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Discovery Of 'Other' Claim Files in Coverage Disputes: The Need For A Rational Approach

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Commentary

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Introduction

Often in coverage disputes the insurer is faced with a deluge of discovery requests seeking inspection of "other similar claims files" under the guise that these files are reasonably calculated to lead to admissible evidence. The insurer's response is usually an objection based upon work-product protection and burdensomeness. The threshold issue, however, is whether such claim files are reasonably calculated to lead to admissible evidence.[1] Courts in varying jurisdictions have reached differing conclusions. This commentary explores the conflicting conclusions of various courts and why denial of these requests present a more rationale approach to resolution of the issue.

The Relevance Argument

The insured's contention of relevance in a coverage dispute generally rests upon the idea that discovery of these other claim files involving similar claims may show inconsistent interpretations of policy provisions; thus, insureds argue that inconsistent interpretations of a policy could give rise to a waiver of estoppel defense. Relying on these arguments, insureds typically ask the courts to require the insurer to produce what can amount to thousands of claim files. Although the insurers will normally respond objecting to the unduly burdensome nature of the request, the stronger legal objection is that such discovery is not reasonably calculated to lead to the discovery of admissible evidence.[2]

The contention that an insurer's handling of other similar claims may provide evidence of waiver or estoppel ignores the elements of those defenses. "Waiver" is an intentional relinquishment of a known right. There is nothing in other claims with other insureds that could possibly establish such knowing relinquishment of a right viś a viś the subject right, claim, or insured. Estoppel requires representation to the insured that the insured justifiably relies upon to its detriment. Again, other claims not involving the subject insured cannot contain such evidence. Thus, it does not make sense that a waiver or estoppel can arise from the insurer's handling of claims involving other insureds. The insured would not even know of the existence of those claims to rely upon how the insurer handled them. Without the element of knowledge or detrimental reliance, which is impossible if the insured is unaware of the claim, there can be no waiver or estoppel.[3] Yet, an insured will often advance these legal theories to create the illusion of relevance. As the Federal Rules of Civil Procedure mandate, however, the consideration of relevance also involves a balancing of the need for the information against the burden on the responding party.

The Federal Rules Of Civil Procedure

While courts generally interpret the rules of discovery liberally in favor of producing the requested informa-

tion, the Federal Rules of Civil Procedure contain an important, and often over-looked, rule of construction.[4] Fed. R. Civ. P. 1 requires that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."[5] In fact, federal courts have indicated that the principles of Rule 1 act as an injunction against unbridled discovery.[6] This means that "the discovery rules provide no absolute, unharnessed right to find out every conceivable, relevant fact that opposing litigants know."[7] As a result, the scope of discovery must be tempered by the principle that the determination of every action shall be just, speedy, and inexpensive. The application of Rule 1 supplies an important principle that insurers can utilize in responding to discovery requests of "other similar claim files." While insurers can formulate an independent objection based upon undue burden, Rule 1 requires the court to consider the burden on the producing party in determining relevance. Therefore, courts should not ignore the expense imposed by the request when considering relevance; expense is part of the relevance analysis.

Interpretations Of Various Courts

Florida courts have denied discovery of *the* claim file which precipitates the coverage dispute:

> When the issue of insurance coverage is unresolved and at issue in pending court proceedings, a trial court must not order an insurer to produce its claim files and other work-product documents.[8]

At least one Florida court has denied production of documents related to drafting, marketing, and interpreting of insurance policies in a coverage determination.[9] Given the logic of this opinion, it follows that Florida courts would not permit discovery of "other" claim files in a coverage dispute to aid in policy interpretation. If evidence of policy interpretation is not discoverable in a coverage action, it should necessarily follow that discovery of other claim files for the purpose of policy interpretation should be prohibited. Moreover, in Florida insurers do not face the prospect of having to produce discovery related to "bad-faith" in a combined action for coverage and "bad-faith."[10]

In Florida a "bad faith" claim does not become viable until there has been a determination that coverage exists under the policy and the insurer is liable thereunder.[11] The rationale for this rule is simply that the insurer cannot be liable for "bad faith" failure to settle a claim when it did not fail to pay the claim. However, this requirement of viability is not present in some other jurisdictions. Some jurisdictions allow a coverage and "bad-faith" action to proceed simultaneously. It is primarily within these jurisdictions that courts have permitted the discovery of the insurer's "other claim files."

However, returning to coverage cases, the court in *Rhone-Poulenc Rorer, Inc. v. The Home Indemnity Co.*, interpreting New Jersey law in a coverage dispute, determined that discovery of other similar claims and policies *were* relevant because it could show how identical policy language was interpreted by the insurer.[12] *Rhone-Poulenc* involved a declaratory action by various policyholders seeking an order that the insurers were obligated to defend and indemnify them for underlying AIDS-related claims. The issues in the case involved the interpretation of policy language.[13] The policyholders sought discovery of documents from other insureds that have faced similar claims.[14] The insurers objected to production of these claim files from non-party insureds, arguing that such information could open the "flood gates" to discovery of additional insurance.[15]

The *Rhone-Poulenc* court permitted discovery of claim files and policies from four non-party insureds. While recognizing that the policies in question contained standard industry-wide terms, the court nonetheless permitted discovery of these other claim files because they contained "almost identical allegations" as in the present case.[16] As a result, the court concluded that how these claim files were handled would shed light on how the policy terms were applied by the insurer.[17] In so holding, the court was accepting the notion that the interpretation of standard policy terms could be based upon how claims of other insureds were handled. In effect, the court was permitting discovery of extrinsic information that may show that policy terms were applied inconsistently and were, therefore, ambiguous. Such an approach invites insureds to search for any other similar claims in order to argue that the terms of the policy are ambiguous. This is in direct contradiction to the fundamental rule of construction that policy language should be given its plain and ordinary meaning.

Under the rationale of *Rhone-Poulenc*, there would be no such thing as plain and ordinary policy language. Indeed, even the most rudimentary terms can now be interpreted based on what the insurer did in other claims. This approach casts aside all of the well-settled rules of contract construction. Now an insured can simply shop claim files for its desired interpretation. Not only is this the wrong approach, but it is in an approach that is unworkable. The slightest inconsistency in how another claim was handled will be utilized by the insured to allege ambiguity. Policy language will itself have no meaning separate and apart from how other claims were handled. Discovery will now be focused upon what insurer did in other claims, rather than more appropriately on the facts of the instant dispute. This cannot and should not be how courts set about to interpret policy language. The terms and conditions of a policy are expressed in the policy itself. These terms and conditions are not dependent in any way upon how the insurer conducted itself in other claims.

Unfortunately, the *Rhone-Poulenc* court's failure to squarely address the issue of ambiguity in determining the discovery request presents the insured with the opportunity to manipulate the scope of discovery by alleging ambiguities in the policy as part of their claim. Thus, even if an allegation of ambiguity is without merit, the insured may still be entitled to discovery that has nothing to do with valid issues in the case. Moreover, even if a policy is considered to be ambiguous, it is not clear how the insured's conduct in other cases could even be relevant to the issues in the dispute.

The insurer and insured are bound by a contractual arrangement. Attempts to "interpret" the policy through the comparison of other claims is only an erroneous method for the insured to argue a modification of the terms and conditions of the policy. Contracts cannot be modified except with assent of the parties. However, in considering "other similar claims" in determining a coverage issue, the court is permitting a potential change in the terms of the contract based upon the insurer's conduct in unrelated contracts. Setting aside for a moment that such discovery sanctions a huge fishing expedition, it also permits the insured the ability to argue for what amounts to a modification of a contract based upon something other than the course of dealing between the actual parties to the contractual agreement. As a result, the ruling in *Rhone-Poulenc* allows an insured tremendous latitude to search for extraneous information in order to change the terms of a policy based upon post-contract conduct involving an independent and separate contract with an unrelated party. This latitude is antithetical to fundamental contract principles that a contract represents a bargained for exchange of promises.

One line of cases permit discovery of the insured's "other claim files" when the issue of coverage deals with the pollution exclusion.[18] Again, critical to the court's consideration of whether the insurer's "other claim files" were discoverable was whether extrinsic evidence could be permitted to interpret the pollution exclusion. This issue, of course, must be determined on a jurisdiction-by-jurisdiction basis. The Florida Supreme Court has held that the pollution exclusion is not ambiguous and extrinsic evidence should not be permitted in its interpretation.[19] Thus, the principles relied upon by the pollution exclusion line of cases have no application in Florida. Still, in a dispute about the insurer's other claim files, invariably these cases will be cited and relied upon by the insured. In fact, Florida law provides that the "interpretation of an insurance contract, including the determination and resolution of ambiguities, is a matter of law to be determined by the court."[20] This principle, at least in Florida, should effectively render discovery of the insurer's "other claim files" irrelevant as a matter of course. There would be no legal basis to consider "other claim files" as extrinsic evidence would not be admissible to interpret the policy in a coverage dispute.

Other courts have recognized that the insurer's conduct in other claims is of no relevance to a dispute between an insurer and its policyholder.[21] In these cases, the courts appear to recognize the fact that each case has its own unique facts and "there are simply too many variables to render the information [from other claims] relevant or meaningful."[22] Many courts have also correctly recognized that attempts by insureds to obtain other claim files in the course of a "bad-faith" dispute simply amounts to "an out and out fishing expedition."[23] Some courts, while expressing that there may be some relevance to the claim files, find that such discovery is disproportionately burdensome and expensive when considered in light of the issues

in the case.[24] Regardless of whether the court denies discovery of the claim files based upon considerations of proportionality, or relevance, these decisions reflect a better reasoned approach to resolution of the issue then allowing insureds to cull through numerous files under the fictional premise that they will provide evidence of coverage.

Conclusion

Insurers will continue to be faced with requests for other claim files in a coverage dispute. While some courts have completely rejected the relevance of such files, other courts still permit some limited discovery of these files. However, a thorough analysis of the insured's relevance arguments, as it relates to questions of coverage, reveals that insureds are simply grasping for any argument to alter the terms and conditions of the policy. Permitting such an attempt is inappropriate on several levels, not the least of which is consideration of basic contract principles and relevancy.

Endnotes

1. Federal Rules of Civil Procedure 26(b)(1).

2. Many times these coverage disputes will contain allegations of "bad-faith," forcing the insurer to address the discovery of other claim files with respect to both the coverage (breach of contract) action and the "bad-faith" allegations. In responding to the relevancy arguments pertaining to the "bad-faith" issues, insurers rely upon the common sense proposition that, because other claims will possess their own unique facts, these unrelated claim files will simply have too many variables to produce relevant information. *First Fidelity Bancorporation v. National Union Fire Ins. Co. of Pittsburgh, P.A.*, 1992 WL 55742 (E.D. Pa. 1992).

3. *State Dept. of Revenue v. Anderson*, 403 So. 2d 397 (Fla. 1981); *Globe Mutual Life Ins. Co. of New York v. Wolff*, 95 U.S. 326 (1877).

4. Rule 1, Federal Rules of Civil Procedure.

5. For a discussion of disconnect between the purpose of Rule 1 and the tactics employed in litigation, *see* John J. Pappas, *What Ever Happened to Rule #1?*, *Mealey's Litigation Report: Insurance Bad Faith*, Volume 17, number 20 (February 20, 2004).

6. *See Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979)("But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, speedy, and inexpensive determination of every action").

7. *See Hilt v. SFC Inc.*, 170 F.R.D. 182, 187 (D.Kan. 1997).

8. *Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana De Los Estados Unida, Inc.*, 813 So. 2d 250, 251 (Fla. 3d DCA 2002).

9. *Allstate Ins. Co. v. Swain*, 921 So. 2d 718 (Fla. 3d DCA 2006).

10. However, when the "bad-faith" claim does become viable, *see Allstate v. Ruiz*, 899 So. 2d 1121 (Fla. 2005) (permitting discovery of claim file pertaining to the dispute producing bad faith allegations and denying work-product protection for such claim files in the bad faith action).

11. *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991). See also, John J. Pappas and L. Andrew Watson, *Federal Florida, Mealey's Litigation Report: Insurance Bad Faith*, Vol. 20, Number 6 (July 18, 2006), John J. Pappas, *Florida's First-Party Bad-Faith Law, Mealey's Litigation Reporter: Insurance Bad Faith*, Vol. 18, Number 12 (October 19, 2004).

12. *Rhone-Poulenc Rorer, Inc. v. The Home Indemnity Co.*, 20 Fed. R. Serv. 3d 1479, 1991 WL 78200 (E.D. Pa. 1991).

13. *Id.* at 1.

14. *Id.* at 2.

15. *Id.*

16. Apparently, these four other non-party insureds also faced claims that their blood derivatives were contaminated.

17. *Id.* at 3.

18. *See, i.e., PECO Energy Co. v. Ins. Co. of N. Am.*, 852 A.2d 1230 (Pa. Super. Ct. 2004); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101 (D.N.J. 1990); *Nat'l. Union Fire Ins. Co. of Pittsburgh, PA v. Stauffer Chem. Co.*, 558 A.2d 1091 (Del. Super. Ct. 1989); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 283 (D.D.C. 1986).

19. *Deni Assoc. of Florida, Inc. v. State Farm Fire & Casualty Insurance Company*, 711 So. 2d 1135 (Fla. 1998).

20. *Those Certain Underwriters at Lloyd's Subscribing to Policy Number 25693JB v. Capri of Palm Beach, Inc.*, 932 F.Supp. 1444, 1446 (S.D. Fla. 1996).

21. *Moses v. State Farm Mut. Auto. Ins. Co.*, 104 F.R.D. 55 (D.C. Ga. 1984).

22. *First Fidelity Bancorporation v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 1992 WL 55742 (E.D. Pa. 1992).

23. *Steinkerchner v. Provident Life & Acc. Ins. Co.*, 1999 WL 734545 (Tenn. App. 1999).

24. *Leksi, Inc. v. Federal Ins. Co.*, 129 F.R.D. 99 (D.N.J. 1989). ■

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