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Lawyer Insights

A Young Lawyer's Guide to Navigating Discovery in Coverage and Bad Faith Disputes[1]

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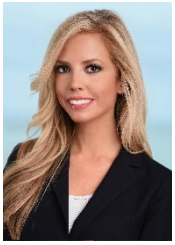


In insurance coverage litigation, a young lawyer's first opportunity to take ownership over part of the case is often in discovery. However, discovery in coverage and bad faith actions can be contentious and the rules far from uniform across jurisdictions. Typically, insureds seek discovery of an insurer's claim file, reserve information, reinsurance information, information regarding other insureds, the insurer's manuals and guidelines, underwriting manuals and a policy's drafting history. However, whether an insurer must produce these documents depends on the jurisdiction in which the action is being litigated. Below are exemplar cases from various jurisdictions demonstrating how different courts have ruled on these discovery issues.

I. Insurer's Claim File

In most instances, once discovery opens, the insured's coverage counsel will seek the insurer's claim file. The insurer often objects to this discovery and argues that the claim file is privileged, contains attorney work-product or is otherwise precluded from discovery. However, courts disagree as to whether a claim file is actually privileged or otherwise protected.

For example, New York courts have held that the claim file may be discoverable. *Bombard v. Amica Mut. Ins. Co.*, 11 A.D.3d 647, 648 (2nd Dep't 2004) ("The payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business. Reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable even when those reports are 'mixed/multi-purpose' reports, motivated in part by the potential for litigation with the insured.") (internal citations and quotation marks omitted).

Further, even where an insurer retains outside counsel to render a coverage position, those documents, too, may be discoverable where counsel is engaged in "claims handling—an ordinary business activity for an insurance company." *See Nat'l Union Fire Ins. Co. of Pitt., Pa. v. TransCanada Energy USA, Inc.*, 119 A.D.3d 492, 493 (1st Dep't 2014) ("The record shows that the insurance companies retained counsel to provide a coverage opinion, i.e. an opinion as to whether the insurance companies should pay or deny the claims. Further, the record shows that counsel were primarily engaged in claims handling—an ordinary business activity for an insurance company. Documents prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so merely because [the] investigation was conducted by an attorney."); *In re Residential Capital, LLC*, 575 B.R. 29, 35 (Bankr. S.D.N.Y. 2017) ("Under New York law, an insurance company's claim handling activities are generally subject to discovery even if they were performed by an attorney."); *Melworm v. Encompass Indem. Co.*,

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112 A.D.3d 794, 796 (2nd Dep't 2013) ("[T]he Supreme Court properly directed disclosure, as the materials sought by the plaintiffs were prepared as part of the defendants' investigation into the claim and were not primarily and predominantly of a legal character. Therefore, the defendants failed to meet their burden of establishing that the materials sought by the plaintiffs were immune from discovery because they were protected by the attorney-client privilege."); *Brooklyn Union Gas Co. v. Am. Home Assur. Co*., 23 A.D.3d 190, 191 (1st Dep't 2005) ("Documents prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and to evaluate the extent of a claimant's loss are not privileged, and, therefore, discoverable. In addition, such documents do not become privileged 'merely because an investigation was conducted by an attorney.' ").

In Florida, whether a claim file is discoverable arguably depends on (1) whether the case is brought in federal or state court; and (2) whether the case is a coverage case (declaratory action or breach of contract) or a case alleging bad faith. In Florida federal courts, there is no "claim file privilege." Rather, the claim file is generally discoverable if relevant to the claims alleged. *See Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 696 (S.D. Fla. 2007) (finding that where bad faith failure to settle claim was not ripe, "documents related to the 'investigation, processing, analysis' and ultimate denial of Plaintiff's claim are relevant to the extent they relate to Plaintiff's breach of contract claim."). Additionally, Florida federal courts recognize a presumption that documents in the claim file prepared before a final coverage position are not protected work-product. *Id*. at 701 ("Plaintiff asks that we utilize the rebuttable presumptions … that documents or things prepared before the final decision on an insured's claim are not work product, and that documents produced after claims denial are work product … The Court agrees with Plaintiff's argument, and Defendant is entitled to work-product immunity for those documents created after Defendant denied the claim for coverage….").[2] Moreover, where the insured alleges bad faith, Florida federal courts are likely to permit discovery of the insurer's claim file. *McMullen v. GEICO Indem. Co.*, No. 14-CV-62467, 2015 WL 2226537, at *4 (S.D. Fla. May 13, 2015) (finding policyholder alleging third-party bad faith claim was entitled to discovery of insurer's claims file materials, including work-product materials).

In contrast, in Florida state court, claim files are generally not discoverable until coverage has been resolved. Some Florida courts have determined that claim files are not relevant to the determination of coverage while others have focused on work-product considerations. Therefore, claim files are typically not discoverable in Florida state court until a bad faith claim has been brought against the insurer. *See Homeowners Choice Prop. & Cas. Ins. Co. v. Avila*, 248 So.3d 180, 182-83 (Fla. 3d DCA 2018) (Where, an insured "is not pursuing a bad faith claim, but rather seeks relief for breach of contract, a trial court departs from the essential requirements of the law in compelling disclosure of the contents of an insurer's claim file when the issue of coverage is in dispute and has not been resolved."); *Nationwide Ins. Co. of Fla. v. Demmo*, 57 So.3d 982, 984 (Fla. 2d DCA 2011) (where insured brought breach of contract claim, "[A] trial court departs from the essential requirements of the law in compelling disclosure of the contents of an insurer's claim file when the issue of coverage is in dispute and has not been resolved.").

Likewise, in California, courts have held that claim file discovery may not be relevant in coverage actions. *See James 3 Corp. v. Truck Ins. Exchange*, 91 Cal. App.4th 1093, 1109-1110 (Cal. App. 2001) (holding that trial court did not abuse its discretion in denying motion to compel claim file in coverage action where bad faith had not been alleged because "[t]he arguments the insureds raise as to why the discovery sought is relevant do not deal with the issue raised in this declaratory relief action—whether Truck is contractually obligated to provide its insureds with independent Cumis counsel because of a conflict of interest.").

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Nonetheless, California courts have found claim file discovery relevant in bad faith actions. *See 2,002 Ranch v. Superior Ct.*, 113 Cal. App.4th 1377, 1396 (Cal. App. 2003) (disapproved on other grounds by *Costco Wholesale Corp. v. Superior Ct.*, 47 Cal. 4th 725 (Cal. 2009) ("The importance of claims files as evidence in insurance bad faith actions has long been emphasized: 'In bad faith cases, the jury is entitled to know exactly what information was in the insurer's claims file (aside from privileged information): how else could they have properly determined whether [the insurer] acted fairly and in good faith in its handling of the claim?' … 'The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action [for bad faith] the need for the information in the file is not only substantial but overwhelming.' ") (citations omitted). However, attorney-client and attorney work-product privileges may shield some of the contents of a claim file from discovery. *2,002 Ranch*, 113 Cal. App. 4th at 1397 ("However, not everything in the insurer's claims file is discoverable. Upon timely objection or motion for protective order, privileged information (e.g., attorney-client communications or attorney work product) is protected from discovery. Application of the privilege must generally be determined by the court on a document-by-document and issue-by-issue basis.").

II. Reserve Information

Reserves are funds insurers set aside to cover payment in the event of future liability. Insurers typically assert that reserve information is not relevant to insurance coverage actions. Nonetheless, whether reserve information will be subject to discovery depends not only on the jurisdiction in which the action is pending, but if bad faith has been alleged.

Many New York federal courts have found reserve information to be discoverable. *See Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 284 F.R.D. 132, 138 (S.D.N.Y. 2012) (rejecting insurer's argument that reserve information "is generally irrelevant in insurance coverage actions").[3] However, some New York state courts have held that reserve information is not material and necessary in coverage actions because bad faith has not been alleged. *See 40 Rector Holding, LLC v. Travelers Indem. Co.*, 40 A.D.3d 482, 483 (N.Y. 1st Dep't 2007) ("Supreme Court erred in granting that aspect of plaintiffs' motion seeking to compel defendant to produce [reserve information] since such are not material and necessary to this coverage action."); *see also Mt. McKinley Ins. Co. v. Corning*, 2010 WL 6334283 (Sup. Ct. N.Y. Cty. 2010) ("Because the claims and defenses here involve insurance coverage - not allegations of bad faith - reserve information is irrelevant").

Similarly, in Florida, some courts have held reserve information to not be discoverable where the insured has not alleged bad faith. *See Seacoast 5151 Condo. Assoc. v. Great Am. Ins. Co. of N.Y.*, 2018 WL 6653342, at *4-5 (S.D. Fla. Sept. 21, 2018) ("reserve information is generally not discoverable in insurance coverage cases absent an allegation of bad faith by the insured. Florida courts have repeatedly held that reserve information is not subject to discovery in a first-party breach of contract action because it 'is irrelevant to the determination of coverage....' Thus, the undersigned recommends that Seacoast's request for documents containing reserve information be denied."); *Dade Cty. Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 2011 WL 13100237, at *3 (S.D. Fla. Aug. 1, 2011) ("The majority rule in cases involving first-party claims that do not include allegations of bad faith is that reserve information is irrelevant to a determination of coverage and/or may be protected by the attorney-client privilege or work-product doctrine and, therefore, is not discoverable.").[4]

California courts have found reserve information to be discoverable in bad faith cases. *See Lipton v. Superior Court*, 48 Cal. App. 4th 1599, 1616 (Cal. 2d Dist. Ct. App. 1996) (In bad faith action against professional liability insurer, insured was entitled to discovery of requested loss reserve information,

regarding insurer's reserves in underlying actions against attorney insured, unless trial court could, as a matter of law, conclude, as to each separate item of information, that it was not relevant to subject matter or was not calculated to lead to discovery of admissible evidence in bad-faith action.).[5]

III. Reinsurance Information

Policyholders often seek discovery of reinsurance information because they believe that information provided by the insurer to reinsurers, or the reinsurance contracts themselves, may contain admissions or other concessions that may support their claims. Like reserve information, whether this is discoverable not only depends on the jurisdiction but on whether bad faith has been alleged.

Many federal district courts have held that Federal Rule of Civil Procedure Rule 26 requires initial disclosure of reinsurance agreements in insurance coverage litigation. In *Missouri Pacific*, the Northern District of Texas considered whether Rule 26(a)(1)(D) requires initial disclosure of reinsurance agreements. *Missouri Pac. R. Co. v. Aetna Cas. & Sur. Co.*, 1995 WL 861147, at *1-2 (N.D. Tex. Nov. 6, 1995). The court held it does, reasoning:

> When an insurer "cedes" a portion of its risk to a reinsurer, the reinsurer agrees to indemnify or reimburse the insurer according to the contractual terms. The court agrees with the magistrate judge's holding that the Rule mandates disclosure of reinsurance policies because "by definition such policies would render a reinsurer liable for all or part of an adverse judgment entered against the primary insurer which obtained the reinsurance policy."

1995 WL 861147, at *2.[6] *See also Hartman v. Am. Red Cross,* 2010 WL 1882002, at *2 (C.D. Ill. May 11, 2010) ("This Court has previously held that reinsurance agreements are discoverable and, in fact, must be produced as part of initial disclosures under Rule 26(a)(1)"); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.,* 244 F.R.D. 638, 642 (D. Kan. 2007) ("The Court agrees with the reasoning … that because reinsurers 'carry[ ] on an insurance business' and 'may be liable ... to indemnify [insurers] for payments made to satisfy the judgment' " reinsurance agreements fall within the plain language of the rule"); *Tardiff v. Knox County,* 224 F.R.D. 522, 523 (D. Me. 2004) ("Federal courts have held that reinsurance agreements are discoverable under Rule 26"); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Cont'l Illinois Corp.,* 116 F.R.D. 78, 84 (N.D. Ill. 1987) ("Reinsurance agreements are thus 'insurance agreements' for the direct insurers within the literal coverage of Rule 26(b)(2).").

Similarly, in New York, CPLR 3101(f) "entitles [policyholders] to copies of the applicable reinsurance policies themselves." *Clarendon Nat. Ins. Co. v. Atl. Risk Mgmt., Inc.*, 59 A.D.3d 284, 286 (1st Dep't 2009).[7] However, in Florida, some federal courts have determined that reinsurance information, including the reissuance policy, is only discoverable in a bad faith action. *See Royal Bahamian Ass'n, Inc. v. QBE Ins. Corp.*, 268 F.R.D. 692, 695 (S.D. Fla. 2010) (holding that reinsurance policy documents were not discoverable in coverage suit); *Simon v. Pronational Ins. Co.*, No. 07-60757-CIV., 2007 WL 4893477, at *2 (S.D. Fla. Nov. 1, 2007) (in bad faith action, ordering insurer to produce the names of its reinsurers in addition to reinsurance information).

Reinsurance agreements, reinsurance communications and related information may also be sought under Rule 34. In *Klein*, the Northern District of Texas granted a motion to compel reinsurance agreements and reinsurance communications sought under Rule 34, finding the information to be

relevant to the issue of notice. *Klein v. Fed. Ins. Co.,* 2014 WL 3408355, at *8 (N.D. Tex. July 14, 2014). When a party seeks more than the agreement's contents, however, some courts rely on the general relevance standard to determine if these materials should be produced. *See Klein* 2014 WL 3408355, at *7-8; *In re Dana Corp.,* 138 S.W.3d 298, 303-04 (Tex. 2004); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.,* 117 F.R.D. 283, 288 (D.D.C. 1986). And, insurers and their reinsurers may still claim attorney-client privilege or work-product protection where appropriate. *First Horizon Nat'l Corp. v. Certain Underwriters at Lloyd's,* 2013 WL 11090763, at *8 (W.D. Tenn. Feb. 27, 2013) ("However, the court acknowledges that some communications between the insurers and their reinsurers may be protected by the attorney-client privilege and work product doctrine. Any such claim by the insurers to individual documents or categories of documents shall be made on the privilege log."); *Lipton v. Superior Ct.*, 48 Cal. App. 4th 1599, 1616 (Cal. Ct. App. 1996) (Reinsurance information may be discoverable in suits against insurer for bad faith, although relevancy issue is problematic, since reinsurance contract predates any claim and does not alter original or ceding insurer's relationship with policyholder; moreover, communications to reinsurer may contain advice from counsel for ceding insurer relating to coverage, exposure or other legal liability issues, which are protected.).

Moreover, the distinction as to whether the reinsurance agreement is treaty or facultative appears to go more to the relevance of reinsurance communications or other information under Rule 34 than the discoverability of the agreement itself under Rule 26. *See,* e.g., *Isilon Sys., Inc. v. Twin City Fire Ins. Co.,* 2012 WL 503852, at *3 (W.D. Wash. Feb. 15, 2012) ("As Judge Martinez explained in Heights, the assumption that reinsurance decisions do not involve questions of policy interpretation is especially applicable when the reinsurance is treaty insurance …. While Twin City must produce all reinsurance policies themselves pursuant to Federal Rule 26(a)(1)(D), Twin City does not have to produce other reinsurance documents unless Isilon presents a basis for the relevance of such documents."); *Heights at Issaquah Ridge Owners Ass'n. v. Steadfast Ins. Co.,* 2007 WL 4410260, at *4-5 (W.D. Wash. Dec. 13, 2007) ("[Reinsurance] is a decision based on business decisions and not questions of policy interpretation. This is particularly so when the reinsurance is treaty insurance, as it is here. Under a reinsurance treaty, the reinsurer agrees to accept an entire block of business from the insured. There is no connection between the claims asserted against defendant Steadfast, and Steadfast's reinsurance of a block of its insurance policies, that would make that reinsurance relevant to the claims asserted here. Plaintiff's motion to compel discovery of reinsurance documents is therefore GRANTED as to the policies themselves, pursuant to F. R. Civ. Proc. 26(a)(1)(D), but DENIED as to all other reinsurance documents, including communications."); *Leksi, Inc. v. Fed. Ins. Co.,* 129 F.R.D. 99, 106 (D.N.J. 1989) (Finding that facultative reinsurance certificate may be relevant and should be produced to discern terms of "lost policy" if not overly burdensome and explaining "it is simpler to trace a particular policy in a facultative reinsurance contract than through treaty reinsurance.").

IV. Information Regarding Other Insureds and Claims

Insureds also often seek information regarding other claims or insureds in order to establish a general business practice by the insurer, which can be necessary to establish bad faith in certain jurisdictions or necessary to establish entitlement to punitive damages. Insurers usually object, claiming the requests are overly broad and burdensome, or the documents sought are confidential. Nevertheless, some states allow policyholders to obtain this information during discovery in limited circumstances.

For instance, in New York and New Jersey, information concerning other claims or other insureds may be discoverable if such information is relevant to the claims asserted in the coverage litigation. *See*

Mariner's Cove Site B Assocs. v. Travelers Indem. Co., 2005 WL 1075400, at *1 (S.D.N.Y. May 2, 2005) ("[D]ocuments regarding similar claims of other insureds, the drafting history of a policy, and claims manuals are relevant and discoverable in actions to recover insurance reimbursement."); *Stonewall Ins. v. National Gypsum Co.*, 1988 WL 96159, at *5 (S.D.N.Y. Sept. 6, 1988) (allowing discovery related to other claims by other insureds and policies issued to other insureds on grounds that it is relevant to policy interpretation); *Ins. Co. of North Am. v. UNR Indus.*, Nos. 92 Civ. 4236, 1994 WL 683423 at *1 (S.D.N.Y. Dec. 6, 1994) (allowing discovery of pleadings from other coverage actions against insurer "involving the meaning and application of the exclusions relied on by INA in this case"); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 106–07 (D.N.J. 1990) (holding that discovery sought related to how insurer has handled other claims with the same policy language "is relevant for purposes of discovery since it may show that identical language has been afforded various interpretations by the insurer. It may also tend to show that the interpretations suggested by the defendants today are not the same as those of the original drafters," but reducing required production to 20 underwriting files of other insureds concerning other environmental pollution claims, "including any claims-handling manuals and guidelines connected to the files.").

However, federal courts in the Southern District of Florida have held information is only discoverable in bad faith suits. *See Integon National Ins. Co. v. T.R.F. Trucking, Inc.*, 2011 WL 13225177, at *3 (S.D. Fla. Feb. 16, 2011) ("Information regarding other insureds, absent a claim of bad faith, is outside the scope of even the broad bounds of discovery envisioned by Rule 26."); *Hurley Mayfair House Ass'n, Inc. v. QBE Ins. Corp.*, 2010 WL 472827, at *4 (S.D. Fla. Feb. 5, 2010) (in bad faith action affirming "the provision of the omnibus discovery order which compels complete production of the specified other insured claim files with respect to all file materials created up to and including the date of resolution of the underlying disputed matter.").

California courts also limit when information regarding other claims and insureds is discoverable. In California, this information is only discoverable when the policyholder attempts to establish a general business practice of the insurer. *Colonial Life & Accident Ins. Co. v. Superior Ct.*, 31 Cal.3d 785, 791 (Cal. 1982) (discovery of names, addresses or files of other claimants with whom individual claims adjusters attempted settlements was establishing a general business practice of unfair settlement practices); *J & M Assocs., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 06-CV-0903-W (JMA), 2008 WL 638137, at *3 (S.D. Cal. Mar. 4, 2008) (holding that other claims discovery was relevant because plaintiff intended to show that the insurer "adopted a policy of denying the defense of additional insureds for insurance policies like the one it sold to J & M"); *Tilem v. Travelers Commercial Ins. Co.*, No. CV176904RSWLASX, 2018 WL 4963124, at *4 (C.D. Cal. May 22, 2018) ("Plaintiff's reliance on *Colonial Life* is inapposite because here, Plaintiff's allegations involve only whether Defendant acted in bad faith in denying coverage, not a pattern and practice of unfair settlements.").

V. Insurers' Manuals and Guidelines

Insureds typically also seek the insurer's manuals and guidelines in order to establish a general business practice or a deviation from the insurer's business practices in that case in order to demonstrate bad faith. However, policyholders may also seek these materials in coverage actions, arguing that the materials are relevant to the insurer's purported breach of the policy. Some courts agree. For example, courts have held that an insurer's manuals and guidelines are discoverable, even in a coverage action where "bad faith" has not been alleged. *See Silgan Containers v. National Union Fire Ins.*, 2010 WL 5387748, at *8 (N.D. Cal. Dec. 21, 2010) (holding that claims manuals "are relevant for coverage claims

(not just bad faith claims)"); *Mariner's Cove Site B Assocs. v. Travelers Indem. Co.*, 2005 WL 1075400, at *1 (S.D.N.Y. May 2, 2005) ("[D]ocuments regarding similar claims of other insureds, the drafting history of a policy, and claims manuals are relevant and discoverable in actions to recover insurance reimbursement."); *Glenfed Dev. Corp v. Superior Ct.*, 53 Cal.App.4th 1113, 1117-1119 (Cal. Ct. App. 1997) (in a coverage action holding that "carrier's claims manual is discoverable"); *Ins. Co. of N. Am. v. UNR Indus.*, 1994 WL 683423, at *1 (S.D.N.Y. Dec. 6, 1994) ("any drafting materials and any interpretive portions of claims manuals, other guidelines or communications related with reinsurance with regard to these issues" were relevant in coverage action).

However, Florida state courts, and others, often hold this information is only discoverable in bad faith suits. *See State Farm Fire & Casualty Co. v. Valido*, 662 So.2d 1012, 1013 (Fla. 3d DCA 1995) (insured's claim files, manuals, guidelines and documents concerning its claims handling procedures were irrelevant to first-party dispute); *Old Republic National Title Insurance Company v. Homeamerican Credit*, Inc., 844 So.2d 818, 819 (Fla. 5th DCA 2003) (insured not entitled to discovery of documents relating to insurer's litigation files, the insurer's business policies or practices regarding the handling of claims until the insurer's obligation to provide coverage has been established).

VI. Underwriting Manuals and Drafting History

Another source of discovery disputes is the issue of whether an insurer's underwriting manual is discoverable in a coverage action. Courts often permit this discovery, particularly where an underwriting issue is alleged. For example, in *Firemen's Ins. Co. of Newark, N. J. v. Gray*, 41 A.D.2d 863, 863 (3d Dep't 1973), the court held that in a coverage action, that "underwriting file and claim file of each defendant are subject to disclosure in that they did not consist of material prepared for litigation of this action for a declaratory judgment …. An investigation conducted to defend insured against a possible legal action is not material prepared for legal action as against the insurer himself." *See also Mt. McKinley Ins. Co. v. Corning Inc.*, 96 A.D.3d 451, 453 (1st Dep't 2012) ("The parties may also pursue discovery concerning the intended meaning of the relevant policy language and the insurers' underwriting guidelines and procedures insofar as there is any ambiguity…."); *Silgan Containers v. Nat'l Union Fire Ins.*, No. C 09–05971 RS (LB), 2010 WL 5387748, at *8 (N.D. Cal. Dec. 21, 2010) ("The underwriting file is relevant to determining the risks that National Union expected to cover in the policy, how it interpreted the various policy terms, and whether the terms of the policy are ambiguous in the first instance.").

Policyholders also seek previous drafting history information in order to shed light on the meaning of the policy language. Courts will allow the discovery of this information when it is relevant to the case. Typically, a policy's drafting history is relevant where ambiguity has been alleged. For instance, in *Champion Int'l Corp. v. Liberty Mut. Ins. Co.*, the Southern District of New York held, "inquiries concerning the drafting history of the provisions in question, how-to-sell instructions and claims manuals are clearly germane to the interpretation of such policies." 129 F.R.D. 63, 67-68 (S.D.N.Y. 1989).[8]

Similarly, Florida courts have held that underwriting materials, including drafting histories, are discoverable where ambiguity has been alleged. *See Del Monte Fresh Produce B.V. v. Ace Am. Ins. Co.*, 2002 WL 34702176, at *3 (S.D. Fla. Sept. 4, 2002), *R & R adopted sub nom.*, 2002 WL 34702175 (S.D. Fla. Sept. 23, 2002) ("The drafting history of the policy in question and interpretations given to those terms and their interrelationship with one another are thus discoverable."); *Viking Yacht Co. v. Affiliated FM Ins. Co.*, 2008 WL 8715540, at *2 (S.D. Fla. Feb. 7, 2008) ("Contrary to AFM's position, drafting history and extrinsic evidence of interpretive materials is discoverable at this early stage of the litigation

when questions concerning ambiguity have not been resolved …. Even *Dimmit Chevrolet, Inc. v. Southeastern Fid. Ins. Co.*, 636 So.2d 700 (Fla.1993), relied upon by AFM, supports Viking's position, holding that it is only after the court determines the policy language is unambiguous, that it is inappropriate and unnecessary to consider drafting history."); *ABCO Premium Fin., LLC v. Am. Int'l Group, Inc.*, 2012 WL 13013233, at *2 (S.D. Fla. May 9, 2012) (denying motion for protective order as to various interpretive materials and relevant drafting history, finding the requested documents were relevant in insurance coverage disputes).

The same is true in California. *See Ivy Hotel San Diego, LLC v. Houston Cas. Co.*, 2011 WL 13240367, at *4 (S.D. Cal. Oct. 20, 2011) ("The Court finds considerable California case law permitting an insured to introduce extrinsic evidence of the drafting history of an insurance policy as evidence of the intent of the drafter.").

VII. Conclusion

As the cases demonstrate, discoverability of these documents is not only jurisdiction-dependent, but fact-dependent as relevance is determined by the claims alleged in each coverage or bad faith suit. Accordingly, even where the case law suggests that a category of discovery is or is not relevant, young insurance coverage lawyers should distinguish applicable law by demonstrating why the information sought is or is not relevant to the claims asserted in that action.

Moreover, young insurance coverage lawyers should make themselves an invaluable member of the coverage or bad faith litigation team by becoming the team's point person on (1) key discovery decisions in that jurisdiction, (2) the state or federal rules of procedure and any applicable local rules and (3) the court's scheduling order and any orders on discovery practice and procedure. By taking ownership of pretrial discovery efforts and becoming the team's go-to attorney on applicable law and procedure, young coverage lawyers can make themselves indispensable to the matter and convince partners, and clients, of why they deserve second or third chair at the coverage or bad faith trial.

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Notes

1. Parts of this article are based on the written materials for and seminar presented at the ABA Section of Litigation Insurance Coverage and Litigation Committee's Annual Conference on March 5, 2020.

2. *See also Commercial Long Trading Corp. v. Scottsdale Ins. Co.*, No. 12-22787-Civ, 2012 WL 6850675, at *2 (S.D. Fla. 2012) (An "insurance carrier may rebut the presumption that documents prepared before the final decision are not work product by 'specific evidentiary proof of objecting facts.' "); *Redfish Key Villas Condo. Ass'n, Inc. v. Amerisure Ins. Co.*, No. 13-cv-241, 2014 WL 1333202, at *3 (M.D. Fla. 2014) ("Numerous courts have held that documents constituting a factual inquiry of a claim undertaken by an insurance company to make a claim decision are not work product."); *1550 Brickell Assocs. v. Q.B.E. Ins. Co.*, 253 F.R.D. 697, 699 (S.D. Fla. 2008) (finding insurer did not overcome presumption that it anticipated litigation before denial letter on the day after hurricane struck simply because it believed damages were excessive); *Seacoast 5151 Condo. Ass'n v. Great Am. Ins. Co. of N.Y.*, 2018 WL 6653342, at *4 (S.D. Fla. Sept. 21, 2018) (communications between coverage counsel and insurer, before insurer finally denied coverage, were not protected by the attorney-client privilege or work-product doctrine).

3. *See also 99 Wall Dev. Inc. v. Allied World Specialty Ins. Co.,* 2019 WL 2482356, at *4 (S.D.N.Y. June 14, 2019) (reinsurance and loss reserve information relevant in breach of insurance contract action and further stating "[t]he factual level of the reserve is not privileged and, as Allied notes, is a business judgment and requirement of New York law. An insurance company must set reserves to pay claims under its policies. Thus, in the context of an insurance claim, the proposition that reserve decisions are privileged holds less weight than in other litigation contexts."); *Great Am. Ins. Co. of New York v. Castleton Commodities Int'l LLC,* 2015 WL 6437397, at *3 (S.D.N.Y. Oct. 15, 2015), *on reconsideration*, 2015 WL 6955176 (S.D.N.Y. Nov. 3, 2015) (reinsurance and reserve information is discoverable); *Ins. Co. of N. Am. v. UNR Indus., Inc.,* 1994 WL 683423, at *1 (S.D.N.Y. Dec. 6, 1994) (compelling discovery of reserve information in coverage dispute).

4. *See also Pepperwood of Naples Condo. Ass'n, Inc. v. Nationwide Mut. Fire Ins. Co.*, No. 2:10-CV-753-FTM-36, 2011 WL 4596060, at *13 (M.D. Fla. Oct. 3, 2011) (granting discovery on insurance reserves in bad faith claim); *Homeowners Choice Property and Casualty Ins. Co., Inc. v. Avila*, 248 So. 3d 180, 186 (Fla. 3rd DCA 2018) (J. Logue concurring holding that "[i]n addition to work product, claim files usually contain confidential and proprietary claims handling materials such as … reserve placed on the claim…" These claims handling materials, while discoverable in a bad faith suit, are not discoverable in a first- or third-party claim for damages based on the policy.)

5. *See also Bernstein v. Travelers Ins. Co.,* 447 F. Supp.2d 1100, 1114-15 (N.D. Cal. 2006) (insurers' reserves for large first-party property claims, as well as internal communications concerning reserves and criteria used in determining the size of reserves, were discoverable in bad faith cases alleging that insurers delayed payment and made excessive demands for proof of loss in attempt to secure low-ball settlement, as request was reasonably calculated to shed probative light on what insurers actually thought regarding merits of claims and it was uncertain at current stage of litigation whether California law would permit insurers to use genuine dispute doctrine to avoid use of their state of mind to prove bad faith).

6. The terms of the reinsurance policies and the identity of the reinsurers may be maintained confidential under a protective order. *Missouri Pacific,* 1995 WL 861147 at *2.

7. *See also Discover Prop. & Cas. Co. v. Nat'l Football League*, 2019 WL 4899032, at *4 (N.Y. Sup. Ct. Oct. 4, 2019) (compelling the production of reinsurance agreements based "on the plain language of CPLR 310[1](f)").

8. *See also Mariner's Cove Site B Assocs. v. Travelers Indem. Co.*, 2005 WL 1075400, at *1 (S.D.N.Y. May 2, 2005) ("[D]ocuments regarding similar claims of other insureds, the drafting history of a policy, and claims manuals are relevant and discoverable in actions to recover insurance reimbursement."); *Ins. Co. of N. Am. v. UNR Indus.*, 1994 WL 683423, at *1 (S.D.N.Y. Dec. 6, 1994) ("any drafting materials and any interpretive portions of claims manuals, other guidelines or communications related with reinsurance with regard to these issues" were relevant in coverage action).

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