to 1993, was oriented toward issuance of a standard form homeowners policy. A 'standard' form, as the word implies, is a pre-printed and filed basic insurance policy as compared to a custom or 'manuscript' policy which is customized to the characteristics of property which contains unusual attributes or risks associated with it. This standard form main coverage part is basically organized or structured the same as homeowners policies have been structured for at least 30 years. A major distinction is drawn between the dwelling, on one hand, and other structures, on the other hand, with the latter commonly limited to 10% of the policy limit of the dwelling. The distinction in the form between dwelling coverage and other structures coverage as well as the 10 to 1

disparity in policy limits reflects typical valuation differences and risk underwriting differences. Aside from the higher values of construction and finish work found in the typical dwelling, a key underwriting consideration is the higher risk of damage associated with the dwelling. The prototype of residential housing consists of one structure where the insured 'dwells' - spends most of his or her time - and where a higher risk of damage prevails in part because of the frequent employment of sources of ignition such as electrical or gas devices to light, heat, and cook and the use of open fireplaces and candles as well as hazards such as tobacco smoking and portable heaters, for example. The inclusion of structures 'attached' to the dwelling within the dwelling's coverage limit is in part a recognition of the physics of fire spread. Unattached structures reduce the likelihood of fire spread because heat dissipates in air and spreading ignition of combustible materials is less likely through separation. The same is true to some extent of other major perils such as water leaks and even wind damage. Thus, the distinction between a dwelling and other structures in a typical homeowners policy is grounded in underwriting considerations of property value, fire physics, and frequency and severity of loss as well as the calculation of premiums.

In this context, one can see the reasonableness of 'fixing' dwelling and other structures at the time the insurance contract is written. Standard underwriting guidelines cannot function in a useful manner if the 'dwelling' migrates back and forth between two separate structures. Underwriting the risks posed by an unusual property with two dwellings would require additional information, further considerations, and a customized endorsement, if not the issuance of an additional, separate policy."

EXPLAINING THE BASIS FOR DECLINING COVERAGE

"Another bedrock aspect of good faith claim handling is properly interpreting the coverage that is available to the insured in the policy he purchased. This entails, of course, accurate references to policy provisions and explaining how a particular

exclusion applies to specific facts of the loss. Washington insurance regulations further define an 'unfair practice' as 'failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim.' Claim adjusters are usually very familiar with the forms their company uses to create a complete policy. It is common also for property insurance companies to modify basic forms by the use of endorsements. These modifications are usually readily available in the company's claim software system. Experienced claim adjusters know to look for endorsements which modify the main coverage part of the policy.

The insurer's interpretation of coverage was seriously flawed and unreasonable in several respects. First, neither of the two letters declining coverage explained how the exclusions related to the cause or facts of the loss. They simply quoted exclusions from the policy and then generally concluded that they apply, without any reference to the efficient proximate cause rule. Nor was any specific language in the faulty workmanship exclusion identified as encompassing the factual cause. No analysis was made of coverage for damage to personal property. The provenance of the earth movement exclusion, quoted in both letters, is unclear but seems to have been drawn from the 'mandatory coverage' section which relates only to personal property damaged by volcano and thus has no application to the loss."

EVALUATING BODILY INJURY

"Evaluating pain and suffering and associated medical treatment from a MVA [motor vehicle accident] takes into account not only the subjective reports from the insured and the care documented by treating caregivers but also the physical circumstances of the accident, relevant prior injuries and conditions and the course and duration of and adherence to prescribed treatment and therapies. In the circumstances presented here, the accident's characteristics suggest a low impact collision. Immediate treatment was not sought, and diagnosis the following day was neck and back strain with no hospitable admission.

In the PIP [personal injury protection] claim the insurer relied on an IME [independent medical examination] and a record review by, respectively, an orthopedic surgeon and a rheumatologist, and in the UIM {underinsured motorist} claim, two record reviews by a neurologist and rheumatologist. An extensive set of pre- and post-accident medical records was gathered and reviewed. Claim valuation software was consulted in the UIM analysis. A reasonable process was employed in the UIM claim to arrive at a settlement offer which was within a reasonable range of compensation, taking into account the factors listed above.

A broad range of latitude should be accorded bodily injury damage valuations. As the Washington Supreme Court observed in the Dayton case (a UIM claim):

'Compensatory damage awards are highly individual, and depend on the facts of the particular case. We have no precise valuation formula with which to calculate awards. [Citation omitted] This is particularly true in personal injury recoveries. Even in cases where the facts appear similar, juries vary greatly in their estimates of what constitutes adequate compensation for certain types of pain and suffering.' " [Citation omitted]

ADJUSTER'S TRAINING AND EXPERIENCE

"The insurer has been criticized in its claim handling by allegations that it did not retain its own expert but rather relied on the concrete experts retained by its insured, and in doing so sought to shift responsibility for investigation of the claim to the insured. The insured also alleges that the insurer did not determine the 'precise cause' of the loss.

The insurer's obligation was to conduct a reasonable, objective investigation into the cause of the loss for purposes of determining insurance coverage under the builder's risk policy at hand. It was not obligated to undertake the scientific or research task of determining the precise chemical or molecular interactions which were at work in the cause. The depth and breadth of an investigation are guided by its purpose, and that

purpose in this instance was to determine the cause of the loss consistent with Washington law and regulations: a reasonable insured's practical (not technical) understanding of the terms, conditions and exclusions of the policy, aided where needed by a standard dictionary.

In arriving at this practical determination of causation the insurer relied appropriately on the concrete experts consulted by the parties to the construction contract and subcontracts. The insured's expert on claim handling criticizes the insurer for assigning 'an inexperienced, unqualified adjuster to the claim.' The substantiation for this opinion is that the adjuster 'only had a few years of adjusting experience and had never handled a claim involving allegations concerning concrete' and 'lacked any type of scientific or technical background... to arrive at a reasonable, well-thought out, scientifically-based opinion concerning coverage for this claim....'

Implicit in this opinion is the belief that insurance company claim departments should be populated by scientifically trained specialists covering the design, engineering and craft vocations across the construction industry spectrum. This is unrealistic, unreasonable and unsupportable in custom and practice. Claim representatives are generalists, trained on the job to handle a broad range of factual investigations keyed to the interpretation of insurance policy provisions. Where necessary, specialists - experts - are retained and consulted to assist in understanding the particular facts underlying a particular claim. The process of construction is a dynamic undertaking with an almost infinite number of variables involving issues of site conditions, weather, material components, labor, finance, sequencing of work, code requirements and economic conditions, to name a few. Any one or a combination of these can generate an insurance claim. The record shows that the adjuster reviewed the expert reports; identified relevant, dispositive exclusions in the policy; thought through the coverage issues; consulted claim management several times and consulted counsel in the final denial decision to arrive at a reasonable coverage decision. There is nothing in the record reviewed which suggests that the

investigation or coverage determination was flawed in any manner by any alleged inexperience or lack of scientific training."

WATER DAMAGE

"In the course of re-roofing their house the insureds experienced a severe wind and rainstorm which blew the protective tarpaulin off and exposed the interior of their house to extensive water damage.
Water damage from wind-driven rain can be a troublesome and insidious cause of loss. Water infiltration, of course, follows the path of least resistance, as governed by gravity and the whimsical intervention of wind gusts. When there are multiple points of entry, as here, it can be very difficult to trace and discover all the hidden areas of damage. In addition, moisture creates ensuing loss from mold, rust and chemical reaction with other substances. Confronted with this kind of loss, an insurance adjuster/investigator must assist the insured in acting quickly to mitigate the damage (separation, ventilation, heat and ozone treatment) and must recognize that the estimate of damage will likely grow over time as further investigation or remediation, restoration and repair efforts expose further damage. In other words, the odds of capturing an accurate, comprehensive scope of repair from an initial inspection are not good. This is particularly true of assessing damage to the dwelling's electrical system. An insurance adjuster should expect and plan for follow-up inspections and deployment of experts to evaluate damage and repair/replacement options for the different kinds of damaged property."

EXTENT OF INVESTIGATION

"The good faith obligation to investigate a claim applies to all claims, simple or complex, but by regulation and case authority that duty is governed by a reasonableness standard. It cannot be otherwise, because each claim presents a unique set of variables, which must be managed and evaluated by individualized judgment. Claims involving bodily injuries in motor vehicle accidents may reasonably

require recorded statements of witnesses to compare fault, examinations under oath of the insured, review of pre- and post-accident medical treatment and even independent medical reviews or examinations. Investigations of minor property damage, whether collision or comprehensive, may reasonably require nothing more than a telephone conversation with the insured or his representative. This minimal investigation is reasonably employed in dozens if not hundreds of insurance claims on a daily basis to resolve and facilitate repair of minor property damage, or 'fender-benders.' Our common experience is to report a front panel dent or windshield ding to our insurer, obtain a referral to a pre-approved vendor or repair shop and go about our business.

This minimal investigation applies equally in situations, as here, where we find we have no insurance coverage. Parking along Third Avenue in front of the King County Courthouse at 3 PM on a weekday will likely result in one's car being towed and impounded. This results in loss of use, inconvenience and impoundment charges but not a viable insurance claim. Reporting these facts to one's insurer does not reasonably compel that insurer to launch a comprehensive investigation of witnesses, parking enforcement officers and tow truck drivers in order to verify the basic facts of the event. Similarly, a joyriding adventure in Dad's car, undertaken by his wayward 14-year-old son, contrary to Dad's prohibition, can result in loss of use and emotional distress, but typically not a viable insurance claim. The facts, as truthfully presented by the insured, suffice to warrant a coverage denial, without an exhaustive investigation.

In a nutshell, the nature and scope of a reasonable investigation are governed by its purpose."