

DISCOVERY OF INFORMATION FROM AN INSURER

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I. INTRODUCTION

Since adoption of the Federal Rules of Civil Procedure and similar rules by courts of most states, the pre-trial discovery arena has become a separate staging ground for disputes. The now familiar standard of Rule 26(b) of the Federal Rules of Civil Procedure allows access to any information which is relevant to the subject matter of the case. Under this Rule, “[t]he information sought need not be admissible at the trial ... if it appears reasonably calculated to lead to the discovery of admissible evidence.”¹ This broad standard has been the source of frequent disagreement as plaintiffs and defendants-turned-plaintiffs attempt to get into and discover a wide range of information contained in the files of their or someone else’s insurer.

Interest in insurance and related files may be understandable given the information they often contain. The insurer’s prompt investigation may record information which otherwise fades by the time of litigation. Often, the insurer’s investigation includes contemporaneous witness statements, photographs, correspondence and memoranda which candidly evaluate facts, evidence, and the positions of parties. Such information can be helpful or damaging during settlement negotiations or at trial.

In coverage and so called “bad faith” cases the insured often seeks discovery of files other than the claim file directly involved in the litigation.

1. FED. R. CIV. P. 26(b)(1).

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For example, plaintiffs in bad faith cases may seek to show either that the insurer is involved in an alleged pattern of denying certain claims, that the insurer failed to adequately investigate the plaintiff's claim, or that the insurer denied coverage of the plaintiff's claim while extending coverage to other similar claims. In addition, plaintiffs in coverage cases often inquire as to whether the insurer has set aside reserves for the claim in order to urge that the reserve itself is an admission of liability. Such efforts typically include discovery of correspondence between the primary insurer and its reinsurer.

Attempts by insurers to protect this information from discovery usually are based upon relevancy objections and application of the work product doctrine or attorney-client privilege. Case law on these issues is often confused² and unpredictable, due largely to the growing trend of decisions holding that the ability to discover insurance information must be determined upon an analysis of the specific facts of each case.

Generally, insurance related discovery disputes can be divided into two basic categories. The first category includes cases where the insurer is a party or insures a party to litigation and the central issue is liability or fault, not coverage. This category includes cases where the insurer is defending its insured or where the insurer sues a third party based upon rights of subrogation. The second category includes cases where the insurer is sued directly for coverage and/or for "bad faith." This article separately addresses coverage issues involved in each of these two categories.³

II. DISCOVERY IN NON-COVERAGE CASES

Discovery disputes often arise in cases between the insurer or its insured and a third party. For example, an insurance company may assert subrogation rights against a third party or provide a defense where the insured has been sued by a third party. In these cases, the insurance company's actions with regard to a policy or contract are not directly in issue. Rather, the insurance company's files are sought for information collected on an incident or event relevant to the litigation.

Where discovery is sought of the insurer's claim file directly relating to the pending litigation, there may be circumstances under which there will

2. See James P. Garrity, *Discovery of an Insurer's Files: Now you See It, Now You Don't*, 20 THE FORUM 20 (1984) (discussing the "widespread, pervasive disagreement at both the state and federal levels as to what may be discovered and what may not" in insurance-related litigation).

3. The rules relating to the discovery of insurance files are largely applicable to discovery in cases involving fidelity bonds as well. This is true because a fidelity bond is generally considered to be insurance. See ROBERT F. CUSHMAN ET AL., *HANDLING FIDELITY, SURETY, AND FINANCIAL RISK CLAIMS* § 1.1 (2nd ed. 1990)(explaining that most fidelity bonds are viewed as insurance).

be little room to argue that certain of the information in the file is neither relevant nor within the scope of permitted discovery. Therefore, discovery of the insurer's claim file might be permitted unless the insurer is able to establish that the information is otherwise protected from discovery. In those instances where the documents at issue do not involve communications with lawyers, the attorney-client privilege will be inapplicable. In such cases, the central discovery issue may be applicability of the work product doctrine.

A. The Work product Doctrine

The work product doctrine is governed by Federal Rule of Civil Procedure 26(b)(3) and its state counterparts. Under Rule 26 (b)(3), a party may obtain documents and tangible things prepared in anticipation of litigation or for trial by the party or the party's agent or representative only "upon a showing that the party seeking discovery has substantial need for the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."⁴ Under the rule a party's representative includes his "attorney, consultant, surety, indemnitor, insurer, or agent."⁵ Thus, the privilege is available for documents prepared by the insurance company, to the extent that they are prepared in anticipation of litigation.

Items not prepared in anticipation of litigation are not protected by the doctrine. Items prepared by or for the party in anticipation of litigation are given a qualified immunity from discovery. This qualified privilege is outweighed by a party's showing that it has a substantial need of the materials and that the substantial equivalent may not be obtained without undue hardship. Where the claim file is sought, a frequent issue is whether the documents were "prepared in anticipation of litigation."⁶ While the holdings on this issue vary widely, the current state of the law can be distilled into three basic camps spanning the spectrum from freely allowing discovery of claims files to wholesale prohibition against discovery.

1. Cases Holding That Insurance Investigations Are Not Conducted in Anticipation of Litigation

A substantial number of courts allow liberal discovery of claim files by finding that insurance companies have a routine practice of investigating incidents and, "absent unique circumstances showing to the contrary,"⁷ these

4. FED. R. CIV. P. 12 (b)(3).

5. *Id.*

6. *Id.*

7. *Schmidt v. California State Auto. Ass'n*, 127 F.R.D. 182, 184 (D. Nev. 1989). *See also* *Pete Rinaldi's Fast Foods v. Great American Ins.*, 123 F.R.D. 198, 202 (M.D.N.C. 1988).

investigations are always in the ordinary course of business and not in anticipation of litigation.

One such case is *Fann v. Giant Food, Inc.*,⁸ where the plaintiff sued a store owner for an injury incurred when she slipped and fell in water near the entrance to the defendant's store. The plaintiff sought to discover all statements made by any witness to the incident. The defendant objected on grounds that the statements were "taken by its insurance claims adjuster after plaintiff informed defendant that she had retained counsel,"⁹ and were privileged work product. Compelling the defendant to produce the statements taken by its insurer, the *Fann* court stated, "the privilege does not apply to documents prepared in the regular course of the compiler's business, rather than specifically for litigation, even if it is apparent that a party may soon resort to litigation."¹⁰ The statements in issue were taken by the adjuster shortly after learning that the plaintiff had hired counsel, but prior to the actual filing of the action. In the court's opinion this amounted "only to a more or less routine investigation of a possibly resistible claim ... not sufficient to immunize an investigative report developed in the ordinary course of business."¹¹

Courts following the liberal approach advocated in *Fann* generally refuse to protect investigative reports unless the investigation was performed under the direction of counsel. For these courts, the absence of counsel is deemed conclusive in determining whether the work product privilege applies. Often cited for this position are *Thomas Organ Co. v. Jadranska Slobodna Plovidba*¹² and *Henry Enterprises, Inc. v. Smith*.¹³

In *Thomas Organ Co.* the plaintiff filed suit for damage to electric organs during shipment aboard defendant's ocean liner. The plaintiff sought to compel production of a transcript of certain dictation and a letter prepared by a surveyor hired by the freight company's insurer. The surveyor had been hired to investigate damage to the organs and had conducted his survey shortly after the organs were delivered. The United States District Court for the Northern District of Illinois granted the plaintiff's motion to compel, stating:

[A]ny report or statement made by or to a party's agent (other than to an attorney acting in the role of counselor), which has not been requested by nor

8. 115 F.R.D. 593 (D.D.C. 1987).

9. *Id.* at 596.

10. *Id.*

11. *Id.*

12. 54 F.R.D. 367 (1972). *But see* *Schmidt v. California State Auto. Ass'n*, 127 F.R.D. 182 (D. Nev. 1989); *Harriman v. Maddocks*, 518 A.2d 1027 (Me. 1986); *Askew v. Hardman*, 918 P.2d 469 (Utah 1996).

13. 592 P.2d 915 (Kan. 1979). *But see* *Harriman v. Maddocks*, 518 A.2d 1027. (Me. 1986).

prepared for an attorney nor which otherwise reflects the employment of an attorney's legal expertise must be conclusively presumed to have been made in the ordinary course of business and thus not within the purview of the limited privilege of new Rule 26 (b)(3) and (b)(4).¹⁴

Similarly, in *Henry Enterprises, Inc. v. Smith*,¹⁵ the Kansas Supreme Court held that "the initial investigation of a potential claim, made by an insurance company prior to the commencement of litigation, and not requested or made under the guidance of counsel, is made in the ordinary course of business ... and not 'in anticipation of litigation or for trial.'"¹⁶ Providing the rationale for its holding, the court stated:

We do not believe that Rule 26(b)(3) was designed to so insulate insurance companies merely because they always deal with potential claims. If this were true, they would be relieved of a substantial portion of the obligations of discovery imposed on the parties generally that are designed to insure that the fact finding process does not become reduced to gamesmanship that rewards parties for hiding or obscuring potentially significant facts.¹⁷

2. Cases Holding That Insurance Investigations Are Always in Anticipation of Litigation

At the other extreme are decisions holding that insurance investigations by nature involve legal rights and obligations and should be granted broad protection. These courts are of the opinion that the filing of an insurance claim necessarily creates anticipation of litigation, which invokes the work product doctrine. In *Fireman's Fund Insurance Co. v. McAlpin*,¹⁸ for example, the Rhode Island Supreme Court adopted this position, stating:

In our litigious society, when an insured reports to his insurer that he has been involved in an incident involving another person, the insurer can reasonably anticipate that some action will be taken by the other party. The seeds of prospective litigation have been sown, and the prudent party, anticipating this fact, will begin to prepare his case [T]here is an ever-present possibility of a claim's ending in litigation. The recognition of this possibility, provides in any given case, the impetus for the insurer to garner information regarding the circumstances of a claim.¹⁹

14. *Thomas Organ*, 54 F.R.D. at 372.

15. 592 P. 2d 915 (Kan. 1979).

16. *Id.* at 921.

17. *Id.* at 919, *citing* *Thomas Organ Co., v. Jadranska Slobodna Plovidba*, 54 F.R.D. at 372-373.

18. 391 A.2d 84 (R.I. 1978).

19. *Id.* at 89-90.

The *McAlpin* court rejected any rule calling for a case-by-case inquiry into whether the insurer actually gathered or prepared the documents in anticipation of litigation, saying that such a holding would not provide sufficient “uniformity in the manner in which the issue is resolved in the lower tribunals.”²⁰

The Iowa Supreme Court adopted a similarly conservative position in *Ashmead v Harris*²¹ finding that an insurer’s investigation of a traffic accident was work product and not discoverable. The *Ashmead* court did not consider the fact that the investigation might have been carried out routinely by non-lawyers as influential in determining whether the investigation was conducted in anticipation of litigation. Rather, the court held that “[i]t does not matter that the investigation is routine. Even a routine investigation may be made in anticipation of litigation [A] document prepared in the regular course of business may be prepared in anticipation of litigation when the party’s business is to prepare for litigation.”²² The Iowa Supreme Court dispensed with any inference that its ruling should be circumscribed by factual inquiry into the certainty of litigation by finding that “it [is] sufficient if the primary motivating purpose behind the creation of the document was to aid in possible future litigation.”²³

3. Case Analysis – The Emerging Trend

The emerging trend eschews both of these all-or-nothing positions in favor of a case-by-case analysis. These courts hold that the point at which a routine investigation ends and anticipation of litigation begins is variable. Each case requires an individual inquiry into several

factors, including the facts of the case, the nature and timing of the insurer’s investigation, the relationship of the parties, and the nature of the litigation.²⁴

A recent case from the Mississippi Supreme Court adopts this approach. In *Haynes v. Anderson*, the court analyzed and rejected both bright-line tests, finding that “[i]n the end, a case by case approach is the only approach which seems to us to make any real sense, even though paradoxically, insurance company investigations of accidents typically encompass ‘routine’ investigations with an ‘eye toward litigation.’”²⁵ In *Haynes*, the insurance

20. *Id.* at 89.

21. 336 N.W. 2d 197 (Iowa 1983). *But see* Langdon v. Champion, 752 P.2d 999 (Alaska 1988).

22. *Id.* at 200.

23. *Id.* at 201.

24. *See, e.g.*, Haynes v. Anderson, 597 So. 2d 615 (Miss. 1992).

25. *Id.* at 619.

company's investigation occurred after the plaintiff's attorney had written to the insurer stating that it represented the plaintiff in her "claim for injuries and damages."²⁶ Under these circumstances, the court found the insurer's assertion that it acted with an eye toward litigation "hard to dispute,"²⁷ and held that the documents were privileged.²⁸

The case-by-case approach has a substantial following, and has been characterized as the "developing majority view."²⁹ However, the obvious difficulty with the fact-specific approach is that it provides no certainty and requires a determination by the court of whether specific documents are discoverable. At a minimum, the court will inquire into the timing of the investigation relative to the budding dispute between the parties, the type of documents contained in the files, and the manner in which the documents were collected. This information is necessary for the court to determine the variable point at which the "insurance company's activity shifts from mere claim evaluation to a strong anticipation of litigation ... the point where the probability of litigating the claim is substantial and imminent."³⁰

4. "Anticipation of Litigation" Further Defined

The work product analysis is further complicated in cases involving documents prepared in anticipation of litigation, but not in anticipation of the specific litigation in which the discovery is sought. In *Rickman v. Deere & Co.*,³¹ for example, the plaintiff sued John Deere & Co. for injuries incurred while operating equipment on a dairy farm. At the time of the injury, the dairy farm had workers' compensation insurance with Farm Bureau Insurance Company, and Farm Bureau paid the plaintiff's workers' compensation claim. The plaintiff's injuries were severe, and Farm Bureau hired a claim service to investigate the accident in preparation for a subrogation action against John Deere. Subsequently, the injured worker brought suit against John Deere directly, and John Deere requested production of Farm Bureau's investigative report.

26. *Id.*

27. *Id.*

28. *Id.*

29. See, e.g., *Airheart v. Chicago and N. W. Transp. Co.*, 128 F.R.D. 669, 671 (D.S.D. 1989); *Pete Rinaldi's Fast Foods v. Great Am. Ins.*, 123 F.R.D. 198, 201-02 (M.D.N.C. 1988); *Sham v. Hyannis Heritage House Hotel, Inc.*, 118 F.R.D. 24, 26 (D. Mass. 1987); *Lett v. State Farm Fire & Cas. Co.*, 115 F.R.D. 501 (N.D. Ga. 1987); *Taroli v. Gen. Elec. Co.*, 114 F.R.D. 97, 98-99 (N.D. Ind. 1987), *aff'd*, 840 F.2d 920 (7th Cir. 1988); *Mission Nat'l. Ins. Co. v. Lilly*, 112 F.R.D. 160, 164 (D. Minn. 1986); *Basinger v. Glacier Carriers, Inc.*, 107 F.R.D. 771, 773-74 (M.D. Pa. 1985); *Ex Parte State Farm Mut. Auto. Ins. Co.*, 386 So. 2d 1133 (Ala. 1980); *Heidebrink v. Moriwaki*, 706 P.2d 212 (Wash. 1985).

30. *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982).

31. 154 F.R.D. 137 (E.D. Va. 1993).

The court ordered production, notwithstanding its finding that the report was prepared in anticipation of Farm Bureau's subrogation action, stating:

The protection accorded by Rule 26(b)(3), however, applies only to documents prepared by a "party" or a party's "representative." In this case, Farm Bureau is not a "party." Nor, as the workers' compensation carrier of plaintiff's employer, is it the "representative" or "insurer" of plaintiff Rickman himself... . Reports prepared by Farm Bureau in preparation for its own potential subrogation litigation therefore do not fall within the literal terms of Rule 26(b)(3) for the purposes of this action.³²

The court found that, while the work product doctrine might apply to Farm Bureau's subrogation action, it did not apply to the instant case where Farm Bureau was neither a party nor the insurer of a party.³³

Other courts find that the work product doctrine applies regardless of whether the documents were prepared in anticipation of the litigation in question. For example, in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*,³⁴ the Fourth Circuit Court of Appeals held that "work product material ... is immune from discovery although the litigation in which it was developed has been terminated."³⁵

5. *Overcoming the Work Product Doctrine*

The work product doctrine is qualified. Even if the factual inquiry results in a finding that the documents in dispute were prepared in anticipation of litigation, the documents may still be discoverable upon a showing that the requesting party has substantial need for the information and is unable to obtain the substantial equivalent without incurring undue hardship. Under the work product doctrine, even information gathered or prepared in anticipation of litigation may be discoverable if necessary for a complete airing of the facts. The underlying philosophy of the doctrine thus reflects the view that the eventual outcome of the litigation should be based upon the facts, not the investigatory prowess of either party.³⁶

32. *Id.* at 138.

33. *See also* Procha v. M & N Modern Hydraulic Press Co., 76 F.R.D. 207, 206 (W.D. Wis. 1977); Bunting v. Gainsville Mach. Co., 53 F.R.D. 594, 595 (D. Del. 1971); State *ex rel* J.E. Dunn Constr. v. Sprinkle, 650 S.W.2d 707, 711 (Mo. Ct. App. 1983).

34. 509 F.2d 730 (4th Cir. 1975). *But see* Tackett v. State Farm Fire and Cas. Ins. Co., 653 A.2d 254 (Del. Super.Ct. 1995).

35. *Id.* at 732.

36. *See* McDougall v. Dunn, 468 F.2d 468, 473 (4th Cir. 1972) (citing Tiedman, v. Am. Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958)).

To overcome the work product doctrine the party seeking discovery will often attempt to show that the investigative reports from the claim file contain information which is no longer available. For example, statements of witnesses or documentation of an accident scene may only be available from the insurer's contemporaneous investigation. In *Ogea v. Jacobs*³⁷ plaintiff sued her employer for injuries incurred while at work and sought to discover statements taken from a company executive at or near the time of the accident that had been sent to the employer's insurer. Although the company executive was available to be deposed, the Louisiana Supreme Court held the contemporaneous statements were uniquely relevant such that the opposing party would be unable to obtain their substantial equivalent elsewhere. Accordingly, the court found the substantial need and undue hardship test was met, and the statements were discoverable even though they were prepared in anticipation of litigation.

Most courts apply the substantial need and undue hardship standard more strictly.³⁸ For example, in *Warmack v. Mini-Skools Ltd.*,³⁹ the plaintiff Warmack sought to compel discovery of statements from employees of a day care center taken by the center's insurance adjuster shortly after plaintiff's son was fatally injured. On appeal from denial of a motion to compel, the Georgia appellate court affirmed, holding:

[A]ppellant simply failed to show undue hardship in obtaining the substantial equivalent of the materials. Appellant obtained extensive interrogatories and lengthy depositions from the defending parties and other witnesses; if appellant did not inquire into the same matters as the claims representative, certainly she had the opportunity to do so.⁴⁰

6. Added Protection for Mental Impressions

In *Duplan Corp., v. Moulinage et Retotderie de Chavonoz*,⁴¹ the United States Court of Appeals for the Fourth Circuit held that the mental impressions, legal theories, conclusions and opinions of an attorney are absolutely privileged. Under this rule, mental impressions, theories and legal opinions

37. 344 So. 2d 953 (La. 1977).

38. See Garrity, *supra* note 2, at 28-30 (discussing *Ogea* and stating generally that "a party seeking discovery will not easily relieve the additional burden imposed by the two-pronged test" of substantial need and undue hardship).

39. 297 S.E.2d 365 (1982).

40. *Id.* at 367.

41. 509 F.2d 730 (4th Cir. 1974).

may be redacted from work product documents, even if the documents themselves are discoverable due to substantial need of the opposing party.⁴²

Other courts find that Rule 26(b)(3) provides greater—but not absolute—protection for mental impressions. If the theories and opinions of claims analysts and lawyers are in question, discovery may be permitted.⁴³ As discussed in section III.A. of this article, the opinions of attorneys and analysts may be in issue in bad faith cases and, under the majority rule, may be discovered in certain situations. In non-coverage cases, however, it is difficult to imagine how these mental impressions might be in issue in most situations, and they are more likely to be absolutely privileged in non-coverage cases.

The attorney-client privilege applies to confidential communications with an attorney for the purpose of seeking legal advice.⁴⁴ This includes documents in the insurer's claim file. Unlike the work product doctrine, the attorney-client privilege is absolute and cannot be overcome by a showing of substantial need or undue hardship. Courts are careful to construe the privilege narrowly and often refuse to protect insurer-insured communications under the attorney-client privilege.

III. DISCOVERY IN COVERAGE CASES

1. *Insurer-Insured Communications*

The recent decision in *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corporation*⁴⁵ involved an unsuccessful attempt to extend the attorney-client privilege to communications between an insurer and its insured. In *Linde Thomson* the Resolution Trust Corporation served administrative subpoenas upon a law firm with connections to a failed savings and loan, requesting information concerning “asset transfers and liability insurance coverage and claims.”⁴⁶ The law firm refused to comply with this portion of the subpoena on the ground that the documents were privileged under an “insured-insurer privilege under either state or federal law.”⁴⁷ The trial court directed the law firm to produce a privilege log of documents which might be protected under the work product doctrine or attorney-cl-

42. *See also* ADL Corp. v. Aetna Cas. Sur. Co., 91 F.R.D. 10 (D.Md. 1980) “If those investigative documents in question herein had been ‘prepared in anticipation of litigation,’ this Court would have excised from them all references to the mental impressions, conclusions, opinions, or legal theories of defendant’s representatives and would have ordered only the balance of said documents to be produced.”)

43. *Reavis v. Metro. Property & Liab. Ins. Co.*, 117 F.R.D. 160 (S.D. Cal. 1987).

44. *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981).

45. 5 F.3d 1508 (D.C. Cir. 1993).

46. *Id.* at 1511.

47. *Id.*

ent privilege, but ordered production of all asset transfer information. On appeal, the law firm argued that “the insured-insurer communications would be insulated from production as part and parcel of the attorney-client privilege.”⁴⁸ The United States Court of Appeals for the District of Columbia Circuit found that “[f]ederal courts have never recognized an insured-insurer privilege as such,”⁴⁹ and refused to create such a “broad new privilege.”⁵⁰ However, the court found some merit in the law firm’s claim that the insurer might serve as an intermediate agent of the attorney where the insured communicates its need for legal services through its insurer.⁵¹ The court endeavored to determine “whether protection for insured-insurer communications is coextensive with the ‘logic’ of the attorney-client privilege.”⁵² Noting that the attorney-client privilege must be narrowly construed to protect only “communications made ... for the purpose of obtaining legal advice from the lawyer,”⁵³ the court rejected the law firm’s argument that the privilege extended to communications between the insurer and insured, stating:

[W]e now firmly reject any sweeping general notion that there is an attorney-client privilege in insured-insurer communications. An insured may communicate with its insurer for a variety of reasons, many of which have little to do with the pursuit of legal representation or the procurement of legal advice. Certainly where the insured communicates with the insurer for the express purpose of seeking legal advice with respect to a concrete claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case, the law would exalt form over substance if it were to deny application of the attorney-client privilege. However, a statement betraying neither interest in, nor pursuit of, legal counsel bears only the most attenuated nexus to the attorney-client relationship and thus does not come within the ambit of the privilege ... if what is sought is not legal advice, but insurance, no privilege can or should exist.⁵⁴

The *Linde Thomson* court concluded that, while the work product doctrine is broader than the attorney-client privilege, the documents in question were not prepared in anticipation of “a specific claim supported by concrete facts which would likely lead to litigation.”⁵⁵ Rejecting “any notion that

48. *Id.*

49. *Id.* at 1514.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1515.

54. *Id.*

55. *Id.*

insured-insurer communications as such warrant an extension of the federal work product doctrine beyond its current confines,”⁵⁶ the court found the doctrine inapplicable.

2. *Investigation by an Attorney*

While the involvement of an attorney is often relevant to determine whether litigation was anticipated for purposes of the work product privilege, an attorney’s involvement does not always impress the results of an investigation with the attorney-client privilege. Where the insurer engages an attorney to conduct a factual investigation, the attorney-client privilege is often found to be inapplicable, and the documents might be protected only if prepared in anticipation of litigation and otherwise within the work product doctrine.

In *National Farmers Union Property and Casualty Co. v. Denver District Court*,⁵⁷ for example, the court held that the attorney-client privilege did not shield files created by an outside attorney hired by the insurer to investigate an accident. With fidelity insurers employing many claims representatives who are also attorneys, the same argument as to the absence of the attorney-client privilege is arguably applicable. As discussed in Section III.A.2. below, however, several courts have found that factual inquiries by attorneys are covered by the attorney-client privilege if they were undertaken to enable the attorney to provide legal advice or counseling.

In litigation focusing upon coverage, the scope of relevant documents requested from the insurer is arguably expanded. Where the insured has sued the insurer for coverage or where the insurer is sued for “bad faith,” the acts and obligations of the insurance company are directly in issue. More of the insurer’s files and records are arguably pertinent than where the insurer is not directly involved.

Bad faith claims tend to expand the focus of the insured’s discovery efforts and sponsor arguments of entitlement to extensive discovery of documents and records. Allegations of bad faith may put in issue the advice of counsel and work done investigating the claim so that the attorney-client privilege and work product doctrine may be attenuated. However, the mere presence of a bad faith allegation does not necessarily abrogate the attorney-client privilege or the work product doctrine, nor does a bad faith claim make all of the insurer’s files relevant to the subject matter of the claim.⁵⁸ It may even be necessary or desirable to the insurer to completely waive the

56. *Id.* at 1516.

57. 718 P.2d 1044 (Colo. 1986).

58. For an excellent discussion of discovery in bad faith cases see Elizabeth Medaglia et al., *Privilege, Work Product and Discovery Issues in Bad Faith Litigation*, 32 TORT & INS. L. J. 1 (1996).

privilege in the bad faith part of the case in order to claim that it acted reasonably and upon the advice of its attorney.

Courts often look beyond superficial bad faith claims to prevent wholesale discovery of the insurer's claim file when there is little indication that the case provides sufficient basis for the bad faith allegations. For example, in *United States Fire Insurance Company, v. Clearwater Oaks Bank*,⁵⁹ a bank sued its fidelity insurer for losses sustained from worthless checks. When the insurer denied coverage, the bank sued for bad faith failure to pay the claim and, as often happens, sought both the insurer's file involving the underlying claim and all files related to claims by other insureds on similar bonds. The trial court ordered production, and the insurer appealed.

The appellate court ruled that the nature of the claim precluded any possibility that the sought-after claim files were relevant, as the case did not involve a failure to defend. The court characterized the discovery issue as arising in the context of a mere coverage dispute, and stated that such a suit could not give rise to punitive damages. The court denied the bank's request, finding that the insured bank had failed to show how claims on similar bonds could be relevant to a first-party coverage dispute.

Other courts are more liberal in applying the relevance standard in coverage cases and allow discovery tempered only by applicable work product and attorney-client privileges. These courts find that under the broad standard of Rule 26, the insurers' entire file could conceivably "lead to the discovery of admissible evidence."⁶⁰

iv. The Relevant Claim File

1. *The Work product Doctrine*

The work product analysis is substantially the same in coverage and non-coverage cases. In both kinds of disputes courts are divided on whether insurance investigations are always, never, or sometimes prepared in anticipation of litigation. As in non-coverage cases, the emerging trend calls for a case-by-case inquiry into whether litigation was anticipated at the time the documents were prepared. The Arizona Supreme Court's decision in *Brown v. Superior*,⁶¹ which provides a thorough review of the various approaches applying the work product doctrine to coverage cases, arose from an insured's claim on its fire insurance policy. The insurer acknowledged coverage for

59. 421 So. 2d 783 (Fla. Ct. App. 1982).

60. See, e.g., *Brown v. Super. Ct. in & for Maricopa County*, 670 P. 2d 725 (Ariz. 1983). But see *Fidelity and Deposit Co. of Md. v. McCulloch*, 168 F.D. 516 (E.D. Pa. 1996); *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.*, 168 F.R.D. 554 (E.D. La. 1996).

61. 670 P.2d 725.

physical damage to the insured's retail establishment but refused to compensate the insured for "loss of earnings" caused by fire. The insured sued for "bad faith" based upon the handling of the loss of earnings claim and sought production of the claim file pertaining both to the physical damages and loss of earnings. When the insured moved to compel production of these documents, the trial judge held an *in camera* inspection and eventually denied discovery of the entire claim file, stating only that the material was "not discoverable."⁶²

On application for a writ of mandamus, the Arizona Supreme Court found that portions of the claim file were protected by the work product doctrine while other portions were discoverable. It disagreed with the notion that only documents prepared under the direction of counsel are work product, stating:

[T]he plain language of Rule 26(b)(3) rejects the proposition that only materials prepared or requested *by counsel* are entitled to protection from discovery. The rule protects materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent) ... [t]herefore, the "direction of counsel approach" ignores the clear import of the rule ...⁶³

The *Brown* court also rejected the rule that "all statements and information secured by an insurance company after an occurrence which might give rise to a claim against it are work product."⁶⁴ The Court reasoned that where coverage is at issue it is particularly unlikely that the insured's original claim creates an expectation of litigation.

The court next enumerated factors to consider in determining what amounts to anticipation of litigation. The factors identified in *Brown* are often applied by those courts which follow a fact specific approach to coverage related cases:

1. "[T]he nature of the event that prompted the preparation of the materials and whether the event is ... likely to lead to litigation."⁶⁵ The court described this factor as encompassing a sliding scale, under which the greater the likelihood that a particular set of facts might give rise to

62. *Id.* at 729.

63. *Id.* at 731.

64. *Id.*

65. *Id.* at 733.

litigation, the greater the probability the claim file was prepared in anticipation of litigation.

2. The ratio of legal analysis or opinion contained in the sought-after materials compared to the factual contents.⁶⁶ The greater the purely factual information, the less likely the document was prepared in anticipation of litigation.

3. The involvement of an attorney in preparation of the material.⁶⁷

4. Whether the materials sought were prepared in the ordinary course of the insurer's business.⁶⁸

5. When the materials were prepared. Considering this component, the court should "take into specific account whether claims were presented to the insurer at the time of preparation of the materials, and whether negotiations of any kind had occurred."⁶⁹

Applying these factors, the court concluded that litigation was anticipated when the insurer notified Brown of his failure to present adequate proof of the loss of earnings claim and advised that all rights under the policy were being reserved due to a "recent finding that Brown had misrepresented certain facts at the time the policies were issued."⁷⁰ After the insurer took this position, litigation was "not merely possible, but quite probable,"⁷¹ and materials prepared thereafter were "prepared in anticipation of litigation rather than as part of [the insurer's] regular business of handling claims."⁷²

What often determines whether the work product privilege applies in bad faith cases is whether the plaintiff's claim involves the integral operations of the insurer and the manner in which the insured's claim was handled. Sometimes the operative facts are reflected nowhere better than in the internal records of the insurer. Some courts, albeit a minority, hold "that the mere allegation of bad faith in a complaint will satisfy the substantial need and undue hardship requirement, especially with respect to access to the relevant claims file."⁷³

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Medgalia, *supra* note 58, at 14.

The minority view has correctly been criticized as superficial and as encouraging unfounded allegations of bad faith.⁷⁴ Consequently, a number of courts require the plaintiff to show that the documents are actually needed to prove that the claim was mishandled.⁷⁵ Other courts avoid wholesale discovery of work product documents by holding that the insured can obtain evidence of how the claim was processed by deposing the agents and witnesses involved in the investigation. When that occurs, the undue hardship requirement is not met, the work product privilege prevails.⁷⁶

2. *The Attorney-Client Privilege*

As observed above, the attorney-client privilege protects “communications between a lawyer and client [intended to] facilitate the rendition of legal services or advice.”⁷⁷ Strictly non-legal communications between attorney and client are discoverable. For this reason, some courts have held that communications with an attorney related to investigation of claims are not protected.

For example, in *Mission National Insurance Co. v. Lilly*,⁷⁸ the insured moved to compel documents prepared by attorneys retained by the insurer “as a matter of course to conduct adjustment investigations.”⁷⁹ The court found that documents prepared by the attorneys were actually prepared as part of an ordinary business function and were not privileged. The court noted that using attorneys in the concurrent role of claims investigator and counsel creates difficult questions. When that occurs, the court held it would not “be fair to allow the insurer’s decision in this regard to create a blanket obstruction to discovery of its claims investigation.”⁸⁰

In *Dunn v. State Farm Fire & Casualty Co.*⁸¹ the Fifth Circuit reached the opposite conclusion, holding that attorney investigations intended to facilitate legal service or advice are privileged. State Farm denied Ms. Dunn’s fire insurance claim based on her husband’s confession that he set the house on fire intentionally. Ms. Dunn had separated from her husband prior to the

74. See, e.g., *Travelers Indem. Co. v. Allied-Signal, Inc.*, 124 F.R.D. 101, 103 (D.Md. 1989); *Md. Am. Gen. Ins. Co. v. Blackmon*, 639 S.W. 2d 455, 458 (Tex. 1982).

75. *Id.*

76. *Id.*

77. *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869 (5th Cir. 1991).

78. 112 F.R.D. 160 (D. Minn. 1986).

79. *Id.* at 162.

80. *Id.* See also *Western Nat’l Bank v. Employers Ins. of Wausau*, 109 F.R.D. 55 (D. Colo. 1985).

81. 927 F.2d 869 (5th Cir. 1991).

fire and asserted that her claim was not tainted by his arson. Seeking to prove that State Farm failed to examine her claim adequately, Ms. Dunn requested production of all the insurer's investigatory files. State Farm refused, asserting that the investigation was undertaken by its attorney and was privileged. The court agreed that the attorney's investigative tasks were "related to the rendition of legal services" and thus privileged.⁸²

Any conflict between *Mission* and *Dunn* may be resolved by comparing the facts of the two cases. In *Mission National*, the insurance company regularly retained the same law firm to investigate all claims in a certain geographic area, while State Farm retained counsel to investigate Ms. Dunn's claim only after her estranged husband confessed to setting fire to the house intentionally. In *Dunn* it is clear that counsel was retained for advice and defense relating to a particular claim, rather than merely as an investigator and adjuster as a matter of course.

Application of the attorney-client privilege may be severely limited in coverage cases of two kinds. First, the privilege is often held to have been waived, intentionally or unwittingly, if the insurer places the advice of its counsel in issue and seeks to avoid liability by claiming to have acted upon what its attorney told it about the claim. Second, the privilege may not apply between insurer and insured regarding communications with an attorney who has represented both parties in a matter of common interest. Therefore, where the insurer hires counsel to defend the insured from discovering its communications with defense counsel the insured, the insurer may not be able to prevent the insured from discovering its communications with defense counsel.

3. Waiver of the Attorney-Client Privilege

The attorney-client privilege may be waived by the insurance company's placing the advice of counsel in issue. It is generally held that the attorney-client privilege is waived if the insurer pleads that it denied the plaintiff's claim in reliance upon the advice of counsel.⁸³ Moreover, some courts find that the insurer's communications with its coverage attorney are placed in issue by the very nature of the bad faith claim. For example, in *Silva v. Fire Insurance Exchange*⁸⁴ the court found the attorney-client privilege does not apply in a bad faith case where the issue is the insurer's consideration of its obligation to pay the claim:

82. *Id.* at 875.

83. *State Farm Fire and Cas. Co. v. Super. Ct.*, 254 Cal. Rptr. 543 (Cal. Ct. App. 1988).

84. 112 F.R.D. 699 (D. Mont. 1986).

Under ordinary circumstances, a first-party bad faith claim can be proved only by showing the manner in which the claim was processed, and the claims file contains the sole source of much of the needed information... . [T]he time worn claims of work product and attorney-client privilege cannot be invoked to the insurance company's benefit where the only issue in the case is whether the company breached its good faith duty in processing the insured's claim.⁸⁵

By holding that the attorney-client privilege does not apply because the bad faith claim "can only be proved by showing the manner in which the claim was processed,"⁸⁶ the *Silva* court implies that the attorney-client privilege may be overcome by a showing of need. This rationale blurs the attorney-client privilege analysis with the work product analysis, substantially weakening the protection afforded by the attorney-client privilege. Unlike the work product privilege, the attorney-client privilege is absolute and cannot be overcome by a showing of need.⁸⁷

A better analysis recognizes that the attorney-client privilege is absolute, subject only to a definite waiver of that privilege. This rationale was applied by the Montana Supreme Court in *Palmer v. Farmers Insurance Exchange*,⁸⁸ where the court held that the attorney-client privilege survives if the insurer was influenced by — but did not rely upon — the advice of counsel. After a jury verdict of \$750,000 in compensatory damages and \$750,000 in punitive damages, Farmers Insurance appealed, arguing that the trial court erred in admitting eight letters from the insurer's defense attorney. The letters were marked "confidential reports," and were obtained by the plaintiff only after the court compelled production of the insurer's entire claim file, including all attorney-client communications prior to the date the insured's attorney threatened suit for bad faith.⁸⁹ In these letters the attorney advised the insurer on matters relating to the plaintiff's claim, including an evaluation of witnesses, investigation, trial preparation, defense strategy, and prospects for successful defense. The insurer argued that the jury was prejudiced because the letters "allowed [the plaintiff] to focus much of the bad faith case on the litigation tactics of defense counsel."⁹⁰ The court agreed and ordered a new trial.

85. *Id.* at 699-700.

86. *Id.*

87. See *Upjohn Co. v. United States*, 449 U.S. at 401-02.

88. 861 P. 2d 895 (Mont. 1993).

89. In granting the plaintiff's motion to compel, the court ruled that "defendant's assertion of the attorney-client privilege with respect to those claim file documents which constitute communications between it and its counsel is overcome by plaintiff's need for such materials in preparation of its bad faith claim against defendant." *Id.* at 904.

90. *Id.*

After analyzing the applicability of the attorney-client privilege in bad faith cases, the court noted that mere allegation of bad faith does not itself abrogate the privilege. If the bad faith action involves former dual representation, the privilege may not be asserted by either party against the other. However, if the bad faith action is one where “the claimant and the insurer are in adverse positions from the outset of the underlying case,”⁹¹ the parties are never represented by the same attorney, and the dual representation exception does not apply. Under these circumstances, the privilege is unaffected by a bad faith claim unless it is waived. The court found that because Palmer and Farmers Insurance were adverse from the outset the privilege survived.

With regard to whether the insurer waived the privilege by placing the advice of counsel in issue, the court held: “the attorney-client privilege applies ‘unless the insurer directly relies on advice of counsel as a defense to the bad faith charge.’”⁹² Farmers Insurance testified that although it “listened to the advice of counsel in deciding to deny Palmer’s uninsured motorist claim, Farmers did not directly rely on advice of counsel as a defense to Palmer’s bad faith claim.”⁹³ Therefore, the court concluded that the privilege was not waived and that the documents were neither discoverable nor admissible.

4. *The Dual Representation Exception*

The attorney-client privilege generally does not apply when an attorney represents two parties with a common interest and those parties later sue each other. Under the dual representation exception, communications between defense counsel and the insurer during litigation to determine the insured’s liability may be discovered in subsequent coverage or bad faith litigation brought by the insured.⁹⁴

In *Central National Insurance Co. of Omaha v. Medical Protective Co. of Fort Wayne, Indiana*,⁹⁵ it was held that a primary insurer could not assert the attorney-client privilege against an excess insurer. The excess insurer sued the primary carrier for bad faith failure to settle an action against the insured. In its discovery requests, the excess insurer sought production of “information and documents relating to the settlement negotiations in the

91. *Id.*

92. *Id.* at 907, quoting *Spectra-Physics v. Super*. Ct. 244 Cal. Rptr. 258, 261 (Cal. Ct. App. 1988).

93. *Id.* at 907.

94. *Simpson v. Motorists Mutual Ins. Co.*, 494 F.2d 850 (7th Cir. 1974).

95. 107 F.R.D. 393 (E.D. Mo. 1985).

claim against the insured.”⁹⁶ The primary carrier asserted the attorney-client privilege, but the court ordered the documents produced. Conceding that the negotiation communications would normally be protected by the attorney-client privilege, the court held that the privilege does not apply when the lawyer represents “two clients in a matter of common interest.”⁹⁷ When the insured has excess liability coverage, “the duty owed the excess carrier by the primary carrier is identical to that owed to the insured,”⁹⁸ and the attorney-client privilege cannot be asserted against the excess carrier.⁹⁹

The joint defense exception is generally held inapplicable to an insurer’s communications with an attorney prior to the insurer’s accepting defense of the insured under the policy. Thus, where the insurance company engages counsel to advise as to whether coverage exists, the joint defense exception does not apply, and communications are protected in subsequent coverage litigation, unless the privilege is waived.¹⁰⁰

V. Discovery Beyond the Relevant Claim File

Plaintiffs often seek documents which they contend show the insurer mishandled the claim, failed to follow its own internal procedures, or refused payment despite apparent underwriting intent that the claim be covered. Therefore, underwriting files, similar claims files, and documentation of reserves are often the subject of discovery disputes between insurer and insured. The attorney-client and work product privileges seldom apply in these cases because the documents sought are prepared by non-lawyers in the routine business of the insurer. These requests are generally defended on grounds that the documents sought are irrelevant and outside the scope of permissible discovery.

1. *Discovery of Underwriting Intent in Coverage Cases*

Coverage claimants often seek to prove that the underwriting intent of the policy in question includes coverage of the claim. To demonstrate such intent, claimants routinely seek discovery of claims files for similar claims,

96. *Id.* at 394.

97. *Id.*

98. *Id.* at 394-395.

99. The court went on to find that the requested documents were not protected by the work-product doctrine because the excess carrier had substantial need for the materials, stating: “such communications cut to the heart of its claim ... for bad faith failure to settle a claim.” *Id.* at 395.

100. *See, e.g., Aetna Cas. & Sur. Co. v. Super. Ct.* 200 Cal. Rptr. 471, 475 (Cal. Ct. App. 1984).

underwriting manuals and the underwriting file for the policy in question.¹⁰¹ Moreover, claimants generally attempt to depose the underwriter as to the meaning of disputed portions of the policy.¹⁰²

The broad discovery standard of the rules of civil procedure may foster permissive disclosure of underwriting documents in coverage disputes, and many courts “permit extensive pretrial discovery of information and documents in the insurer’s possession, custody, or control pertaining to the insurer’s interpretation and/or previous application of the policy language at issue.”¹⁰³ In *Nestle Foods Corporation v. Aetna Casualty and Surety*¹⁰⁴ an insured commenced a declaratory judgment action against Aetna, asserting coverage for environmental damage. Upon Nestle’s motion to compel, the court sought to determine “whether material relating to the drafting history of the policy language in question is relevant to this action.”¹⁰⁵ Aetna claimed that the information was not discoverable because it would be inadmissible at trial under the parol evidence rule. The court rejected that argument stating, “defendants’ position that such extrinsic evidence would be inadmissible at trial is not the standard by which relevancy for discovery purposes is measured.”¹⁰⁶ The court went on to hold that, because extrinsic evidence could be admissible if the policy is determined to be ambiguous, the drafting history of the policy was discoverable. As to the parameters of discovery allowed, the court found that the language of the policies was standardized to a great extent, and that plaintiff is “entitled to review the drafting history for the operative policy language, even though it may predate these respective policies.”¹⁰⁷ Similarly, in *Owens-Corning Fiberglass Corporation v. Allstate Insurance Co.*¹⁰⁸ an Ohio court overruled an insurer’s

101. See Douglas G. Houser and Randy L. Arthur, *The Role of the Insurance Underwriter in Claims Disputes*, 31 TORT & INS. L.J. 573, 578 (1996), quoting *Lawyers Title Ins. Corp. v. U.S. Fidelity & Guar. Co.*, 122 F.R.D. 567, 569 (N.D. Cal. 1988), in which the court explained the probable motive for claimants’ attempts to discover an insurer’s file as follows:

At its heart, plaintiffs objective may be to learn what [the defendant insurer] ... secretly think[s] the language in the contract means. Plaintiff may hope that it will find documents which suggest an interpretation of the relevant contract language that is arguably inconsistent with the position taken by [the insurers] at trial, thus creating some doubt in the mind of the trier of fact about what [the insurer’s] real view of the contract language is.

102. See Houser and Arthur, *supra* note 101, at 573.

103. *Id.* at 577-78 (providing a detailed analysis of the emerging role of the insurance adjuster in claims analysis and litigation.)

104. 135 F.R.D. 101 (D. N.J. 1990).

105. *Id.* at 102.

106. *Id.*

107. *Id.* at 101. The Nestle court cited *Olin Corp. v. Ins. Co. of N. Am.*, No. 84 Civ. 1968, slip op. at 6-7 (S.D.N.Y. July 10, 1986) for the proposition that “where the court had already interpreted the CGL policy language in question... there was no need for defendant to provide discovery on drafting history.”

objections on grounds of relevance, undue burden, confidentiality and vagueness, and ordered production of underwriting documents. In granting a substantial portion of Owens-Corning's motion to compel, the court accepted the contention that "the [underwriting] information is pertinent to what the defendants knew about the risks of asbestos and when they started the use of asbestos exclusion," and further agreed that "such information would be useful in determining whether the defendants intended to cover asbestos liability."¹⁰⁹

While it appears that a large number of courts allow discovery of underwriting files in coverage and bad faith cases, other courts hold discovery of underwriting intent to be irrelevant. For example, in *Rhone Poulenc Rorer, Inc. v. Home Indemnity Co.*,¹¹⁰ the court found underwriting intent neither relevant nor discoverable until there has been a finding that the policy provisions in question are ambiguous.¹¹¹ Similarly, *Olin Corp. v. Insurance Company of North America*,¹¹² holds that policy history and underwriting information is not discoverable where the provisions in question have been interpreted by the court in prior decisions. Moreover, the argument of undue burden is often successful in narrowing underwriting discovery as occurred in *Nestle Foods, supra*, where the court limited discovery to underwriting files from the last ten years.¹¹³

2. *Discovery of Similar Claim Files and Reserves*

With regard to discovery of claims files of other insureds, a majority of courts "deny any discovery of the records of other insureds, either on grounds that it will not lead to the discovery of relevant evidence, or on the ground that the relevance is so clearly outweighed by the burden of production."¹¹⁴ In *Leski Inc. v. Federal Insurance Co.*,¹¹⁵ the federal district court found that the content of similar claims files "would be relevant to the insurer's

108. 660 N.E. 2d 765 (Ohio 1993).

109. *Id.* at 768.

110. 139 F.R.D. 609, 612 (E.D. Pa. 1991).

111. *See, e.g., id.*; *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317 (E.D. Mich. 1988).

112. No. 84 Civ. 1968, slip op. at 6-7 (S.D.N.Y. July 10, 1986).

113. *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 135 F.R.D. 101, 106 n. 6 (D. N. J. 1990).

114. *North River Ins. Co. v. Mayor and City Council of Baltimore*, 680 A.2d 480 (Ct. App. Md. 1996).

115. 129 F.R.D. 99 (D. N. J. 1989).

interpretation of the language of an identical policy in an identical situation.”¹¹⁶ However, the court granted the insurer’s motion for protective order, holding that the burden to the insurer was “disproportionate” to the declaratory judgment action filed by the plaintiff.”¹¹⁷ The court deemed it appropriate to exercise its discretion to limit discovery “because although ‘[the similar claim files] may be considered remotely relevant, [their] production would be unduly burdensome and disproportionate to the case.”¹¹⁸

A similar result was reached in *Clark Equipment v. Liberty Mutual Insurance Co.*¹¹⁹ In *Clark* the insured moved to compel production of underwriting files relating to Liberty Mutual’s decision to “provide insurance coverage for certain risks” and Liberty Mutual’s decision to “cease offering insurance coverage for the same risks.”¹²⁰ In response, Liberty Mutual submitted affidavits describing the “massive burden involving time, effort, and expense, as well as the disruption of business operations that would be imposed upon the defendants if discovery of the policyholders claims would be allowed.”¹²¹ The court agreed, stating that “production of the files of other insureds not only involves enormous inconvenience and management difficulties, but also entails a frightening potential for spawning unbearable side litigation which, in my view, defeats the purpose and spirit of the discovery rules themselves.”¹²²

Other courts appear less sympathetic to the insurer. In *Colonial Life & Accident Insurance Co. v. Superior Court of Los Angeles*,¹²³ the California Supreme Court held that the insured was entitled to discover similar files handled by the same adjuster who analyzed the plaintiff’s claim. The court found “meritless”¹²⁴ the insurer’s argument that these files were irrelevant, and ordered production of the documents despite the insurer’s defense of undue burden.

A moderate approach which allows limited discovery of similar claim files has been adopted by a number of courts. In *Stonewall Insurance Co. v.*

116. *Id.* at 105 (citing *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 283 (D.D.C. 1986)); *Nat’l Un. Fire Ins. Co. v. Stauffer Chemical Co.*, 558 A.2d 1091, 1094-95 (Del. Super. Ct. 1989).

117. *Leski, Inc. v. Fed. Ins. Co.*, 129 F.R.D. at 106

118. *Id.*

119. No. C.A. 89C-OC-173, 1995 WL 867344 (Del. Super. Ct. April 21, 1995).

120. *Id.* at *1.

121. *Id.* at *2.

122. *Id.*

123. 647 P. 2d 86 (1982).

124. *Id.* at 90.

*National Gypsum Co.*¹²⁵ the court ordered production of the “ten earliest and most recent claims files subsequent to 1969 that deal with claims asserted regarding asbestos in buildings, leaded paint, foam insulation and pollution and/or toxic or hazardous waste.”¹²⁶ Such a limited order seeks to allow plaintiff some leeway in uncovering similar claims files while structuring the discovery to reduce the burden on the insurer.”¹²⁷

In *Mead Reinsurance Co. v Superior Court of Riverside County*¹²⁸ the court disposed of the insurer’s defense that production of similar claim files would be unduly burdensome by ordering that the insurer produce the names and addresses of parties with similar claims during the relevant time period. The plaintiff was allowed to use a court approved form letter to obtain permission from former claimants for the insurer to disclose the contents of their claim file. This arrangement allowed the plaintiff access to similar files while substantially reducing the burden of production to the insurer.

Discovery of reserves presents a similar issue. Information relating to reserves is not generally discoverable. The most widely accepted view is that reserve information is “not an admission or evaluation of liability but involves internal financial stability” and is therefore not relevant.¹²⁹ For example, in *Hoechst Celanese Corp., v. National Union Fire Insurance Co. of Pittsburgh, Pa.*¹³⁰ the court denied plaintiff’s motion to compel discovery of reserve information on grounds of relevance, stating that “reserves are accounting entries which the insurance company regularly uses to set aside sufficient funds in the event of policyholder liability.”¹³¹ This rationale is logical and should enable the insurer to obtain a protective order for reserve information in most cases.

125. No. 86 Civ. 9671, 1988 WL 96159 (S.D.N.Y. Sept. 6, 1988).

126. *Id.* at *2. *See also* Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 135 F.R.D. at 107; Nat’l Un. Fire Ins. Co. v. Stauffer Chem. Co., 558 A.2d at 1094.

127. *See* Nat’l Un. Fire Ins. Co. v. Stauffer Chem. Co., 558 A.2d at 1095 (where discovery claim files of other insureds is necessary, “appropriate measures should be taken to protect the confidentiality of the insureds.”). For example, the court may authorize the insurer to redact confidential or proprietary information such as trade secrets or business practices. *See* Nestle Foods Corp. v. Aetna Casualty & Sur. Co., 135 F.R.D. at 107.

128. 188 Cal. App. 3d 313, 232 Cal. Rptr. 752 (4th Dist. 1986).

129. Clark Equip. Co. and VME v. Liberty Mut. Co., No. CA. 89C-OC-173, 1995 WL 867344 (Del. April 21, 1995).

130. 623 A.2d 1099 (Del. Super. 1992). *See also* Nat’l Union Fire Ins. Co. v. Stauffer Chemical Company, 558 A.2d 1091; Union Carbide Corp. v. The Travelers Indemn. Co., 61 F.R.D. 411 (D. Pa. 1973).

131. 623 A.2d 1099, 1109.

VI. CONCLUSION

As observed in the foregoing discussion, generalizations regarding discovery of an insurer's file and records is unpredictable and necessarily varies by jurisdiction. While the attorney-client privilege and work product doctrines provide substantial protection in most cases, they may not shield some information prepared during claims investigation or underwriting. In addition, these privileges might be attenuated, or abrogated completely, in "bad faith" or other coverage related cases. Insurers should be mindful that their records may eventually become subject to scrutiny by an opponent in litigation. This potential implication should not interfere with a thorough and forthright investigation of the facts. However, investigators, claims analysts and attorneys should forego entering gratuitous and completely unnecessary remarks into the claims file, and they should insure that factual investigations are objective and accurate.