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An Insurer's Duty of "Reasonable Inquiry": A Strategy for Exploiting Deficient Responses to Requests for Admission

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Dorothy: Oh, will you help me? Can you help me?

Glinda, the Good Witch: You don't need to be helped any longer. You've always had the power to go back to Kansas.

Dorothy: I have?

Scarecrow: Then why didn't you tell her before?

Glinda, the Good Witch: Because she wouldn't have believed me. She had to learn it for herself.

(Frank Baum, "The Wizard of Oz")

I. Introduction

158. In subrogation and insurance defense litigation, insurers' use of "cookie cutter" boilerplate responses or objections to discovery requests have become ubiquitous. Frequently, individual insureds — or their corporate representatives possessing first-hand knowledge of a claim's operative facts — may be difficult to locate

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and/or unwilling to cooperate. By the time a suit is commenced in a subrogation action, the insured has already recouped its loss, and therefore has very little "skin in the game." The insured may reside or do business in a distant location, and stands only to recover what may be a relatively insignificant deductible amount. Former employees of the insured with actual knowledge of the occurrence may be either difficult to locate or unresponsive. Bound only by a rarely enforced cooperation clause in the standard insurance contract, by settlement agreement, or by the common law duty to cooperate, the insurer may have little, if any, leverage to secure the insured's participation in litigation. These facts, combined with the strict "drop-dead" deadline for serving responses to Requests for Admission ("RFAs"), often cause an insurance company's counsel to resort to evasive responses and/or objections. Most frequently, an insurer will attempt to justify its objections and/or inability to respond by claiming that it lacks first-hand knowledge or information. An understanding of the law governing this recurring scenario can empower opposing counsel with the tools to exploit deficient responses to RFAs.

159. This article will define the parameters of the duty imposed upon an insurer by state and federal court rules to make a "reasonable inquiry" to ascertain "readily obtainable" information when responding to RFAs.² The focal point, on which the case law is scant, is the extent to which this duty extends to making inquiry of and obtaining information from its insured, who in certain circumstances is considered a non-party.³ A West Virginia District Court seems to stand alone in supporting the position that an insurer has a duty to consult with non-party occurrence witnesses, including the insured, when responding to RFAs.⁴ In stark contrast, recent Kentucky⁵ and California District Court⁶ decisions, arguably subject to criticism, reach a different result.

160. Cases that have addressed the issue of whether the duty to inquire requires a party to obtain information from non-parties, turn on factors such as the degree of "control" exercised over the third party, and the "identity of interest" between the parties.⁷ Decisions construing an insurer's duty to secure the attendance of a knowledgeable agent of its insured for a deposition, and to make inquiry of the insured to provide compliant responses to interrogatories, can elucidate the scope of the duty. Case law suggests that a subrogor could, by definition, be considered

2 FED. R. CIV. P. 36(a)(4).

3 *Prudential Prop. & Cas. Co., v. Dow Chevrolet-Olds, Inc.*, 10 S.W.3d 97 (Tex. App. 1999).

4 *Erie Ins. Prop. Cas. Co. v. Johnson*, 272 F.R.D. 177 (S.D. W. Va. 2010).

5 *Petro v. Jones*, No. 11-151-GFVT (E.D. Ky. 2014).

6 *Diamond St. Ins. Co. v. Deardorff*, No. 1:10-cv-00004 AWI JLT (E.D. Cal. 2011).

7 Robert Wise & Katherine Fayne, *Requests for Admission Under the Texas Discovery Rules*, 45 ST. MARY'S L.J. 655, 683 n. 93, 685 n. 97 (2014).

to be within the control of and closely conjoined with the interests of the insurer, thereby triggering the insurer's duty to obtain its cooperation.⁸

161. When encountering a “lack of knowledge” claim of inability to admit or deny a RFA, the proponent must be prepared to move the court for an order compelling the respondent to articulate, in detail, the efforts that have been undertaken to obtain the requested information.⁹ Insufficiently supported responses to RFAs invoking the “lack of information” response can set a trap¹⁰ for unwary or careless counsel for insurers. Familiarity with the limits of the “lack of knowledge”¹¹ exception will enable opposing counsel to proactively respond to an insurer's recycled, boilerplate responses or objections to RFAs that may fall short of satisfying the legal requirements. If the insurer is unable to comply, such a strategy may lay a solid legal foundation for requesting sanctions or summary judgment.

II. The Contractual and Common Law Duty of an Insured to Cooperate

162. In the event of a potentially covered loss, claim, or lawsuit, the insured is required to cooperate with its insurer in the investigation and resolution of the claim. This “duty to cooperate” is specifically set forth in the vast majority of policies as one of several duties and conditions imposed on the insured. A typical cooperation clause provides:

The insured shall cooperate with the Company and, upon the Company's request or through attorneys selected by the Company to represent the insured must . . . (b) assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance . . . (i) allow the Company to take signed and recorded statements and answer all questions we may ask when and as often as we may require; (j) submit to examinations under oath as often as the Company requires, outside the presence of any other insured or person to be examined under oath . . . The Company has no duty to provide coverage under this policy unless there has been full compliance with these responsibilities.¹²

8 *U.S. Fire Ins. Co. v. Rockland Fire Equip. Co. Inc.*, 642 N.Y.S .2d 314 (N.Y. App. Div. 1996); *QBE Ins. Corp. v. Jorda Enters, Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012).

9 FED. R. CIV. P. 36(a)(4).

10 FED. R. CIV. P. 36(a)(4).

11 FED. R. CIV. P. 36(a)(4).

12 *Am. Access Cas. Co. v. Alassouli*, 31 N.E.2d 803 (Ill. App. Ct. 2015).

163. Even if it is not expressly set forth in the policy, it has been held to be an implied-in-law condition to coverage.¹³

164. In a subrogation posture, the primary purpose of the cooperation clause is to assist the insurer in pursuing a claim for reimbursement against a responsible third-party. In this context, the insurance company must rely on the insured to provide it with sufficient details to pursue the claim and respond to discovery requests, details that often only the policyholder can provide. In this posture, if the insured takes an "I've got better things to do" approach, the insurer is essentially left with no remedy against its insured, other than perhaps seeking reimbursement of attorneys' fees and costs. Because the policyholder stands to recover its deductible, and the economic interests of the insurer and its policyholder are at least to that extent mutual, there would seem to be more of a significant incentive to cooperate. The insured's incentive to cooperate may be stronger in a claim defense posture, as in certain limited circumstances the insurer may deny coverage if it can demonstrate that the insured's failure caused "actual prejudice."¹⁴

III. The Strategic Role of RFAs When Litigating Against An Insurer

165. Generally, Federal Rule of Civil Procedure 36(a) requires one of three answers to a Request for Admission: (1) an admission; (2) a denial; or (3) a statement detailing why the answering party is unable to admit or deny the matter.¹⁵ RFAs can be a far more powerful tool than other forms of discovery. First, and perhaps foremost, RFAs have a definitive deadline for responses, after which immediate and potentially severe consequences — admission of the subject facts and or documents — can result.

166. The Advisory Committee's 1970 Notes to Rule 36 explain the dual purposes of RFAs.¹⁶ Admissions are primarily sought to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. Essentially, the purpose of Rule 36(a) is to expedite a trial by establishing certain material facts as true, thus narrowing the range of issues for trial. The Committee cautions that parties may not view requests for admission as a mere procedural exercise requiring minimally acceptable conduct, and should focus

13 *First Bank of Turley v. Fid. & Deposit Ins. Co.*, 928 P.2d 298, 305 (Okla. 1996).

14 Rick Virnig, *The Insured's Duty to Cooperate*, 6 J. TEX. INS. L. 2, 11 (Fall 2005).

15 FED. R. CIV. P. 36(a).

16 FED. R. CIV. P. 36 advisory committee's note (1970).

on the goal of the Rules — full and efficient discovery — as opposed to evasion and word play.¹⁷ Arguably, courts must enforce a stricter standard of timely compliance with the Rule than with other forms of written discovery.

167. Perhaps the insurer is unable to admit or deny the requests because it lacks the requisite first-hand knowledge or information; or the insurer may object on the basis that it has no obligation to obtain information from a non-party over whom it has no control. Additionally, it is not uncommon for the insurer to simply fail to recite the simple phrase that it has in fact exercised reasonable diligence to procure readily obtainable information. The RFA proponent should be locked and loaded to react to one or a combination of possible technically inadequate responses from insurers. To be fully prepared for these scenarios, the propounding party's counsel should lay the preliminary groundwork by initiating discovery designed to ascertain the details and dynamics of the insurer-insured relationship, including the communications and documentation exchanged between the parties, and the terms and conditions of the policy.

IV. The “Lack of Information or Knowledge” Justification for Refusing to Admit or Deny

A. “Degree of Control” over and “Identity of Interest” with third parties

168. In *Asea, Inc. v. Southern Pac. Transp. Co.*,¹⁸ the Ninth Circuit held that a response which fails to admit or deny a proper request for admission does not comply with the requirements of Rule 36(a) if the answering party has not, in fact, made “reasonable inquiry,” or if information “readily obtainable” is sufficient to enable him to admit or deny the matter. “Thus, Rule 36 requires the responding party to make a reasonable inquiry, a reasonable effort, to secure information that is readily obtainable from persons and documents within the responding party’s relative control and to state fully those efforts.”¹⁹

169. The crux of the issue is whether the degree of control necessary to trigger the duty of reasonable inquiry extends to third parties/non-parties. The court in *Sea Island Acquisition LLC v. Barnett* (“*In re: Sea Island Co.*”) articulates the policies that should be weighed:

17 FED. R. CIV. P. 36 advisory committee’s note (1970).

18 *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981).

19 *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981).

The requirement for a shared identity of interest or control over the third party ensures that the respondent admits or denies with the requisite belief that the information provided is correct. Without a sufficient identity of interest with or level of control over any of the third parties . . . forcing (the respondent) to admit or deny the requests would require third party discovery with each of those third parties to compel and test the accuracy of the response. This task would extend beyond a "reasonable inquiry," and the requested information would go beyond what (the respondent) could "readily obtain."²⁰

170. Courts have applied a consistent standard when defining the parameters of this duty. "At a minimum, a party must make inquiry of a third party when there is some identity of interest manifested, such as by both being parties to the litigation, a present or prior relationship of mutual concerns, or their active cooperation in the litigation, and when there is no manifest or potential conflict between the party and the third party."²¹ Courts have held that this duty to inquire of third parties extends to and includes officers, directors, employees, agents, and attorneys.²² As discussed hereinbelow, courts are divided on whether the duty applies to insureds and agents of insureds.

171. To effectively challenge deficient or evasive responses, it is essential to construct a legal foundation to support the argument that one or more of these requirements exists. When this can be accomplished, the duty of reasonable inquiry is triggered, as is the duty to recite "in detail" the actual efforts that have been made. To do so, we must draw from cases involving other forms of discovery. Having stockpiled the legal support, a focused discovery plan can be then implemented to mount a challenge to the factual basis for the deficient responses to RFAs.

B. Cases involving other forms of discovery may provide legal support by analogy

172. A pair of 20th century rulings interpreting New York state law vaguely comment on the degree of control that a subrogee exercises over its insured. In *Furniture Fantasy v. Cerrone*, the plaintiff-subrogee appealed from an order striking its subrogation complaint, that which was entered as a sanction for failing to produce the principal of its insured for a deposition in accordance with a prior court order. The subrogee argued that it lacked control over its insured and that the insured's

²⁰ *In re: Sea Island Co.*, No. 10-21034 (Bankr. S.D. Ga. Nov. 25, 2015).

²¹ *K'NAPP v. Adams*, No. 1:06-cv-01701-LJO-GSA-PC (E.D. Cal. Oct. 6, 2014).

²² *Noble v. Gonzalez*, No. 1:07-cv-01111-LJO-GSA-PC (E.D. Cal. Aug. 26, 2013).

business could not initially be located. Subsequently, the designated agent of the insured declined to appear. The New York Supreme Court affirmed the dismissal action based upon the absence of evidence presented by the subrogee detailing its efforts to secure the attendance of the witness.²³ Seven years later, in a curt two paragraph opinion, the New York Supreme Court examined a similar situation in which the plaintiff-subrogee was ordered to produce an employee of its insured for examination. Affirming the entry of the order, the court held that the subrogation agreement between plaintiff and its subrogor, in which the subrogor agreed to cooperate fully with the plaintiff in its prosecution of subrogation actions, established the plaintiff's control over its subrogor's employees for purposes of disclosure.²⁴

173. The idea that a cooperation term in an agreement between the subrogor and subrogee is sufficient in and of itself — to create the requisite degree of control of a subrogee over its insured to compel its agents' presence at a deposition — can form the basis of a compelling (albeit creative) legal argument.

174. Opinions construing “lack of information” responses to interrogatories provide additional support for the legal argument that an insurer exercises control over its insured. In *Essex v. Amerisure*, the plaintiff insurer, who was suing as the assignee of its insured, stated in its answers to interrogatories that the insured's personnel possessed the requested information and that the insurer was therefore unable to respond. The court held that merely because the requested information was not possessed by the insurer, it did not mean that the information was unavailable to it, especially given that it was an assignee of the owner's interests. The insurer was required to make reasonable efforts to obtain relevant documents or interview the insured's personnel in responding to the interrogatories. If the insurer refused or failed to make its personnel available, then the plaintiff insurer was required to set forth, in its supplemental responses, the efforts it made to obtain responsive information.²⁵

175. Cases construing the insurer's obligations under FRCP 30(b)(6) to designate and produce a knowledgeable witness can also be argued by analogy to support the position that the insurer has the requisite degree of control over its insured. *QBE Insurance Corporation v. Jorda Enterprises, Inc.* offers an in-depth analysis of the duties imposed upon a plaintiff-subrogee, when the corporate insured/subrogor is unable to locate an appropriate FRCP 30(b)(6) witness with requisite knowledge of the facts that are “relevant and material to the incidents underlying the lawsuit.” In *QBE*, the court held, “[t]herefore, *QBE* was obligated to seek out information

²³ *Furniture Fantasy, Inc. v. Cerrone*, 546 N.Y.S.2d 133 (N.Y. Sup. Ct. 1989).

²⁴ *U.S. Fire Ins. Co. v. Rockland Fire Equip. Co., Inc.*, 642 N.Y.S.2d 314 (N.Y. Sup. Ct. 1996).

²⁵ *Essex Builders Grp., Inc. v. Amerisure Ins. Co.*, 429 F. Supp. 2d 1274 (M.D. Fla. 2005).

and documents from available third party sources — including its insured, the condominium association.” The court in *QBE* finds that the subrogee’s duty to obtain information and documentation from its insured was particularly applicable, where the insured was contractually obligated to cooperate with the insured pursuant to the terms of a settlement agreement.²⁶

V. Does the Duty to Use “Reasonable Inquiry” Require an Insurer to Obtain Information from Its Insured?

176. It would seem that the above-cited authority construing “control” over and “identity of interests” with the insured would effectively settle the issue, and lend virtually irrefutable support for the proposition that the insurer has a duty to make reasonable inquiry of its policyholder when responding to RFAs, as a matter of law. However, the weight of scant case law is to the contrary. In *Petro v. Jones*, the insurer defending a personal injury action objected to and claimed lack of knowledge and information in response to RFAs served by the plaintiffs, which related to the operative facts of the accident. The plaintiffs moved for sanctions. The court disagreed with the plaintiffs’ contention that FRCP 36 required the insurer to collect information from third parties outside of its immediate control. The court flatly rejected plaintiffs’ argument that the insurer had an obligation to interview the driver of the vehicle (its insured), and denied the motion for sanctions, finding that, “the reasonable inquiry standard does not require that defendants perform discovery on a plaintiff’s behalf.”²⁷

177. In the context of a subrogation proceeding, case law is in accord with *Petro*. In *Diamond State Insurance Co. v. Deardorff*, the Defendant contended that he was entitled to an award of expenses and attorneys’ fees pursuant to FRCP 37(c)(2) because the plaintiff-subrogees failed to consult with their insured before responding to defendant’s RFA. The defendant contended that, in the context of a subrogation case, where plaintiffs’ rights are wholly derivative of those held by their insureds, it was incumbent on plaintiffs to confer with the policyholders to ensure that their responses to the RFAs were adequately supported. The court found that the fact that plaintiffs did not fully consult with the insured prior to responding to the RFAs did not mean, per se, that plaintiffs lacked good reason for denying the requests, and declined to award attorneys’ fees on that basis alone.²⁸

26 *QBE Ins. Corp. v. Jorda Enters, Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012).

27 *Petro v. Jones*, No. 11-151-GFVT (E.D. Ky. Mar. 12, 2014).

28 *Diamond St. Ins. Co. v. Deardorff*, No. 1:10-cv-00004 AWI JLT (E.D. Cal. June 8, 2011).

178. The holding in *Erie Insurance Property & Casualty Co. v. Johnson* is contrary to that in *Petro* and *Diamond State*. The author submits and represents that it is the better, and well-reasoned view. In *Erie*, the insurer for the counter-defendant objected to a particular RFA served by the injured counter-plaintiff, which requested that the insurer admit the fact that the vehicle involved in the accident was connected to its insured's business. The court found the objection to be "inappropriate" and opined: "A reasonable inquiry and effort into the responding to his request — which involves its insured, Mr. Halford Johnson — would have allowed Erie to admit or deny it." The court proceeded to order the insurer to re-respond to the RFA.
²⁹

179. It strains logic to accept the conclusion that an insurer's interests are not unified with those of its insured, that it lacks control over its insured, and that the parties do not actively cooperate in prosecuting or defending the litigation. This seems particularly applicable in a subrogation posture. As unsuccessfully argued in *Diamond State*,³⁰ the plaintiff-subrogee essentially "steps into the shoes" of its insured, and derives the very essence of its reimbursement claim from its insured. Moreover, the subrogee is subject to all defenses that can be raised against its subrogor. The parties' financial interests are mutual, inasmuch as the insured must rely upon its insurer to recover its deductible per the terms of the policy, and the insurer is bound to reimburse it if subrogation is successful.

180. It is submitted that placing the burden on an insurer to contact and obtain first-hand information from its insured to enable it to respond to RFAs is not unreasonable, particularly when balanced against the clearly-articulated policies of full and complete disclosure and simplification of the issues for trial. It does not seem to be significantly more burdensome than requiring an insurer to contact its employees and agents. After all, its contract of insurance, and in any event common law, imposes a reciprocal duty of communication and cooperation upon its insured. These contentions could arguably form the basis for arguing that a court should reject the doctrine adopted by the courts in *Petro* and *Diamond State*, in favor of that articulated in *Erie Insurance*.

²⁹ *Erie Ins. Prop. & Casualty Co. v. Johnson*, 272 F.R.D. 177 (S.D. W. Va. 2010).

³⁰ *Diamond St. Ins. Co. v. Deardorff*, No. 1:10-cv-00004 AWI JLT (E.D. Cal. June 8, 2011).

VI. Must the Lack of Knowledge Response Be Supported by "Detailed Facts" Describing the Particular Efforts?

181. It is well-established that when a lack of information response is challenged, the responding party must demonstrate that there was in fact insufficient information to admit or deny the request, or that it failed to make a reasonable inquiry.³¹ The degree to which the respondent must demonstrate the diligence of its inquiry is a fluid concept, that the propounding party can potentially use to gain tactical advantage. Federal courts have split on the issue in interpreting Federal Rule 36(a)(4)'s language.³² Although some have held that the responding party must detail its inquiry, most have held that a simple statement that the party has made a reasonable inquiry and lacks adequate information to admit or to deny the request is sufficient.³³ The latter construction appears to represent the majority view:

To require the answering party to describe in detail the efforts it has made to inquire would be to turn the request(s) for admission into an open-ended interrogatory. Moreover, an in-detail description of the inquiry does not advance the discovery ball much; such an answer still does not produce an admission or denial. The detail is not much use for discovery. The detail is more useful for after trial to determine whether Federal Rule 37(a)(5) expenses should be awarded for failure to admit, but requiring that information now pushes to an early part of the case a lot of work and squabbles that may never need to be addressed if the case settles or the issue proves to be irrelevant down the road . . . to read a requirement that the answering party describe in detail the reasonable inquiry only promotes satellite litigation with little benefit.³⁴

182. However, the majority view articulated hereinabove leaves the door open for strategic maneuvering, by raising the "benefit outweighs the burden" argument and the absence of "good faith." In *Knisely v. National Better Living Association, Inc.*,³⁵ the District Court observes that utilizing these "magic words" does not absolve an answering party from complying with Rule 36(a)(4) in good faith. The court in *Knisely* notes that Rule 36 admission requests serve the highly desirable purpose of

31 Robert Wise & Katherine Fayne, *Requests for Admission Under the Texas Discovery Rules*, 45 ST. MARY'S L.J. 655, 682 n. 91 (2014).

32 FED. R. CIV. P. 36(a)(4).

33 *Jacobs v. Sullivan*, No. 1:2005cv01625 (E.D. Cal. Aug. 27, 2012).

34 *Radian Asset Assurance, Inc. v. Coll. of Christian Brothers*, No. 09-0885 JB/DJS (D. N.M. Nov. 11, 2011).

35 *Knisely v. Nat'l Better Living Ass'n, Inc.*, No. 3:14-CV-15 (N.D. W. Va. Feb. 11, 2015).

eliminating the need for proof of issues upon trial, and accordingly, there is strong disincentive to finding an undue burden where the requested party can make the necessary inquiries without extraordinary expense or effort.

183. It is precisely this “seam” in the case law that can be strategically exploited by proactively challenging the sufficiency of the detail of in the insurer’s lack of knowledge response.³⁶ By utilizing information obtained through written discovery, the RFA proponent may be able to formulate an argument that (a) the respondent has in fact failed to make good faith efforts to diligently seek information from its insured; (b) the insured does in fact possess the requisite degree of control over its insured; and (c) that the benefit of ordering the respondent to specify the degree of effort that it expended outweighs any potential slight burden.

VII. A Methodological Discovery Strategy for Exploiting Deficient Responses to RFAS

184. The foregoing legal framework should be an integral part of a strategy designed not only to obtain potentially damaging admissions, but also to set discovery traps for opposing insurer’s counsel. As previously mentioned, lax, inexperienced, or overburdened counsel for an insurer often rely upon standardized, evasive responses or objections to RFAs. It is striking how many reported cases involve “lack of knowledge” responses to RFAs that fail to contain the simple statement required by applicable Rule, that the respondent has made diligent inquiry and that the requested information is not readily obtainable.³⁷ The simple reason is that such insufficient responses are rarely, if ever, challenged — perhaps because of a calculated cost-benefit analysis — and/or the perception that a challenge would be unsuccessful. The reader of this piece will be equipped to exploit deficient responses and reshape that paradigm.

185. The key is to formulate and implement a discovery strategy designed to establish a factual foundation to demonstrate the insurer’s control over, identity of interests with, relationship of mutual concerns with, or active cooperation with the insured. To do so, counsel should prepare and serve on the insurer a Notice to Produce the insurance policy, cooperation agreement, or settlement/litigation agreement, if any, that contractually binds the insured to furnish information to the insurer. The insurer’s entire claim file, including its investigation and documentation of any payouts, should also be requested. Any sworn statements or other communications between the insurer and the insured and insured’s agents should

³⁶ *Knisely v. Nat’l Better Living Ass’n, Inc.*, No. 3:14-CV-15 (N.D. W. Va. Feb. 11, 2015).

³⁷ FED. R. CIV. P. 36(a)(4).

also be requested, as well as any and all documents furnished by the policyholder to the insurer. Securing possession of these documents could help to establish the degree of control over and identity of interest with the insured, which may subsequently be argued in support of a motion requesting more specific responses. Concurrently, interrogatories should be prepared and served, requiring the insurer to identify all non-parties with knowledge or information relating to the operative facts and relevant documents relating to the claim, including the insured and agents of the insured.

186. Next, a 30(b)(6) Notice of Deposition should be served, requesting the insurer to produce the insured or agent(s) of the insured with first-hand knowledge of the operative facts.³⁸ Any objections or claim of lack of knowledge or unavailability of witnesses with first-hand knowledge should be immediately challenged with a Motion to Compel. The foundation will have been laid to prepare and serve a RFA focusing on the operative facts and essential documents underlying the dispute, of which only the insured would possess first-hand knowledge. The requests should be framed with an eye toward framing the material factual issues for which admissions could provide a basis for summary judgment.

187. In a subrogation case, the plaintiff-subrogee, who essentially "steps into the shoes" of its insured, must plead and prove the operative facts of the insured's underlying cause of action. Quite often, particularly in motor vehicle accident cases, the complaint will consist of bare-bone, boiler-plate allegations minimally sufficient to plead a cause of action for negligence. The allegations may be verified by an agent of the insurer, who will not have any actual first-hand knowledge of the operative facts, other than what can be gleaned from a police or accident report in the claim file. It would not be out of the ordinary for the complaint to be verified by an insurance company representative without even obtaining a sworn statement from the insured. It is quite possible that the defendant's version of the underlying facts will vary from or contradict the boiler-plate allegations contained in the complaint. A request to the insurer to admit the defendant's version of the material facts could elicit a response exposing the insurer's lack of first-hand knowledge or information, or other evasive response.³⁹

188. Evasive responses, claims of lack of knowledge or information, and/or failure to sufficiently allege that the responding party has exercised reasonable diligence to obtain readily obtainable information and documentation, call for aggressive motion practice. However, counsel implementing this strategy must exercise caution and restraint in complying with the applicable rules of procedure, particularly when litigating in federal court. *Beasley v. State Farm Mutual* offers a cautionary

³⁸ FED. R. CIV. P. 30(b)(6).

³⁹ FED. R. CIV. P. 36(a).

tale for practitioners.⁴⁰ In *Beasley*, while acknowledging that the insurer's responses to plaintiff's RFAs "appeared to be insufficient," the court denied the plaintiff's motion pursuant to FRCP 36(a)(6) to compel State Farm's responses,⁴¹ based upon the movant's failure to comply with FRCP 37 by conferring with opposing counsel and alleging that an impasse had occurred, before filing the motion.⁴²

189. Once attempts to resolve the dispute over the alleged insufficiency of RFAs have proven fruitless, a meticulous motion strategy should be implemented. Many federal courts are disinclined to deem matters admitted when they find the responding party's answers to RFAs to be deficient. Typically, when the responding party's answer to requests for admission is deemed to be noncompliant with FRCP Rule 36, federal courts order the responding party to serve a supplemental answer.⁴³ Accordingly, the litigator should prepare a motion requesting the court to order the insurer to re-serve compliant responses to the objectionable RFAs.

190. Where a federal court finds a lack of good faith on the part of the responding party, it may deem the matter admitted.⁴⁴ Typically, courts have ordered matters admitted either when the evidence shows that it should have been admitted,⁴⁵ or when the court finds the responding party's conduct in answering the requests for admission to be reprehensible.⁴⁶ The case law cited hereinabove may lend support to an argument that the responding party failed to exercise reasonable diligent efforts to obtain readily obtainable information. Evasive responses, or those found to be made in bad faith, or purporting to contradict other evidence in the case, can lead to the next phase of the strategy. With the support of the information obtained during the preliminary stage of discovery, the responding party's failure to sufficiently articulate "in detail" its efforts to obtain information from the insured can and should be challenged. In the case of an insurer, the RFA proponent may be positioned to challenge the argument that the insurer is a non-party, and therefore not within the control of the insured, or that their interests are not unified. In situations where a factual basis exists for any of these contentions, a Motion to Deem Facts as Admitted and Documents as Genuine should be prepared.

191. A successful motion to Deem Facts as Admitted or Documents as Genuine may set the stage for a motion for summary or at least partial summary judgment on a material issue, and potentially for sanctions. FRCP 37 provides for sanctions,

40 *Beasley v. State Farm Mutual Auto. Ins. Co.*, No. C13-1106RSL (W.D. Wash. Mar. 25, 2014).

41 FED. R. CIV. P. 30(b)(6).

42 FED. R. CIV. P. 37.

43 FED. R. CIV. P. 36.

44 *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981).

45 *Uniden Am. Corp. v. Ericsson, Inc.*, 181 F.R.D. 302, 304-05 (M.D. N.C. 1998).

46 *A. Farber and Partners, Inc. v. Garber*, 417 F. Supp.2d 1143 (C.D. Cal. 2006).

including attorneys' fees, for pursuing and prevailing on a motion challenging the sufficiency of responses to RFAs.⁴⁷ FRCP 37(c)(2) states in relevant part:

If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless: (A) the request was held objectionable pursuant to FRCP 36(a); (B) the admission sought was of no substantial importance; (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter; (D) there was other good reason for the failure to admit.⁴⁸

VIII. Conclusion

192. The strategies suggested herein are based upon developing case law that is far from being universally applied, and rely upon arguments pieced together from analogous lines of cases. That being said, an effective discovery "ground game," culminating in focused RFAs, may elicit defective or evasive responses from an insurer. In turn, these responses can be exploited to opposing counsel's advantage. In order to position oneself to exert such exploitation, the practitioner is well-advised to master the above-cited case law and implement the foregoing discovery strategies. By doing so, it may be possible to establish the requisite degree of the insured's control over and identity of interests with the insured. If one or both of those facts can be successfully established, the duty of "reasonable inquiry," to be pursued in good faith, is triggered. At that juncture, the insurer must satisfy its burden.

⁴⁷ FED. R. CIV. P. 37.

⁴⁸ FED. R. CIV. P. 37(c)(2).