Endless Variations on a Theme: Developing the Defense Theme in the Bad Faith Case

Selected Discovery Challenges in Bad Faith Insurance Litigation

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SELECTED DISCOVERY CHALLENGES IN BAD FAITH INSURANCE LITIGATION

Without question, the defense of a bad faith case against an insurance carrier presents one of the most intricate and challenging tasks for a trial attorney. Paramount in meeting this challenge is developing the proper theme to best present the "story" of the carrier. In developing this theme and in properly preparing witnesses for deposition and trial, we obviously need to know what evidence will be discoverable and ultimately admissible. It is the goal of this paper to present an overview of the various areas of discovery that typically arise in these cases and provide the practitioner with insight as to the admissibility of certain documentation and testimony in the typical bad faith case.

Discovery is often described as the engine that drives civil litigation, and this is especially the case in the insurance bad faith arena. Given the nature of a bad-faith action and the plaintiff's burden of proof, a plaintiff will often seek discovery from any and every conceivable source by casting a broad net to detect the slightest hint that the claim was improperly handled. To that end, plaintiffs will seek discovery from a variety of sources including, for example: claim files; claim manuals, guidelines, and training materials; personnel files of adjusters and others; and similar claims or litigation involving the insurer. These general discovery-source categories are examined in further detail below; although, there are certainly countless cases around the country where courts have been tasked with determining whether other materials, such as policy history, communications with counsel, settlement reserves and post litigation conduct, are discoverable in an insurance bad faith action. Not surprisingly, given the complicated nature of bad-faith claims, coupled with the complexity and technical nature of discovery sources, discovery disputes in bad faith actions are plentiful.

As the research below reflects, there is no uniform approach as to how courts resolve discovery disputes in the context of an insurance bad faith action. As a threshold issue, liability for bad faith must be determined according to the law of the jurisdiction. The factual differences between cases, trial courts' broad discretion in managing discovery and lack of controlling authority in many jurisdictions create a great deal of uncertainty for bad faith litigants at odds over discovery. This paper addresses the general scope of discovery in the context of certain materials and, where applicable, the admissibility of such materials in bad faith litigation in that bad faith bastion, Florida and the rest of the country.

CLAIM FILES

The Florida Supreme Court's decision in *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005) is one of the seminal cases on the discovery of the claim file in a bad faith action. In concluding that materials contained in the insurer's claim and litigation files are discoverable, the court explains:

> [I]n connection with evaluating the obligation to process claims in good faith under section 624.155, all materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages, should also be produced in a . . . bad faith action."

Id. at 1130 (citation omitted). In addition, according to the court, "all such materials prepared after the resolution of the underlying disputed matter and initiation of the bad faith action may be subject to production upon a showing of good cause or pursuant to an order of the court following an in-camera inspection." *Id.*

Despite the Florida Supreme Court's broad directive, subsequent cases have cautioned that *Ruiz* does not eviscerate the shield afforded to attorney-client communications. For instance, in *Geico Gen. Ins. Co. v. Moultrop*, 148 So. 3d 1284, 1285 (Fla. 4th DCA 2014), the court held that "when an insured party brings a bad faith claim against its insurer, the insured may not discover those privileged communications that occurred between the insurer and its counsel during the underlying action." *Id.* at 1068. Continuing, the court explained that "absent an exception, such as when the insurer places counsel's advice at issue, attorney-client privileged information from the underlying suit is not discoverable in a bad faith case." *Id. See also Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1069 (Fla. 2011), as revised on denial of reh'g (Nov. 10, 2011) (approving the portion of the Fourth District Court of Appeal's decision precluding the discovery of attorney-client privileged information in the first-party bad faith action).[1]

Most courts across the country likewise allow at least some discovery of the claim file in an insurance bad faith action. In *Hallmark Ins. Co. v. Fannin*, 1:17-CV-04839-CAP, 2018 WL 8929810, at *2 (N.D. Ga. July 16, 2018), the Northern District of Georgia allowed production of the entire claim file. Earlier cases from that district explain that "the insurance claim file may be discoverable in a third party claim for bad faith if the plaintiff can show a 'substantial need of the materials' and an inability 'without undue hardship' to obtain the materials by other means." *Camacho v. Nationwide Mut. Ins. Co.*, 287 F.R.D. 688, 694 (N.D. Ga. 2012); *Trehel Corp. v. Owners Ins. Co.*, 1:12-CV-3366-CAP, 2013 WL 12061845, at *2 (N.D. Ga. Dec. 2, 2013) (stating same).

Following this general trend, in *re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 224 (Tex. 2016), the Texas Supreme Court held that plaintiffs may discover certain reports and e-mails from the carrier that are limited as to time, place, or subject matter, but not indiscriminate reports and e-mails that lack any limitation. In *Barela v. Safeco Ins. Co. of Am.*, 13-1084 SMV/SCY, 2014 WL 11497826, at *4 (D.N.M. Aug. 22, 2014), the District of New Mexico agreed that the information sought by the plaintiff regarding the claims file was relevant and reasonably calculated to lead to the discovery of admissible evidence and, was, therefore discoverable in her

[1]In *Ruiz*, 899 So. 2d at 1128, the Florida Supreme Court reasoned there was no basis to apply different discovery rules first party and third party bad faith claims. Notably, however, the Supreme Court in *Genovese* limited its holding to the context of first party actions.

bad faith action. Likewise, the District of Nevada ruled in *Renfrow v. Redwood Fire & Cas. Ins. Co.*, 288 F.R.D. 514, 521 (D. Nev. 2013), that the claim file—including documents, writings, and communications, and any drafts or revisions thereof, that contain explanations of the grounds for the carrier's denial of the plaintiff's claim—was relevant to the Plaintiff's bad faith claim and ordered production.

In Washington, courts have applied a burden shifting framework where the insured "is entitled to broad discovery, including, presumptively the entire claims file." *Cedell v. Farmers Ins. Co. of Washington*, 295 P.3d 239, 244 (Wash. 2013). According to the court, the insurer may overcome this presumption by showing its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating the claim. *Id.* If the insurer meets this burden, it may redact communications from counsel that reflected the mental impressions of the attorney to the insurance company, unless those mental impressions are directly at issue in their quasi-fiduciary responsibilities to their insured. *Id.* Finally, under New York law, "[d]ocuments 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 are, therefore, discoverable." *Venture v. Preferred Mut. Ins. Co.*, 61 N.Y.S.3d 210, 214 (N.Y. App. Div. 2017). Such documents do not become privileged merely because an investigation was conducted by an attorney." *Id*.

Ultimately, the general trend among states regarding discovery of an insurer's claim file turns on *when* the material in question was prepared. For example, Ohio courts have explained that "the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage." *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154, 156 (Ohio 2001). The court reasoned that the claims file will not contain work product because, at the claim handling stage, the existence of coverage has not yet been determined. *See also Nat'l Union Fire Ins. Co. of Pittsburgh v. Ohio State Univ. Bd. of Trustees*, 2005-Ohio-3992, ¶ 13 (Ohio Ct. App. 2005) (stating "[w]ithout the requested claims files, OSU cannot ascertain how National Union determined whether the claimant who received settlement was an 'insured' under the policy or whether the settlement was in accordance with its attorney's advice and conclusions."). Applying similar reasoning, in *Thompson v. Travelers Home & Marine Ins. Co.*, 4:15-CV-4688-BHH, 2016 WL 11606771, at *3 (D.S.C. May 3, 2016), the South Carolina District Court denied discovery of the insurer's claim file materials that were prepared after the insurer anticipated litigation because the plaintiffs had not demonstrated a substantial need for such documents. Instead, the court reasoned that the plaintiffs could "thoroughly depose and examine the Defendant's adjuster and special investigator to find out all of their actions and decisions leading to the denial of the claim." *Id; see also Parker v. S. Farm Bureau Cas. Ins. Co.*, 935 S.W.2d 556 (Ark. 1996) (denying discovery of four pages of the insured's claims file where the pages included work product prepared in anticipation of litigation); *Harlan Lee v. Med. Protective Co.*, 10-CV-123-WOB-CJS, 2011 WL 13156819, at *2–3 (E.D. Ky. Sept. 30, 2011) (denying request for entire claim file reasoning that Kentucky law did not envision such plaintiffs would, by the very nature of their claim, have access to documents protected by the attorney-client privilege and declining to extend the "at issue" exception to documents protected by the attorney-client privilege).

The Eastern District of Pennsylvania took a similar approach in *Wagner v. Allstate Ins. Co* ., 5:14-CV-07326, 2016 WL 233790, at *5 (E.D. Pa. Jan. 19, 2016), wherein the court rejected the plaintiffs' argument that it was entitled to discovery of Allstate's entire claim and investigation file because all of that information was created in the ordinary course of business. According to the *Wagner* court, such an argument was untenable. *Id.* Importantly, the court reasoned that "whether Plaintiffs may be entitled to a subset of that information would hinge upon a fact-specific inquiry into the nature of the information that they seek, when Allstate reasonably anticipated litigation, Plaintiffs' need for the particular information, and whether they can obtain the information through other means." *Id.* The court's reasoning in *Wagner* is consistent with the analysis adopted in the vast majority of jurisdictions and attempts to balance the parties' need for the information sought, with the longstanding protections afforded to attorney-client communications and work-product.

At least one court, however, has adopted a stricter approach. In *Ridgaway v. Mount Vernon Fire Ins. Co.*, CV116009339, 2012 WL 6901203 (Conn. Super. Ct. Dec. 24, 2012), the Connecticut Superior Court held that a plaintiff was not entitled to an in camera review of claim documents because he did not allege that the insurer sought the advice of its attorney in order to conceal or facilitate its alleged bad faith conduct and, more importantly, the insurer had not waived the attorney-client privilege by placing the advice of counsel at issue.

Altogether, as the above authorities demonstrate, it is difficult to extrapolate a single bright-line rule regarding discovery of claim file materials across jurisdictions nationwide. Notwithstanding, the majority of courts will generally order and allow the discovery of claim file materials that are relevant to the bad faith action and are not affected by any applicable privileges.

CLAIMS MANUALS, GUIDELINES, AND TRAINING MATERIALS

Similar to the claim files, the discovery and admissibility of insurance company claims manuals and guidelines can play an important role in bad faith litigation. Often times, insurer's claims manuals and guidelines may outline procedures for a number of processes, such as: verifying coverage; communicating with insureds; investigating losses; identifying potentially applicable insurance policies; identifying other parties who may share fault for an occurrence; assessing damages; communicating with claimants and their counsel; setting reserves; negotiating settlements; initiating fraud investigations; and retaining defense and coverage counsel. *See* Douglas R. Richmond*, Recurring Discovery Issues in Insurance Bad Faith Litigation*, 52 TORT TRIAL & INS. PRAC. L.J. 749, 753 (2017). Due to the sensitivity and potential propriety nature of this information, it should come as no surprise that discovery of these materials is highly contested in insurance bad faith actions.

While an insurer's guidelines, claims manuals, and training materials may be a factor in adjudicating the issue of insurer bad faith, they are not dispositive, as a company's internal guides do not set the standard for reasonable care or bad faith. *See Somerville ex rel. Somerville v. United States*, No. 6:08-CV-787-ORL22KRS, 2010 WL 2643533, at *5 n.9 (M.D. Fla. June 30, 2010) (discussing, in the context of a medical malpractice claim, that "the standard of care is not equivalent to 'best practices.' "). Nonetheless, bad faith plaintiffs will often seek discovery of

insurers' internal claim manuals and guidelines to set the standard of care or show that the insurer did not adhere to its own policies and procedures. Whether these materials are discoverable—and ultimately admissible at trial—turns on a number of different factors and varies by jurisdiction.

Florida courts, for example, have adopted a "totality of the circumstances" standard in determining whether an insurer has acted in bad faith in handling claims against the insured. *Bannon v. GEICO General Insurance Company*, 743 F. Appx. 311, 313 (11th Cir. 2018). Applying this standard, the Eleventh Circuit found that GEICO's Claims Manual were properly admitted into evidence at trial because "evidence about the violation of a party's internal policies is appropriate to include in the totality of the circumstances inquiry as one indicator of possible bad faith." *Id*. at 314. Under Florida law, an insurer's violation of its own policies and procedures alone does not constitute bad faith, but is a relevant factor to be considered under the "totality of the circumstances" inquiry.

Pennsylvania has adopted a similar fact-specific inquiry in assessing bad faith actions and, under this analysis, a trial court may consider the insurer's claim manuals when assessing issues regarding bad faith. *See e.g.*, *Grossi v. Travelers Personal Ins. Co.*, 79 A.3d 1141 (Pa. Super. Ct. 2013) An Arizona court has further expanded the scope of what internal documents are admissible in an insurer bad faith action, allowing into evidence articles from an insurer's in-house newsletter, which discussed the handling of excess liability claims, as well as a portion of the insurer's general claims manual which discussed the handling of such claims. *See Miel v. State Farm Mut. Auto. Ins. Co.*, 912 P.2d 1333, 1337 (Ariz. Ct. App. 1995). On appeal, the insurer argued that its in-house newsletter and internal manual bore no relevance to the facts of the case, and even if it did, such relevance was substantially outweighed by the prejudicial effect. *Id.* The appellate court disagreed, reasoning that the evidence was relevant because it addressed the insurer's approved policies and procedures for handling the insured's claims which the claims representative admitted she did not follow. *Id*. The court "[did] not believe the evidence was particularly prejudicial because the claims representative admitted that she had failed to follow established State Farm procedures in handling this case." *Id.* Interestingly, the court also noted that the admitted evidence was helpful to the insurer when viewed from another perspective, as "arguably, they demonstrate that the company had gone to considerable trouble to be sure its employees dealt with insureds and injured persons in good faith." *Id*.[2]

An insurer's internal guidelines and claim manuals may likewise be discoverable and relevant even when the insurer hires the services of a separate company to handle an insured's claim. For example, in *Ro v. Everest Indemnity Insurance Company*, No. C16-0664RSL, 2017 WL 368349 (W.D. Wash. Jan. 25, 2017), the District Court ordered production of the insurer's third-party

[2] It should also be noted that, depending on the intended purpose, the relevance and admissibility of insurance company training materials are not limited to those of the insurer that is a party to the litigation or even training materials utilized in adjusting the claim. In one Tenth Circuit Court of Appeals case, the training material of another insurer were deem properly-admitted rebuttal evidence where the insured had based much of his bad-faith claim under Oklahoma law on his allegation that the insurer's investigation fell below industry standards. *Morton v. Progressive Northern Ins. Co.*, 498 F. Appx. 835, 841 (10th Cir. 2012).

administrator's own internal manuals and guidelines. According to the court, regardless of whether the insurer reviewed or was required to comply with its agent's guidelines, the agent's advice as to the claim was relevant to a determination of whether the agent and the insurer acted reasonably and/or in bad faith. Under Washington law, much like Florida law, an insurer's internal guidelines do not set the standard of reasonable care or bad faith; however, "they may inform the analysis by showing an industry participant's custom or practice" and/or "by providing a benchmark by which to compare the insurer's conduct and policies." *Id*.

Given the potential of issues that may flow from production of internal guidelines and manuals, insurers often attempt to thwart and subvert discovery of their internal guidelines and claim handling manuals by arguing that that such documents are not relevant to the facts of the case. These arguments have gained traction in certain circumstances, but the majority view is that these materials are discoverable given the liberal scope of discovery in civil litigation. For example, in *Garvey v. National Grange Mut. Ins. Co*., the insurer argued that claims and underwriting manuals were not relevant and protected from discovery as trade secrets. *Garvey v. Nat'l Grange Mut. Ins. Co.*, 167 F.R.D. 391, 396 (E.D. Pa. 1996). The court agreed, reasoning that "the fact that the defendant may have strayed from its internal procedures does not establish bad faith … in handling the plaintiff's loss." *Id.* Nevertheless, in a more recent opinion, another Pennsylvania district court walked back the applicability of *Garvey*. *See Platt v. Fireman's Fund Ins. Co*., No. CIV.A. 11-4067, 2011 WL 5598359, at *1, n.2 (E.D. Pa. Nov. 16, 2011) (holding "while the *Garvey* court found that the defendant's claims manuals were not discoverable in that particular case, there are instances where such materials may be relevant to a bad faith claim"). Similarly, in *Hadenfeldt v. State Farm Mut. Auto*, 239 N.W.2d 499, 504 (Neb. 1976), the Supreme Court of Nebraska held that manuals were not relevant to "any issue in the case," specifically whether an insurer employed ordinary care, skill, and diligence in refusing to settle within policy limits, and there was no showing of good cause for their production.

Notwithstanding the holdings in *Garvey* and *Hadenfeldt*, the majority view is that claims handling manuals and similar internal guidelines are in fact discoverable, particularly considering the broad discovery that is generally permitted under the Federal Rules of Civil Procedure and analogous state civil rules. *See, e.g.*, *Mills v. Liberty Mut. Ins. Co.*, Case No. 4:16-cv-00571-JAR, 2017 WL 1497904, at *3 (E.D. Mo. Apr. 24, 2017) (finding internal claims manuals and procedures applicable to the adjusting of plaintiff's claim "are discovery pursuant to Rule 26(b)'s broad scope of discovery."); *White Mountain Cmtys. Hosp. Inc. v. Hartford Cas. Ins. Co.*, No. 3:13-CV-8194 JWS, 2014 WL 6885828, at *3 (D. Ariz. Dec. 8, 2014) ("Given the broad scope of discovery established by the Federal Rules of Civil Procedure, the argument that the [internal best practices standards] are irrelevant fails.").

Best Practices for Insurer's Development of Internal Guidelines

While addressing the issue of claims manuals and related documents, this line of cases provide valuable insight into how these materials are generally viewed by courts and warrants further attention. In properly preparing the corporate representative, for example, this insight should be incorporated into the defense theme. In that regard, insurers can and should review and analyze caselaw discussed herein to proactively improve their own internal materials. Ultimately, insurers should assume that their internal claims manuals and guidelines will be discoverable in

bad faith litigation. Therefore, insurers should also assume that plaintiffs will try to use these documents to their advantage at every opportunity. Knowing this, insurers would be mindful to proactively evaluate their claims practices documentation and related materials in the context of their expected use in potential bad faith litigation. *See generally* 52 TORT TRIAL & INS. PRAC. L.J. 749, 764.

More specifically, the claims manuals and guidelines should be analyzed through two lenses. First, whether claims professionals might understand guidelines or policies to require them to act in unreasonable or unfair ways; and second, whether courts or jurors might interpret guidelines or policies as promoting bad faith conduct. *Id*. Indeed, to facilitate this analysis, drafters of such policies can assess the same while asking:

> How will courts or jurors perceive a policy? Can a policy be easily misconstrued, whether by claims staff or by a court or jurors? Does a guideline suggest that the insurer is favoring its financial interests over those of its insureds? Can the acronym for a process or program be exploited by a plaintiff? To the extent these questions are answered in ways that suggest an insurer's potential vulnerability to allegations of bad faith, what corrections are required? Should materials be rewritten? Should explanations or qualifiers be added? Should internal titles for procedures or programs be changed? Do claims representatives require training to ensure that they uphold the insurer's duty of good faith and fair dealing?

Id.

Courts have been critical of policies that do not encourage claims professionals to ultimately evaluate each claim on a case-by-case basis. In other words, insurers can be better positioned to avoid having their internal guidelines used against them when the guidelines and manuals emphasize that every case rests on its own facts. *See Zappile v. Amex Assur. Co., 928 A.2d 251*, 258 (Pa. Super. Ct. 2007) *(*observing statements in claim manual could be used as evidence in bad faith determination "to show that the insurer did not encourage a reasonable case-by-case evaluation of claims as a matter of company policy"); *see also Bonenberger v. Nationwide Mut. Ins. Co.*, 791 A.2d 378 (Pa. Super. Ct. 2002). Ultimately, guidelines are merely guidelines and not a substitute for a fact-specific, individualized inquiry of a claim that considers all of the relevant circumstances. Moreover, when claims professionals do not act in accordance with the goals and practices set forth in internal guidelines, such discrepancies can be exploited by claimant's counsel. Therefore, the standards established in the manuals and guidelines should be realistic ones that claims professionals can achieve reliably and consistently. 52 Tort Trial & Ins. Prac. L.J. 749, 764-765.

If an insurer believes that its claims manual or guidelines embody or contain trade secrets, it should take reasonable precautions to safeguard them as such, and must be prepared to demonstrate why they are trade secrets when such discovery is sought in litigation. *See, e.g.*, *Republic Servs., Inc. v. Liberty Mut. Ins. Cos.*, No. Civ. A. 03-494-KSF, 2006 WL 1635655,

at *3-8 (E.D. Ky. June 9, 2006) (recognizing the validity of the insurer's trade secrets claim and explaining in detail the supporting analysis). Even if it is not positioned to assert a trade secret claim, an insurer should insist on a confidentiality agreement or protective order when producing its claims manual or guidelines in discovery. Confidential commercial information that does not qualify as a trade secret may still be the subject of a protective order requiring that it "not be revealed or be revealed only in a specified way." Fed. R. Civ. P. 26(c)(1)(G). Courts are usually willing to enter such orders or require such agreements, and with good reason. After all, confidential information that does not qualify as a trade secret still has commercial value that may be compromised, diminished, or exploited if not protected.

Altogether, the majority rule—including Florida law—favors discovery of internal manuals, guidelines, and training materials in bad faith litigation. Accordingly, prudent insurers (and their counsel) must embrace the possibility that such information will likely be discoverable and should proactively review and revise materials that could be misconstrued or viewed as favoring the insurer's own financial interest over a case-by-case review.

PERSONNEL FILES

A more recent issue courts have faced is whether an insurer's personnel files are discoverable in an insurance bad faith action. In these instances, courts must balance the non-party employee's privacy rights and relevancy, with the need for the information sought.

As a Florida District Court has explained, personnel files may contain "the history of the employees' training, competence, evaluation, compensation, discipline, educational background, work duties, and hours of work." *O'Connor v. GEICO Indem. Co.*, 8:17-CV-1539-T-27JSS, 2018 WL 1409750, at *2 (M.D. Fla. Mar. 21, 2018). In Florida, courts routinely allow discovery of the personnel files of employees who have handled the claim at issue. For instance, the Middle District of Florida has explained that personnel files may be relevant to a bad faith claim to show why an employee handled a claim in a particular way. *Lavigne v. Safeco Ins. Co. of Illinois*, 3:17-CV-167-J-20PDB, 2018 WL 8244609, at *3 (M.D. Fla. May 25, 2018). In ordering discovery of the personnel files of the employees who "touched the matter in a direct or supervisory way", the court reasoned that "the plaintiff should not be unduly limited in trying to gather facts to meet her high burden of establishing bad faith." *Id.*

Despite permitting such discovery, courts have cautioned that requests should be limited in subject matter and time, and not seek information from individuals with no "more than incidental or minimum contact" with the claim. *Id.* (citing *Cousin v. Geico Gen. Ins. Co.*, 3:14-cv-397-J-39JRK, 2015 WL 12838352, at *3 (M.D. Fla. July 1, 2015) and *Wiggins v. Gov't. Emp. Ins. Co.*, No. 3:16-cv-1142-TJC-MCR, 2017 WL 3720952, at *3 (M.D. Fla. July 10, 2017) *(unpublished)*. Florida courts have ordered discovery of personnel files under the following circumstances:

> *Wiggins*, 3:16-CV-01142-TJC-MCR, 2017 WL 3720952, at *3 (finding employee personnel files regarding job performance, compensation, evaluation, discipline, training, educational background, work duties, and hours of work discoverable and relevant to plaintiff's bad faith claim); *Maharaj v. GEICO Cas.*

> *Co.*, 289 F.R.D. 666, 672–73 (S.D. Fla. 2013), aff'd, 12-80582-CIV, 2013 WL 1934075 (S.D. Fla. Apr. 5, 2013) (granting plaintiff's motion to compel as to the personnel file of the adjuster who handled plaintiff's claim, while denying it as to adjusters who did not have more than incidental or minimal involvement in handling the claim); *Moss v. GEICO Indem. Co.*, 5:10-CV-104-OC-10TBS, 2012 WL 682450, at *5 (allowing plaintiff to discover personnel files from adjusters who had more than minimal involvement with plaintiff's claim and limiting the discovery to information "concerning the employees' training, competence, abilities, shortcomings, accolades and disciplinary history"); *Kafie v. Nw. Mut. Life Ins. Co.*, 11-21251-CIV, 2011 WL 4636889, at *2 (S.D. Fla. Oct. 6, 2011) (granting plaintiff's motion to compel personnel files of employees involved in the determination of the denial of benefits, "including information related to those employees' job performance, compensation, evaluation, discipline, training, educational background, work duties and hours of work"); *Pepperwood of Naples Condo. Ass'n, Inc. v. Nationwide Mut. Fire Ins. Co.*, 2:10-CV-753-FTM-36, 2011 WL 4596060, at *12 (M.D. Fla. Oct. 3, 2011) (compelling production of the personnel files for adjusters and supervisors who worked on plaintiff's claim); *Turner v. GEICO Indem. Co.*, No. 11–20546–CIV, 2011 WL 11769047, at *2 (S.D. Fla. Sept. 8, 2011) (finding "that information in the personnel files of the employees responsible for adjusting the claim are reasonably calculated to lead to the discovery of admissible evidence regarding the training, supervision and control of those GEICO employees; the competence of the employees assigned to this claim; GEICO's knowledge of their professional abilities or shortcomings; and the standards for evaluating an employee's performance").

O'Connor, 2018 WL 1409750, at *3 (collecting cases).

Courts in other jurisdictions have taken a similar approach to the discovery of personnel files in bad faith litigation against an insurer. In *Ingram v. Great Am. Ins. Co.*, 112 F. Supp. 3d 934, 940 (D. Ariz. 2015), the court held that the plaintiffs were entitled to the adjustor personnel files based on the following reasoning:

> [T]he potential probative value of the information contained in employee personnel records outweigh any privacy concerns. Evidence regarding whether Defendants "set arbitrary goals for the reduction of claims paid" and whether "[t]he salaries and bonuses paid to claims representatives were influenced by how much the representatives paid out on claims" is relevant to whether Defendants acted unreasonably and knew it. *Zilisch,* 995

> P.2d at 280 (citing *Hawkins v. Allstate Ins. Co.,* 152 Ariz. 490, 733 P.2d 1073, 1082 (1987)). Likewise, the Court agrees with Judge Sedwick that "an expectation that assessments of work performance and any financial incentives to minimize payments on claims would be kept private is unreasonable." *White Mountain Communities Hosp. Inc. v. Hartford Cas. Ins. Co.,* 2014 WL 6885828 (D.Ariz.2014). Further, this information was unavailable through deposition testimony of the employees themselves (*see e.g.,* Doc. 172–1 at 147), and Defendants have not shown that this information would be available by other less intrusive means.

Id. See also Thompson v. Travelers Home & Marine Ins. Co., 4:15-CV-4688-BHH, 2016 WL 11606771, at *4 (D.S.C. May 3, 2016) (ordering production of the personnel files of employees involved in claim with respect to information and documents relating to employees' qualifications, experience, training, and work history); *Darmer v. State Farm Fire & Cas. Co.*, 17-CV-4309-JRT-KMM, 2018 WL 4846759, at *1 (D. Minn. Oct. 5, 2018) (denying discovery of personnel files of three employees but granting as to one employee, while limiting time frame and scope to documents reflecting performance evaluations, training materials, supervisor reviews, and the like); *AKH Co., Inc. v. Universal Underwriters Ins. Co.*, 300 F.R.D. 684, 692 (D. Kan. 2014) (ordering discovery of personnel files of adjusters who actually handled some aspect of claim and supervisors who participated in adjusting the claim); *Morrison v. Chartis Prop. Cas. Co.*, 13-CV-116-JED-PJC, 2014 WL 840597, at *3 (N.D. Okla. Mar. 4, 2014) ("Participating in the decision on whether Plaintiff's claim should be paid is sufficient 'handling' of the claim that their personnel files are fair ground for discovery in this case."); *Waters v. Cont'l Gen. Ins. Co.*, 07-CV-282-TCK-FHM, 2008 WL 2510039, at *1 (N.D. Okla. June 19, 2008) (ordering production of information relating to the adjusters' background, qualifications, training and job performance from the personnel files of adjusters who actually handled some aspect of the claim, but insurer not required to produce files for the supervisors that did not participate in adjusting the claim in some manner); *Stokes v. Life Ins. of N. Am.*, CV 06-411-S-LMB, 2008 WL 2704564, at *1 (D. Idaho July 3, 2008) (ordering production of personnel files for four specific claims handlers who had substantial involvement with claim); *Weller v. Am. Home Assur. Co.*, 3:05-CV-90, 2007 WL 1097883, at *6–7 (N.D.W. Va. Apr. 10, 2007) (holding that the personnel files of employees and/or representatives of Defendant that in any way handled, adjusted and/or supervised the claims are critical to their allegations of bad faith and relevant, and could not be easily obtained from other sources; such materials will reflect how the persons were viewed at the time they handled the claim); *Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169, 184 (E.D. Pa. 2004) (ordering production of personnel files on the basis there was no "less confidential source from which Plaintiff could obtain this material," but limiting the relevant dates).

Under certain circumstances, courts have allowed discovery of the personnel files of other employees who are not directly connected to a particular claim. For example, in *Leichtnam v. Am. Zurich Ins. Co.*, 5:15-CV-05012-JLV, 2018 WL 4701353, at *3 (D.S.D. Sept. 30, 2018), the South Dakota District Court noted that attempts to limit discovery to the claims handler and his

or her immediate supervisor have been rejected in other cases, particularly where personnel files may reveal an inappropriate reason or reasons for the insurer's action with respect to a claim or an 'improper corporate culture'. Citing to *Fair v. Royal & Sun Alliance*, 278 F.R.D. 465, 474–76 (D.S.D. 2012), the court explained that "evidence of institutional pressure that was brought to bear on an insurance company's claims handlers was not in the personnel file of the claims handler herself, nor was it in her immediate supervisor's file; rather, the entirely relevant evidence was found in the personnel file of the regional claims manager." *Id.*

An insurer may argue that deposition testimony is a reasonable alternative to production of personnel files; however, courts have taken the position that deposition testimony is not a substitute for the information contained in a personnel file. *Ingram*, 112 F. Supp. 3d at 940. *See Vibal v. GEICO Cas. Co.*, 17CV534-LAB(BLM), 2018 WL 571948, at *5 (S.D. Cal. Jan. 26, 2018); *Am. Auto. Ins. Co. v. Hawaii Nut & Bolt, Inc. Moore*, CV 15-00245 ACK-KSC, 2017 WL 80248, at *5 (D. Haw. Jan. 9, 2017) (stating same); *Liberty Mut. Ins. Co. v. Cal. Auto. Assigned Risk Plan*, 2012 WL 892188, at *7 (N.D. Cal. Mar. 14, 2012) (stating same).

Although courts have generally allowed discovery of employee personnel files, some courts have taken the contrary position. For instance, in *Westport Ins. Corp. v. Hippo Fleming & Pertile Law Offices*, 319 F.R.D. 214, 218 (W.D. Pa. 2017), the plaintiff requested the personnel files of three employees in Westport's claims department that handled the underlying claim to gather information about Westport's corporate policy, standards, and procedures, information relating to Westport's state of mind and relationship with its employees, and information regarding the relationship between the corporate policies and the training of the claims employees. *Id.* In determining whether such discovery would be permitted, the court considered the following factors: whether there was another way for the requesting party to obtain the information sought; whether there was other evidence suggesting the personnel files were likely to include relevant information; how broad the request was; and how closely the personnel files related to the requesting party's claims. *Id.* Ultimately, the court found that the factors did not meet the heightened standard of relevancy and the information sought could likely be obtained through the depositions of those employees. *Id.; Barnard v. Liberty Mut. Ins. Corp.*, 3:18-CV-01218, 2019 WL 461510, at *7 (M.D. Pa. Feb. 6, 2019) (stating same).

Best Practices to Attempt to Limit Discovery of Personnel Files

In the event production of personnel files is ordered, it is standard for courts to employ measures designed to ensure the protection of sensitive information contained in those files. *See Porter v. Farmers Ins. Co., Inc.*, 10-CV-116-GKF-PJC, 2011 WL 1566018, at *1 (N.D. Okla. Apr. 25, 2011); *Christensen v. Am. Family Mut. Ins. Co.*, 1:09-CV-94 TS, 2011 WL 3841293, at *7 (D. Utah Aug. 29, 2011) ("To maintain the privacy of AFI's employees, the files shall be produced with redactions for dates of birth, social security numbers, home addresses, home phones, bank account numbers and information, child support, judgment or bankruptcy, or garnishments. Medical information, workers compensation claims, disability claims, health insurance forms, and medical reimbursements or treatment information *which did not affect job performance or attendance* shall be redacted."); *Nye v. Hartford Acc. & Indem. Co.*, CIV. 12-5028-JLV, 2013 WL 3107492, at *11 (D.S.D. June 18, 2013) (describing certain sensitive information typically contained in personnel files and noting such information may be redacted or withheld); *Weller*,

3:05-CV-90, 2007 WL 1097883, at *6–7 (entering a protective order prohibiting disclosure to persons outside litigation and requiring return of all material at the conclusion of the litigation).

SIMILAR CLAIMS AND OTHER BAD FAITH CLAIMS

As noted above, bad-faith plaintiffs attempt to cast the broadest net possible in discovery and one of the most highly contested discovery issues is whether a plaintiff is entitled to discovery regarding other similar claims brought against the insurer. Deftly navigating discovery disputes on this issue is paramount to insurer success. Undoubtedly, a plaintiff seeks this information to show a pattern of bad conduct or a general business practice. If admitted at trial, such evidence would certainly prejudice an insurer, as it may allow the fact finder to draw an inference that the insurer did in fact engage in bad faith conduct in handling the insured's claim based on how the insurer handled other claims.

Florida jurisprudence reflects a trend towards rejecting requests for discovery of claims and litigation files related to other similar claims. One of the early cases addressing this issue is *U.S. Fire Ins. Co. v. Clearwater Oaks Bank*, 421 So. 2d 783 (Fla. 2d DCA 1982). In that case, the trial court ordered production of "U.S. Fire's files with respect to claims and lawsuits against U.S. Fire by third parties under similar blanket bonds." *Id.* at 784. On appeal, Florida's Second District held this was "a departure from the essential requirements of law because "[t]he bank ha[d] not shown how details concerning the manner in which U.S. Fire handled third parties' claims on similar bonds could be remotely relevant to the disposition of the instant claim which must necessarily be decided upon its own peculiar facts." *Id.* The Fifth District addressed a similar issue in *Nat'l Sec. Fire & Cas. Co. v. Dunn*, 751 So. 2d 777, 778 (Fla. 5th DCA 2000), where the court granted certiorari to quash the circuit court's order compelling production of an insurer's files regarding 38 bad faith claims filed against it that were previously identified in interrogatories. Similarly, in *Geico Cas. Co. v. Beauford*, 8:05-CV-697-24EAJ, 2006 WL 4774798, at *1 (M.D. Fla. Aug. 22, 2006), Florida's Middle District ruled that the plaintiff failed to show the relevance of Geico's audits and surveys of all other bodily injury liability claims involving multiple competing claimants handled by the Florida office over a six year period.

A slightly different approach was taken in *National Security Fire & Casualty Co. v. Dunn,* 705 So.2d 605, 606–607 (Fla. 5th DCA 1997), where the court found that the contents of the files for other bad faith actions filed against the insurer were protected by the work product privilege, and that the plaintiff failed to show either his need for the files or his inability to obtain equivalent information without undue hardship.

Despite these opinions, at least one case suggests that discovery of this information could very well be allowed in Florida. That case is *Bray & Gillespie Mgmt., LLC v. Lexington Ins. Co.*, 6:07-CV-222-ORL19KRS, 2008 WL 5110643, (M.D. Fla. Nov. 11, 2008), *report and recommendation adopted*, 607CV222ORL35KRS, 2008 WL 5427755 (M.D. Fla. Dec. 30, 2008). In that case, the plaintiff sought production of documents related to similar hurricane/storm claims that had been made under policies issued by Lexington during a specified period of time. While the court denied a portion of the request as premature and possibly irrelevant, it ordered Lexington to identify and describe all other property claims for losses arising out the 2004

Hurricanes that it adjusted, but only to the extent that (1) the insuring agreement was the same or substantially similar as the agreement insuring B & G, and (2) the insured sought recovery for losses arising from more than one of the 2004 Hurricanes." *Id.*

Courts around the country differ in their approach as to the discovery of other, similar bad faith claims. Similar to the Florida majority view, some courts have cited to the non-relevancy of this information in denying requests for other claims information. For instance, in *Apex Mortgage Corp. v. Great N. Ins. Co.*, 17 C 3376, 2018 WL 341661 (N.D. Ill. Jan. 9, 2018), the plaintiff sought claims files and litigation documents for other cases in the last ten years in which the insurer raised the foreclosure exclusion and other exclusions as a defense to coverage or was accused of bad faith in asserting any exclusion to coverage. The plaintiff argued these documents were relevant because they could show that Federal has a pattern of denying similar claims or has interpreted the provision differently at different times. *Id.* The Northern District of Illinois, applying Pennsylvania law, declined to order the production, explaining that Pennsylvania courts "have generally refused to compel such discovery because insurance litigation rests upon particular factual circumstances, which are likely to differ significantly from case to case. *Id.* (quotations omitted). Similarly, in *First Horizon Nat'l Corp. v. Houston Cas. Co.*, 2:15-CV-2235-SHL-DKV, 2016 WL 5869580 (W.D. Tenn. Oct. 5, 2016), the Western District of Tennessee held that "permitting the Plaintiffs to conduct 'other claims' discovery would indeed result in a fishing expedition, with little or no relevance to the Plaintiffs' . . . bad faith claim and with significant and disproportionate burden to the Defendants and the increased potential for further discovery disputes." Importantly, the court found that such discovery was irrelevant as "[o]ther bad faith claims 'involve circumstances unique to each' policyholder, such as different facts, different policies, and different applicable law." *Id.*

Recently, the Western District of Pennsylvania cited this very same reasoning and analysis in *Horvath v. Globe Life & Accident Ins. Co.*, 3:18-CV-84, 2019 WL 975172 (W.D. Pa. Feb. 28, 2019). There, the court stated:

> Plaintiff does not explain how information regarding other bad faith claims against Defendant is relevant to materiality in this case. And the Court fails to see the connection between other bad faith claims against Defendant and the issue of materiality here, particularly considering the myriad of potential factual differences between other claims and the present claim, including different types of policies, unique policy language, the application of different states' law, varying circumstances surrounding the bad faith allegations, etc.

Id. at *3. The Superior Court of Delaware took this same position in *Crowhorn v. Nationwide Mut. Ins. Co.*, CIV.A. 00C-06-010WLW, 2002 WL 1767529 (Del. Super. Ct. July 10, 2002), denying the request on the basis that it could not see how discovery of previously-litigated claim files and any claims which had proceeded through arbitration was reasonably calculated to lead to the discovery of admissible evidence as the file materials were not relevant. These opinions are consistent with the overarching principle that claims are to be evaluated on an individualized case-by-case basis and cannot be examined under a "one size fits all" approach.

Other courts have denied such similar discovery due to the burden imposed on the insurer. For example, the Middle District of North Carolina addressed this very situation in *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 122 (M.D.N.C. 1989), stating that "[a] decision to require a party to produce its litigation and claims histories involves more than assertions of relevancy" and "the more critical factor is whether the need for the information, considering its relevancy and the nature of the case, outweighs the burdensomeness of the request." In denying production, the court reasoned that the lawsuit was a simple breach of contract action involving a small amount of money; the plaintiff did not demonstrate a sufficient need for the information; and the burden on the defendant to produce the documents would be significant. *Id.*

Similarly, in *Zettle v. Am. Nat. Prop. & Cas.*, Co., 3:10-CV-307, 2012 WL 2359962, at *1 (W.D. Pa. June 20, 2012), the court found that the insurer was not required to produce documents pertaining to other denied automotive insurance claims during the period extending from one year before plaintiff's loss through the present, where the insurer argued that that compliance would require an associate-level attorney to work full time for over one year to review, redact and produce the documents in question. *See also Graham v. Progressive Direct Ins. Co.*, CIV.A. 09-969, 2010 WL 3092684, at *1 (W.D. Pa. Aug. 6, 2010) (denying discovery of similar claims information on the basis that Plaintiffs had not presented any evidence that Defendant's production of the similar claims information would not be unduly burdensome). Likewise, in *Grove v. State Farm Fire & Cas. Co.*, 13-CV-754-JED-FHM, 2014 WL 11636148, at *1 (N.D. Okla. Sept. 23, 2014), the Northern District of Oklahoma denied production of "any and all documents regarding complaints about claims handling, all responses to such complaints, and complete copies of all required complaint records, even as limited to the specific types of claim denial involved in this case" on the grounds that the request was overly broad and unduly burdensome, particularly where the claimed relevance was stated in the most general terms.[3]

But still, other courts take the opposite position and have allowed discovery of similar claims. For example, the Kentucky Supreme Court has found that "discovery of information and documents related to similar claims involving other adjusters could reveal a pattern of bad faith conduct", which "would certainly be relevant to [a] bad faith claim, regardless of whether such information was admissible at trial." *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 812 (Ky. 2004), as modified (Dec. 1, 2004). The West Virginia Supreme Court of Appeals took a similar position in *State ex rel. Allstate Ins. Co. v. Gaughan*, 640 S.E.2d 176, 180 (W. Va. 2006), where it granted discovery of "[a]ll claims files wherein Allstate deducted and/or withheld any monies for alleged profit and/or overhead on first party claims for damage to real property, including dwellings and other structures, in West Virginia for the period from 1983 to the present[.]" In that case, the court reasoned that the information sought was clearly relevant and material to determining whether Allstate had violated the Unfair Trade Practices Act as a general business practice. Finally, in *Southard v. State Farm Fire & Cas. Co.*, CV411-243, 2012 WL 2191651, at *1–2 (S.D. Ga. June 14, 2012), the plaintiffs requested discovery of four other State Farm, water-leak claim files in which their remediation personnel participated, so they could determine "whether State Farm handled their claim differently from the preceding four, and thus

[3]However, the court did order production of a list of similar lawsuits, finding that production of this list would not be an undue burden on Defendant and the information may lead to the discovery of admissible evidence.

whether State Farm deviated from its usual custom and practices—a bad faith marker." In permitting such discovery, the court explained that the request was tailored to just the four cases and it was "not beyond the realm of possibility that in at least one of the prior mold/bacteria cases State Farm or a claimant's agent conducted a follow-up test, then altered the claim's disposition in a manner relevant to the way the contract performance (and, in turn, any bad-faith conduct,) unfolded in this case." *Id.* at 2.

Discovery issues aside, evidence of similar claims may be properly admitted at trial, as several decisions around the country have shown. For example, the Arizona Court of Appeals held that "information regarding how an insurance company handles other claims is admissible if it is sufficiently similar to the insured's experiences to show a pattern of claims handling." *State Farm Mut. Auto. Ins. Co. v. Superior Court In & For County of Maricopa*, 804 P.2d 1323, 1326 (Ariz. Ct. App. 1991) (citing *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1081 (Ariz. 1987); *McCormick v. Allstate Ins. Co.*, 505 S.E.2d 454, 460 (W. Va. 1998) (stating same). In *McElgunn v. Cuna Mut. Ins. Soc.*, 700 F. Supp. 2d 1141, 1152 (D.S.D. 2010), the District of South Dakota determined that evidence related to other claims in other states was not erroneously admitted because it was relevant to the issues of the insurer's intent and awareness of its actions and demonstrated insurer's intent or plan with regard to how it handled the decedent's claim. The Supreme Court of Kentucky has likewise found that evidence pertaining to similar litigation involving Farm Bureau and its adjuster was relevant to show that Farm Bureau was aware that its adjuster had previously used methods in handling claims that are unacceptable under Kentucky law and that Farm Bureau had knowledge of a pattern of conduct practiced by its agent. *Kentucky Farm Bureau Mut. Ins. Co. v. Troxell*, 959 S.W.2d 82, 85 (Ky. 1997).

More recently, the Western District of Oklahoma admitted "evidence that other insureds of commercial properties in the same locality suffered similar losses and allegedly were subjected to similarly heavy-handed treatment by Defendant during the investigations by the same representatives and adjusters and received similar denials for failure to cooperate (assuming that is the evidence)" as relevant to Plaintiff's claim of bad faith conduct. *Charles A. Shadid, L.L.C. v. Aspen Specialty Ins. Co.*, CIV-15-595-D, 2018 WL 3420816, at *3 (W.D. Okla. July 13, 2018).

Despite these holdings, courts have cautioned that such evidence must be "truly similar", as shown in *Burley v. Homeowners Warranty Corp.*, 773 F. Supp. 844, 858 (S.D. Miss. 1990), for admission to be proper. In that case, the court found that the only common ground was the denial and such minimal similarity could not be probative on the issue presented. Id. (citing *Jernigan v. INA Underwriters Ins. Co.*, No. 86–4867 (5th Cir. April 8, 1987) [816 F.2d 676 (table)].

CONCLUSION

Obviously, there is no uniform approach to addressing the discovery, and ultimately admissibility, issues that may surface in a bad faith action. Given this uncertainty, one must assume that the court will set a high bar for the defendant carrier in order to prevent disclosure or keep certain documentation or testimony out. The old adage "… plans for the worst- hope for the best …" is prescient. In developing our theme for the case, just what will be discovered and potentially come into evidence must constantly be at the forefront.

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