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Production of Adjuster Personnel Files in Insurance Litigation



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It is well known that discovery can be one of the most expensive and time-consuming parts of the litigation process. Often, an insurer is faced with requests for sensitive material that seem to test the limits of the Federal Rules' liberal discovery provisions. Adjuster personnel files are commonly the subject of such requests. Accordingly, today's blog post discusses the relevance and discovery of adjuster personnel files in insurance litigation.

Strong Public Policy Against Disclosure of Adjuster Personnel Files

"There is a strong public policy against the disclosure of personnel files..." 10 John Kimpflen et al., Federal Procedure § 26:130 (L.Ed. West 2011). See *Blount v. Wake Elec. Membership Corp.*, 162 F.R.D. 102, 105 (E.D. N.C. 1993) (Discovery of personnel files "would discourage future candid evaluations of employees, making it difficult for the firm to maintain its standards and improve its performance."); *Alterra Healthcare Corp. v. Estate of Shelly*, 827 So.2d 936, 944-45 (Fla. 2002) ("In recognizing the danger of permitting the disclosure of personnel records of any witness or litigant, one court has said: 'It has been widely noted that such records often contain raw data, uncorroborated complaints, and other information which may or may not be true but may be embarrassing, although entirely irrelevant to any issue in the case, even as to credibility.'" (internal quotations and citations omitted)); see also *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 648 (10th Cir. 2008) ("[P]ersonnel files often contain sensitive personal information, ... and it is not unreasonable to be cautious about ordering their entire contents disclosed...").

Heightened Standard of Relevance for the Production of Adjuster Personnel Files

Under Federal Rule of Civil Procedure 26, a plaintiff may only obtain discovery regarding a nonprivileged matter that is relevant to a party's claim or defense. Fed. R. Civ. P. 26(b)(1). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

Although the Fourth Circuit has not directly addressed this issue, courts in other jurisdictions apply a "heightened standard of relevance" to the production of personnel files. For example:

- The court in *Compuware Corp. v. Moody's Investors Services, Inc.*, 222 F.R.D. 124, 134 (E.D. Mich. 2004), held that personnel files were not discoverable where the plaintiff failed to show that they were clearly relevant and that a compelling need existed.
- In *Carlucci v. Maryland Casualty Co.*, No. Civ. A. 98-3294, 2000 WL 298925 (E.D. Pa. March 14, 2000), the court applied the heightened relevance standard to production of claims adjusters' personnel files.

- The court in *Miller v. Federal Express Corp.*, 186 F.R.D. 376, 384 (W.D. Tenn. 1999), stated, "Personnel records, because of the privacy interests involved, should not be ordered produced except upon a compelling showing of relevance."
- In *Stabililus v. Haynsworth, Baldwin, Johnson & Greaves, P.A.*, 144 F.R.D. 258, 266 (E.D. Pa. 1992), the court required a heightened standard of relevance for discovery of confidential information contained in personnel files.
- The court in *Raddatz v. Standard Register Co.*, 177 F.R.D. 446, 447-48 (D. Minn. 1977), noted that because personnel files contain an employee's sensitive and personal data, ordering their disclosure is a highly intrusive act that should not be undertaken lightly.

Under the heightened standard of relevance, discovery of personnel files is permissible only if:

- (1) the material sought is clearly relevant; and
- (2) the need for discovery is compelling because the information sought is not otherwise readily obtainable.

10 John Kimpflen et al., *Federal Procedure* § 26:130 (L. Ed. West 2011) (emphasis added). "[G]eneral allegations of negligence or wrongdoing do not suffice to render personnel records discoverable." *Id.*

What is "Clearly Relevant"?

In determining whether the adjuster personnel files are "clearly relevant," courts have generally focused on whether the requests are relevant to the primary issues in the case. See *Royal Bahamian Ass'n, Inc. v. QBE Ins. Co.*, 268 F.R.D. 692, 693-94 (S.D. Fla. 2010); see also *Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir. 1994) (no abuse of discretion where "privacy interests, coupled with [the district court's] determination to keep the trial focused ..., justified limiting [plaintiff's discovery of] personnel files").

For example, courts have found that adjuster personnel files were not clearly relevant where:

- The case did not concern the individual negligence of an adjuster, but rather, was based on the alleged negligence of the insurer as a company.

See Allstate Ins. Cos. v. Herron, 393 F. Supp. 2d 948 (D. Alaska 2005), in which the court denied the plaintiff's motion to compel production of personnel files of individual adjusters and found files were not relevant in declaratory judgment action concerning bad faith breach of insurance contract. In so finding, the Court stated, "With respect to requests for personnel files, Herron's theory is murky. It is unclear to the Court how the files of individual adjusters will be relevant to the issue in this case, i.e., the negligence of Allstate as a company. Clearly, the files would be relevant in the state trial since claims were filed against individual adjusters. However, such claims are not at issue in this case. The request is denied."

- The plaintiff could identify no specific purpose necessitating the production of the personnel file which would override privacy concerns regarding the production of confidential material.

See Tolz v. Geico Gen. Ins. Co., No. 08-80663-CIV, 2010 WL 298397 (S.D. Fla. Jan. 19, 2010), a bad faith action wherein the court found production of a personnel file improper where the plaintiff claimed the files were relevant to establish "whether the very employee hired by Geico to handle [the insured's] claim acted in bad faith while doing so" and "argued the files most likely memorialize relevant circumstances surrounding Jones' conduct both in handling similar claims prior to that of [the insured]," but there was no evidence the files were necessary for a specific purpose, such as to impeach sworn testimony.

What is "Not Otherwise Readily Obtainable"?

In addition, requests for adjuster personnel files do not meet the heightened standard of relevance where the information sought is readily obtainable through less invasive means. See *Fed. R. Civ. P. 26(b)(2)*; *Cecena v. Allstate Ins. Co.*, No. C05-03178, 2006 WL 3302837 (N.D. Cal. Nov. 9, 2006) ("Generally, even if personnel records are relevant, discovery of such files is permitted only upon a showing of 'compelling need.'").

For example, in *Carlucci v. Maryland Casualty Co.*, No. Civ. A. 98-3294, 2000 WL 298925 (E.D. Pa. March 14, 2000), the plaintiff in a bad faith insurance suit moved to compel production of the personnel file of one of the claims adjusters to whom her insurance claim had been assigned. In support of the request for disclosure, the plaintiff cited the adjuster's termination for poor performance and the adjuster's deposition testimony that she had complained that she had too many files to handle, and argued that the adjuster's poor performance was likely to be central to the issues at trial. *Id.* at *1. The court concluded that the plaintiff could obtain the information sought regarding the claims philosophy of the company and the specifics of the adjusters assigned to the plaintiff's claims by other less invasive means. *Id.* Accordingly, the court denied the plaintiff's motion to compel and found the plaintiff "failed to establish she cannot obtain the necessary information through supervisors or other adjusters assigned to the case." *Id.* at *2.

Courts in other jurisdictions have ruled similarly. For example:

- In *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1034 (9th Cir. 1990), the Ninth Circuit Court of Appeals concluded that the district court did not abuse its discretion by denying the appellants' request for all of the defendant's confidential personnel files, because "focused discovery could have been employed" in order to discover the relevant information.
- The court in *Adams v. Allstate Insurance Co.*, 189 F.R.D. 331, 333 (E.D. Pa. 1999), found that "Plaintiff seeks the personnel files of every Allstate employee who worked on plaintiff's claims. This request is overbroad, and seeks information that is unnecessarily invasive. Plaintiff should seek the information that it needs by a less invasive means, such as by deposition or interrogatory. Thus, defendant need not comply with Plaintiff's Request for Production No. 22."
- In *Kaufman v. Nationwide Mutual Insurance Co.*, No. Civ. A. 97-1114, 1997 WL 703175 (E.D. Pa. Nov. 12, 1997), the court denied the motion to compel where the plaintiff in a bad faith action sought production of personnel files of employees involved in handling of the plaintiff's claim on grounds that information could be learned from a less confidential source.

Practice Point

In determining whether an adjuster personnel file should be disclosed, an insurer should consider whether the plaintiff's request meets the heightened standard of relevance.

However, in the event that some of the personnel file may meet the heightened standard of relevance, the insurer may request an in camera review of the file to limit the production of material to that which is relevant to the primary issues in the case. See, e.g., *Porter v. Farmers Ins. Co., Inc.*, No. 10-CV-116-GKF-PJC, 2011 WL 1566018 (ND. Okla. April 25, 2011) (recognizing confidential nature of personnel files in bad faith insurance suit and ordering same to be produced for in camera review); *DeKnikker v. Gen. Cas. Co. of Wis.*, No. Civ. 07-4117, 2008 WL 1848144 (D.S.D. April 23, 2008) (same); *Cecena*, 2006 WL 3302837 ("[C]ourt should first examine the [personnel] file in camera and order disclosure of only that information which might be relevant to the lawsuit.").

If you have any questions about determining whether an adjuster personnel file should be disclosed, I'd be happy to talk with you. Just email me at lwells@collinsandlacy.com or call (864) 282-9108. - Logan

About Logan Wells

Logan Wells is an associate practicing in the areas of premises liability, retail / hospitality / entertainment and insurance coverage. She received her undergraduate degree in history and political science from Furman University and earned her juris doctor from the University of South Carolina School of Law.

During her undergraduate career, she worked for a law firm in Spartanburg as a legal assistant. While in law school, she worked as a summer associate for Collins & Lacy, before joining the firm as an attorney in the fall of 2009.

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