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# PRATT'S PRIVACY & CYBERSECURITY LAW REPORT



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# Pratt's Privacy & Cybersecurity Law Report

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# New York Court Decision Provides Rare Insight into Representations and Warranties Insurance Arbitration

*By Patrick M. McDermott, Madalyn Moore and Jae Lynn Huckaba\**

*In this article, the authors discuss a court decision that provides unique insight into how one arbitration panel resolved a discovery dispute arising out of a representations and warranties insurer's reliance on outside counsel.*

Many formal disputes over representations and warranties insurance (RWI) claims play out behind closed doors in confidential arbitration proceedings. That makes it rare to see how arbitration panels address familiar coverage and discovery issues in RWI claim disputes. A court battle offers a glimpse into how one arbitration panel addressed a discovery fight involving the role of its RWI insurer's outside counsel.

The dispute came out of a JAMS arbitration between Axos and its RWI insurer, PartnerRe Ireland Insurance DAC. Like many insurers, PartnerRe brought in outside counsel early in the claim process. After PartnerRe denied coverage under the RWI policy, Axos took the dispute to arbitration.

A discovery ruling in that arbitration spawned litigation in New York state court, *Freedman Normand Friedland LLP v. Axos Nevada LLC et al.*<sup>1</sup> In that litigation, PartnerRe's law firm, Freedman Normand Friedland, challenged the panel's ruling compelling Freedman to produce internal documents that Freedman had never transmitted to its client, PartnerRe. That court fight, in turn, sheds light on what happened before the arbitration panel, which is summarized below.

## BACKGROUND

Axos said that it had sought documents in the arbitration that were created by Freedman prior to PartnerRe's coverage denial, including internal Freedman documents. To support that request, Axos argued that policyholders were "entitled to discovery of documents that were created in the claims adjustment process, even if those documents were created by attorneys." PartnerRe pushed back, claiming those documents were privileged and, for the internal Freedman documents, also argued that the material was not within PartnerRe's possession, custody, or control.

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<sup>1</sup> *Freedman Normand Friedland LLP v. Axos Nevada LLC et al.*, No. 655332/2025 (Sup. Ct. N.Y. Cnty. Feb. 6, 2026).

As the court later explained, the panel “ordered PartnerRe to produce certain documents held by” Freedman. The court said that “the arbitrators determined . . . that [Freedman] was wearing two hats: claims handler and counsel.”

Axos’s court filings add more context to the panel’s reasoning. According to Axos, the panel viewed Freedman as acting “in a business capacity of claim handler,” and the panel saw “no indication that [Freedman] acted in any other capacity prior to” the coverage denial. Axos quoted the panel as stating that “PartnerRe has not established privilege or any other protection for [Freedman’s] documents and communications prior to” the coverage denial.

According to Axos, the panel explained that “documents and communications during pre-coverage-denial claim review and adjustment, even when outsourced to be performed by experts including outside counsel, are subject to disclosure in discovery under normal practice in other insurance coverage litigation settings under New York law.” Axos also stated that the panel concluded that the involvement of an RWI policy “does not justify deviation from that practice.”

In the end, the panel ordered Freedman’s internal documents produced for in camera review.

## THE COURT DECISION

After the panel’s rulings, Freedman turned to New York state court, seeking a protective order to relieve it of any obligation to produce its internal documents. The court denied that re-request. It found Freedman lacked standing because Freedman was not a signatory to, nor a party to, the arbitration agreement between Axos and PartnerRe, and it had never been served a sub-poena or other process commanding it to produce documents. Freedman has filed a notice of appeal of that ruling.

While this dispute involved a single RWI claim and arbitration panel, the issues it highlights will sound familiar to those involved in RWI claims. In RWI claims, insurers commonly retain outside counsel early in the claims process. In practice, that outside counsel may then fulfill a role that an arbitration panel or court could consider to be non-legal, especially where outside counsel is coordinating and performing claim investigations.

## CONCLUSION

As shown by the arbitration panel’s decision, this arrangement could mean that documents created or advice given by outside counsel may not be protected from discovery, particularly prior to any coverage decision. As confidential arbitrations continue to serve as a common method for resolving coverage disputes under RWI policies, the *Axos* panel’s decision provides unique insight into how one arbitration panel resolved a discovery dispute arising out of an R&W insurer’s reliance on outside counsel. In addition, while not all aspects of RWI and the associated underwriting and claims processes mirror other types of insurance, arbitration panels and courts may apply standard insurance principles in RWI disputes, as the *Axos* panel did in reaching its discovery decision.