MEALEY'S™ LITIGATION REPORT
Insurance Bad Faith

'Bad-Faith' Discovery: Claim Files, Training Materials, Personnel Files, And The Kitchen Sink

by
John J. Pappas
and
Janice C. Buchman

Butler Pappas Weihmuller Katz Craig LLP

A commentary article reprinted from the January 31, 2013 issue of Mealey's Litigation Report: Insurance Bad Faith

LexisNexis®

Commentary

'Bad-Faith' Discovery: Claim Files, Training Materials, Personnel Files, And The Kitchen Sink

By
John J. Pappas
and
Janice C. Buchman

[Editor's Note: John J. Pappas and Janice C. Buchman are with the law firm of Butler Pappas Weihmuller Katz Craig LLP, which has offices in Tampa, Chicago, Charlotte, Philadelphia, Mobile, Tallahassee, and Miami. Mr. Pappas and Ms. Buchman are experienced trial and appellate lawyers in the firm's Coverage and Extra-Contractual Departments. Any commentary or opinions do not reflect the opinions of Butler Pappas or Mealey's. Copyright © 2013 by the authors. Responses are welcome.]

I. Introduction

A recent discovery order in the federal court case of *Signature Development, LLC v. Mid-Continental Casualty Company*[1] is illustrative of our liberal discovery. Note, this liability insurer has yet to be found liable or guilty of any wrongdoing. Signature alleges, however, that the corporate defendant insurer breached the contract of insurance, committed "bad-faith," breached its fiduciary duty to its insured, committed unfair trade practices, intentionally inflicted emotional distress and vexatiously refused to pay.[2] Based upon these allegations alone, the court addressed the scope and burden of discovery.

II. Federal Rule 26(b)

Federal and state courts have been forced for years to intervene when the parties to a dispute wrestle with the scope of discovery. *Signature* acknowledges that "[t]he scope of discovery under Rule 26(b) is extremely broad," citing the 1994 edition of the treatise entitled *Federal Practice & Procedure*, which itself cited to the United States Supreme Court's 1947 seminal decision on discovery in *Hickman v. Taylor*.[3] Although the Court's decision in *Hickman v. Taylor* is best known for establishing the "work product doctrine,"[4] *Hickman's* explanation of the rationale for broad discovery has also been frequently cited:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. *Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation*. [*Emphasis* supplied.] To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30(b) and (d) and 31(d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.[5]

It is also interesting to note the United States Supreme Court's footnote in *Hickman* to its "fishing expedition" comment, in which it quoted from a University of Chicago Law Review article stating:

> One of the chief arguments against the "fishing expedition" objection is the idea that discovery is mutual-that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position.[6]

The idea that the discovery obligation is "mutual" and that "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation" seemed to justify such broad discovery, and allow something of a "fishing expedition."

Thirty years later, the United States Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*[7] further elaborated on the general scope of discovery, as defined by Fed.Rule Civ.Proc. 26(b)(1) in effect at that time, which stated "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . ."[8] In its remarks on the scope of this Rule, and citing to *Hickman*, the Supreme Court stated:

> The key phrase in this definition-"relevant to the subject matter involved in the pending action"-has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.[9]

The United States Supreme Court also noted in its footnote to its citation to *Hickman* (which itself quoted from the 1976 second edition of Moore's treatise entitled *Federal Practice*) that "the court should and ordinarily does interpret 'relevant' very broadly to mean matter that is relevant to anything that is *or may become* an issue in the litigation."[10] The Supreme Court did, however, acknowledge that "discovery, like all matters of procedure, has ultimate and necessary boundaries,"[11] and explained that:

> Discovery of matter not "reasonably calculated to lead to the discovery of admissible evidence" is not within the scope of Rule 26(b)(1). Thus, it is proper to deny discovery of matter that is relevant only to claims or defenses that have been stricken, or to events that occurred before an applicable limitations period, unless the information sought is otherwise relevant to issues in the case. For the same reason, an amendment to Rule 26(b) was required to bring within the scope of discovery the existence and contents of insurance agreements under which an insurer may be liable to satisfy a judgment against a defendant, for that information ordinarily cannot be considered, and would not lead to information that could be considered, by a court or jury in deciding any issues.[12]

III. Insurance 'Bad-Faith' Claims

A "third-party bad-faith" action concerns a case in which an insured sues his own liability insurance company for "bad-faith" concerning a claim, typically for failing to settle a claim or providing a defense.[13] In *Signature*, the defendant liability insurer withdrew its defense of Signature. In this "third-party" context, the liability of the insurer to its insured arises because of the *fiduciary* relationship that exists between the insured and the insurer.[14] Third-party claims files, which are thus created in defense of the insured and to which the insured has full access, are typically discoverable by the insured. In fact, most of the communications evidenced by such a third-party claims file were already addressed and sent to the insured, including attorney-client privilege communications.

As the authors of this commentary have previously stated in *"The Begrudged 'Insurance Bad-Faith-Suit' Exception to the Attorney-Client Privilege*:"

> [A] third-party claim from inception has a fiduciary relationship between the insured

> and the insurer and the mutually acceptable defense counsel. The insurer and defense counsel are contractually and ethically obligated to defend the insured and represent the insured in such a defense. None of the communications defense counsel has with the insurer can ever be protected as privileged from the insured. This is because a mutually acceptable defense counsel is first and foremost the attorney for the insured. After all, it is the insured who defense counsel is defending. Everything that attorney knows, certainly his or her legal opinions and recommendations, the insured is entitled to receive, and, indeed, should receive. In a third-party triumvirate relationship all defense counsel's opinions and mental impressions are for the benefit of the insured. The "client" in such a relationship is from the onset the insured. All this the insured is entitled to pursuant to a liability carrier's "duty-to-defend" the insured.[15]

In *Chitty v. State Farm Mut. Auto. Ins. Co.*[16] the federal court in South Carolina explained why, in the context of a "third-party" liability excess judgment "bad-faith" insurance claim, the insurance file is created on behalf of the insured, and therefore the entire file is typically discoverable by the plaintiff," stating:

> The papers and writing which [Plaintiff] seeks are not related to or were not prepared by its attorney for the present action between [the liability carrier] and [the Plaintiff]. These papers were prepared in a different action at an earlier time when the same attorney represented both [the liability carrier] and [the Plaintiff]. It has been held that, where two parties are represented by the same attorneys for their mutual benefit, the communications between the parties are not privileged in the later action between such parties or their representatives.[17]

Courts in other jurisdictions have similarly held that the claim file in the underlying "third-party" liability case is discoverable, although they do not always explain their decisions. For example, in a New York case, *Groben v. Travelers Indem. Co.*,[18] which was a similar type of "third-party bad-faith" case involving an excess judgment against the insured, the court stated only, "[f]or the guidance of the parties, however, it should be pointed out that it was held in *Colbert v. Home Ind. Co.* that the objections of privilege[,] work product of any attorney and material prepared for litigation are legally insufficient in a case such as this."[19] Like *Groben*, the court in *Colbert v. Home Ind. Co.*[20] did not explain its rationale for permitting discovery of the "third-party" liability defense claim file. Although it explained in detail the facts of the underlying "third-party liability case, the *Colbert* court stated only that "plaintiff seeks to search defendants' files of the underlying negligence actions to ascertain if there is any evidence therein to support his claim of bad-faith on defendants' part."[21]

Similarly, in *Dumas v. State Farm Mutual Auto Ins. Co.,*[22] in which the insured sued its insurer for "bad-faith" in its handling of its defense in a "third-party" case, *Dumas* sought production of the liability insurance carrier's claim file in the original tort action, a claim file that was indeed prepared, at least in part, in behalf of the insured, pursuant to the liability carrier's duty to defend a "third-party's" suit against him. That "third-party" liability claim file also included mutually acceptable defense counsel's communications, work product, and some of the liability carrier's representations to that attorney. As the Supreme Court of New Hampshire stated in *Dumas*:

> Defendant argues that such an order invades the privileged communications of the defendant and its counsel. The argument fails to take into account that the attorney it engaged in that case represented both the defendant and the present plaintiff Dumas. '(W)here two parties are represented by the same attorneys for their mutual benefit, the communications between the parties are not privileged in later action between such parties or their representatives.'[23]

Based on the nature of a dispute between an insured and its liability carrier, as well as the considerations articulated by these courts, it is certainly understandable why the claim file from the underlying litigation, for which the liability carrier is providing a defense, would be the subject of discovery in a "bad-faith" litigation. Not only is it calculated to lead to the discovery of admissible evidence, but this defense claim file, to

which the insured already had full access, was created for the benefit of the insured.

Under South Dakota law, as in many jurisdictions, an insurer does not engage in actionable "bad-faith" by denying coverage if the insured's claim is fairly debatable.[24] As the Supreme Court in South Dakota stated:

> [F]or proof of bad faith, there must be an absence of a reasonable basis for denial of policy benefits [or failure to comply with a duty under the insurance contract] and the knowledge or reckless disregard [of the lack] of a reasonable basis for denial[.] [I]mplicit in that test is . . . that the knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless disregard of a lack of reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured.
>
> Under these tests of the tort of bad faith, an insurance company, however, may challenge claims which are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis.[25]

Based on this standard, one would think that an analysis of the underlying claims file would be sufficient. But the *Signature* court applied a much broader standard for discovery, stating:

> Relevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleading. For purposes of discovery, relevance has been defined as "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer*, 437 U.S. at 351. Discovery requests should be considered relevant if there is any possibility that the information sought is relevant to any issue in the case, and should ordinarily be allowed, unless it is clear that the information sought can have no possible bearing on the subject matter of the action. *See Brown Bear*, 266 F.R.D. at 319 (citations omitted).[26]

The *Signature* court also noted that the Federal Rules distinguish between "discoverability" and "admissibility of evidence."[27] Recognizing that it is the obligation of the trial court to apply the rules of evidence to prevent incompetent, unreliable or prejudicial evidence from being admitted at trial, the court stated that such considerations "are not inherent barriers to discovery."[28]

The *Signature* court latched on to the Fed.R.Civ.P. 26(b)(1) Advisory Committee's Note, which it quoted[29] by stating, "[r]elevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleadings" and "[r]elevancy . . . encompass[es] 'any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.' "[30] The Advisory Committee Note cites a federal court decision from Nebraska,[31] which quoted from the United States Supreme Court's decision in *Oppenheimer Fund, Inc. v. Sander*: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears *reasonably calculated to lead to the discovery of admissible evidence*." [*Emphasis* supplied.][32]

In considering the scope of discovery to be permitted, the court in *Signature* also noted that Signature sought both compensatory and punitive damages. With regard to punitive damages, the *Signature* court stated:

> To be entitled to an award of punitive damages, plaintiffs must show that MidContinent acted with malice, actual or implied. "Actual malice is a positive state of mind, evidenced by a positive desire and intention to injure one another, actuated by hatred or ill-will towards that person." "By contrast, presumed malice is 'malice which the law infers from or imputes to certain acts.' " "Presumed malice may not 'be motivated by hatred or ill-will but is present when a person acts willfully or wantonly to the injury of others.' "
>
> In awarding punitive damages, a jury is to evaluate: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by

> the jury and the civil penalties authorized or imposed in comparable cases. In evaluating these factors, it is relevant whether the harm caused to plaintiffs was a company policy or practice. With these legal issues in mind as to plaintiffs' claims, the court turns to the individual discovery requests which are in dispute.[33]

The *Signature* court additionally explained that it could consider several facts in determining the appropriateness and amount of a punitive damages award including that "the degree of reprehensibility of the defendant's conduct is paramount." The court explained that when considering this particular factor, "one considers whether 'the harm caused was physical as opposed to economic; [whether] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [whether] the target of the conduct had financial vulnerability; [whether] the conduct involved repeated actions or was an isolated incident; and [whether] the harm was the result of intentional malice, trickery, or deceit, or mere accident.' "[34]

Armed with the "reasonably calculated to lead to the discovery of admissible evidence," Signature sought a wide variety of documents in support of its allegations that its liability insurer breached the contract of insurance, committed "bad-faith," breached its fiduciary duty to its insured, committed unfair trade practices, intentionally inflicted emotional distress, and vexatiously refused to pay insurance benefits,[35] as well as its request for compensatory as well as punitive damages. The court in *Signature* began by focusing on the "bad-faith" claim, noting that, under *Sawyer v. Farm Bureau Mut. Ins. Co*. (involving a claim for "bad-faith" arising out of an insured's dispute with its first-party insurer, not on third-party claim),[36] plaintiffs must establish that their insurer had "no reasonable basis for denying benefits, and that it acted with knowledge or a reckless disregard as to the lack of a reasonable basis for the denial of policy benefits."[37]

IV. Third-Party Claims Files

Signature requested the claims files relating to its claim for breach of contract for failing to defend it in the underlying third-party claims, and for "bad-faith." The *Signature* court stated that, in order to establish its claim for "bad-faith," Signature is required to prove that its insurer denied its claims knowing that there was no reasonable basis for the denial, or that the insurer "acted with reckless disregard as to whether a reasonable basis existed for denial of the claim."[38]

Based on the nature of a dispute between an insured and its own liability carrier, as well as the standards for broad discovery and the proof required for a "bad-faith" claim, it is certainly understandable why the claim file from the underlying litigation would be the subject of discovery in a "bad-faith" claim. In justifying production of the underlying third-party claim file for the defense, the insured, the *Signature* court noted the Federal Rules' recognition that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."[39] It also recognized, however, the need to distinguish between documents created "in the ordinary course of business" and those created in "anticipation of litigation," quoting an Eighth Circuit Court decision stating:

> [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.[40]

The *Signature* court then noted the Advisory Committee notes recognizing that some materials are "assembled in the ordinary course of business . . . or for other nonlitigation purposes," and thus are "not subject to qualified immunity under the Rule."[41] Applying these concepts to Signature's claims, the court stated:

> The claims files Signature requested in discovery may show why MidContinent [sic] changed its decision to defend Signature in the Carlson lawsuit and why it declined to defend Signature in the Kerr and Klosterman lawsuits. The documents may further show whether Mid–Continent denied Signature's request to defend the claims initially with the knowledge that it had no reasonable

> basis for denying the request, or with reckless disregard to whether it had a reasonable basis for its actions. These decisions by Mid–Continent form the basis for the lawsuit filed by Signature against Mid–Continent.
>
> Furthermore, there is no indication that Mid–Continent's claims files were prepared solely in anticipation of litigation. Mid–Continent's decision not to defend its insured was not likely a decision made in anticipation that the insured would then file suit against it. However, as Mid–Continent has already provided these case files to Signature, there is nothing for the court to compel under this request. Therefore, as to this request, the motion to compel is denied as moot.[42]

Not only are the discoverability of these liability defense claim files calculated to lead to the discovery of admissible evidence, but these liability defense claim files, to which the insured already had full access, were in theory created for the benefit of the insured.

V. Training Materials And Claims Manuals

Signature requested production of "[a]ll claims manuals, memoranda, directives, letters, and other forms of written or computerized communication directed to claims personnel, claims managers, claims supervisors, or any other person acting on behalf of defendant . . . in the handling of claims, . . .,"[43] which was obviously intended to secure all materials the insurer uses to teach or train its employees on how to adjust a claim.

The *Signature* court stated that it had previously held in other cases that all such claims manuals and related materials are discoverable, noting through its citations to those holdings that "[t]he claims manual could lead to relevant information and provide context for the information relating to how UIM claims are handled" and a request for all claims manuals, procedure guide materials, and training materials for claim handlers is "relevant to proving a bad faith claim."[44] The *Signature* court also explained:

> The court finds that information tending to show that Mid–Continent was applying the same policy language to claims by policyholders in different ways may be relevant to the issues of defendant's reprehensibility and whether it knew there was no reasonable basis for refusing to defend Signature. Additionally, training manuals are relevant to determine what process a claims adjuster must go through in determining whether Mid–Continent has a duty to defend a claim and which period of policy coverage applies when determining whether coverage exists. These documents would have a direct bearing in determining whether Mid–Continent followed its own procedures when it discontinued coverage in the *Carlson* case and refused to defend Signature in the other cases. Thus, the court finds that this request is not irrelevant to the subject matter of this action. Furthermore, Mid–Continent has not shown that the requested information is subject to a claim of privilege. Therefore, to the extent that Mid–Continent has not provided Signature with the requested training materials, Signature's motion to compel is granted.[45]

Courts in South Dakota[46] and elsewhere[47] allow the discovery of training materials and claim manuals in the context of a "bad-faith" case. For example, the Supreme Court of Kentucky in *Grange Mut. Ins. Co. v. Trude*[48] articulated why it thought such materials to be relevant in the context of a "bad-faith" case, by stating the question as whether the insurer's "own policies, as described in the manuals, embody or encourage "bad-faith" practices," and noting that "use of such manuals is not without precedent in our courts."[49]

In *Kirschenman v. Auto-Owners Ins.*,[50] the federal court in South Dakota appeared intolerant of the insurer for its failure to articulate sufficiently specific objections to the production of training materials, stating:

> When plaintiffs filed the instant motion to compel, they listed numerous examples of sources of training materials that they knew about, but for which Auto–Owners had not produced documents relative to. Auto–Owners gratuitously responded by casting aspersions on plaintiffs' pre-motion attempt to resolve discovery disputes (calling them "so-called"), and then stated that it would produce additional materials.

> Auto–Owners responds, in part, by also asserting that some of the materials are licensed, that some of the materials are only forms, and that some of the training is permissive for employees, not mandatory. This merely skirts the issue. If there are some materials that Auto–Owners uses to train its claims employees, then they are relevant. It is then up to Auto–Owners to establish grounds for prohibiting discovery of relevant documents. These vague and partial allegations are not sufficient. For example, as to the licensed materials, Auto–Owners has not shown that it may not allow plaintiffs to inspect those materials. As to the on-line materials, Auto–Owners has not shown why it is not capable of producing those documents which are not "forms" or even that the "forms" are in fact irrelevant.
>
> Again, so that both parties are clear, the court orders Auto–Owners to respond fully and completely to plaintiffs' request number 13. Auto–Owners shall immediately make reasonable and thorough efforts to identify documents responsive to plaintiffs' request and to supplement its response if additional documents become known at a later date.[51]

In *McCallum v. Allstate Property and Cas. Ins. Co.*,[52] the Washington state court considered the insurer's motion for protective order relating to its claim manuals, claim bulletins, and training manual, based on its contention that such documents were "confidential, commercial information and/or trade secrets that may only be produced subject to confidentiality protections."[53] To support its argument, the insurer had submitted declarations from its assistant vice president and a local claims representative. The trial court expressed concerns about the declarations, noting that they contained conclusory statements, with no specific examples about how the insurer's competitors could gain access to its national policies, and thus gain an unfair advantage, and relating to the time, manpower, and finances the insurer devoted to developing the documents. The trial court also expressed concerns about the declarations based on the employees' inconsistent deposition testimony, concluding that the declarations were not credible. The trial court additionally noted that the insurer had provided no other affidavits with concrete examples of why the documents should be considered trade secrets and/or confidential materials, and that without the declarations, the insurer had failed to support its argument that the documents contained confidential information and/or trade secrets, and therefore it had failed to establish "good cause" for a protective order. The appellate court affirmed the trial court's ruling on appeal.

VI. Personnel Files

Signature addressed Plaintiff's request for the insurer's employees' personnel files. Signature had requested "[c]opies of all personnel files of each person who handled, reviewed, supervised, and/or audited the claims brought against the Plaintiffs, including" ten (10) specifically identified employees. Through a protective order signed by the court, Signature had agreed to protect the privacy of these employees, by agreeing that none of the documents could be used for purposes outside the litigation, or disclosed or otherwise made public without redaction of names and information that could enable the identification of these employees. The *Signature* court justified ordering such discovery by stating:

> Personnel files *may* reveal an inappropriate reason or reasons for defendant's action with response to plaintiff's claim or an "improper corporate culture." However, personnel files also typically contain documents such as health care documents, life insurance, wages or salary, W–4s, I–9s, retirement account information, information about employees' bank accounts for purposes of electronic deposits, and counseling information regarding employee assistance programs. None of these documents are relevant to this case and MidContinent [sic] is justified in redacting or withholding these portions of the files.[54]

The *Signature* court did not require Signature to explore during depositions questions relating to the insurer's employees' training, competence, abilities, shortcomings, accolades and disciplinary history in order to justify production of the personnel files. The court likewise does not indicate or inquire as to how the ten employees were involved in the handling of Signature's claims. Rather, based solely on the mere possibility that such files might contain information that

could be helpful to prove Signature's claims, such documents were ordered produced.

In *Kirschenman v. Auto-Owners Ins.*,[55] a federal court in South Dakota granted plaintiffs' request to produce "personnel files of Defendant's employees who handled, reviewed, supervised and/or audited the Plaintiffs' claim, including persons in the chain of command above these individuals up to the head of the claims department,"[56] to be protected in accordance with the parties' stipulated protective order filed with the court. In responding to plaintiffs' argument that "evidence of claims handling procedures, including incentive programs, are more likely to be found in personnel files of managers and supervisors further up the chain of command rather than in the personnel files of low-level claims handlers and their immediate supervisors,"[57] the court noted that "[i]ndeed, in a similar case that came before this court recently, such evidence was in the hands [of] the personnel file of the regional claims supervisor, not the claims handler or her immediate supervisor."[58]

Courts in South Dakota[59] and elsewhere,[60] while recognizing the "sensitive nature"[61] of personnel files and affording "protection" against widespread dissemination, have allowed the discovery of personnel files in a "bad-faith" case. In *Anspach v. United of Omaha Life Ins. Co.*,[62] a federal court in South Dakota explained the rationale for the production of personnel files in "bad-faith" litigation by stating:

> As this court has noted on prior occasions, personnel files in bad faith actions may be discoverable because they may provide evidence of inappropriate reasons for the insurance company's actions with respect to the plaintiff's claim or an "improper corporate culture." Personnel files may reveal whether a particular employee was rewarded financially for denying a certain number or percentage of claims or achieving a particular outcome with regard to claims handling. This is certainly relevant to Mrs. Anspach's bad faith and punitive damages claims.[63]

However, some courts have been willing to curtail such discovery. In *Fullbright v. State Farm Mut. Auto. Ins. Co.*,[64] an Oklahoma federal court held that information reflecting the background, qualifications, and job performance of adjusters directly involved in the handling of Plaintiffs' claim was discoverable, but the background, qualifications, and job performance of all supervisory personnel was not discoverable. This federal court also held that information from personnel files regarding merit pay or related salary information was not discoverable, since plaintiffs had offered only speculation that adjusters' salaries are affected by the number of claims reduced or denied, and the court deemed that speculation insufficient to justify disclosure of personal and sensitive information contained in personnel files. This same federal court also held that plaintiffs had not provided justification for a review of disciplinary materials in an adjuster's personnel file, and that absent such justification, the material was not "reasonably calculated to lead to the discovery of admissible evidence."[65]

In *Carlucci v. Maryland Casualty Co.*,[66] a Pennsylvania federal court's focus was on whether less invasive means existed by which the plaintiff could obtain the information sought. Plaintiff argued that the adjuster's poor performance was relevant to whether her insurance claim had been handled properly. The court concluded, however, that plaintiff could obtain the necessary information through the depositions of supervisors and other adjusters assigned to the case, and thus it was not necessary to compel disclosure of the requested personnel file.[67]

A Florida federal court in *Moss v. GEICO Indem. Co.*[68] similarly stated "[t]he Court does not know what is in those files but drawing on its own experience, assumes they contain information concerning each employee's training, competence, abilities, shortcomings, accolades and disciplinary history, if any, all of which is relevant."[69] This same court recognized, however, that not all documents in the personnel file may be relevant, stating "[t]he Court also assumes the files contain information regarding the employees' compensation, health, benefits, pensions and the like, the relevancy of which is not apparent to the Court."[70] The court also specifically addressed the employee's privacy rights (and safeguards with respect to the requested training files), and stated "[t]hese restrictions on Plaintiff's right to obtain and use the information in Defendant's personnel and training files do not restrict, in any way, Plaintiff's right to make inquiry about personnel or training matters in any other manner or from any other source."[71]

VII. Bonus And Incentive Programs

Signature requested documents referencing "bonus or award programs," "referring to goals, targets or objects" communicated to claims personnel, relating to "the manner in which claims personnel, including supervisory personnel, might receive increases in salary, bonuses, commissions or awards," and those "documents used by or communicated to claims personnel since January 1, 2004, that contain information about performance-based incentive plans."[72]

As the court in *Signature* explained, courts have deemed relevant in a "bad-faith" action any programs that qualify an employee for additional financial remuneration through a monetary bonus or other employee incentive awarded because of the manner in which an insurer's employees respond to a claim.[73] Another South Dakota federal court, in *Lyon v. Bankers Life and Cas. Co*.[74] (which the *Signature* court quoted), articulated the rationale for requiring production of bonus and incentive programs by stating that such programs can provide evidence of the motivation of claims personnel in their evaluation and handling claims.[75] The court in *Lyon* quoted from an unpublished decision by another federal court judge in South Dakota, who stated:

> The claims incentive bonus program rewarded certain employees who met targets or predetermined goals for claim payments. . . . The first objective listed in the plan is reducing previous year's claims payouts. . . . A large award [punitive damages], therefore, punishes defendants for their repeated misconduct. . . . [T]here is sufficient evidence from which the jury could conclude that defendants' incentive plans improperly motivated claims handlers and created an improper corporate culture that required an award of punitive damages. . . .[76]

The *Lyon* court also quoted from an expert's testimony in this same case, stating:

> As one defense expert stated in *Torres*, "[i]f you give somebody a number, an objective they have to reach, and you tie it to their career, they are going to reach that number or they are going to manipulate that number so that it comes out the way they want it. And believe me it's been done. I have seen it done."[77]

A federal court in Pennsylvania in *Saldi v. Paul Revere Life Ins. Co*.,[78] explained the rationale for requiring production of documents reflecting bonus and incentive programs more generally, stating "[w]e consider these documents relevant to show [the insurers'] state of mind as well as their relationship with the employees who handled Plaintiff's claims."[79]

Other courts have applied these concepts similarly. The Supreme Court of Kentucky in *Grange Mut. Ins. Co. v. Trude*[80] held wage, salary and bonus data, and other requests relating to how an insurer's overall compensation system works, discoverable, for the reason that it "sheds light on" whether the compensation of an insurer's employees "could be keyed to obtaining low settlements, which might in turn encourage bad faith practices by adjusters and other employees."[81] A federal court in New York in *McDonnell v. First Unum Life Ins. Co*.[82] held performance evaluations and bonus/compensation information to be relevant based on plaintiff's argument that it needed the information "in order to investigate a potential conflict of interest that may 'influence the conduct of the employees and the way that they make claim determinations.' "[83] A federal court in Colorado in *Berwick v. Hartford Fire Ins. Co., Inc*.[84] stated that it "agree[d] with Plaintiffs that the adjustors' basis (or method) of compensation may be relevant to Plaintiffs' bad faith allegations," granting their motion to allow Plaintiffs to seek the information during their Rule 30(b)(6) deposition of the insurer concerning certain employees' basis or method of compensation including whether, during the relevant time period, the adjustor(s) received a salary, any commissions, or any bonuses, and on what basis.[85]

VIII. Loss Ratios

Signature additionally requested production of "[a]ll documents relating to efforts to reduce loss ratios or claims severity costs on Commercial General Liability Coverage policies in the last 10 years," inclusive of "all documents relating to claim severity or loss ratios for Commercial General Liability Coverage policies on either a national level, regional level, branch level, or individual adjuster level, or any other criteria whatsoever."[86] The insurer asserted written objections on the basis that the request would require it to devote substantial resources to locate such documents, and

that the requested documents "would be of little relevancy and would place an unreasonable and oppressive burden on defendant."[87]

The *Signature* court was not persuaded. Quoting from the South Dakota federal court's decision in *Lyon v. Bankers Life and Cas. Co.*,[88] the court stated:

> "Claims ratios are inherently tied to bonus programs." Thus, for the same reasons that documents relating to qualifying for a monetary bonus, or other employee incentives, are discoverable in a bad faith claim, loss ratios are also discoverable.[89]

In *Kirschenman v. Auto-Owners Ins.*,[90] the insureds sought "[a]ll documents related to efforts to reduce loss ratios or claims severity costs since January 1, 2000,"[91] as well as documents relating to the insurer's cost containment programs and efforts to lower costs and increase profitability, which they explained as "documents related to company programs, campaigns, or initiatives designed to influence employee behavior on a systematic and wide-spread basis throughout the company."[92] The federal court in South Dakota noted that:

> In its response, Auto–Owners derides plaintiffs' requests as "laughable" and characterizes plaintiffs as "chasing a rainbow." Defense counsel's comments do not advance the court's understanding of the issue in any way. And such comments are not in keeping with this court's expectations of civility among counsel—particularly in formal filings with the court.[93]

In explaining why the documents sought were relevant, the *Kirschenman* court stated:

> Auto–Owners resists all of this discovery by representing to the court that its efforts to become more profitable are directed exclusively at increasing sales and premiums and not at all with controlling the cost of handling or paying claims. This assertion is belied by the few and isolated facts of which the plaintiffs have already learned about how Auto–Owners conducts business. It is also contrary to common sense and the evidence that has been adduced in any number of bad faith cases litigated in the state and federal courts of South Dakota. Any business that intends to remain in existence must concern itself with both increasing revenue and keeping costs reined in.[94]

IX. Other 'Bad-Faith' Litigation Claim Files And Transcripts

Signature requested "[a]ny and all documents that identify past litigation involving claims of breach of contract or "bad-faith" and "[a]ny and all transcripts of depositions or trial testimony of any of Defendant's employees or officers since January 1, 2004, in any suit alleging breach of contract or bad faith."[95] In allowing such discovery, the *Signature* explained:

> Whether Mid–Continent has engaged in conduct with other insureds that is similar to the conduct they are alleged to have engaged in with plaintiffs in this case is relevant. *Roth*, 2003 S.D. 80, ¶ 49, 667 N.W.2d at 666 (quoting *Campbell*, 538 U.S. at 419) (one of the factors in determining the appropriateness and amount of punitive damages to award is "the conduct involved repeated actions or was an isolated incident; and [whether] the harm was the result of intentional malice, trickery, or deceit, or mere accident.").[96]

The *Signature* court also highlighted that the transcripts of the depositions of the insurer's officers and other employees who had previously testified would be available to it, to be used for the purpose of assisting in the preparation of its witnesses for depositions and generally in the defense of Signature's claims.[97] The court then focused on the *burden to Signature* of obtaining that same information through other means, stating:

> Requiring Signature to ferret out this information from other sources would be extremely costly and contrary to the cause of providing a "just, speedy, and inexpensive determination of every action. . . ." *See* Fed.R.Civ.P. 1.[98]

Rule 1 of the Federal Rules of Civil Procedure states:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.

> They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

The *Signature* court additionally stated that "because no part of any file has been produced, [it did] not have sufficient information to determine if there is a nexus between any of the the [sic] other breach of contract or bad faith litigation Mid–Continent may have been involved in and the plaintiffs' claims against Mid–Continent here."[99]

The *Signature* court concluded that the insurer had failed to carry its burden to demonstrate that the requested discovery was irrelevant.[100] It recognized, however, that producing "[a]ny and all documents that identify past litigation involving claims of breach of contract or bad faith" and "[a]ny and all transcripts of depositions or trial testimony of any of Defendant's employees or officers since January 1, 2004, in any suit alleging breach of contract or bad faith"[101] could be burdensome, and thus, declined to issue a "blanket order" for the production of a "complete copy of all the litigation files involving a claim of breach of contract or bad faith."[102] The Court instead explained:

> A single litigation file can be voluminous and extend to several bankers' boxes full of documents. Accordingly, the court will grant plaintiffs' request to this extent: Mid–Continent is ordered to produce to plaintiffs a copy of the complaint and answer as to each of the breach of contract and bad faith lawsuits, including any amended complaints and answers thereto. In addition, if a dispositive motion was filed in any of these cases (a Rule 12(b)(6) motion to dismiss or a motion for summary judgment), defendants shall produce a copy of each of the briefs filed in regard to that dispositive motion, though not the supporting affidavits and other documents. If necessary, Mid–Continent must obtain these limited initial documents from either its in-house counsel, or from outside counsel who represented Mid–Continent in each of these cases. After plaintiffs review these limited initial pleadings, plaintiffs may identify files that they believe have a factual or legal nexus to their own claims in this case and request copies of the entire litigation file as to those related claims. MidContinent [sic] shall produce the litigation files requested by plaintiffs in their entirety.
>
> Alternatively, if Mid–Continent still disputes the relevance of these files once plaintiffs have identified the files they wish to have access to, it may request a protection order and submit the complaints, answers, and dispositive briefs from the files requested by plaintiffs to the court for in camera review. The court will then be in a better position to rule on the relevancy of such files to the plaintiffs' claims in this case.
>
> In addition to the limited initial pleadings identified above to be produced, Mid–Continent shall also obtain copies of any transcripts of deposition or trial testimony of its employees or officers in any of the litigation files requested by plaintiffs. Mid–Continent is ordered to contact counsel who represented it in the prior action, in-house counsel, as well as its officers and employees, in an attempt to obtain copies of these transcripts.[103]

The parties also disagreed on the burden and expense to the insurer associated with the production of its breach of contract or "bad-faith" litigation files and deposition transcripts. As the court explained:

> [M]id–Continent asserts that it would be required to "review every single claim file to determine whether it involved litigation and then determine whether that litigation involved breach of contract or bad faith." Mid–Continent indicates that it would then need to contact the attorney it retained for defense of the lawsuit and obtain the requested information. Id. Mid–Continent asserts that it would it would have to follow the same procedure for any deposition transcripts. Mid–Continent estimates that this would require it to review more than 42,000 files, which would take approximately 14,665 hours of work.
>
> Signature disputes that Mid–Continent would have to review every single claim to determine whether the claim involved breach

> of contract or bad faith. Mid–Continent admitted that all of its files are electronic so that there are no file folders. Furthermore, Keith Nye, Assistant Vice President of Mid–Continent, noted that an electronic search could be performed for claims filed after December of 2007. As to claims before December of 2007, although they were not electronically maintained, the claims were imaged. Thus, it is highly unlikely that Mid–Continent would be required to physically review every claim file. Rather, Mid–Continent should be able to conduct a search of the electronic files using keywords such as "bad faith" and "breach of contract" to locate relevant files.[104]

The *Signature* court rejected the insurer's request that, due to the burden and expense of producing the requests, the court shift to Signature the cost of producing "[a]ny and all documents that identify past litigation involving claims of breach of contract or bad faith against" the insurer and "[a]ny and all transcripts of depositions or trial testimony of any of Defendant's employees or officers since January 1, 2004, in any suit alleging breach of contract or bad faith." The court noted the standard for shifting the burden and expense to the requesting party, stating:

> Costs for producing documents are to be shifted only when an "undue burden or expense" is imposed on the responding party. *Zubalake*, 217 F.R.D. at 318. Whether the burden or expense of producing the discovery is "undue" is determined by considering whether it "outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." *Id.*[105]

Clearly, *Signature* does not appreciate the burden on an insurer if it should be required to comply with such requests in the numerous instances in which it is sued for breach of contract and "bad-faith." The broad and intrusive nature of the discovery itself may cause an insurer to settle even though all the allegations are all false.

Candidly, but not surprisingly, the *Signature* court expressly stated that the insurer is in a better position to front the burden and expense, stating:

> Here, Mid–Continent has not shown sufficient, specific facts to show that the burden or expense of producing copies of the files is undue, and it is MidContinent's [sic] burden to do so. Mid–Continent has not shown that they cannot perform an electronic search using specified terms to find files associated with breach of contract or "bad-faith" claims. Performing an electronic search would significantly reduce the time necessary to find and produce the required files. *Furthermore, Mid–Continent can be presumed to have vastly more resources than Signature, a development company in Rapid City, South Dakota.* [*Emphasis* supplied.] Finally, the requested documents would include prior sworn testimony of MidContinent employees, which may show whether Mid–Continent acted knowingly or recklessly without a reasonable basis, which goes directly to whether MidContinent acted in bad faith in this case. The court finds that Mid–Continent has not shown that producing the requested documents is unduly burdensome or that cost-shifting is appropriate in this case. However, as to copies made for plaintiffs, while the employee time expended in the making of such copies shall not be chargeable to plaintiffs, Mid–Continent may charge plaintiffs ten cents per page for all the pages copied. Plaintiffs may make their own arrangements for having the copies picked up and shipped to them, or plaintiffs may allow Mid–Continent to arrange for shipping and then reimburse Mid–Continent for that expense.[106]

In support of its declaration that the insurer is in a better position to front the discovery costs, the *Signature* court noted that the insurer is part of a $3.7 billion dollar company."[107] So a corporation that has yet to be found liable or guilty of anything must pay the costs of the broad and intrusive discovery forced upon it by a plaintiff because that corporate defendant has a lot of money.

The *Signature* court also rejected the insurer's objection on the basis that the requests were overbroad, and that the request be limited only to cases arising in South Dakota, as opposed to including cases arising in South Dakota and elsewhere. The court explained:

> [T]he "Supreme Court has cautioned that evidence of a company's practices which are relevant to punitive damages should be limited to evidence of practices in the same state as the plaintiff." See Docket No. 26 at 9–10 (citing *Anspach v. United of Omaha Life Ins. Co.*, 2011 WL 3862267, *6 (D.S.D.2011) (citing *State Farm v. Campbell*, 538 U.S. 408, 419–24, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)). However, in this case, Signature is not only seeking punitive damages. Rather, Signature is asserting several claims including bad faith and breach of contract.
>
> . . .
>
> It is likely that the number of cases in South Dakota, in which MidContinent [sic] was involved, that included a bad faith or breach of contract claim, are very few. Furthermore, it is not very likely that the total number of cases that Mid–Continent was involved in outside the state of South Dakota, which involved breach of contract or bad faith claims, are particularly overwhelming. Therefore, the court finds that Signature is entitled to discovery on claims files and transcripts involving cases outside the state of South Dakota. However, given that the incidents forming the basis for Signature's lawsuit date back to 2007, the court will limit the time period for which Mid–Continent must produce claims files and transcripts of depositions or trial testimony from January 2006 to the present.
>
> . . .
>
> [A]dditionally, the court finds that it is not unduly burdensome for Mid–Continent to provide such information given that Mid–Continent can perform an electronic search using keywords and phrases to find the requested documents. Finally, the court finds that given the limited number of breach of contract or bad faith cases involving Mid–Continent in the state of South Dakota, that requiring MidContinent [sic] to produce files for relevant cases outside the state of South Dakota is not overly broad. Accordingly, with regard to these requests, the motion to compel is granted as outlined above.[108]

Another federal court in South Dakota had the same "attitude." In *Beyer v. Medico Ins. Group,*[109] the insured plaintiff sought by its request 21 "'any and all documents relating to other claims made,' to include Medico's denial of benefits or termination of benefits similar to her claim," and by its request 22 "the "methods of electronic search of claims file data or log notes available to your employees, including the type of software in use" for any claim by Medico that it was unable to search and identify information set forth in response to request 21.[110] The court denied a prior motion to compel documents responsive to request 22 because Medico had not claimed an inability to conduct electronic searches. Subsequently, Medico issued a discovery response stating that it was unable to undertake the electronic search, and that it objected to the request as unduly burdensome, since it would be required to search for the information manually.

In response to the insured's second motion to compel, Medico argued that request 22 was unduly burdensome because, despite its earlier agreement to produce the documents pursuant to an electronic search, documents scanned into its computer system were not in fact searchable by text. Thus, Medico argued, it would be required to convert all images on the computer system to a format which allows text searching. The *Beyer* court identified several courts which had found that "where the discovery requests are relevant, the fact that answering them will be burdensome and expensive is not in itself a reason for a court's refusing to order discovery which is otherwise appropriate."[111] The *Beyer* court further stated:

> [T]he fact that Medico will have to scan images to make them text-searchable or search manually for documents relating to

> the documents requested in request 21 is not a sufficient reason to find that request 21 is unduly burdensome. Moreover, Medico does not cite and the court is not aware of any binding authority that concludes that a manual review of numerous files makes producing such documents an undue burden. The total number of all denied claims is 5,040, not in excess of 200,000. The court presumes that the number of denied claims which are similar to Ms. Brown Bear's claim is much smaller than 5,000. Thus, under the facts of this case, the fact that producing requested documents requires work and expense does not mean that such a request is unduly burdensome.[112]

X. E-Mail 'With Identifiers'

Signature also requested "all documents and (e-mails with attachments) including metadata intact, from all company databases, including computers of" ten specifically named employees that contain reference to the claim numbers, the names of the claimants in the underlying litigations, and "Signature Development" or "Signature Water."[113] The court denied Signature's motion to compel as moot, for the reason that the insurer agreed to provide the information. The court specifically stated, however, that "the documents are clearly discoverable," and cited to *Lyon v. Bankers Life and Cas. Co.*,[114] for the proposition that "[t]he use of specific words or key phrases in electronic searches of computerized claim files has been approved historically in this district."[115]

XI. Signature's Request For A Privilege Log

Signature additionally specifically requested the production of a privilege log with certain specifically identified information. Such request was prompted by the fact that the insurer had withheld from its production certain documents contained in its files from the declaratory judgment action brought by Signature relating to the one of the underlying claim files and the settlement files of the insurer's counsel (who was a Judge by the time of the parties' discovery dispute) in such action. Signature sought to compel such documents on the basis that the insurer had "impliedly waived" its attorney-client privilege relating to such documents.[116]

The *Signature* court recognized that "[t]he attorney-client privilege protects the confidentiality of communications between attorney and client made for the purpose of obtaining legal advice."[117] It also explained in a footnote, however, that:

> When an insurance company "unequivocally delegates its initial claims function and relies exclusively upon outside counsel to conduct the investigation and determination of coverage, the attorney-client privilege does not protect such communications." *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 48 n. 4, 796 N.W.2d 685, 701 n. 4 (citing, inter alia, *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 56, 771 N.W.2d 623, 638). "When attorneys act as claims adjusters, their communications to clients and impressions about the facts are treated as the ordinary business of claims investigation, which is outside the scope of the attorney-client privilege." *Id. Here, based on the record before this court, it appears that Mid–Continent had already made its investigation and coverage determination prior to the declaratory judgment action brought by Signature and, thus, prior to Judge Pfeifle's representation of Mid–Continent. Hence, Judge Pfeifle was not "acting as a claims adjuster" in his representation of Mid–Continent.*[118] [*Emphasis* supplied.]

The *Signature* court also noted that "[t]he attorney-client privilege may be implicitly waived,"[119] and cited, for clarification as to how to make that determination, to the South Dakota Supreme Court's decision in *Bertelsen v. Allstate Ins. Co.*[120] in which the court stated:

> First, the analysis of this issue should begin with a presumption in favor of preserving the privilege. Second a client only waives the privilege by expressly or impliedly injecting his attorney's advice into the case. A denial of bad faith or an assertion of good faith alone is not an implied wavier of the privilege. "Rather, the issue is whether [Mid–Continent], in attempting to demonstrate that it acted in good faith, actually injected its reliance upon

> such advice into the litigation." The key factor is reliance of the client upon the advice of his attorney.[121]

In denying Signature's motion to compel, the court recognized that there is a presumption in favor of preserving the attorney-client privilege, and explained:

> There is no indication in the amended answer to the complaint that MidContinent is raising the affirmative defense of advice of counsel, nor is there any indication that Mid–Continent is relying upon the advice of counsel to argue that its actions were in good faith. Rather, Mid–Continent is asserting the affirmative defense that the claims alleged by Signature are barred pursuant to a settlement agreement and release. Signature has failed to show that Mid–Continent has implicitly waived the attorney-client privilege. Furthermore, asserting this affirmative defense does not in and of itself implicitly waive the privilege.[122]

Note that there is wide disagreement among courts regarding the point at which a client impliedly waives the privilege by injecting privileged communications into a case.[123] As the South Dakota Supreme Court in *Bertelsen* [124] explained:

> The first approach provides that a litigant waives the attorney-client privilege if, and only if, he directly puts his attorney's advice at issue in the case. The second approach provides that a litigant automatically waives the privilege upon assertion of a claim, counterclaim, or affirmative defense that raises an issue to which privileged material is relevant. Finally, the third approach balances the need for discovery with the importance of maintaining the attorney-client privilege.[125]

XII. Claim File Documents Relating To An Underlying Claim That Was Not The Subject of Signature's Bad Faith Action

Signature also requested production of the claim file concerning "the *Perry* action." This particular claim file was not the subject of Signature's breach of contract and "bad-faith" action, but was requested by Signature because it had substantially the same claims and parties as those third-party claims that were the subject of Signature's "bad-faith" action against its insurer.[126] Signature's insurer argued that the *Perry* claim file was not relevant on the basis that there was no allegation relating to it, and the file contained attorney-client privileged information. The court disagreed, holding the *Perry* claim file to be relevant and discoverable, explaining:

> [G]enerally, as noted above, a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the claim or defense of any party. See Fed.R.Civ.P. 26(b)(1). Discovery should ordinarily be allowed unless it is clear that the information sought has no possible bearing on the claims and defense of the parties otherwise on the subject matter of the actions.
>
> [T]he court cannot say that the Perry file clearly has no bearing on the claims in this action. The Perry file is relevant in determining what process Mid–Continent goes through in determining which policy period applies for coverage purposes. Additionally, the Perry file could lead to evidence as to whether Mid–Continent, when making a decision to defend a claim, arbitrarily chooses a period of policy coverage that excludes coverage. This would bear directly on whether Mid–Continent breached its fiduciary duty to Signature. Thus, the court finds that the Perry file is relevant.[127]

The *Signature* court also explained that the insurer bears the burden of establishing the four essential elements of the state statutory attorney-client privilege, which it quoted from the federal court's opinion in *Brown Bear v. Cuna Mut. Group*,[128] and articulated as follows:

> "Four elements must be present to invoke the attorney-client privilege: (1) a client; (2) a confidential communication; (3) the communication was made for the purpose of facilitating the rendition of professional legal services to the client; and (4) the communication was made in one of five relationships enumerated in S.D.C.L § 19–13–3."[129]

The court concluded, however, that the insurer had not alleged facts to establish these four required elements as to any of the documents in the *Perry* claim file, and thus had not carried its burden of proving each of the necessary elements of the state statutory attorney-client privilege.

The *Signature* court also, however, was obviously concerned with preserving the privilege, and additionally stated:

> In the alternative, as to any discrete documents within the Perry file that MidContinent has a bona fide claim of privilege, Mid–Continent shall produce to the court for in camera review those parts of the file which it claims are subject to the attorney-client privilege along with a Vaughn index. Mid–Continent shall summarize, in factual and not conclusory terms, the nature of the material withheld and shall link each specific claim of privilege to specific documents.[130]

While the burden was clearly on the insurer to carry its burden of establishing the privilege, the *Signature* court at least recognized the possibility that the *Perry* file could contain protected attorney-client privileged documents.

XIII. Negligent Misrepresentation Documents

The last category of documents that were the subject of the *Signature* court's order were Signature's request for a "complete copy of the entire file relating to each declaratory judgment action in which Mid–Continent was/is a party, including the pleadings, final determination of the court, and any transcripts, involving allegations of negligent misrepresentation against an insured of Mid–Continent from 2005 to present."[131] The insurer objected to production of these documents, taking the position that they were not relevant on the basis that there was no "property damage" or an "occurrence" under its policy, and therefore, it was not obligated to provide any defense for claims against Signature for negligent misrepresentation. The *Signature* court disagreed:

> The court agrees with Signature that these files are relevant to determining whether Mid–Continent acted knowingly or with reckless disregard when it withdrew from defending the Carlson action and when it refused to defend the claims in the other cases. In addition, as discussed in Section C.6(bc) with regards to the request for files relating to bad faith and breach of contract, this request is not unduly burdensome as Mid–Continent can perform an electronic search using keywords and phrases to find the files, thereby limiting the number of files they must review and the burden placed upon MidContinent [sic] in producing these files.[132]

The Signature court also rejected the insurer's claim of attorney-client privilege or the work-product doctrine, stating that the insurer had failed to carry its burden of alleging the facts necessary to be able establish either the attorney-client privilege or the work-product protection.[133]

Further, as with the breach of contract and "bad faith" claim files from other litigations, the court required production of transcripts of testimony by the insurer's employees associated with the requested files. It limited only the scope of the request, relating to the period of years for which the insurer was required to produce records.

XIV. Conclusion

If an insurer finds itself in "bad-faith" litigation, the broad liberal discovery rules and laws can be a burden. The more experienced and sophisticated insurers (maybe the more jaded and bitter insurers) try to produce more than what they deem reasonably relevant in the hope of convincing the courts that producing even more would not be reasonably calculated to lead to the discovery of admissible evidence.

Endnotes

1. 2012 WL 4321322 (D.S.D. 2012).

2. 2012 WL 4321322, at *6.

3. Hickman v. Taylor, 329 U.S. 495 (1947).

4. In Hickman v. Taylor, the Court held that the "work-product" doctrine protects a lawyer's trial preparation

materials from discovery but may be overcome if the party requesting the materials shows it has a "substantial need" for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. 329 U.S. 495, 510-514 (1947).

5. 329 U.S. at 507-508 (footnote omitted).

6. 329 U.S. at 507, fn. 8 (citation omitted).

7. 437 U.S. 340 (1978).

8. 437 U.S. at 350-351.

9. 437 U.S. at 351.

10. 437 U.S. at 351 n.12 (*quoting* 4 J. Moore, Federal Practice ¶ 26.56 [1], p. 26-131 n.34 (2d ed. 1976) and *emphasis* supplied).

11. 437 U.S. at 351 (*quoting* Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

12. 437 U.S. at 351-352.

13. Hogan v. Provident Life & Acc. Ins. Co., 2009 WL 2169850, at *4 n.3 (M.D. Fla. 2009) (*citing* Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla.1998)).

14. An insurer's bad faith is considered a tort, and not a breach of contract. One Florida court, Greene v. Well Care HMO, Inc., 778 So. 2d 1037 (Fla. 4th DCA 2001), in connection with explaining why, prior to the enactment of Florida's Bad Faith Statute (Fla. Stat. § 624.155), the *only* relief available in a first party context was a claim for breach of contract unless the insured could allege an independent tort such as fraud or intentional infliction of emotional distress, stated as follows:

> [T]hese decisions were based in part upon the relationship between the insured and insurer as one of debtor/creditor. On the other hand, Florida common law recognized that where there exists a fiduciary relationship between the parties, such as under the duty to defend under bodily injury liability provisions, and the insurer must exercise good faith in negotiating and effecting a settlement of claims, then a cause of action by the insured for bad faith exists against the insurer. These were called third party bad faith claims.
>
> The distinction between the first party claims and third party claims was based upon obligations between the insured and insurer. In the duty to defend and settle, the insurer is acting on the insured's behalf and for his or her benefit. If the insurer refuses to settle in good faith, it could result in additional liability to its insured, when the insured turned over control of settlement to the insurer. However, where the insurer failed to pay a claim of its own insured, the relationship was one of debtor and creditor, and the insured was free to sue its insurer for breach of contract for failure to pay the claim.

778 So. 2d at 1042 (citations omitted). *See also* Industrial Fire & Cas. Ins. Co. v. Romer, 432 So. 2d 66, 68 (Fla. 4th DCA 1983) (*quoting* from Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973), *cert. discharged*, 317 So.2d (Fla 1975). "The legal relationship existing between the insured and his insurer on claims for collision damages or damages caused by uninsured motorists is that of debtor and creditor in which no fiduciary relationship is present. It would be a strange quirk in the law to hold that each time a debtor fails or refuses to pay demands made upon it by a creditor, the debtor would be liable for both compensatory and punitive damages even though his failure or refusal was motivated by spite, malice, or bad faith.").

15. John J. Pappas, *"The Begrudged 'Insurance Bad-Faith-Suit' Exception to the Attorney-Client Privilege,"* Mealey's Litigation Report: Insurance Bad Faith, Vol. 22, #26 (May 20, 2008), *citing* John J. Pappas, "*Bad Faith Should Be Difficult To Prove*," Mealey's Litigation Report: Insurance Bad Faith, Vol. 19, #22 (March 21, 2006). In this same article, we also explained:

> In a first-party claim there is no "duty-to-defend" the insured and the insurance company's attorney is never representing the insured and never sharing any of their legal analysis, opinions, and mental impressions with the insured. Such written communications were and are kept confidential as maintained only between the insurance company and its legal counsel, clearly never intended to be shared with the insured.

Id.

16. 36 F.R.D. 37 (D.S.C 1964).

17. 36 F.R.D. at 40-41 (D.S.C 1964) (citations omittted).

18. 49 Misc. 2d 14 (N.Y. Sup. Ct. 1965).

19. 49 Misc. 2d at 16 (citations omitted).

20. 45 Misc. 2d 1093, 259 N.Y.S.2d 36 (N.Y. Sup. 1965).

21. 45 Misc. 2d at 1095.

22. 111 N.H. 43, 274 A.2d 781 (N.H. 1971).

23. 111 N.H. at 49, 274 A.2d at 784-785 (citations omitted).

24. Anderson v. Western Nat. Mut. Ins. Co., 857 F. Supp. 2d 896, 904 (D.S.D. 2012).

25. Dakota, Minn. & E. R.R. Corp. v. Acuity, 771 N.W.2d 623, 629 (S.D. 2009) (*quoting* Walz v. Fireman's Fund Ins. Co., 556 N.W.2d 68, 70 (S.D. 1996) and some brackets in original and some supplied to assist with understanding).

26. 2012 WL 4321322 at *15.

27. 2012 WL 4321322 *7.

28. 2012 WL 4321322 *6.

29. 2012 WL 4321322 *7.

30. 2012 WL 4321322 *7.

31. E.E.O.C. v. Woodmen of the World Life Ins. Society, 2007 WL 1217919 at *1 (D. Neb. 2007).

32. 437 U..S. at 351-352 (footnotes omitted).

33. 2012 WL 4321322 at *9.

34. 2012 WL 4321322 at *9 n.7 (citations omitted).

35. 2012 WL 4321322, at *7.

36. 2000 S.D. 144, ¶ 18, 619 N.W.2d 644, 649 (S.D. 2000).

37. 2012 WL 4321322 at *7.

38. 2012 WL 4321322 at *11 (*citing* McDowell v. Citicorp U.S.A., 2007 S.D. 53, ¶ 15, 734 N.W.2d 14, 19).

39. 2012 WL 4321322 at *10.

40. 2012 WL 4321322 at *10 (*quoting* Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987)).

41. 2012 WL 4321322 at *10 (*citing* advisory committee notes for Fed. R. Civ. P. 26(b)(3)).

42. 2012 WL 4321322 at *11.

43. 2012 WL 4321322 at *11.

44. 2012 WL 4321322 at *12 (*quoting* Hurley v. State Farm Mut. Auto. Ins. Co., 2012 WL 1600796, *5 (D.S.D. 2012) and *citing* Brown Bear v. Cuna Mut. Group, 266 F.R.D. 310, 329 (D.S.D. 2009)).

45. 2012 WL 4321322 at *12.

46. Kirschenman v. Auto-Owners Ins., 280 F.R.D. 474 (D.S.D. 2012); Hurley v. State Farm Mut. Auto. Ins. Co., 2012 WL 1600796, *5 (D.S.D. 2012); Brown Bear v. Cuna Mut. Group, 266 F.R.D. 310, 329 (D.S.D. 2009)).

47. Ohio Cas. Ins. Co. v. Firemen's Ins. Co., 2008 WL 413849, *1 (E.D.N.C. 2008); Brown v. Great Northern Ins. Co., 2006 WL 2246408, *1 (M.D. Pa. 2006); Mariner's Cover Site B Assocs. v. Travelers Indem. Co., 2005 WL 1075400, *1 (S.D.N.Y. 2005).

48. 151 S.W.3d 803 (Ky. 2004).

49. 151 S.W.3d at 813.

50. 280 F.R.D. 474 (D.S.D. 2012).

51. 280 F.R.D. at 486-487.

52. 204 P.3d 944 (Ct. App. Wash. 2nd Div. 2009).

53. 204 P.3d at 946-947.

54. 2012 WL 4321322, at *13.

55. 280 F.R.D. 474 (D.S.D. 2012).

56. 280 F.R.D. at 482.

57. 280 F.R.D. at 483.

58. 280 F.R.D. at 483 (D.S.D. 2012) (citing Fair v. Royal & Sun Alliance, 278 F.R.D. 465, 475-76 (D.S.D. 2012)).

59. See Kirschenman v. Auto-Owners Ins., 280 F.R.D. 474 (D.S.D. 2012); Lyon v. Bankers Life and Cas. Co., 2011 WL 124629 (D.S.D. 2011); Swigart v. Progressive Classic Insurance Company, 2005 WL 1378754 (D.S.D. 2005); McElgunn v. Cuna Mutual Group, et al., CIV. 06–5061 (Docket 84) (D.S.D. 2007).

60. Stokes v. Life Ins. of North America, 2008 WL 2704564 (D. Idaho July 3, 2008); Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169 (E.D. Pa. 2004);

61. Porter v. Farmers Ins. Co., Inc., 2011 WL 1566018 (N.D. Okla. 2011) ("courts have also recognized the sensitive nature of personnel files and have, therefore, afforded protection against widespread disclosure").

62. 2011 WL 3862267 (D.S.D. 2011).

63. 2011 WL 3862267, *9 (*citing* See Lyon v. Bankers Life & Casualty Co., Civ. No. 09–5070–JLV, Docket No. 39, pages 17–18 (Jan. 14, 2011).).

64. 2010 WL 300436 (W.D. Okla. 2010); *see also* Waters v. Continental General Ins. Co., 2008 WL 2510039 (N.D. Okla. June 19, 2008).

65. 2010 WL 300436, *4.

66. 2000 WL 298925 (E.D. Pa. March 14, 2000).

67. 2000 WL 298925, at *2.

68. 2012 WL 682450 (M.D. Fla. 2012).

69. 2012 WL 682450, at *4.

70. 2012 WL 682450, at *4.

71. 2012 WL 682450, at *4.

72. 2012 WL 4321322, at *13.

73. 2012 WL 4321322, at *14.

74. 2011 WL 124629, *10 (D.S.D. 2011).

75. 2011 WL 124629, *10.

76. 2011 WL 124629, *10.

77. 2011 WL 124629, *8s.

78. 224 F.R.D. 169 (E.D. Pa. 2004).

79. 224 F.R.D. at 185.

80. 151 S.W.3d 803 (Ky 2004).

81. 151 S.W.3d at 815.

82. 2011 WL 5301588 (S.D.N.Y. 2011),

83. 2011 WL 5301588, *6.

84. 2012 WL 573939 (D. Colo. 2012).

85. 2012 WL 573939, *5.

86. 2012 WL 4321322, at *14.

87. 2012 WL 4321322, at *14.

88. Lyon v. Bankers Life and Cas. Co., 2011 WL 124629 (D.S.D. 2011).

89. 2012 WL 4321322, at *14 (*quoting* Lyon v. Bankers Life and Cas. Co., 2011 WL 124629, *10 (D.S.D. 2011)).

90. 280 F.R.D. 474 (D.S.D. 2012).

91. 280 F.R.D. at 483.

92. 280 F.R.D. at 483.

93. 280 F.R.D. at 484.

94. 280 F.R.D. at 485.

95. 2012 WL 4321322, at *15.

96. 2012 WL 4321322, at *15.

97. 2012 WL 4321322 at *16.

98. 2012 WL 4321322 at *16.

99. 2012 WL 4321322, at *16.

100. 2012 WL 4321322 at *16.

101. 2012 WL 4321322, at *15.

102. 2012 WL 4321322 at *16.

103. 2012 WL 4321322 at *16-17.

104. 2012 WL 4321322 at *17 (citations to record omitted).

105. 2012 WL 4321322 at *17.

106. 2012 WL 4321322 at *18 (*emphasis* supplied and footnote omitted).

107. 2012 WL 4321322 at *18, n.9.

108. 2012 WL 4321322 at *18-*19.

109. 266 F.R.D. 333 (D.S.D. 2009).

110. 266 F.R.D. at 336.

111. 266 F.R.D. at 337 (*citing to* In re Folding Carton Antitrust Litigation, 83 F.R.D. 260, 265 (N.D. Ill.1979) (court stated that "[b]ecause the interrogatories themselves are relevant, the fact that answers to them will be burdensome and expensive 'is not in itself a reason for refusing to order discovery which is otherwise appropriate' "); Alexander v. Parsons, 75 F.R.D. 536, 539 (W.D. Mich. 1977) (court stated that "the mere fact discovery is burdensome . . . is not a sufficient objection to such discovery, providing the information sought is relevant or may lead to the discovery of admissible evidence"); Burns v. Imagine Films Entm't, Inc., 164 F.R.D. 589, 593 (W.D.N.Y. 1996) (court determined that fact that answering interrogatories would require objecting party to expend considerable time, effort, and expense consulting, reviewing, and analyzing huge volumes of documents and information is insufficient basis for objection). The *Signature* court also stated that if discovery requests were relevant, the fact that responding to such discovery is time consuming is not sufficient reason to render it objectionable, citing to United States v. Nysco Labs., Inc., 26 F.R.D. 159, 161-62 (E.D.N.Y. 1960) ("If the interrogatories are relevant, the fact that they involve work, research and expense is not *162 sufficient to render them objectionable.") and Rogers v. Tri-State Materials Corp., 51 F.R.D. 234, 245 (N.D. W. Va.1970) ("Interrogatories, otherwise relevant, are not objectionable and oppressive simply on grounds [that] they may cause the answering party work, research and expense").).

112. 266 F.R.D. at 338 (D.S.D. 2009).

113. 2012 WL 4321322 at *19.

114. Lyon v. Bankers Life and Cas. Co., 2011 WL 124629 (D.S.D. 2011).

115. 2012 WL 4321322 at *19 (*quoting* Lyon v. Bankers Life and Cas. Co., 2011 WL 124629, *10 (D.S.D. 2011)).

116. 2012 WL 4321322 at *20.

117. 2012 WL 4321322 at *20.

118. 2012 WL 4321322 at *20 n.12.

119. 2012 WL 4321322 at *11.

120. 796 N.W.2d 703 (S.D. 2011).

121. 2012 WL 4321322 at *21 (*quoting* Bertelsen v. Allstate Ins. Co., 796 N.W.2d at 703 (at ¶ 52) (S.D. 2011) and brackets in original).

122. 2012 WL 4321322 at *22 (citing Bertelsen v. Allstate Ins. Co., 796 N.W.2d at 703 (at ¶ 52) (S.D. 2011)).

123. Bertelsen v. Allstate Ins. Co., 796 N.W.2d at 702 (at ¶ 50) (S.D. 2011).

124. 796 N.W.2d 685 (S.D. 2011).

125. 796 N.W.2d 702 at ¶ 50, n.6 (S.D. 2011) (citations omitted).

126. 2012 WL 4321322, at *4 n.6 and 22.

127. 2012 WL 4321322, at *23.

128. 266 F.R.D. 310, 317 (D.S.D. 2009).

129. 2012 WL 4321322 at *20 (*quoting* Brown Bear v. Cuna Mut. Group, 266 F.R.D. at 317 (D.S.D. 2009). SDCL § 19-13-3 states:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (1) Between himself or his representative and his lawyer or his lawyer's representative;
>
> (2) Between his lawyer and the lawyer's representative;
>
> (3) By him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (4) Between representatives of the client or between the client and a representative of the client; or
>
> (5) Among lawyers and their representatives representing the same client.

130. 2012 WL 4321322 at *24.

131. 2012 WL 4321322 at *24.

132. 2012 WL 4321322 at *24.

133. 2012 WL 4321322 at *24. ■

MEALEY'S LITIGATION REPORT: INSURANCE BAD FAITH
edited by Mark Rogers
The Report is produced twice monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1526-0267