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The Use of Depositions From Other Cases to Prove Pattern and Practice

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On February 3, 2002, a unanimous federal jury awarded our client, Joan Hangarter, $7.7 million in damages against Paul Revere Insurance and UnumProvident Corporation for bad faith denial of disability benefits. The jury's award included$5 million dollars for punitive damages. The subject discussed in this article figured prominently during the course of the litigation.

We regularly hear about mergers and acquisitions. Unfortunately, for plaintiffs in insurance bad faith cases, that causes a lot of trouble. For example, the plaintiffs often find the company they are suing is really owned and operated by another company. Furthermore, that company may or may not be a party to their lawsuit. Companies try hard to hide the ball on this issue, especially if they are aware that the predecessor corporation has made damaging admissions. Defendants try even harder to separate themselves from the acts of the predecessor corporation when there is any possibility of proving that the "bad acts" committed by the succeeding company originated with the predecessor. As an example, in 1997 Provident Life and Accident Insurance Company acquired Paul Revere. Consequently, the new company is Provident Companies. Provident Companies merged with Unum in 1999 and the resulting company was named

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Unum before it was acquired by Provident); Colonial Companies, Inc. (owned by Unum before it was acquired by Provident;)Colonial Life & Accident Insurance Company; Commercial Life Insurance Company; Equitable (block of disability insurance acquired by Paul Revere;) General American Life Insurance Company; John Hancock; Lincoln National; Mutual of New York; New York Life Insurance Company; National Life of Vermont; NW Life (Reliastar)(best guesses to date is that this is probably Northwestern; Paul Revere; Protective Life; Provident Life and Accident; Provident Mutual; The New England and; Union Life Insurance Company of America. By the time you read this, there may be more companies added to or subtracted from this constellation.

Whether or not you are able to enter evidence that will help you to connect the dots from Provident Life and Accident's plan for unfairly terminating through Paul Revere to Unum or any of the companies listed above, is directly related to your ability to convince the judge of the nexus between the facts of your case and the evidence you hope to introduce even if the evidence or testimony was obtained in a different case and bears the name of a different corporate entity.

Introducing Past Deposition Testimony Obtained In A Different Case

The rules governing the admission of past deposition testimony as an exception to the hearsay rule in both State and Federal court are similar. Federal Rule of Evidence 804(b)(1) states that former testimony given under oath at another hearing, whether in the same case, a different case, or in a deposition, may be admissible in the current proceeding provided:

1. the witness is unavailable; and
2. the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination. Thus, under this Rule, the testimony may be offered against the party by whom it was previously offered; or against a successor in interest to a party to the prior action who had a similar motive and

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Code 1291(a)(2) and 1292(a)(3), and California Code of Civil Procedure Section 2022, depositions from a different lawsuit can be introduced into evidence if the deponent is presently "unavailable" to testify and the party against whom deposition testimony is offered either offered it in evidence in the former action or had the right and opportunity to cross-examine the deponent with the same motive and interest as he or she has in the present action or the issue of the testimony is such that some party to the former action, who had the same interest or motive as the party against the testimony is now being offered had the same motive, right and opportunity to cross-examine the witness.In the *Hangarter* trial, mentioned above, the Plaintiff sought to introduce the prior deposition testimony of Dr. William Feist, a past medical director and Vice President of Provident Life and Accident, the predecessor corporation to first Provident Companies and then UnumProvident. Plaintiff wanted this testimony on record as evidence of the ruthless and unfair claims handling initiatives that the plaintiff used. This could then show the pattern and practice brought into being by then Vice President of Claims for Provident Life and Accident, Mr. Ralph Mohney. Plaintiff argued that the above deposition testimony demonstrated the importance of Mr. Mohney to her case. Mr. Mohney was in charge of the claims department prior to the acquisition of Paul Revere by Provident and the creation of Provident Companies. Plaintiff had introduced evidence that Mr. Mohney instituted changes to the claims department during that period of time, he was part of the transition team during the merger of Provident and Paul Revere insurance companies, he remained in charge of the claims department and he had substantial settlement authority over claims such as Dr. Hangarter's.As with the case in which Dr. Feist's previous deposition had been taken, the issue of claims philosophy in general, and of the changes made by Mr. Mohney regarding said claims philosophy in particular, were central to the testimony. Dr. Feist's observations were directly relevant to these issues, and UnumProvident, a named defendant in the Hangarter lawsuit had the opportunity to cross-examine him about these exact issues. Plaintiff argued that the fact that the lawyers representing UnumProvident at trial had chosen not

the Plaintiff.Defendants strenuously argued, as they did throughout the trial, that Provident Life and Accident Insurance Company, UnumProvident and Paul Revere were three separate entities and since Dr. Feist had worked for Provident Life and Accident, his testimony was irrelevant. Defendants also argued that because his deposition had been noticed and taken in another individual disability case in which UnumProvident, but not Paul Revere, was a defendant, they didn't have an opportunity to cross examine the witness. Additionally, they also argued, erroneously, that Dr. Feist had not been on plaintiff's witness list.
Relying on the Ninth Circuit case of Murray *v. Toyota Motors Distributors, Inc.* 664 F.2d 1377, 1379-80 (1982), *In Re IBM Peripheral EDP Devices Antitrust Litigation,* 444 F.Supp.110, 113 (1978), and *Weinstein On Federal Evidence, section* 804.044(a) the Judge ruled that Dr. Feist's deposition was admissible. In *Murray* the appellate Court ruled that former deposition testimony was properly admitted because the parties had a similar motive to cross examine in both cases. The Court held that the motive need only be "similar, not identical." In *IBM,* the Court held that the exception to the hearsay rule for former testimony is when "a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness"

In *Hangarter* the Court found that UnumProvident had sufficient opportunity to cross-examine Dr. Feist and that the interests from which he was cross-examined were essentially identical to the interests of Paul Revere and UnumProvident in the instant case. Moreover, the Court also stated that Paul Revere and UnumProvident's argument that the companies had nothing to do with each other was "disingenuous."

If you are seeking to introduce past deposition testimony from another matter into your trial be sure to look for the way that you can prove that the interests of the party who cross-examined the deponent were the same if not identical to that party in your trial. Do your homework. Know, before you go to trial, how your defendant may be related to other defendants who have been sued under similar facts. And be

introduce evidence of UnumProvident's pattern and practice of claims handling sufficient for the jury to conclude that the defendants had acted with malice fraud or oppression in denying Dr. Hangarter's disability benefits.

Dr. Feist testified that "Before Chandler and Mohney came to their positions at Provident, claims were handled in a fair and above-board way". There was "never anything about shredding documents and not putting in information," he said.

He testified that to instruct or direct field claims adjusters to not put conclusions in writing but instead to communicate them verbally was at in violation of the Company's duties to their policyholders and was "unethical."

Mr. Mohney, said Feist, even issued an edit "prohibiting doctors from writing on a file that an insured "was disabled". "I recall specifically a case," he said, "probably in November of '95 in which there was a very unfortunate man in his mid 40's, who had had several myocardial infarctions and had severe incapacitating angina – this man literally could not walk across the length of the room without getting severe chest pain.

"I wrote on the file that this man is permanently and totally disabled, just as clear as I could write it. I was called on the carpet by Mr. Mohney saying 'Dr. Feist you are **not** to write on any file. This file or any file, that this person is disabled. That is for the **claims** department to make the decision.

"That sounds like a simple procedural thing but it is really a profound philosophical change....

"Well with that change Mr. Mohney and his associates could make the call. Even if the person is disabled for some reason, (if) they didn't want to permit disability. They could make the final call.

"I think that is a small example, but that is a good example of the philosophy change that came in when. Mr. Mohney (and Mr. Chandler) came on board."

integrity of the treating physician, using surveillance inappropriately, getting an IME to prove their case, saying that the individual was fraudulently trying to get money out of Provident. All of those modalities were used.

Dr. Feist himself personally attended Roundtable Meetings that had profiled over 250 claims, targeting high-value claims and brainstorming for 'any excuse or pretext' to cut them off.

"The whole tenor of the meeting was we have got to find some way to terminate(this) claim whatever it takes or however we can do it."

As you can see from this small excerpt, the testimony was invaluable to plaintiff's case both for bad faith and her claim for punitive damages.

INTRODUCING DOCUMENTS OBTAINED THROUGH DISCOVERY IN OTHER CASES

We have been in the position of suing the same defendant or defendants many times. Through discovery in past cases we have obtained thousands of pages of internal documents, some very damning to the defendants. In such circumstances, defendants argue that the documents are not relevant to the instant case because a "different" insurer denied the claim. In addition, although we have been able to obtain stipulations that the documents will be deemed "produced" in whatever current litigation we are engaged in, at trial the insurers argue that the documents lack authenticity.

With regard to the relevance objection, as with prior deposition testimony, it will be necessary to provide a nexus between the documents of the predecessor or successor corporation and the current defendant or defendants. In our case we used deposition testimony of the Head of Claims, Ralph Money, stating that he was in charge of the philosophy for all of the individual claims departments for all of the Provident companies. Since many of the documents we sought to admit had been authored by Mr.

documents were relevant to Paul Revere's current claims handling practices.

Once the relevancy hurdle has been past, it is also necessary to authenticate the documents in order for them to be admitted into evidence. It may seem incredible but even though the documents were produced by one of the named defendants, defendants still argued that the documents were not authentic. Under the Federal Rules of Evidence, "there is no single way to authenticate evidence and, in particular, direct testimony of custodian or percipient witness is not a sine qua non to the authentication of a writing. Fed.Rules Evid.Rule 901(a), 28 U.S.C.A." *U.S. v. Holmquist* 36 F.3d 154 C.A.1 (Mass.), 1994.

Moreover, the burden of authentication of evidence does not require proponent to rule out all possibilities inconsistent with authenticity or to prove beyond any doubt that the evidence is what it purports to be; rather, standard for authentication, and

hence for admissibility, is one of reasonable likelihood. Fed.Rules Evid.Rule

901(a), 28 U.S.C.A. *Alexander Dawson, Inc. v. N.L.R.B.* 586 F.2d 1300 C.A.9, 1978.

The issue for the trial judge under Rule 901 is whether there is prima facie

evidence, circumstantial or direct, that the document is what it is purported to be. If so, the document is admissible in evidence. See, e.g., *United States v. Wilson*, 532 F.2d 641, 644-45 (8th Cir.), Cert. denied, (1976); *United States v. Scully*, 546 F.2d 255, 269 (9th Cir. 1976), Cert. Denied. It is then up to the jury to make its own determination of the authenticity of the admitted evidence and the weight which it feels the evidence should be given.

At trial in the *Hangarter* case, counsel for Paul Revere and UnumProvident constantly objected to the authenticity of the very documents produced by Provident and UnumProvident in other cases because they had not been produced in the *Hangarter* case. The Judge found, however, that the Plaintiff had authenticated the documents in a number of different ways

Federal Judge; that the documents were produced in related cases, that the documents had the heading of Provident and a Custodian of Records had testified, albeit in another case, that the documents had been produced by Provident.

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