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## **Insurance Litigation and Work Product: Obtaining or Protecting Documents in Coverage and Bad Faith Claims**

Resolving Discovery Over Claims Files, Underwriting Files and Manuals, Other Insureds Files, Reserve Information, and More

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WEDNESDAY, JANUARY 15, 2020

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Today's faculty features:

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# Insurance Litigation and Attorney Work Product

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# Coverage Litigation Discovery Overview

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- Key Documents
- Policyholder Discovery Objectives
- Insurer Discovery Objectives

# What do Policyholders Want?

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- Claims File
- Underwriting File
- Claims Manuals/Guidelines
- Underwriting Manuals/Guidelines
- Drafting History
- Other Insureds' Claims Files
- Reserve and Reinsurance Information
- “Bad Faith” Discovery

# Strategic Considerations

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- Bad Faith v. Breach of Contract/Declaratory Judgment Action
- Ambiguity & Policy Interpretation
- State Law Differences
- State v. Federal Court Differences



# Discovery Of Insurer Claims Files

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- Ordinary Course of Business v. Anticipation of Litigation
- The “Primary Motivating Purpose” Test
- Presumption Against Work Product Before Coverage Decision Is Made
- Burden on Insurer to Establish Each Document Is Subject to Protection

# Ordinary Course of Business v. Anticipation of Litigation

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- Federal Rule 26(b)(3)(A): “Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation ...”
- *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 635 (N.D. Iowa 2000) (“[T]he application of the work product doctrine to documents prepared by insurance companies during claims investigations is difficult because the nature of the insurance business is such that an insurance company must investigate a claim prior to determining whether to pay its insured, and thus pre-litigation investigation is the routine business of insurance companies. ... [Although] a company’s investigation may shift from the ordinary course of business to an anticipation of litigation, there is no hard and fast rule as to when this occurs; rather, a fact-specific inquiry is required to determine when this shift occurs”)

# What Is The “Primary Motivating Purpose” Of The Communication?

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- *Compton v. Allstate Prop. & Cas. Ins. Co.*, 278 F.R.D. 193, 196 (S.D. Ind. 2011) (work product privilege attaches where the “primary motivating purpose behind the creation of a document or investigative report [is] to aid in possible litigation”)
- *St. Paul Fire & Marine Co. v. SSA Gulf Terminals, Inc.*, 2002 U.S. Dist. LEXIS 11776 (E.D. La. June 10, 2002) (for work product protection to attach, insurer must establish that “primary motivating purpose” of investigations, reports and meetings “was to aid in future litigation”)
- *Munich Reinsurance Am., Inc. v. Am. Nat. Ins. Co.*, 2011 U.S. Dist. LEXIS 41826 (D.N.J. 2011) (proper inquiry is whether the attorney-client relationship is “predominantly for the purpose of rendering legal services”)

# Presumption Against Work Product Protection Before Coverage Decision Is Made

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- *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 701 (S.D. Fla. 2007)
- *Ivy Hotel San Diego, LLC v. Houston Cas. Co.*, 2011 U.S. Dist. LEXIS 119746, at \*21 (S.D. Cal. Oct. 27, 2011)
- *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 190 F.R.D. 532, 537-38 (S.D. Ind. 1999)

# Attorney As Claims Adjuster

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- *National Union Fire Ins. Co. v. Transcanada Energy USA, Inc.*, 119 A.D.3d 492, 493 (N.Y. App. Div. 2014) (“Documents prepared in the ordinary course of an insurer’s investigation of whether to pay or deny a claim are not privileged, and do not become so merely because the investigation was conducted by an attorney”)
- *American Home Assurance Co. v. U.S.*, 2009 U.S. Dist. LEXIS 93597 (D.N.J. 2009) (“[S]imple involvement of counsel in an insurer’s claim investigation does not transform the investigation to one undertaken in anticipation of litigation”)

# Burden on Insurer to Establish Each Document Is Subject to Protection

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- *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 663-64 (S.D. Ind. 1991) (“the insurer must demonstrate, by specific evidentiary proof of objective facts, that a reasonable anticipation of litigation existed when the document was produced, and that the document was prepared and used solely to prepare for that litigation, and not to arrive at a (or buttress a tentative) claim decision”)
- *Consugar v. Nationwide Ins. Co. of Am*, 2011 U.S. Dist. LEXIS 61756 (M.D. Pa. 2011) (requiring insurer to produce privilege log specifying basis for work product privilege for each document)

# Conducting Discovery of Insurer Documents and Files

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# Discovery of Underwriting Files

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Why do insurers oppose production of underwriting files?

Under what circumstances have courts compelled their production?

- Ambiguity of policy terms.
- Potentially relevant to prove insurer's intent of meaning of disputed terms. *Machinery Movers v. Fidelity and Deposit Co. of Maryland*, 2007 WL 3120029 (N.D. Ill. Oct. 19, 2007)
- Material not likely to be protected work product. *Silgan Containers v. National Union Fire Ins.*, 2011 WL 1058861 (N.D. Cal. March 23, 2011).



# Discovery of Underwriting Files

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Some courts have permitted discovery of underwriting files for the history of policies issued to the same insured. *Lexington Ins. Co. v. Commonwealth Ins. Co.*, 1999 WL 33292943 (N.D. Cal. Sept. 17, 1999).

Other courts have declined based on relevancy depending on the claims asserted in the dispute. *National Fire Ins. Co. of Pittsburgh, Pa. v. Mead Johnson & Co.*, 2014 WL 931947 (S.D. Ind. March 10, 2014) (not relevant where policy language unambiguous); *Guardardo v. State Farm Lloyd's*, 2015 LEXIS 182520 (N.D. Tex. Dec. 21, 2015); *Koster v. Landmark Am. Ins. Co.*, 2016 WL 3014605 (M.D. Fla. May 20, 2016) (not relevant in absence of bad faith claim); *Westfield Ins. Co. v. Icon Legacy Custom Modular Homes*, 2017 WL 2021514 (M.D. Pa. May 12, 2017)

# Discovery of Claims Manuals

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Why do insurers oppose production of claims manuals?

Under what circumstances have courts compelled their production?

Allegations of bad faith or unfair trade practices. *Ohio Cas. Ins. Co. v. Firemen's Ins. Co. of Washington, D.C.*, 2008 WL 413849 (E.D.N.C. Feb. 13, 2008).

Insurer's understanding, interpretation and application of relevant policy language. *Glenfed Development Corp. v. Superior Court*, 53 Cal. App. 4<sup>th</sup> 1113 (1997).

May contain information relevant to resolving ambiguities, course of dealing or insurance industry practice. *U.S. Fire Ins. Co. v. City of Warren*, 2012 WL 1454008 (E.D. Mich. April 26, 2012).

# Discovery of Claims Manuals

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Establish inconsistency of insurer's position or failure to follow own internal procedures. *Champion Intern. Corp. v. Liberty Mut. Ins. Co.*, 129 F.R.D. 63 (S.D.N.Y. 1989); *U.S. Fire Ins. Co. v. Burge North America, Inc.*, 244 F.R.D. 638 (D. Kan. 2007).

*Grange Mut. Ins. Co. v. Trude*, 151 S.W. 3d 803 (Ky. 2004) (manuals may show procedures that “embody or encourage bad faith practices”).

May not be protected by the work-product doctrine – guidelines for resolving claims in ordinary course of business. *Safeco Ins. Co. of America v. M.E.S., Inc.*, 289 F.R.D. 41 (E.D.N.Y. 2011).

*National Fire Ins. Co. of Pittsburgh, Pa. v. Mead Johnson & Co.*, 2014 WL 931947 (S.D. Ind. March 10, 2014) (relevant to late notice defense)

# Discovery of Claims Guidelines and Manuals

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Claims manual not relevant to policy interpretation. *Garvey v. Nat'l Grange Mut. Ins. Co.*, 167 F.R.D. 291 (E.D. Pa. 1996)(whether insurer strayed from its internal procedures does not establish bad faith).

Claims manual not reviewed or used by claims handler not relevant. *Safeguard Lighting Systems, Inc. v. North American Specialty Ins. Co.*, 2004 WL 3037947 (E.D. Pa. Dec. 30, 2004).

*Saldi v. Paul Revere Life Ins. Co.*, 224 F.R.D. 169 (E.D. Pa. 2004) (manual discoverable even if employees involved in claim have not reviewed or relied on manual); *Bell v. Allstate Ins. Co.*, 2004 WL 1240627 (E.D. Pa. June 3, 2004)(limited to employees who had some interaction with the policy and claim).

# Discovery of Underwriting Guidelines and Manuals

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Underwriting guidelines and manuals discoverable to show intentions of the insurer to include or exclude certain risks. *GBTI, Inc. v. Ins. Co. of State of Pa.*, 2010 WL 2942631 (E.D. Cal. July 23, 2010); *Coffeyville Resources Refining & Marketing v. Liberty Surplus Ins. Corp.*, 261 F.R.D. 586 (D. Kan. 2009) (limiting scope of manual production to the time frame during which the insured had coverage with particular insurer).

Some courts have limited discovery of claims and training manuals to the extent they relate to the policy provisions in issue (including definitional sections). *McCrink v. Peoples Benefit Life Ins. Co.*, 2004 WL 2743420 (E.D. Pa. Nov. 24, 2004).

# Drafting History

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Discovery of a policy's "drafting history" (i.e., interpretative and explanatory materials generated by insurance companies or by insurance trade associations) is controversial and the cases are split.

Some cases permit such discovery "as important to a full understanding of the intent of insurance companies." *Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 A. 2d 1099 (Del. Super 1991); *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 135 F.R.D. 101 (D. N.J. 1940). These courts permit such discovery when questions concerning ambiguity have not yet been resolved. *Viking Yacht Co. v. Affiliated FM Ins. Co.*, 2008 WL 8715540 (S.D. Fla. Feb. 7, 2008).

# Drafting History

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Other courts have denied drafting history discovery absent a showing that the policy on its face is ambiguous. *Builders Mut. Ins. Co. v. Parallel Design & Development, LLC*, 2010 WL 6573365 (E.D. Va. Oct. 5, 2010) (absent any ambiguity, a court will not allow extrinsic evidence); *Lappin v. Gwartney*, 2001 WL 185167 (D. Kan. Feb. 20, 2001); *Missouri Pacific R. Co. v. Aetna Cas. & Sur. Co.*, 1995 WL 861146 (N.D. Tex. May 17, 1995) (request is premature unless and until the policy terms are held to be ambiguous).

# Drafting History

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Where the court specifically finds the relevant policy provision to be unambiguous as a matter of law, courts have denied discovery as to drafting history. *Cato Institute, Inc. v. Continental Cas. Co.*, 2011 WL 3626784 (D. Md. Aug. 16, 2011); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Industries, Inc.*, 907 S.W.2d 517 (Tex 1995).



# Other Insureds' Claim Files

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Insurers seek to resist this category of discovery by arguing:

- 1) there are sufficient differences between the various claims to render an insurer's treatment of one claim irrelevant to treatment of another claim;
- 2) the policy language is unambiguous so that extrinsic evidence is irrelevant;
- 3) the information in the other claim files contains confidential information; and
- 4) the burden of time and expense outweighs any probative value of such information.

# Other Insureds' Claim Files

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Courts permitting discovery regarding the claims of other insureds reason that such information “is relevant for purposes of discovery since it may show that identical language has been afforded various interpretations by the insurer.” *Transcap Associates, Inc. v. Euler Hermes American Credit Indem. Co.*, 2009 WL 1543857 (N.D. Ill. June 3, 2009); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101 (D. N.J. 1990); *Parkdale America, LLC v. Travelers Cas. and Sur. Co. of America*, 2007 WL 3237720 (W.D. N.C. Oct. 30, 2007); *Southard v. State Farm Fire and Cas. Co.*, 2012 WL 2191651 (S.D. Ga. June 14, 2012).

# Other Insureds' Claim Files

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But courts have limited production to the specific type of claims at issue and the time period of the policies in question. *Independent Petrochemical Corp. v. Aetna Cas. and Surety Co.*, 1987 WL 8512 (D.D.C. March 9, 1987).

Documents relating to other claims that are irrelevant absent similar facts and circumstances of the claims. *Apex Mortgage Corp. v. Great Northern Ins. Co.*, 2018 WL 341661 (N.D. Ill. Jan. 9, 2018).

Courts have also limited production to a set number of representative files. *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 135 F.R.D. 101 (D. N.J. 1940)(ten earliest and ten most recent files).

# Other Insureds' Claim Files

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Focus should be on relevancy.

Facts of other claims are distinguishable.

Claims decided under different state's laws.

Older claims not relevant to the insurer's current practices or interpretations.

Unduly burdensome

*Marook v. State Farm Mut. Auto Ins. Co.*, 259 F.R.D. 388 (N.D. Iowa 2009); *Penford Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 265 F.R.D. 430 (N.D. Iowa 2009); *Taco, Inc. v. Federal Ins. Co.*, 2007 WL 4269810 (D. RI. Nov. 30, 2007)(; *Plastic Research and Development Corp. v. Houston Cas. Co.*, 2006 WL 2523450 (W.D. Ark. Aug, 30, 2006).

# Other Insureds' Claim Files

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Unduly burdensome outweighing relevancy. *Williston Basin Interstate Pipeline Co. v. Factory Mut. Ins. Co.*, 270 F.R.D. 456 (D. N.D. 2010); *Retail Ventures, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2007 WL 3376831 (S.D. Ohio 2007); *Leski v. Federal Ins. Co.*, 129 F.R.D. 99 (D. N.J. 1989).

“Legitimate privacy concerns”, i.e., confidential business information of other insureds. *North River Ins. Co. v. Mayor and City Council of Baltimore*, 680 A.2d 480 (Md. 1996).

# Discovery of Reserve and Reinsurance Information

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Courts are split on discovery of reserve information.

Insureds argue that reserve information may reflect the insurer's assessment of coverage and assist in clarifying ambiguous terms.

Insurers oppose, arguing:

Relevancy. *Leksi v. Federal Ins. Co.*, 129 F.R.D. 99 (D. N.J. 1989); *Independent Petrochemical Corp. v Aetna Cas. & Surety Co.*, 1987 WL 8512 (D.D.C. March 9, 1987) (reserves established with legal import protected from disclosure)

Unduly burdensome on reinsurer. *Leksi v. Federal Ins. Co.*, 129 F.R.D. 99 (D. N.J. 1989)

# Discovery of Reserve and Reinsurance Information

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Insurers set reserves to comply with insurance regulations and other reasons and do not necessarily reflect on coverage. See 17A Couch on Insurance (3<sup>rd</sup> Ed.), §251:29.

Work Product: Reserve information may be based on attorney impressions, thoughts and opinions in evaluating the claim. *Certain Underwriters of Lloyds, London v. Fidelity and Cas. Ins. Co.*, 1998 WL 142409 (N.D. Ill. 1998); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 139 F.R.D. 609 (E.D. Pa. 1991); *but see U.S. Fire Ins. Co. v. Bunge North America, Inc.*, 2007 WL 1531846 (K. Kan. 2007) (court rejected insurer's "blanket claim" of work product due failure to submit any information as to who set the reserves, when the reserves were set and why the reserves were set).

# Discovery of Reserve and Reinsurance Information

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Relevancy of reserve information typically decided on a case-by-case basis by considering the claims and defenses, the insured's theory of relevancy, and how the insurer actually set reserves in a particular case.

*Apex Mortgage Corp. v. Great Northern Ins. Co.*, 2018 WL 341661 (N.D. Ill. Jan. 9, 2018)(reserve information may be relevant to certain bad faith allegations).



# Discovery of Reserve and Reinsurance Information

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Courts have found reserve information to be relevant to bad faith claims as evidence of insurer's internal assessment of the claim or timing of reserve changes. *Bernstein v. Travelers Ins. Co.*, 447 F. Supp. 2d 1100 (N.D. Cal. 2006); *Woodruff v. American Family Mut. Ins. Co.*, 291 F.R.D. 239 (S.D. Ind. 2013); *but see Executive Risk Indem., Inc. v. Cigna Corp.*, 2006 WL 2439733 (Pa. Com. Pl. 2006) (reserves are not relevant in bad faith actions because they were set pursuant to regulatory mandate); *Mine Safety Appliances Co. v. North River Ins. Co.*, 2012 WL 12930363 (W.D. Pa. March 14, 2012)(tenuous link between reserves and actual liability because of multitude of factors considered in setting loss reserves).

# Discovery of Reserve and Reinsurance Information

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Discovery of communications between a ceding insurer and its reinsurer: courts have found evidence relevant to whether the insurer believed there was coverage or to its understanding of the meaning of certain provisions. *Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 A.2d 1099 (Del Super 1991); *Stonewall Ins. Co. v. National Gypsum Co.*, 1988 WL 96159 (S.D.N.Y. 1988) (reinsurance documents could “reflect an insurer’s understanding of the risk it underwrote”).

# Discovery of Reserve and Reinsurance Information

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Most courts find reinsurance information irrelevant to interpretation of the insurance policy at issue. *American Medical Systems, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Inc.*, 1999 WL 781495 (E.D. La. 1999); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 139 F.R.D. 609 (E.D. Pa. 1991); *National Fire Ins. Co. of Pittsburgh, Pa. v. Mead Johnson & Co.*, 2014 WL 931947 (S.D. Ind. March 10, 2014) (not relevant where policy language unambiguous).

Whether such information is relevant may depend on the specific issues raised in the coverage litigation.

Sensitive business information. *Indianapolis Airport Authority v. Travelers Property Cas. Co. of America*, 2015 WL 1548959 (S.D. Ind., April 7, 2015).

# Discovery of Reserve and Reinsurance Information

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Courts have recognized work production protection for communications made to reinsurers after commencement of coverage litigation. *North American Philips Corp. v. Aetna Cas. and Sur. Corp.*, 1993 WL 213717 (Conn. Super 1993); *Playtex, Inc. v. Columbia Cas. Co.*, 1988 WL 109304 (Del. Super 1988).

Even if found relevant, courts may limit scope of discovery of reinsurance information. *Cummins, Inc. v. Ace American Ins. Co.*, 2011 WL 130158 (S.D. Ind. Jan. 14, 2011).

# Documents Typically Sought by Insurers

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- Internal Corporate Documents
- Underlying Case Documents
- “Common Interest” Documents
- Policyholder-Broker Communications

# Bad Faith

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Allegations by policyholder of breach of the duty of good faith and fair dealing in connection with an insurer's handling of a claim or denial of coverage.

Typical allegations include:

- Objectively unreasonable conduct by the insurer
- A reckless disregard for a policyholder's rights
- Lack of "reasonable" grounds for coverage denial
- Failure to settle third-party claim within policy limits

# Bad Faith

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*Depending on the jurisdiction, bad faith conduct may include:*

- Unreasonable delay in handling claims
- Misrepresentation of facts or policy provisions
- Failure to make a reasonable offer or settlement
- Unreasonable interpretation of relevant policy provisions
- Failure to adequately investigate
- Failure to settle third-party claim within policy limits

# Bad Faith: Additional Discovery Issues

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Typically, broader discovery of insurer files is permitted in cases involving allegations of bad faith. Some courts permit discovery of privileged communications in the claim file where the documents “may cast light” on whether the insurer acted in bad faith.

- *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154 (Ohio 2001) (“In an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.”)
- *Panattoni Construction, Inc. v. Travelers*, 2012 U.S. Dist. LEXIS 178273 (W.D. Wash. 2012) (in bad faith cases insurer-attorney communications are subject to disclosure if relevant to the issue of bad faith.)
- *C.B. Fleet Co. v. Colony Specialty Ins.*, 2013 U.S. Dist. LEXIS 6504 (N.D. Ohio 2013) (insurer required to produce privileged communications up to date of denial of coverage even if after commencement of litigation)



# Bad Faith: Additional Discovery Issues

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Invoking defense of advice of counsel may waive attorney-client privilege as to communications and documents relating to the advice.

Court will likely employ a balancing test that weighs need for the privileged information against the need to protect it.

Privilege is not waived just because the evidence may be relevant to bad faith claim.

Privilege is waived in situations where advice of counsel is invoked as a defense, which makes it “at issue.” *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926 (N.D. Ca. 1976); *Apex Mortgage Corp. v. Great Northern Ins. Co.*, 2018 WL 341661 (N.D. Ill. Jan. 9, 2018)(insurer did not plead advice of counsel as an affirmative defense - privilege not waived).

# POLICYHOLDER PRACTICE TIPS

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- Choosing Venue
- Bad Faith As A Discovery Tool
- Narrowly Tailor Requests
- Seek A Privilege Log And Then In-Camera Review
- Use Of Confidentiality Agreements
- Limit Broker Communications
- Do Not Get Bugged Down In Discovery

# Thank You

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