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In Search of Consistency in Insurance Claims Handling

Discovery of Reserves and Other Policyholders' Claims

By Marshall Gilinsky and Amy Francisco

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Frequently, getting an insurance claim paid becomes a surreal journey into a world of doubt and uncertainty, completely disconnected from the "good hands" and "piece of the rock" you thought you were getting when you paid your premiums. For example, ever get the feeling that you aren't getting the same treatment as other similarly situated policyholders? The quest for answers to one such vexing concern probably will not cause Leonard Nemoy to produce a new episode of "In Search Of . . ."—but finding out the answers is not exactly as hard as getting a photo of Bigfoot, either.

When forced to sue their insurance company for breach of contract or bad faith, smart policyholders often seek discovery from the insurance company regarding other policyholders' claims files and the insurance company's calculation of reserves for the instant claim. The insurance company's handling of other, similar claims can demonstrate how it has interpreted key terms and conditions in the policy at issue, and inconsistencies can provide evidence of bad faith. Reserve information can demonstrate whether the insurance company intended to pay the underlying claim, the thoroughness of the investigation, and how the insurance company viewed its own liability and obligations under the policy. In response, it is not unusual for insurance companies to refuse to produce such material. Various courts across the country have allowed policyholders to obtain information regarding reserves and other policyholders' claims by balancing the information's relevance to the particular policyholder's case against the insurance company's concerns regarding privilege, confidentiality, and burdensomeness. This article addresses general considerations regarding these issues and examines two recent rulings supporting the discoverability of this information.

Discovery of "Other" Claims Files

Typically, other policyholders' claims files are sought in insurance coverage litigation to demonstrate that the insurance company has acted in an inconsistent manner in resolving claims where similar policies were involved. Insurance companies often object to the production of these files on the following grounds: (1) differences between the claims or policy language at issue renders the insurance company's handling of one claim irrelevant to its handling of the other; (2) the "other" claims files contain confidential or proprietary information regarding the other policyholder's business; and (3) it would be unduly burdensome for the insurance company to compile the requested information.

> ***"... Policyholders often seek discovery from the insurance company regarding other policyholders' claims files ..."***

Where the information sought by the policyholder is deemed relevant to the particular facts of the coverage case, courts typically address the confidentiality issue by requiring the insurance company to redact confidential information from

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the documents and generate a privilege log before turning over the requested documents. Courts typically have addressed the burden issue by limiting the scope and extent of the production in order to balance the importance to the policyholder with the burden on the insurance company.

Although insurance companies generally are unhappy with such outcomes, when the shoe is on the other foot, they themselves take the position that "other" claims files are discoverable. For example, in a recent reinsurance case in New York, Zurich Insurance Company moved the court to compel its reinsurance company to produce comparable "other" claims files. In Zurich American Ins. Co. v. Ace American Reinsurance Co., Zurich alleged that its reinsurer did not pay its share of a settlement reached with Zurich's policyholder. Zurich alleged that the refusal to pay was evidence of the reinsurer's pattern of behavior and that it had similarly refused to pay other reinsureds. Zurich moved to compel the reinsurer to produce documents relating to two lawsuits in which the reinsurer was found to have wrongly denied payment to its reinsureds, as well as all documents on any claims denied by it on the basis of allocation (which was at issue in the dispute with Zurich). While noting that motive and, thus, "similar acts" evidence is usually immaterial to breach of contract claims, the court found that the reinsurer's handling of similar claims could provide evidence of how it had interpreted its obligation to follow the settlements of its reinsureds in similar circumstances by shedding light "on the meaning that the parties ascribed to the terms that they incorporated into the policies at issue." Consequently, the court found that the requested information was relevant and discoverable.

The reinsurer also opposed the production of "other" claims files on grounds of burdensomeness. The reinsurer argued that its computer system was incapable of segregating claims, the type of claim, or the reason the claim was denied. While the court recognized that the "volume of data accumulated" by the defendant made a "search of its entire database infeasible," it nevertheless found that "a sophisticated reinsurer that operates a multimillion dollar business is entitled to little sympathy for utilizing an opaque data storage system, particularly when, by the nature of its business, it can reasonably anticipate frequent litigation." Ultimately, the court ordered the parties to "propose a protocol for sampling" the reinsurer's claim files in order to obtain examples of claims files in which issues of the allocation of policy limits had been addressed.

Discovery of Reserve Information

The claims file for a given claim typically includes documentation regarding the setting of reserves, which basically is the amount of money the insurance company sets aside on its books to ensure the ability to pay the claim. Reserve information is particularly relevant in bad faith cases because it provides insight into the thoroughness of the insurance company's investigation of the policyholder's claim and how it viewed its obligations to the policyholder.

Many courts have held that reserve information is prepared in the ordinary course of business and, therefore, is discoverable. Other courts, however, have held that reserve information is prepared in anticipation of litigation and, therefore, is protected from discovery by the work-product privilege.

In one noteworthy recent case, *Central Georgia Anesthesia Servs., P.C. v. Equitable Life Assurance Society of the U.S.*, a corporate policyholder filed an insurance coverage action to obtain its coverage under a disability income protection policy that insured one of its shareholders. During discovery, the policyholder learned that the insurance company was losing money on its policies and that the insurance company's employees might have been given incentives to deny or take hard stances on claims. The policyholder moved the court to compel the discovery of various documentation relevant to the case—including reserve information. The United

States District Court in Georgia ordered the insurance company to turn over reserve information, as well as documents describing how employees are paid for handling claims. Although the court noted that other courts have differed on whether reserves are discoverable, it observed that the "overwhelming majority of courts" find reserves discoverable in cases involving bad faith claims, because "reserves bear some relationship to the insurer's calculation of its potential liability." The court reasoned that, since the parties were disputing the intended value of the benefits payable under the policy, the reserve information might reveal what the insurance company understood that benefit to be at the time the insurance contract was signed.

Conclusion

Discovery of other policyholders' claims files and insurance company reserve information could make or break a policyholder's insurance coverage case. Obtaining this information is not the stuff of urban legend. Policyholders can rely on experienced coverage counsel to search for—and find—the answers to the perplexing issues that arise when a policyholder is looking for answers (and claims payments) from its insurance company.

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Anderson Kill's Tenth Annual Policyholder Advisor Conference
Maximizing Your Recovery

by Mark Garbowski

Program Recap: On September 18, 2007, Anderson Kill held its Tenth Annual Policyholder Advisor Conference. This conference was a must-attend event for any professional or business person who is concerned with recoveries under their company's insurance investment. This year marked the tenth year of this "State of the Union" event, which covered every major development impacting the insurance loss environment. Our goal was to provide pragmatic, timely and invaluable advice. Attendees commented that they were impressed with "the depth of understanding on the issues on which the speakers presented," and "I enjoyed the conference. It gets better every year and I picked up several pearls of wisdom."

We were pleased to have as our keynote speaker Roger Sevigny, Insurance Commissioner for the State of New Hampshire and Vice President of the National Association of Insurance Commissioners. Other guest speakers included representatives from Advisen, Ltd., Aon, Hilb Rogal & Hobbs, ICI Americas, Inc., Keystone Automotive Industries, Inc., The Lockton Companies, National Fire Adjustment Co., Inc., Sprague Energy Corporation, and Tishman Speyer.

Robert M. Horkovich, chair of the firm's insurance recovery group, provided the opening remarks. The program began with a team of Anderson Kill attorneys presenting on "Key Issues Affecting D&O/E&O Insurance." They provided advice on strategies and tactics to deal with insurance company claims agents for these coverage lines.

A panel of insurance professionals followed and discussed current market conditions for various commercial coverage lines and the changing role of brokers over the last decade.

The participants were then treated to a presentation on alternatives to traditional insurance policies, during which Anderson Kill attorneys discussed options such as captives, self-funding and the self-administration of insurance programs. The morning program concluded with a discussion of "The Risk Manager's Perspective," which addressed the

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evolving role of professional risk managers, enterprise risk management and the relationship of risk managers to general counsel.

Insurance Commissioner Sevigny discussed the question of whether insurance should be federally regulated. After a brief history of the evolution of state insurance regulation, Mr. Sevigny spoke forcefully against a pending National Insurance Act that would partially repeal the McCarran-Ferguson limited antitrust exemption for insurance and create an Optional Federal Charter. Mr. Sevigny argued that the proposed legislation "establishes a bifurcated regulatory regime with overlapping and redundant responsibilities" as well as "barebones federal oversight where the vast majority of regulatory functions—including the core protections—would be outsourced to the insurance industry." While acknowledging that those calling for federal regulation have concerns regarding the uniformity and consistency of producer licensing, Mr. Sevigny outlined NAIC initiatives designed to address these concerns while preserving state regulation of insurance.

The conference then split into industry-themed breakout sessions, including (1) asbestos and manufacturing, (2) energy and chemical, (3) financial services, (4) pharmaceutical and healthcare and (5) real estate and construction. In each session, Anderson Kill attorneys addressed both the emerging trends in liabilities facing those companies and the prospects of securing insurance coverage for those claims.

The conference reconvened as a whole for two final presentations. In the first, a panel comprised of attorneys and public insurance adjusters discussed continuing first party property loss issues developing from Hurricane Katrina, with special attention to business interruption losses. The final presentation included role-playing and covered the ethical issues that face defense counsel who also try to assist their clients in obtaining insurance coverage. The day concluded with a cocktail party during which all speakers and guests had the opportunity to relax and network.

If you would like us to come to your office to make a presentation or if you are interested in receiving a set of course materials for this conference, please contact Veronica Mordan at rmordan@andersonkill.com or (212) 278-1799.

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