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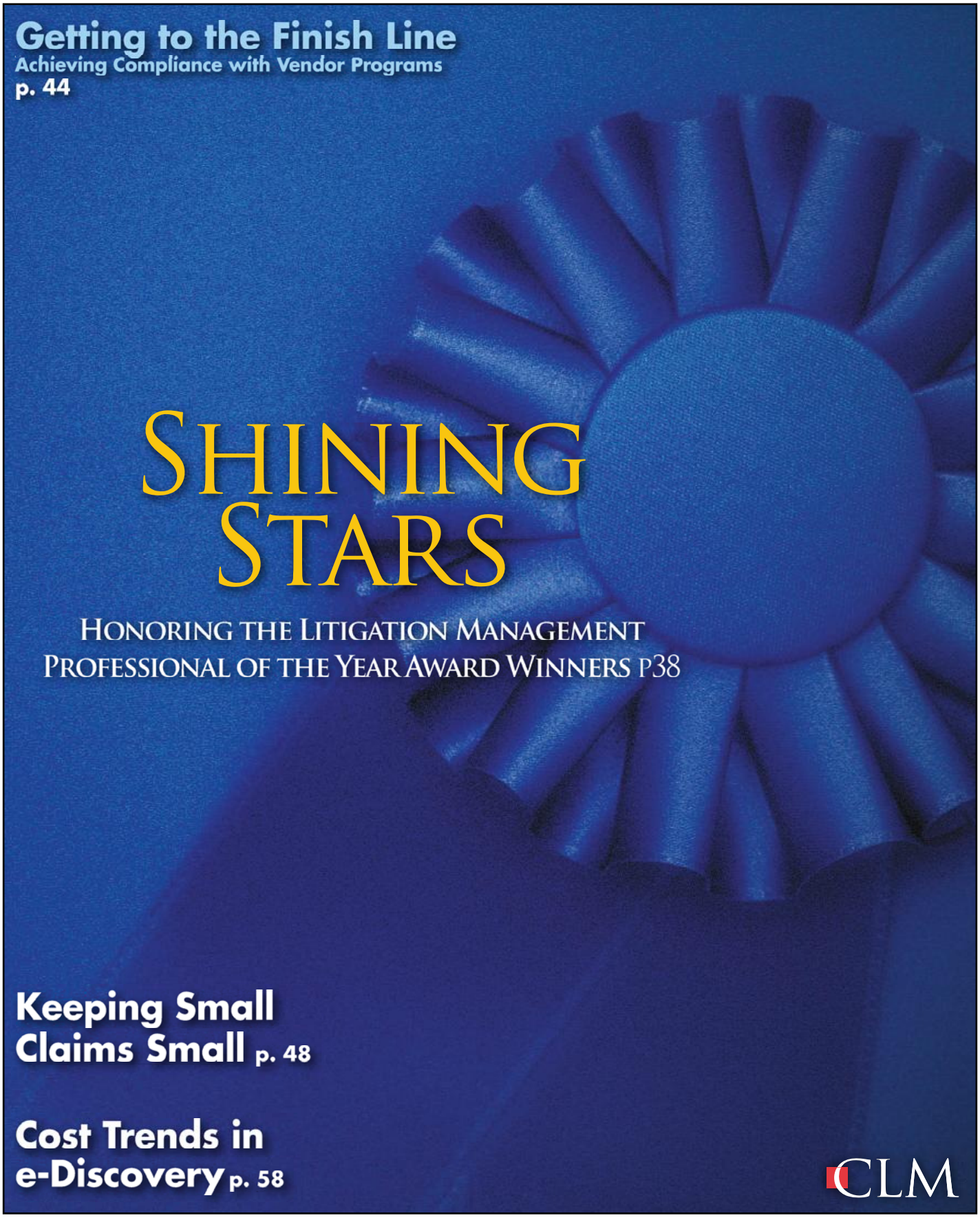

ARE YOU CONNECTING?

Changes in Bad Faith Litigation in the Electronic Era

By Matthew J. Smith and Frank T. Zeigon

Although now a part of nearly everyone's life, the Internet was actually invented in 1969, but did not become a part of common culture until the mid-1990s. It was actually not too long ago persons dissatisfied with the insurance claim process would go to an attorney and learn the insurance company may be liable for "bad faith" damages. Their normal reply was, "what does that mean?" In today's electronic era, dissatisfied individuals who complain to friends, neighbors and co-workers are more likely to hear the term "bad faith" early in the claim adjustment process. Like most people around the world, when we do not know the meaning of a term, we turn to the Internet and the proverbial "Google search."

Most claims professionals, however, have never taken the time to search the term "bad faith." A recent search found 7,590,000 "hits" on this common insurance phrase. Searches will immediately take you to a number of websites promoting themselves as "protecting the insured" and "holding insurance companies to their promises." Often, these websites are owned by, or linked to, law firms or public adjusters and are being used as marketing tools to garner new clients.

Spreading the Word

The era of lawyer advertising via U.S. mail is passing and being replaced by electronic solicitations. In the litigation market of today and with multi-million dollar verdicts at

stake for bad faith damages, lawyers are no longer looking for clients in their hometown, or even their home state. Much in the same manner law firms now advertise routinely on major cable networks for drug and medical device litigation, in the near future, aggressive law firms will be promoting the handling of bad faith claims against insurance carriers in the same way.

The future of bad faith litigation in the electronic era will also not be limited to property claims. One very prevalent website promotes itself as an advocate of insurance reform. The site offers to pay between $250 and $2,500 to claimants willing to allow the site owners to document and audio record all aspects of the claim process from the first call reporting the claim to the agent.

Juries are returning higher verdicts in bad faith cases making these cases more appealing. As this trend continues, those seeking to profit from bad faith litigation will find more aggressive ways to do so. The insurance industry, however, should not simply blame aggressive attorneys for the increased number of bad faith lawsuits and higher verdicts.

Our Own Worst Enemy

In recent years, insurers have raced to out-pace one another by flooding television, radio and the Internet with advertisements that frequently focus on the claims process. While outstanding customer service should be the goal on every claim, in the battle to outdo one another, insurers would be wise to think carefully about promoting how quickly claims are settled, the extent of coverage afforded, and making promises or guarantees concerning satisfaction with the claims handling process. It is difficult for jurors called upon to judge the actions of an insurer in a bad faith trial to separate the reality of investigating a highly questionable claim from what they have been told the claims process should be like from years of watching ads on their televisions, and now laptops and tablets. Our industry itself is setting a higher bar than ever before for jurors to measure us against.

The electronic era is also dramatically changing how evidence is obtained to use against an insurance company in a bad faith lawsuit. Previously production of claims manuals, training materials and internal communications were the subject of a Request for Production in an individual lawsuit. Now much of this information is available by searching the Internet. Attorneys are increasingly posting damaging information regarding insurance companies and their claims handling practices on the Web to share with others and hoping in exchange they will receive similar useful information for cases they are handling now or in the future. Many insurance companies are surprised to find documents produced in litigation under Seal or Protective Order are now freely available through a simple web search.

Picking Up Speed

The impact of the electronic era on bad faith litigation will not slow down at any point in the near future. Ask any seasoned claims professional whether they envisioned the day when email would be the preferred method of communication with claimants. Twenty years ago, this would have been unheard of. Today it is routine. We are entering an era where newer claims personnel are starting to text and even tweet with both first- and third-party claimants. To the next generation beginning their careers in claims, email is already antiquated.

The reality is insurance companies are not keeping up with these new methods of electronic communication. Few insurers have policies in place regarding the use of texting and tweeting in the claims process, and corporate policies and technology often are not in place to make certain texts and tweets are included in the official claim file. Imagine the problem for insurers when their company turns over what is believed to be the entirety of the claim file, only to have the plaintiff produce a series of texts and tweets that were mysteriously not included in the official company documents produced to the Court.

Insurance companies also need to utilize electronic communications and social media to more effectively investigate questionable claims and build a successful defense for both the breach of contract and bad faith litigation that may ensue. A myriad of information is available to insurers who are utilizing electronic communications as an appropriate claim investigation tool. Policy language and releases may need to be updated or rewritten to clearly place claimants on notice of their duty to allow access to these new means of electronic communication.

The best defense to a bad faith claim in this new era should include an electronic data offense leading not only to the correct claim decision, but a stronger foundation for a denial of coverage where appropriate. Unless you effectively use electronic communication data in this new era, however, you may well miss key points in the claim investigation process, and also be electronically blindsided in the bad faith litigation to follow.

As Bob Dylan once sang, "*The times they are a-changin.*" The question is whether we who are charged with the responsibility of ensuring claims are handled fairly and properly to avoid bad faith litigation, are attuned to and understand there is an entirely new world affecting bad faith litigation in the electronic era. Carriers who recognize these changes and take appropriate steps now will save their company and policyholders millions of dollars in defense costs and judgments in the future. Those failing to do so may well end up learning their lesson the hard way. LM

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