
Insight from Carlton Fields

# An Update on Top-Down Discovery in Actions Alleging "Institutional Bad Faith"

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## I. Introduction

Bad faith litigation springs from claims handling gone awry. "Institutional bad faith" claims allege that the policies and practices of the insurer[1] caused or contributed to the improper conduct of the insurer's claims personnel. Essentially, institutional bad faith claims put the insurer on trial, instead of, or in addition to, the specific claims handling at issue.

Bad faith actions are discovery intensive[2] and institutional bad faith claims are even more so.[3] Discovery in a bad faith case starts with the claims file. Most jurisdictions permit discovery of the claims file from inception through the judgment or settlement of the underlying case.[4]

If the focus of the bad faith action is the conduct of the claims handler, the discovery will be directed to the claims file materials and depositions of the insurer's personnel who were involved in the underlying case. This is "bottom-up" discovery, i.e., the plaintiff's focus is on the lower end of the insurer's structure and the people who were "hands on" in the adjusting process. As the culpability of the claims handler becomes less obvious, the plaintiff[5] is likely to shift the discovery approach to the insuring "institution."

By attacking the institution, the plaintiff hopes to establish that the insurer's management created an organizational environment that fosters bad faith. Institutional bad faith claims often involve discovery regarding the insurer's claims handling "patterns and practices,"[6] i.e., to determine whether the insurer's upper level management encouraged bad claim handling.

*State Farm Mutual Automobile Insurance Company v. Campbell,*[7] is a classic example. The insureds contended that they suffered an excess liability judgment because the insurer implemented a national scheme to reduce payments to meet corporate fiscal goals. Similarly, *see Zilisch v. State Farm Mutual Automobile Insurance Company*[8] where the plaintiff contended that the insurer set arbitrary claim payment goals for its claims personnel. The insurer rewarded claims handlers with promotions and salary increases for achieving those goals.

Institutional bad faith claims and actions alleging bad faith by the claims handler are not mutually exclusive. However, in most cases, the intensity of pattern and practice discovery is in inverse proportion to the potential culpability of the claims handler. The more obvious it is that the claims handler is at fault, the less need there is for the paintiff to blame the institution. The plaintiff's emphasis will be on "bottom-up" discovery when the claims handler's conduct is the gravamen of the bad faith claim and "top-down"


discovery when the plaintiff contends that the insurer's policies and practices encouraged bad claims handling.

The elements of bad faith differ from state to state. Thus, there is no universal definition of permissible top-down discovery. This article is intended to serve as a primer for the discovery process in an institutional bad faith action. It will discuss what discovery may be propounded by the plaintiffs; what objections may be made by the insurer; what approaches courts have implemented to resolve the disputes; what strategies may be successful for the parties.

## II. General Discovery Principles

### A. Is It Relevant?

Relevance is the ultimate criterion for discovery. Rule 26 of the Federal Rules of Civil Procedure provides that the parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the action, irrespective of the admissibility of the information at trial. All jurisdictions promote liberal discovery – if the information is admissible at trial, or reasonably calculated to lead to the discovery of admissible evidence, objections based solely on the ground of relevance will be difficult to sustain.

Nevertheless, insurers opposing discovery should consider a relevance objection, especially if it can be joined with other objections. The most fertile source for determining relevance is the published opinions in the applicable jurisdiction. For example, in State Farm v. Campbell,[9] the Supreme Court held that the insurer should not be punished for conduct that may have been lawful in the state where it occurred or which bore no relationship to the conduct alleged by the plaintiff. Thus, a relevance objection to discovery that is unrelated to the allegations in the plaintiff's bad faith complaint should be sustained. Thus, production of files alleging bad faith in first party bad faith actions may not be relevant in an action for third party bad faith. Similarly, an insurer's patterns and practices in other jurisdictions may not be relevant. The potential for a successful relevance objection is enhanced if it is joined with other objections such as privilege or undue burden and expense.

### B. Is It Privileged?

The Attorney-Client Privilege. The purpose of the attorney-client privilege is to encourage candid communications between client and counsel.[10] Attorneyclient privilege objections are infrequent in institutional bad faith actions because those cases attack the patterns and practices established by the insurer. Nevertheless, discovery requests in an institutional bad faith action may invade the attorneyclient relationship.

For example, insurer's counsel may have helped prepare policy language. A request for documentation pertaining to a policy form may reveal communications with insurer's counsel regarding the intended interpretation of the policy. Likewise, a request for production of similar bad faith claims files will require disclosure of attorney-client communications in every file that is produced.

The Work Product Privilege. The work product privilege protects materials prepared in anticipation of specific litigation. Discovery directed to the insurer's policies and practices may not be protected by the work product privilege unless the discovery seeks the insurer's work product related to defense of the pending bad faith action.[11] The privilege may also be asserted to protect work product if the court permits the discovery of other bad faith files that contain mental impressions, conclusions or legal theories related to the defense of those claims.


## III. Specific Examples of Top-Down Discovery Requests

### A. Insurer's Finances

#### Please Produce The Insurer's Financial Statements And Annual Reports For The Last Ten Years Including, But Not Limited To, Documents Related To The Insurer's Profitability And The Profitability Of The Policy At Issue In The Underlying Case

Financial records may demonstrate the insurer's motivation to require that its claims personnel engage in the activity which is the gravamen of the plaintiff's bad faith claim. For example, in Saldi v Paul Revere Life Insurance Company[12] the insured sued for wrongful termination of disability benefits and alleged that the insurer denied his claim because the subject policy was not profitable. The insured requested all profitability analyses pertaining to the policy, and information regarding "cash flow underwriting," interest rate projections, and the relationship between investment income and policy premiums. The insurer objected, arguing that the information was irrelevant, proprietary, privileged, and confidential. The plaintiff countered that the information was relevant to prove that the insurer knew that the pricing structure for the policy was not profitable unless the insurer terminated valid claims or engaged in "post-claim underwriting." The court held that the discovery was relevant to the insurer's motivation to terminate the insured's policy.

In short, courts appear willing, subject to appropriate confidentiality orders, to permit discovery of financial information regarding losses on a particular type of policy because that information may relate to the insurer's motivation to deny a claim.[13]

### B. Claims Handling and Claims Handlers

#### Please Produce All Documents Pertaining To Compensation And Performance Reviews, Including The Complete Personnel Files, Of All Claims Personnel Who Were Involved In The Underlying Case

Plaintiffs often seek information regarding the insurer's claims handlers, including their personnel files, and records of discipline, complaints, compensation, and claim denial. Plaintiffs contend that this information may demonstrate that the insurer encouraged its personnel to "deny, delay or defend" legitimate claims to enhance profitability, and that the institution tracked the employees' performance to reward those who achieved the intended result or discipline those who did not. Plaintiffs also argue that the personnel files demonstrate the insurer's "knowledge and approval" of improper claims handling practices[14] and offers greater insight into the insurer's "corporate mentality."[15]

Courts generally recognize that information regarding the individual claims-handlers actually involved in the underlying claim is relevant and discoverable.[16] Of course, the parties may disagree as to who was "involved"[17] and as to the relevance of supervisors' personnel files.[18]

Courts are sensitive to individual employees' privacy—typically they are not parties to the suit.[19] Accordingly, courts often protect information such as medical history and social security numbers,[20] explicitly subject the information to a confidentiality order,[21] restrict the use of the information to the instant lawsuit,[22] and/or hold an in-camera review[23] of the requested records. Also, the court may limit the


production to less than the entire file,[24] and require production of only those portions of performance evaluations that "relate to claims handling conduct."[25] Finally, as with other categories, such discovery may be confined to a reasonable time frame.[26]

### C. Claims Handling Policies, Procedures And Manuals

#### Please Produce All Claims Manuals Or Other Documentation Relating To Insurer's Policies And Procedures For Claims Handling

Plaintiffs often request production of the insurer's claims manuals or similar documentation. In states that apply an objective standard of bad faith, courts may find that the liability insurer's claims handling manuals are not relevant to that objective determination.[27] However, where the standard requires the plaintiff to demonstrate subjective bad faith, courts have concluded that manuals are relevant because they may show that the claims handler did not follow mandated policies and procedures.[28] Stated differently, "top-down" discovery may be relevant to evaluate "bottom-up" conduct.

Issues relating to discovery of claims manuals are the centerpiece of the nationwide litigation sparked by Allstate's adoption of certain policies and guidelines as part of its "Claim Core Process Redesign" ("CCPR"). Allstate's CCPR is the subject of David J. Berardinelli's book *From Good Hands to Boxing Gloves: The Dark Side of Insurance,* and numerous lawsuits. Plaintiffs allege that Allstate hired McKinsey & Company ("McKinsey") to analyze Allstate's automobile bodily injury claims handling procedures.[29] The "concepts and motivations that McKinsey suggested are summarized in a series of slides, which have become known as the McKinsey documents."[30] Allstate changed its business practices in response to the McKinsey documents.[31] For example, Plaintiffs allege that Allstate required different claims handling approaches for represented and unrepresented claimants.[32]

Allstate has attempted to limit discovery of information related to the CCPR with varying levels of success. Courts have made different rulings, including: (1) refusing to permit discovery because it is irrelevant to a bad faith action; (2) permitting discovery subject to confidentiality; and (3) permitting discovery without a confidentiality order. These approaches apply to claims manual discovery in all bad faith cases.

#### 1. Claims manuals irrelevant.[33]

This approach prevails in jurisdictions where bad faith claims must be based upon conduct and practices applied in the specific case, not the insurer's practices and procedures. For example, a federal court in Pennsylvania held that:

> This court has typically dealt with such disputes by allowing "pattern and practice" requests only "when a bad faith policy or practice of an insurance company is applied to the specific plaintiff." . . . That is because "[w]hat constitutes a reasonable set of business practices for the investigation and evaluation of claims is a question properly left to the Pennsylvania Insurance Commissioner, not a judge or a jury."[34]

#### 2. Claims manuals may be produced subject to confidentiality order.

Some courts have held that information related to CCPR is relevant but should be protected pursuant to Allstate's trade secret and confidentiality objections.[35] It is important to note, however, that the insurer must establish a basis for confidential treatment.[36]


### 3. Claims manuals discoverable.

Other courts have required production of CCPR, notwithstanding relevance objections and requests for protective orders.[37] Such decisions hold that an insurer's internal policies and procedures for adjusting claims are relevant to a bad faith claim.[38]

## D. Other Claims Files

### Please Produce All Documents Relating To Bad Faith Claims Asserted Against Insurer During The Last Ten Years

Discovery regarding other bad faith claims is hotly contested in institutional bad faith cases. Plaintiffs contend that these files will demonstrate the insurer's pattern and practice of bad faith, the insurer's knowledge of poor performance by claims handlers, and the insurer's interpretation of policy language. In punitive damage cases, the plaintiff will argue that the existence and frequency of bad acts are relevant to punitive damages. The unstated reason for discovery of other claims files is to demonstrate that the insurer is an "evil institution."[39] Insurers object to discovery of other claims on many grounds, including relevance, undue burden, disclosure of privileged information, and invasion of the privacy of non-parties.

Relevance is an appropriate objection to discovery of other bad faith claims. For example, evidence of claims arising after the alleged bad faith case may not be probative of the insurer's state of mind at the time of the conduct in question.[40] The insurer's actions at a remote period of time[41] or in a different location[42] or relating to a different type of policy have been held to be irrelevant and, therefore, not discoverable.

Some courts decline to require insurers to produce other claims files reasoning that past claims by other insureds are not relevant to the plaintiff's bad faith claim.[43]

Relevancy is determined by the degree of similarity between the case at issue and the other bad faith claims. There must be "some nexus or connection" between the prior cases and the case before the court.[44]

Courts have also demonstrated concern for confidentiality of non-parties who were involved in the other bad faith actions.[45] One court observed that "insureds who are not involved in this litigation have a recognized privacy right with regard to information maintained by their insurers" and so the complaining parties' names, addresses, and other identifying information must be redacted.[46]

Insurers frequently assert undue burden and expense as a basis for denying or limiting discovery of other bad faith files. Courts are sensitive to the practical considerations implicated by expansive discovery requests, e.g., "discovery should go forward but, if challenged, a balance must be struck between the need for information and the burden of supplying it."[47]

Some courts deny discovery of overly broad requests. In *Dombach v. Allstate Ins. Co.*[48] the court denied a motion to compel production of other bad faith cases because, "where counsel, as here, makes an obviously overbroad request for documents, I do not think it is the responsibility of the trial judge to redefine and redraft the request. Counsel should tailor requests to meet proper discovery needs that will be useful in the preparation for the trial of the issues in litigation."

Other courts limit expansive requests, e.g., "the Court finds that plaintiffs have not given sufficient justification to produce the broad scope of material requested. However, the Court finds that the document request, if narrowed in scope, may lead to discovery

of admissible evidence."[49] Accordingly, the court required production pursuant to the court's view of what was reasonable.

Insurers opposing discovery requests must remember that the mere allegation of undue burden and expense is not likely to succeed. "Objections that state that a discovery request is 'vague, overly broad or unduly burdensome' are, standing alone, meaningless and fail to comply with the local rules and Rule 34's requirement that objections contain a statement of reasons."[50] An objection should be supported by an affidavit stating whether the information is kept in paper files or electronic medium and the amount of time and expense necessary to identify and review the files.

Some courts, however, refuse to limit discovery of other bad faith claim files, except for privilege objections. In a recent Florida case, the court required production of "other insured claims files which relate to and illuminate the manner in which the company handles claims of its other policy holders in the general course of its business."[51] However, the court noted that documents in the other claims files prepared after the underlying litigation was concluded would be protected by privilege. This ruling requires the insurer to comb the other files to construct the appropriate privilege log.[52]

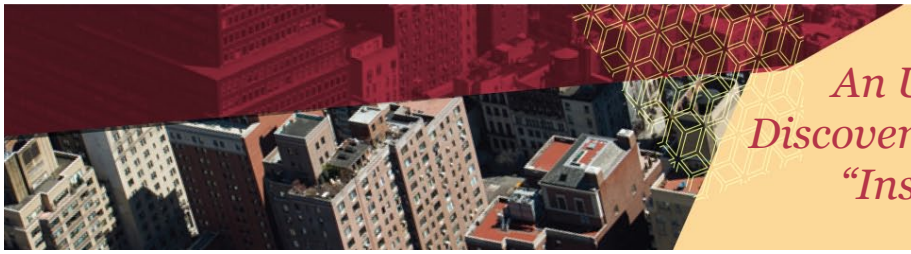
Privacy of other insureds is implicated by production of other bad faith files. If the court requires production, it is appropriate to redact information which would violate the privacy of other claimants. This obviously adds considerable expense to the process.

## E. Reserves

### Please Produce All Documents Relating To Reserves Established In The Underlying Case

Plaintiffs frequently seek to discover the insurer's policies and procedures for establishing reserves as well as the actual reserves set by the claims handler. They argue that reserves demonstrate the insurer's evaluation of the exposure in the underlying case and that reserve information may show a "self conscious disconnect" between the insurer's internal evaluation of the claim and its settlement conduct.[53] Insurers oppose disclosure of reserve information contending that loss reserves are required by law and depend on various confidential assumptions and business considerations rather than the insurer's evaluation of exposure.[54]

Most courts hold that reserves are discoverable in bad faith actions because the reserves bear some relationship to the insurer's calculation of its potential liability.[55] An insurer opposing disclosure of reserve information should establish that reserves are required by regulation and certain business considerations. Moreover, costs of defense are usually included in reserves. This may persuade some courts to resolve disclosure of reserve information on a "case by case basis."[56] Moreover, reserves may not be relevant, e.g., if the bad faith claim was based upon a coverage denial, "[t]he amount established as reserves does not demonstrate that [insurer] expected such claims to be covered by the policy and thus is not relevant."[57]





## IV. What's An Insurer To Do?

### Some Strategies For Opposing Top-Down Discovery

In 1988, Thomas Workman wrote:

> Almost from the beginning of insurance litigation, securing access to the insurer's claims file has been one of the principal objectives of plaintiffs in cases involving insurance company defendants. In the past two decades plaintiffs have become increasingly successful in achieving this objective.[58]

Two decades later, James Varner described institutional bad faith as "the 'Ebola' virus of extracontractual litigation"[59] and in 2010 Douglas R. Richmond wrote:

> The theory of institutional bad faith allows a plaintiff to expand a dispute over a single loss into a widespread attack on an insurance company's practices and procedures as a theory of liability or as a means of establishing reprehensibility for punitive damage purposes.[60]

Some strategies that may be used by insurers to oppose or limit the process are discussed below.

### Be Reasonable, Be Reasonable, Be Reasonable.[61]

Judges disfavor discovery disputes. Often, legitimate reasons for compelling or opposing discovery are treated with the same disdain. The advocate who appears to be reasonable gains credibility and enhances potential for a favorable ruling. Stated differently, it is wise to pick the right fight. If the precedent for opposing discovery is weak (often, it is), or the court appears to favor full discovery, or the requested materials are not harmful, it may be prudent to concede some points.

If the insurer's lawyer is selective regarding discovery objections, it may help persuade the court that the objections which are pursued are serious and likely to have merit.

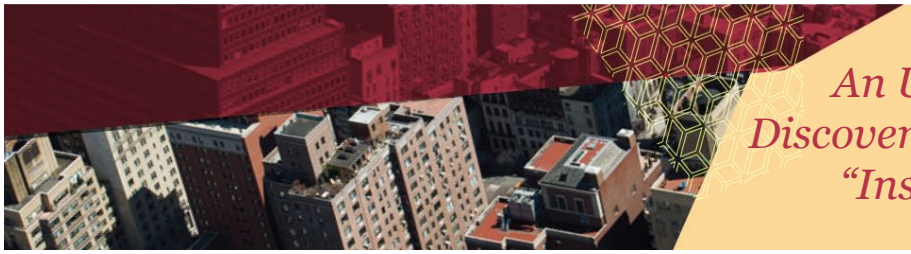
### Emphasize Lack Of Relevancy

Courts are inclined to believe that all discovery requests must be relevant because the plaintiff would not request the information if it made no difference. However, relevancy objections may succeed if they are based on the legal elements of the bad faith claim. For example, if the underlying claim was denied because there was no coverage, the insurer's use of a computer model to evaluate damages is not relevant. In short, if the court can be persuaded that the requested materials are not responsive to the elements of plaintiff's bad faith case, the discovery is irrelevant and should not be produced.[62]

### Raise All Applicable Privileges

Work product and attorney-client privileges are determined by the jurisdiction where the action is pending. The emerging trend is to disallow privilege objections, directed to the claims file in the underlying case. However, privileges not raised are waived. Therefore, it may be prudent to assert privilege objections to prevent any inference of waiver, but concede that the privilege is not recognized in the forum court. This approach may enhance the insurer's credibility for issues that the insurer must argue.

It is important to determine when the privilege attaches. Privileges may be asserted as to attorney-client communications or work product generated after the underlying case has been resolved. If a bad faith claim is threatened before the underlying case is resolved, there may be documents in the claim file that reflect work product and legal opinions related to the potential bad faith action rather than the underlying case. In that event, the insurer should raise





the privilege and seek an in camera inspection to demonstrate that a particular document should not be disclosed.

Documents withheld on the ground of privilege must be referenced in a privilege log. Failure to produce a detailed privilege log may be ground for the plaintiff to argue that the privilege has been waived.[63]

### Request *In Camera* Inspections

In most jurisdictions a party opposing discovery on the basis of privilege is entitled to an in camera review by the trial court.[64] Indeed, in camera inspections may be requested by either side.[65]

An in camera inspection may be more persuasive regarding the insurer's discovery objections than arguments of insurer's counsel.

### Provide Evidentiary Support For Objections Asserting That The Discovery Requests Are Overbroad Or Create Undue Burden And Expense

An insurer's allegation of undue burden will not be persuasive unless it is supported by evidence. Insurer's counsel should present an affidavit explaining why the cost and effort to find and produce the documentation requested by the plaintiff is out of proportion to the potential relevance of the materials.

The affidavit should be specific concerning the locations where the files are kept, the methods of file organization, the numbers of personnel needed to search the files, the effort necessary to search the files for privilege or redacting confidential information, and the cost of accomplishing the task. As the effort and cost of discovery increases, the court's inclination to "balance the interests of the parties" will be enhanced.

### Request Staged Discovery

Insurers should request that the court "stage" the discovery in order to limit the cost until the significance of the materials is established. For example, if the plaintiff is seeking ten years of documentation, the court may be asked to limit the inquiry to one or two years to avoid a "fishing expedition." If a review of documentation from one year fails to provide relevant or admissible evidence, the court can stop the process because the cost of continuing the discovery is not likely to be justified.

The staging approach is also helpful in preventing apex depositions of senior management. If the proposed apex deponent can supply the court with an affidavit indicating lack of personal knowledge of the key facts and identifying lower level employees who can answer the plaintiff's questions, the court may refuse to allow the apex deposition until the plaintiff can demonstrate why it is necessary, based upon the depositions of witnesses who do have personal knowledge.

### Emphasize The Need For Protective And Confidentiality Orders

Protective orders and confidentiality orders should be requested in situations where the plaintiff is given access to documents that disclose information that may invade the privacy rights of nonparties.

Confidentiality and protective orders are essential if the plaintiff's discovery requests invade the proprietary business information or trade secrets of the insurer. Once a court determines that certain information should be disclosed, courts must balance the plaintiff's need for information against the harm suffered by the insurer through the dissemination of confidential business information.



Most commonly, courts will condition discovery of confidential documents by preventing the party obtaining the documents from sharing that documentation with others and by using that documentation for any use other than the present litigation.[66] For example, in *Allstate v. Scroghan*,[67] the appellate court instructed the trial court to enter a protective order that provided:

> 1. Plaintiffs will return all materials, including all copies, to the insurer at the conclusion of the action, including all copies given to co-counsel, witnesses, court reporters and experts.
>
> 2. Plaintiffs and their counsel will not copy any material provided by the insurer except for use in the case.
>
> 3. Plaintiffs and their counsel will not use any material or copies thereof in any other action.
>
> 4. Plaintiffs and their counsel will not distribute any copies of documents to any other person or entity except to co-counsel, court personnel, witnesses, or court reporters.
>
> 5. Plaintiffs will not disclose any of the materials produced by the insurer except to the extent necessary to prosecute the action.
>
> 6. All materials produced by the insurer shall be deemed confidential without the necessity to have the documents marked "Confidential."

## V. Conclusion

Institutional bad faith claims are a significant part of the bad faith landscape. They are driven by top-down discovery. Counsel for plaintiffs and insurers must understand what types of top-down discovery are available, how the courts are likely to resolve the inevitable discovery battles, and what strategies may be implemented to obtain meaningful discovery and restrict harmful and burdensome disclosure.

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1 All underscoring in this article is supplied unless otherwise noted.

2 James Shaw, Jr., Butler Pappas on Bad Faith, 19 Mealey's Litig. Rep., Ins. Bad Faith 8 (Aug. 16, 2005) ("Bad faith cases are burdensome, expensive, contentious, stressful and difficult.")

3 Lee Craig, Ten Stupid Things Insurance Companies Do to Mess Up Their Files, 14 Mealey's Litig. Rep.: Ins. Bad Faith 31 (Nov. 21, 2000), as quoted in Thomas F. Segalla, Bad Faith As a Continuum: From Claim to Trial, FICC Quarterly, Vol. 52, No. 1, at n. 13 (Fall 2001).

4 "Underlying case" refers to the third party plaintiff's suit against the insured or the first party insured's action against the insurer for contract damages.

5 The term "plaintiff" is used to designate the plaintiff in the bad faith action which may, or may not, be the insured.

6 See Jonathan Gross, Defending "Pattern and Practice" Evidence in Punitive Damage Cases, 61 Def. Coun. J. 403 (1994).

7 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513 (2003).

8 Zilisch v. State Farm Mut. Auto. Ins. Co., 196 Ariz. 234, 995 P.2d 276 (Ariz. 2000). Zilisch and Campbell, involved claims for punitive damages. Obviously, top-down discovery becomes critical in punitive damage cases because of the need to show institutional culpability. The discovery approaches discussed herein will be applicable to punitive damage cases. However, the standards for awarding punitive damages are beyond the scope of this article and there will be no attempt to distinguish between claims for compensatory or punitive damages in the discussion that follows.

9 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513 (2003)..

10 See Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677 (1981).

11 Insurers should anticipate that the claims file of the underlying case will be produced in a bad faith action. Therefore, the claims file should be reviewed to withhold documentation relating to work product in anticipation of bad faith litigation and list those items on a privilege log. For example, the claims file may reflect that bad faith was threatened before the underlying case was concluded and that claims personnel included comments reflecting their opinions, theories, or mental impressions regarding preparation for the potential bad faith action. It is also prudent for insurers anticipating bad faith claims to open separate files for handling the underlying case and evaluating or preparing for bad faith litigation. Different personnel should be delegated to handle the underlying claim and the potential bad faith action. This is equally true in jurisdictions where the bad faith action and the underlying case may be prosecuted simultaneously.

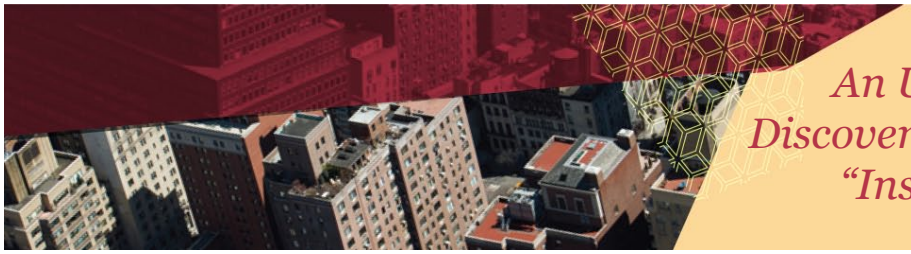
12 Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169 (E.D. Pa. 2004).

13 See Central Ga. Anesthesia Servs. v. Equitable Life Assurance Society of the U.S., No. 5:06-CV-25, 2007 U.S. Dist. LEXIS 53791 (M.D. Ga. July 25, 2007).

14 Grange Mut. Ins. Co. v. Trude, 151 S.W. 3d 803 (Ky. 2004).

15 Allstate Ins. Co. v. Scroghan, 851 N.E. 2d 317 (Ind. Ct. App. 2006).

16 See Waters v. Continental Gen. Ins. Co., No. 07-CV-282-TCK-FHM, 2008 U.S. Dist. LEXIS 47375 (N.D. Okla. June 19, 2008) (finding relevant and requiring production of "information from the personnel files which pertains to the adjusters' background, qualifications, training and job performance," but "only for those adjusters who actually handled some aspect of Plaintiff's claim"); Jones v. Liberty Mut. Fire Ins. Co., No. 3:04-CV-137-MO, 2007 U.S. Dist. LEXIS 58353 (W.D. Ky. Feb. 20, 2008) (compelling production of "job performance information" for "the adjuster and other employees who bore any responsibility, directly or indirectly, for the handling of this claim"); Stokes v. Life Ins. of N. Am., CV 06-411-S-LMB, 2008 U.S. Dist. LEXIS 52280 (D. Idaho July 3, 2008) (compelling production of "personnel files for four specific claims handlers who had substantial involvement" with plaintiff's claim); Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169, 184-185 (E.D. Pa. 2004) (evaluations of the "individuals or units involved in investigating Plaintiff's claim" were relevant and discoverable, as well as documents explaining "the criteria and process used in those evaluations," and "personnel files and performance





reviews of the employees who handled Plaintiff's claim"). But see Fullbright v. State Farm Mut. Auto. Ins. Co., No. CIV-09-297-D, 2010 U.S. Dist. LEXIS 3942 (W.D. Okla. Jan. 20, 2010) (refusing to permit discovery of the involved adjusters' "merit pay or related salary information," or the "disciplinary materials" in their personnel files, in light of the plaintiff's "speculation" and lack of "justification").

17 See Hamilton Mut. Ins. Co. of Cincinnati v. George, No. 2005-SC-000818-MR (Ky. June 15, 2006) (insurer contended that personnel files were irrelevant because the individuals had "nothing to do with the claim handling in this case," but the court concluded otherwise, where they "all participated 'in a round-table discussion,'" and "were involved in internal discussions of the insurance claim…conducted in furtherance of the…processing of the claim").

18 See Fullbright, 2010 U.S. Dist. LEXIS 3942 (information regarding the adjusters involved was discoverable, but not "the background, qualifications, and job performance of all supervisory personnel"); Waters, 2008 U.S. Dist. LEXIS 47375 (N.D. Okla. 2008) (finding relevant and requiring production of "information from the personnel files which pertains to the… background, qualifications, training and job performance," for "those supervisors [who] participated in adjusting the claim in some manner"); DeKnikker v. Gen. Cas., No. Civ. 07-4117, 2008 U.S. Dist. LEXIS 33549 (D. S.D. April 23, 2008) ("personnel files are not discoverable" for persons not "directly involved in the decisions about plaintiff's claim"); Saldi, 224 F.R.D. at 184-85 ("personnel files and performance reviews" were relevant and discoverable, as to the supervisors "of the employees who handled Plaintiff's claim").

19 See Fullbright, 2010 U.S. Dist. LEXIS 3942 ("Personnel files are regarded as private and contain material which employees regard as confidential, and a court must be cautious in ordering their disclosure."); Pochat v. State Farm Mut. Auto. Ins. Co., No. Civ. 08-5015-KES, 2008 U.S. Dist. LEXIS 100389 (D. S.D. Dec. 11, 2008) ("As attested to by State Farm through affidavit, personnel files contain the employees' confidential information…These employees are not parties to this lawsuit, but rather are private individuals with legitimate privacy concerns.").

20 See DeKnikker, 2008 U.S. Dist. LEXIS 33549 ("private information such as personal identification information and health information" would be excluded from discovery).

21 See Fullbright, 2010 U.S. Dist. LEXIS 3942 (information produced from personnel files would be subject to the parties' agreed protective order); Pochat, 2008 U.S. Dist. LEXIS 100389 (personnel file materials subject to a limited protective order, to prevent the information "from being disseminated to third parties"); Saldi, 224 F.R.D. at 185 n. 22 ("We have addressed any potential concerns about maintaining the privacy of the employees with our general order requiring that Plaintiff not exchange or disclose these records to anyone not associated with the case.").

22 See Waters, 2008 U.S. Dist. LEXIS 47375 ("The information produced from the personnel files may be used in this case only.").

23 See DeKnikker, 2008 U.S. Dist. LEXIS 33549 ("If there is other information the defendants believe fits the category of 'private' which should not be discoverable, the information should be provided to the court for an in camera inspection."); Hamilton Mut. Ins. Co., No. 2005-SC-000818-MR ("The trial court insured that privileged information not be furnished…by offering to conduct an in camera review of the documents before they were ordered released.").

24 See Fullbright, 2010 U.S. Dist. LEXIS 3942 ("Court sees no justification for producing the entire personnel file of any employee." Thus, only enumerated information would be produced); Grange Mut. Ins. Co., 151 S.W.3d at 815, 818 (Ky 2004) ("many of the items likely to be found in personnel records (e.g., original job application, marital information, tax and dependent data, medical information, health insurance data, worker's compensations claims, and retirement account data) are irrelevant to a bad faith claim and thus are not discoverable," whereas other information "(e.g., related to job performance, bonuses, wage and salary data, disciplinary matters) is relevant").

25 Cunningham v. Standard Fire Ins., No. 07-cv-02538-REB-KLM, 2008 U.S. LEXIS 117304 (D. Colo. July 1, 2008) ("to the extent that the performance evaluations address other subjects, they are not relevant").

26 See Saldi, 224 F.R.D. at 184 (denying defendants' request for protective order against disclosure, but "chang[ing] the relevant dates in the discovery request" from 1992 "to June 1996, when Plaintiff first applied for benefits").

27 See Hadenfeldt v. State Farm Mut. Auto. Ins. Co., 195 Neb. 578, 239 N.W.2d 499, 504 (1976) (insurer's standards or rules and the manuals were not relevant to any issue in the case and no good cause was shown for their production).

28 See Miel v. State Farm Mut. Auto. Ins. Co., 185 Ariz. 104, 912 P.2d 1333, 1337, 1339 (Ariz. Ct. App. Div. 1 1995), review granted, (Mar. 19, 1996) and review dismissed, 186 Ariz. 370, 923 P.2d 836 (1996) (under an "intentional act" standard). See also APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10, 14-15 (D. Md. 1980) (where the court compelled production of the claims manuals to determine whether the claims handler properly investigated the claim. It should be noted that the court rejected a work product privilege objection because the manuals were prepared in the ordinary course of business and not in anticipation of litigation.).

29 McCallum v. Allstate Prop. & Cas. Ins. Co., 204 P.3d 944, 946-947 (Wash. Ct. App. 2009); Loubier v. Allstate Ins. Co., No. 3:09cv261, 2010 U.S. Dist. LEXIS 30359 (D. Conn. March 30, 2010).

30 McCallum, 204 P.3d at 946-47.

31 Allstate Ins. Co. v. Scroghan, 851 N.E.2d 317, 324 (Ind. Ct. App. 2006).

32 See, e.g., Loubier, 2010 U.S. Dist. LEXIS 30359; Jacobsen v. Allstate Ins. Co., 215 P.3d 649, 65354 (Mont. 2009) (stating that the CCPR "implemented certain policies and guidelines designed to promote quick settlements with unrepresented claimants").

33 See Dombach v. Allstate Ins. Co., No. CIV. A. 98-1652, 1998 U.S. LEXIS 15611 (E.D. Pa. Oct. 7, 1998) (denying discovery request related to CCPR as "obviously overbroad" in spite of allegations Allstate acted in bad faith due to an alleged "corporate policy of training and encouraging its claims personnel to pay as little as possible as late as possible on the claims of its insureds in order to reduce the amount of the average paid claim and maximize claims profit," because "discovery should be aimed at disclosing whether defendant in this particular case (1) did not have a reasonable basis for offering $10,000; and (2) knew or recklessly disregarded its lack of a reasonable basis."). Cf. Milhone v. Allstate Ins. Co., 289 F. Supp. 2d 1089, 1101 (D. Ariz. 2003) (granting Allstate's motion for summary judgment in a case alleging Allstate committed bad faith by implementing the CCPR after Allstate performed an internal audit and concluded that it was routinely overpaying claims by 15%, and by requiring adjusters to keep payments under the amount suggested by the Colossus computer program or suffer a negative performance review, concluding "general allegations of bad faith, assuming they are true, did not affect the processing of Plaintiff's claim in this case … the Court finds that a cause of action for bad faith cannot lie based on these allegations").

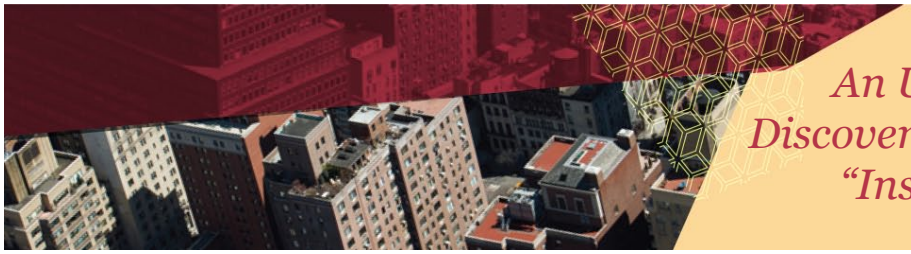
34 Santer v. Teachers Ins. & Annuity Ass'n, No. 06-CV-1863, 2008 U.S. Dist. LEXIS 21767 (E.D. Pa. March 18, 2008) (internal citations omitted).

35 See, e.g., Allstate Ins. Co., 851 N.E.2d at 319-20 (trial court abused its discretion in denying protective order for McKenzie and Colossus documents, but did not abuse its discretion in finding such information was relevant over Allstate's objection that "such information is irrelevant to his bad faith claim because its general business practices and motivations are not at issue; only its behavior regarding Scroghan's claim is at issue"). See also Brown v. Great Northern Ins. Co., No. 3:CV-05-0439 (M.D. Pa. Aug. 4, 2006) (holding that an insurance claims manual is discoverable in a bad faith claim, but the contents must remain confidential).

36 See McCallum, 204 P.3d at 946-47 (declining to grant protective order for Allstate's claim manuals, claim bulletins, CCPR, and the McKinsey documents because insurer failed to provide concrete examples to illustrate how its strategies or procedures in handling claims were materially different from those of its competitors. Affidavits provided by insurer consisted of conclusory statements and unsubstantiated assertions that were insufficient to establish that manuals and bulletins contained trade secrets).

37 See Doan v. Allstate Ins. Co., No. 5:07-CV-13957, 2008 U.S. Dist. LEXIS 41072 (E.D. Mich. May 23, 2008) (denying protective order regarding CCPR and McKinsey documents over Allstate's objection that such information is not relevant in a first party bad faith claim and is "unique to Allstate's claim handling process, has independent economic value to Allstate, was prepared at great expense to Allstate, is not provided to other carriers, with access to said information limited to a small group of authorized individuals"); Jacobsen, 215 P.3d at 661 ("The McKinsey documents were indeed critical to Jacobsen's theory that Allstate's policies regarding unrepresented claimants constituted bad faith.").

38 See Grange Mut. Ins. Co., 151 S.W.3d at 812-13 ("The question is whether Grange's own policies, as described in the manuals, embody or encourage bad faith practices. . . . Grange's training and policy manuals are relevant to Wilder's bad faith claim, and absent some sort of privilege or other showing of irreparable harm, they are discoverable."); Moe v. Sys. Trans., Inc., 270 F.R.D. 613, 631 (D. Mont. 2010) (claims manuals, and related policies, memoranda, correspondences, letters or other documents





"relative to the subject of claims handling are relevant at least with respect to" common law bad faith claims).

39 Discoverability and admissibility of other bad faith claims are different issues. For discovery issues, relevance is the key, i.e., does the information potentially lead to the discovery of admissible evidence. However, evidence of other wrongs is not admissible as character evidence to show the insured's disposition to commit bad acts. Nevertheless, the information may be admitted for other purposes such as to demonstrate motive, opportunity, intent, knowledge or absence of accident or mistake. See Rule 404(b) Federal Rules of Evidence.

40 Schneider v. Revici, 817 F.2d 987 (2d Cir. 1987) (not a bad faith case).

41 See Allstate Ins. Co. v. Scroghan, 851 N.E. 2d 317 (Ind. Ct. App. 2006) (where the plaintiff requested all documents relating to bad faith claims or lawsuits filed against Allstate since 1990, the court limited the request to the time period from 1994 to 1997 and limited the plaintiff's request to the state where the insured resided).

42 See Dombach, 1998 U.S. Dist. LEXIS 15611 (where the court refused to compel discovery of "all complaints against [the insurer] in any court outside Pennsylvania" because it was overbroad.)

43 Ex parte Finkbohner, 682 So. 2d 409, 413-14 (Ala. 1996) (affirming denial of motion to compel information regarding "similarly situated insureds who had valid claims wrongfully denied by Principal Mutual, wherein the insurer misapplied its own definition as contained in the policy drafted by the insurer" where insured argued "this discovery may identify a pattern, practice, scheme or plan, on behalf of the insurer to wrongfully deny claims based upon its undisclosed and secret definition of 'cosmetic surgery.'"); Adams v. Allstate Ins. Co., 189 F.R.D. 331, 333 (E.D. Pa. 1999) ("Plaintiff requests documents and information relating to past claims brought by other Allstate insureds. Past claims by other insureds are not relevant to the present bad faith action before the court."); National Sec. Fire & Cas. Co. v. Dunn, 751 So. 2d 777, 778-79 (Fla. Dist. Ct. App. 2000) (denying discovery of other claims files despite plaintiff's assertion that those files "were of significant relevance to prove a general business practice of bad faith claims" where no showing of need or inability to obtain the substantial equivalent without undue hardship had been made).

44 Saldi, 224 F.R.D. 169 (limiting plaintiff's requests to bad faith cases in Pennsylvania involving a similar policy to the policy in the underlying case and handled by the same adjusting unit that handled the plaintiff's case). In Fullbright, 2010 U.S. Dist. LEXIS 3942, the court narrowed the scope of the plaintiff's request for production of other bad faith claims to "documents reflecting other Oklahoma complaints regarding the processing of uninsured or underinsured motorists claims handled by the same adjusters who investigated plaintiff's claim for the time period of two years preceding the submission of the plaintiff's claim."

45 See Aztec Life Ins. Co. of Texas v. Dellana, 667 S.W. 2d 911 (Tex. Ct. App. 1981) (where the appellate court ordered the trial court to examine the other claims files in camera to determine whether the files contained privileged matter or other non-discoverable matters).

46 Fullbright, 2010 U.S. Dist. LEXIS 3942. See also Peco Energy Co. v. Insurance Co. of North America, 2004 Pa. Super. 221, 852 A.2d 1230 (Super. Ct. 2004).

47 WTHR-TV v. Cline, 693 N.E. 2d 1 (Ind. 1998). In Allstate Ins. Co. v. Scroghan, supra note 41, "the trial court's actions in limiting Scroghan's discovery requests rather than finding them overly burdensome strikes the kind of discovery balance contemplated in WTHR-TV."

48 Dombach, 1998 U.S. Dist. LEXIS 15611.

49 Fullbright, 2010 U.S. Dist. LEXIS 3942.

50 Bank of Mongolia v. M&P Global Fin. Servs., 258 F.R.D. 514 (S.D. Fla. 2009) (emphasis supplied) (The court admonished "[a] party objecting on these grounds must explain the specific and particular way in which a request is vague, overly broad, or unduly burdensome. In addition, claims of undue burden should be supported by a statement (generally an affidavit) with specific information demonstrating how the request is overly burdensome.") (This was not a bad faith case.)

51 Mayfair House Ass'n, Inc. v. QBE Ins. Corp., No. 09-80359-CIV, 2010 U.S. Dist. LEXIS 20253 (S.D. Fla. Feb. 5, 2010). The court's decision may have been influenced by the fact that the plaintiff was seeking punitive damages under the Florida statute which requires proof that the bad faith claims practices occur with such frequency as to indicate a general business nature. See §625.155, Florida Statutes. This statute requires that the plaintiff pursuing punitive damages shall "post in advance the costs of discovery" to be awarded to the insurer if plaintiff does not recover punitive damages.

52 North River Ins. Co. v. Mayor & City Council of Baltimore, 343 Md. 34, 680 A.2d 480 (1996).

53 Flintkote Co. v. Gen. Acc. Assurance Co. of Canada, No. C 04-01827 MHP, 2009 U.S. Dist. LEXIS 44066 (N.D. Cal. May 29, 2009).

54 See U. S. Fire Ins. Co. v. Bunge N. Am., Inc., 244 F.R.D. 638, 644 (D. Kan. 2007) (insurers argued "that their loss reserves, which are required by law, are not evaluations of the particular claims, but instead depend on various assumptions and business considerations").

55 See Central Ga. Anesthesia Servs. v. Equitable Life Assurance Society of the U.S., No. 5:06-CV-25 (CAR), 2007 U.S. Dist. LEXIS 53791.

56 See Heights at Issaquah Ridge Owners Ass'n v. Steadfast Ins. Co., No. C07-1045RSM, 2007 U.S. Dist. LEXIS 42923 (W.D. Wash. Dec. 13, 2007), where the court denied the plaintiff's motion to compel reserve information because the plaintiff did not establish how the information would be relevant to a bad faith claim.

57 Oak Lane Printing & Letter Service v. Atlantic Mut. Ins. Co., No. 04-3301, 2007 U.S. Dist. LEXIS 42923 (E.D. Pa. June 13, 2007).

58 Thomas E. Workman, Plaintiff's Right to the Claim File, Other Claim Files and Related Information: The Ticket to the Goldmine, Tort and Insurance Law Journal (Fall 1988).

59 James A. Varner, et al., Institutional Bad Faith: The Darth Vader of Extra-Contractual Litigation, 57 Fed 'n Def. & Corp. Court: Q. 163 (2007).

60 Douglas R. Richmond, Defining and Confining Institutional Bad Faith in Insurance, Tort Trial & Insurance Practice Law Journal (Fall 2010).

61 The "Rule of Three." "If you want your message to be remembered put it into a list of three." Presentation Magazine.

62 See, e.g., Diamond State Ins. Co. v. His House, Inc., No. 10-20039-CIV, 2011 U.S. Dist. LEXIS 5808 (S.D. Fla. Jan. 18, 2011) (not a bad faith case), where the issue was construction of an insurance policy. The plaintiff sought to depose the insurer on a wide variety of issues including the application process and the basis for denying the claim. The court granted a protective order because construction of a policy was an issue of law for the court and the topics of the deposition were irrelevant. See also Allstate Ins. Co. v. Shain, 921 So. 2d 717 (Fla. Dist. Ct. App. 2006), where the court quashed an order compelling discovery concerning drafting, marketing and interpretation of an allegedly ambiguous policy because the requested discovery was "completely unnecessary."

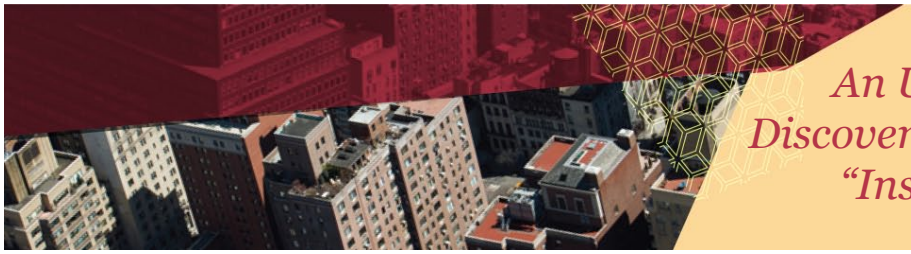
63 See, e.g., Honda Lease Trust v. Middlesex Mut. Assur. Co., No. 3:05CV1426, 2008 U.S. Dist. LEXIS 11547 (D. Conn. Feb. 6, 2008).

64 See, e.g., Alliant Ins. Servs. Inc. v. Reimer Ins. Grp., 22 So. 3d 779 (Fla. Dist. Ct. App. 2009).

65 See Brown v. Superior Court, 137 Ariz. 327, 670 P.2d 725 (Ariz. 1983); Group Hospital Services v. Dellana, 701 S.W.2d 75 (Tex. Ct. App. 1985); Sandalwood Estates Homeowners Ass'n v. Empire Indem. Inc. Co., No. 09-CV-80787, 2010 U.S. Dist. LEXIS 12840 (S.D. Fla. Jan. 29, 2010).

66 Saldi, 224 F.R.D. 169.

67 Allstate Ins. Co. v. Scroghan, 851 N.E.2d 317 (Ind. Ct. App. 2006).



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