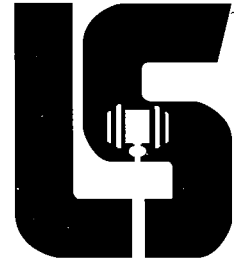


# THE LANDRUM & SHOUSE REPORT



Spring 2006

Welcome to the Landrum & Shouse Report, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

## THE SUCCESSFUL NEGOTIATOR

By Pierce Hamblin

If you want to get a handle on the best way to mediate/negotiate, one word comes to mind—"flexibility". The best negotiators are like the best claims professionals and the finest trial lawyers—they have the most vivid and crazy imaginations. They don't hesitate, for one moment, to use their imagination when evaluating claims. And they are not scared to ask themselves the most important question—"what would a jury in this particular jurisdiction do with this claim, value wise, after hearing both sides of the case?"

You see it does not really matter a darn bit what your opponent thinks or what you think. It doesn't matter what rigid Company doctrine states or what the mediation textbooks or computers say about value. All that matters is what twelve non-lawyers sitting in a box believe. Those of you that are "flexible" enough to look at the claim in that light, each of you who are allowed by your Company to have that freedom, will obtain the best results for your insured and your outfit through negotiation. You see, somewhere, somehow, we have forgotten that the use of professional discretion is a great asset in resolving litigation through alternative dispute resolution. Without discretion and flexibility, cases that should settle don't. Costs to defend escalate. The insured's exposure may well increase. And, usually, no one benefits from courthouse steps settlements.

So, if you are able to do this, remain flexible. Tell those folks who may be looking at the same

claim but at different levels that there is no substitute for actual hands on experience. You are in the foxhole taking the fire. You are the only one able to judge the credibility of the Plaintiff's presentation. You are the one who meets with and can observe the Plaintiff's demeanor, look at Plaintiff's strength of conviction, and judge whether this person falls within or without the box to deserve additional considerations. You are the professional who hears an independent person's (the Mediator) unbiased reality check. You are able to see each side analyzing the strengths and weaknesses of the claim. You are in a position to learn whether Plaintiff has non-economic issues which need to be resolved. You, along with each Party, in private, are able to candidly discuss these hidden interests. Your presence facilitates development not only of a monetary figure, but also an understanding of the reasoning for the Claimant's demand. Simply put, you see first hand how baring one's soul in private helps all the Parties work more realistically to a settlement value. Under these circumstances, the last thing the Company negotiator needs is to be tightly hamstrung with rigid policy and procedure.

I acknowledge that some cases need to be tried. After all, mediations are like trials. Preparation is crucial. And when you prepare to negotiate, guidelines are necessary and helpful. But just like trial, nothing ever goes as expected in a mediation or settlement negotiation. Thinking on one's feet and changes in strategy are necessary assets. Where and when those Company professionals, primarily

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## **BAD FAITH DISCOVERY: THE GENIE IS OUT OF THE BOTTLE**

By John McNeill

In the Kentucky Supreme Court case of Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803 (Ky. 2004) a fellow named Wilder had a motor vehicle accident with a Grange Mutual insured. Pre litigation, Wilder attempted to negotiate with Grange for about 6 months. Wilder felt he was being low balled so he sued for bodily injury and for bad faith. Eventually, the BI claim was tried and the jury awarded Wilder \$26,000.

On the bad faith side, Wilder alleged that Grange undervalued his claim during negotiations and repeatedly delayed communicating. During discovery, Wilder sought production of things such as other bad faith claims, manuals and internal policies for evaluating and adjusting claims, setting reserves, personnel files and compensation policies, advertisements, and newsletters on claims handling. Over Grange's objection, the trial court permitted the discovery of the requested information.

Grange then sought the extraordinary relief of a writ of prohibition before the Kentucky Court of Appeals. In denying the writ, the Court of Appeals held that Grange failed to show that it would be irreparably harmed by the disclosure of the requested information.

Grange then appealed to the Kentucky Supreme Court.

### **Other Bad Faith Claims**

Wilder sought the discovery of other bad faith claims pursued by other plaintiffs or the Kentucky Insurance Commission. The Court rejected Grange's argument the other bad faith claims filed against it were irrelevant. The Court found that it is sufficient that the documents related to similar claims involving other adjusters and could reveal a "pattern" of bad faith conduct.

### **Manuals and Internal Policies on Adjusting Claims**

The question was whether Grange's policies, as set forth in its procedures, encourage bad faith. In other words, did the policies contain criteria or standards which constituted bad faith? The Court found this information to be relevant. The significance being that the emphasis is not just on a "rogue" adjuster that strays from established policies, but whether the policies themselves made the adjusters "rogues," "knaves," or "scoundrels." (Not the court's words.)

### **Setting Reserves**

The Court rejected Grange's argument that the setting of reserves constituted trade secrets. The Court found this information was relevant to show whether the carrier's methodologies for setting reserves were aimed toward achieving unreasonably low values.

The Court did exempt from this category production of average amounts paid on other claims, finding that the damages in the other claims must be comparable to the claimant's damages to be discoverable.

### **Personnel Files and Compensation Policies**

On this issue, the Court played Solomon and gave Grange half a loaf. The Court found that only items such as job performance, bonus information, wage and salary information, and disciplinary policies to be relevant because they may show a prior course of conduct. The compensation request was limited to employees involved in the plaintiff's claim against Grange.

### **Trade Secrets**

The Court rejected Grange's trade secret defense because Grange never set out why it was entitled to the protection of this defense. The Court said it was necessary to introduce specific evidence of each document or category of documents for which a trade secret protection was being sought. The Court suggested that the burden could be met by putting together a privileges log for such documents.

### **Conclusion**

What does all of this tell us? First, this decision was unanimous and, therefore, will be with us for a long time.

Second, it tells you that discovery in bad faith cases in Kentucky will get increasingly expensive and time consuming for all involved.

Third, savvy plaintiff's counsel will utilize the requests identified by the Court in their bad faith litigation.

Fourth, carriers need to look at their manuals with an eye toward not only stressing what to do in handling and adjusting claims, but also what not to do.

Fifth, carriers and counsel will need to work together in disclosing clearly relevant information and be specific in the matters sought to be protected through any privilege.

The discovery waters in bad faith claims have gotten much rougher. For the carrier, the genie out of the bottle is more like Robin Williams than Barbara Eden. Be careful.

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## Homeowner's Policy does not provide Warranty for Pool

By Tyler Griffin Smith

In the case of Williams vs. Farmers Insurance Exchange, Wayne Williams filed a declaratory judgment action and bad faith claim to determine whether the Farmers 'All Risk' homeowners policy covered water damage to his home after his above ground swimming pool leaked 24,000 gallons of water. The water flowed down hill to his residence, eventually collecting at the base of the home. The weight of the water caused the unmortared, concrete block foundation to collapse and then flooded the basement with water and mud. John McNeill and Evan Jones of Landrum and Shouse, LLP represented Farmers.

Farmers denied the claim based upon the water damage exclusions, including 'weight of water'. Williams argued that the pool liner tear was a "covered event" under his policy and that the resulting damage to his residence was a covered loss. The question, however, was not whether the damage was caused by water from the pool but whether the pool liner tear was caused by a 'peril insured against' by the policy.

Farmers immediately shored up the damage to the home and had an engineer examine the pool to ascertain what caused the liner tear. The exact cause of the tear was not determined, however, a lightning strike was ruled out. Lightning was an event covered by the policy, and water damage resulting from a lightning strike would have been covered. Because there was no evidence to suggest that the liner tear was caused by anything other than ordinary wear and tear, Farmers denied the claim.

The trial court ruled that the loss was not covered under the Farmers policy and granted summary judgment to Farmers. Williams subsequently appealed the ruling to the Kentucky Court of Appeals. Williams argued that because the tear could have been caused by a number of things, i.e., falling tree branch or wild animals, the trial court erred by finding that it was not a covered event. Williams also argued that he had asked his agent for "all the coverage he could get," so his "reasonable expectations" were that water damage would be covered. Farmers defended by arguing that there was no evidence that anything other than a defective liner or wear and tear caused the subject loss. Thus, the "weight of water" exclusion applied to the loss.

The Court of Appeals agreed with Farmer's application of the policy and, in an unanimous decision, found that because there was no evidence to suggest that anything other than a faulty liner caused the leak, the water damage was not an ensuing covered event. The Court also found that simply because Williams asked for "all the coverage he could get", does not entitle him to reasonably expect that his policy would include flood insurance since even 'All Risk' policies routinely include numerous exclusions. Lastly, the Court affirmed the dismissal of Williams' bad-faith claim, finding that Farmers was diligent in its investigation of the loss.

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### *The Successful Negotiator - continued*

charged with writing policy and procedure, recognize the benefits of flexibility in negotiation, good results will follow.

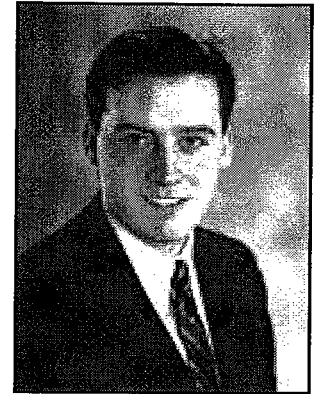
My next few installments will cover topics such as the "Ping Pong" effect on negotiation, why gimmicks don't work, and why mediation textbooks and instructors must be closely scrutinized. Good luck to you all!



After almost thirty years of practice as an insurance defense lawyer for Landrum and Shouse, Pierce has the honor of being inducted this summer into the University of Kentucky College of Law Hall of Fame. In addition, Pierce is an AV rated trial lawyer by his peers through Martindale Hubble. He still practices insurance defense with the firm. Pierce has mediated approximately 2,075 serious injury and death cases in the last five years. And, next semester, Pierce will begin his 26<sup>th</sup> year teaching Senior Law Students Litigation Skills at the University of Kentucky Law School. He is presently serving as Chairman of the Civil Litigation Section for the Fayette County Bar Association.

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Landrum & Shouse LLP is pleased to announce that Jeffrey A. Taylor, Jennifer A. Peterson, and Michael E. Hammond have become partners in the firm. Jeff practices in the areas of insurance defense litigation and bad faith. Jennifer's practice includes insurance defense and coverage. Mike practices in the areas of transportation and trucking representation and civil litigation.

The Landrum & Shouse Report is a quarterly publication and contains news and general information about the firm. It is not meant to nor should it be viewed as a legal research tool or legal advise.

Landrum & Shouse, LLP, is dedicated to serving the needs of its clients. Our professional and support staff has extensive litigation experience and is able to prepare and execute top quality trial presentations in any forum in the Commonwealth of Kentucky. Our computerized systems support productivity in research and include sophisticated communication networks, while the firm's extensive use



of modern accounting methods and budgetary controls maintain the most effective approach for our clients. We are well prepared to meet your legal needs. Give one of our legal professionals a call for an introduction to the tradition of Landrum & Shouse.

You can also visit us on the web at [www.landrumshouse.com](http://www.landrumshouse.com) for additional information about our attorneys and the firm.

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