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Discovery: The claims file in bad-faith cases

HOW TO GET ALL THE INSURANCE COMPANY DOCUMENTS YOU NEED TO BUILD A BAD-FAITH CASE

In an insurance bad-faith case, written discovery provides you with the insurance company's critical internal communications. The insurer's production, including claims and underwriting files, will be voluminous. If you spend time to review the documents, you will find the indispensable details for depositions.

There are some issues that will be present in every insurance case:

- Obtaining the claim file;
- Understanding the insurance company's coverage position (See 10 Cal. Code Regs., § 2695.7, subd. (b) and *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 33);
- Determining who was involved in the claim-adjustment process and deposing them;
- Determining if the insurance company is asserting the advice-of-counsel defense;
- Serving Form Interrogatory No. 15.1 seeking information about denials and special or affirmative defenses and No. 50 seeking the insurance company's position about the policy (the contract); and
- Special interrogatories specifically tailored to the issues in your case to understand the insurance company's contentions in your case.

When preparing the discovery plan in your case, be aware of whether you have a first- or third-party claim. In a third-party failure-to-settle case, you want to use discovery to determine whether the insurer denied the claim because it believed there was no coverage or because it felt that the settlement offer

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was too high. It would also be critical to understand what information and documents the insurer's decision-makers had before making the decision to reject the offer. Discovery can also assist you in trying to lay the foundation to avoid a genuine-dispute defense.

At the time of depositions, it is important to establish authorization or ratification by officers or managing agents. You can also seek, particularly with the assistance of internal claims and underwriting manuals, to get deponents to agree with generally applicable rules.

Insurance companies publicly broadcast considerable information that can assist you in preparing your discovery plans and proving your case, including standards they create or follow. Be creative in the way you gather information and know you can never over-prepare!

Pre-litigation

Before litigation begins, obtain a copy of the policy from your client and all communications that your client exchanged with the insurance company. In today's society, that includes emails, text messages, and videos. This will help you draft the complaint and guide you as you get into the initial round of discovery after you file the complaint.

Depending on the volume of materials your client provides, you may be able to begin the discovery plan. This is particularly helpful in federal cases where discovery is limited. Use the CACI instructions, as well the Rutter Group Practice Guide for Insurance Litigation. Don't be afraid to update your discovery plan as you conduct various rounds of discovery.

Trial preparation in an insurance bad-faith case can be daunting. Usually, by the time of trial, you have gathered a lot of information from your client, the insurance company, maybe brokers and agents, and third parties. It is helpful to maintain working copies of documents and chronologies as you gather information in discovery. It is never too early to start this process.

Claims files

Insurance companies maintain a claim file for each claim. (Cal. Code Regs., tit. 10, §§2695.3(b)(1), §§ 2695.3(b)(2), and 2695.3(b)(3).) This file includes a claims diary, also known as claim notes, that should document events in the claim from the initial reporting until the final disposition. This document is almost always maintained electronically and includes entries regarding internal and external communications from claims handlers, managers, and supervisors. It will also include information about payments to the insured and repair estimates. It should include examination under oath transcripts, audios and videos if they were conducted, as well as photographs, audio, and video relevant to the claim.

The claims file will assist you in learning when the insurance company knew what. Without the claim file, the jury would not be able to determine whether the insurance company acted fairly and in good faith in handling the claim: "How else could they have properly determined whether (Insurer) acted fairly and in good faith in its handling of the claim?" (*2,022 Ranch, L.L.C. v. Superior Court* (2003) 113 Cal.App.4th 1377, 1396 (quoting text) (disapproved on other grounds in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725; see *Amato v. Mercury Cas. Co.* (1993) 18 Cal.App.4th 1784, 1788-1789 – insurer could not rely on belated investigation to justify denial of defense, even though it correctly determined claim was not covered.).)

Advice of counsel defense waives privilege

The claim file may also include loss reserve set up by the insurer to cover the expected cost of defending and settling the claim. This information may be relevant in establishing the potential for coverage, thus triggering a duty to defend, or determining whether the insurer unreasonably refused to settle the case, thereby exposing the insured to an excess verdict. (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1614; see *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 240.)

At times, the insurance company will redact portions of its claim file, particularly for attorney-client communication or attorney work-product privilege. If this occurs, request a privilege log and make sure you have determined whether the insurer is relying on the advice of counsel. Thereafter, determine if you feel you are entitled to see the redacted information. By relying on the advice-of-counsel defense, the insurer waives the attorney-client privilege regarding the advice received. (See *Transamerica Title Ins. Co. v. Superior Court* (1987) 188 Cal.App.3d 1047, 1053.)

Claims manuals

Insurance companies maintain guidelines for the prompt process of insurance claims, including processing and reporting the claim to regional or home office claims supervisors. (California Insurance Company § 790.03(h)(3); Cal. Code Regs., tit. 10, § 2695.6(b).)

California Courts have recognized for years that insurance claims manuals are discoverable and admissible at trial. (See, e.g., *Glenfed Development Corp v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117-1119; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 923, fn. 8; *Downey Savings & Loan Assn v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1082, 1099; *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 620, fn. 3.)

In *Glenfed Development*, the insured served a request for production of documents in which it sought, among other things, the insurer's claims manual. The insurer refused to produce the claims manual, but the Court of Appeal issued a writ of mandate requiring the insurer to produce the claims manual.

> [C]ourts have for years recognized that claims manuals are *admissible* in coverage dispute litigation. (See, e.g., *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 923, fn. 8; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1082,

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> 1099; *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 620, fn. 3.) *If claims manuals are admissible, it follows (as the courts of other states with similar discovery statutes have held) that they are discoverable.*
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> . . .
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> Moreover, even if it is inadmissible at trial, the claims manual may lead to the discovery of other, relevant evidence that is admissible, and no more is required to justify the demand for its production.

(*Glenfed Development Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117-1119 (emphasis added).)

Claims manuals may also provide information to show how the insurance company understood and intended the standard policy language to be used: "[I]t makes no sense to suggest that the book designed to serve as the instruction manual for the carrier's employees would be completely silent about policy terms." (*Glenfed Development, supra*, 53 Cal.App.4th at 1118.) Claims manuals can provide information about the types of personnel involved in the claim process, such as supervisors and managers. (*Ibid*.) They may also be relevant to ambiguity arguments. (See *Andover Newton Theological School, Inc. v. Continental Cas. Co.* (1st Cir. 1991) 930 F2d 89, 94, fn. 5 – claims manual indicated insurer was unsure of correct interpretation.)

Underwriting files and manuals

Insurers maintain an underwriting file, which customarily contains things like the application, notes from the underwriting regarding premiums, copies of documents pertinent to the insurer's rating of the risk, all documents used in underwriting the risk and policy forms. The underwriting file becomes critical when it relates to cases involving alleged misrepresentations.

Like claims manuals, insurers also maintain underwriting manuals, which can be discoverable in your case. (See *Freeman v. Allstate Life Ins. Co.* (9th Cir. 2001) 253 F3d 533, 537 (applying Calif. law) – evidence of underwriting criteria admissible where insured misstated epileptic condition in application for policy.)

Attorney's claim investigation files

There are times an insurance company hires an attorney or law firm to assist in the claim investigation and act as a "super adjuster." For example, the attorney or firm communicates with and obtains documents from third parties. In those instances, you can try to seek the attorney's and law firm's file. Underwriting and claim files do not become privileged because they are later transmitted to the insurer's attorneys. Similarly, the factual information obtained by the attorney or law firm during the claim investigation is not privileged and can be relevant in the analysis of the reasonableness of the insurer's conduct and investigation.

In other words, an insurer cannot shield the discovery of its claims handling and investigation activities by hiring a law firm or a lawyer to perform a portion of these services. The attorney-client "privilege does not protect 'independent facts related to a communication, that a communication took place, and the time, date and participants in the communication.'" (*2,022 Ranch, L.L.C. v. Superior Court* (*Chicago Title Ins. Co.*) (2003) 113 Cal.App.4th 137, 1397-1398 (citing *State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 640; *Aetna Cas & Sur. Co. v. Superior Court* (1984) 153 Cal.App.3d 467, 476; *Watt Industries, Inc. v. Superior Court* (1981) 115 Cal.App.3d 802, 805; *Evans v. United Services Auto Ass'n*, 142 N.C. App. 18, 32, 541 S.E.2d 782, 791 ("an insurance company and its counsel may not avail themselves of the protection afforded by the attorney-client privilege if the attorney was not acting as a legal adviser when the communication was made."); *Arkwright Mut. Ins. Co., v. National Union Fire Ins. Co. of Pittsburgh*, 1994 WL 510043 at * 5 (S.D.N.Y. 1994); *Amerisure Ins. Co. v. Laserage Tech. Corp.*, 1998 WL 310750 at * 11 (W.D.N.Y. 1998); *Chicago Meat Processors, Inc. v. Mid-Century Ins. Co.*, 1996 WL 172148 at *3 (N.D. Ill. 1996) ("to the extent that an attorney acts as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney- client privilege does not apply."); *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 662-63, 671 (S.D. Ind. 1991); *Mission National Ins. Co. v. Lilly*, 112 F.R.D. 160 (D. Minn. 1986) ("to the extent that [attorneys for carrier] acted as claims adjusters . . . , their work-product, communications to a client, and impressions about the facts will be treated herein as the ordinary business of [the carrier], outside the scope of the asserted privileges."); *Boone v. Vanliner Ins. Co*, 744 NE.2d 154 (Ohio 2001).)

Mere transmittal of documents to an attorney which are nonconfidential in character or which have an independent existence, such as photographs, insurance policies, and documents obtained from third parties, are not privileged. (See Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence, (The Rutter Group, 2018) Attorney-Client Privilege: Para. 8:2042, p. 8E-58-58.1; *San Francisco Unified School Dist. v. Superior Court* (1961) 55 Cal.2d 451, 456; *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 176; *Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1522; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 590 Cal.App.4th 110, 119; *Holm v. Superior Court* (1954) 42 Cal.2d 500, 507-508 (overruled on other grounds in *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 176 (mere transmission, even if the parties intended confidentiality, "cannot create the privilege if none, in fact, exists.").)

Financial condition pre-trial

If punitive damages are at play, you will need to determine the insurer's financial condition. This can be problematic in light of California Civil Code section 3295(c), which prevents pretrial discovery unless first obtaining a court order.

You can do a few things to address this issue. First, admitted carriers file annual financial statements with the Insurance Commission and non-admitted

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carriers file financial statements where they are admitted to do business. If the insurer or its parent or holding company are publicly traded, they are required to file financial statements with the Securities and Exchange Commission (SEC). Thus, you can find a lot of information online. Second, there are private services that provide information about insurer's financial condition for a fee, including A.M. Best Co.

Third, you can conduct discovery pretrial, without a court order, requesting the insurer identify the documents in its possession that are admissible on the issue of its financial condition and which of the insurer's employees are most competent to testify to its financial condition. (Civ. Code, § 3295(c).)

Sample special interrogatories

It is often helpful to prepare special interrogatories asking the insurance company to:

- Identify policy provision and related facts used to deny claim;
- Identify each person employed by the insurer in handling, investigating or reviewing the claim;
- Identify any outside investigator, adjuster or claims representative employed to investigate or evaluate the claim;
- Identify the supervisor or supervisors of the claims department at the times in question;
- Identify and describe what files exist with respect to the claim and state the location of each such file or files.

INTERROGATORY NO. 1:

List the names of all individuals acting on Your behalf, other than individuals performing merely clerical functions, who were involved in the underwriting of the policy issued to Plaintiffs, Policy No. XXXX ("Policy"), which is the subject matter of this litigation.

INTERROGATORY NO. 2:

For each of the individuals who were involved in the underwriting of the Policy, state the job title or classification held by that individual at the time that individual was involved in the underwriting of the Policy.

INTERROGATORY NO. 3:

For each of the individuals who were involved in the underwriting of the Policy which is the subject matter of this litigation, state the current title or job classification held by that individual.

INTERROGATORY NO. 4:

For any individuals who were involved in the underwriting of the Policy who no longer works for your company, state his/her last known address.

INTERROGATORY NO. 5:

State the name of the person most knowledgeable from Company regarding Company's underwriting of the Policy.

INTERROGATORY NO. 6:

List the names of all individuals acting on your behalf, other than individuals performing merely clerical functions, who were involved in the Investigation (as used herein, the term "Investigation" is defined in 10 Cal. C. Regs § 2695.2 as: "all activities of an insurer or its claims agent related to the determination of coverage, liabilities or nature and extent of loss or damage for which benefits are afforded by an insurance policy . . . and other obligations or duties arising from an insurance policy . . .") and evaluation of plaintiffs' Claim (as used herein, the term "Claim" refers to the claim filed by plaintiffs under the Policy].

INTERROGATORY NO. 7:

For each of the individuals who were involved in the Investigation and evaluation of the Claim, state the job title or classification held by that individual at the time that individual investigated or evaluated the Claim.

INTERROGATORY NO. 8:

For each of the individuals who were involved in the Investigation and evaluation of the Claim, state the current title or job classification held by that individual.

INTERROGATORY NO. 9:

For any individuals who were involved in the Investigation and evaluation of the Claim who no longer works for your company, state his/her last known address.

INTERROGATORY NO. 10:

State the name of the person most knowledgeable from Company regarding Company's Investigation and evaluation of the Claim.

INTERROGATORY NO. 11:

State the name of the person most knowledgeable from Company regarding Company's denial of the Claim.

INTERROGATORY NO. 12:

If You (as used herein, the terms "You" and "Your" shall mean Company and any present and former agents, divisions, subsidiaries, successors and assigns, officers, directors, employees, investigators, consultants, advisors, accountants, attorneys, agents, adjusters, and any and all other persons or entities acting on behalf of Company) contend that it was reasonable not to accept the XXX offer to settle the Underlying Action (as used herein, the term Underlying Action shall mean the action entitled _____ *v.* _____, _____ County Superior Court Case No.: XXXXX) within policy limits, state all facts that support Your contention.

INTERROGATORY NO. 13:

Identify all individuals who were involved in Your decision not to accept the XXX offer to settle the Underlying Action within policy limits.

INTERROGATORY NO. 14:

State all facts that support Company's contention that it did not have a duty to indemnify Insured in the Underlying Action pursuant to the terms of the Policy.

INTERROGATORY NO. 15:

State all facts that support Company's contention that it did not

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have a duty to defend Insured in the Underlying Action pursuant to the terms of the Policy.

INTERROGATORY NO. 16:

State all facts that support Company's contention that the Policy did not provide coverage for Insured in the Underlying Action.

INTERROGATORY NO. 17:

Are you relying on the advice of counsel in this case?

Sample requests for production of documents

REQUEST NO. 1:

Pursuant to Evidence Code section 1550, a true and correct copy of the following item which has been kept in the regular course of business: _____ insurance Policy No. XXX issued by Defendant to Plaintiffs, including all attachments, endorsements, amendments, and/or riders from date of first issue to Plaintiffs until the present.

REQUEST NO. 2:

Pursuant to Evidence Code section 1550, a true and correct copy of the following item which has been kept in the regular course of business: Any and ALL DOCUMENTS or COMMUNICATIONS comprising the complete claim files (including, but not limited to, home office, regional office, local or other office) pertaining to the claims, including the following;

(a) All inter-office memoranda or other form of DOCUMENTS or COMMUNICATIONS of any employee of defendant relating to the initial processing of the claims listed above when defendant first received said claims;

(b) All inter-office memoranda or other form of DOCUMENTS or COMMUNICATIONS from any employee of defendant relating to the continued processing of plaintiffs' claims listed above;

(c) ALL DOCUMENTS or COMMUNICATIONS between plaintiffs and defendant, including all proof of loss forms and/or personal property lists;

(d) ALL DOCUMENTS or COMMUNICATIONS between defendant and any third party concerning the processing, acceptance, or denial of the claims listed above;

(e) All investigative reports concerning plaintiffs and the claims listed above, and ALL DOCUMENTS or COMMUNICATIONS between defendant and any third party concerning said report or reports;

(f) All inter-office memoranda or other form of DOCUMENTS or COMMUNICATIONS from any employee of defendant concerning denial of the claims listed above;

(g) ALL DOCUMENTS or COMMUNICATIONS between defendant and plaintiffs concerning denial of the claims listed above;

(h) ALL DOCUMENTS or COMMUNICATIONS between defendant and any third party or third party's attorney concerning denial of the claims listed above;

(i) All photographs, motion pictures, videotapes, tape recordings (or transcripts of tape recordings) or investigative reports of defendant concerning plaintiffs taken by or on behalf of defendant, relating to the processing or denial of the claims listed above;

(j) All other DOCUMENTS or COMMUNICATIONS including correspondence, telephone notes, Telex, and fax pertaining to the processing of the above claims in the possession of defendant not designated in requests numbered (a) through (i);

(k) All file folders or file jackets and adjacent or related exhibit folders in which any DOCUMENTS, COMMUNICATIONS or other materials or items described in requests numbered (a) through (i) above are filed or maintained.

REQUEST NO. 3:

Pursuant to Evidence Code section 1550, a true and correct copy of the following item which has been kept in the regular course of business: The complete and original underwriting file (including, but not limited to, home office, regional office, local or other office) pertaining to the Policy from the time Plaintiffs' application was submitted up to and including the present, including, but not limited to, the file folder or file folders themselves; adjacent exhibit folders; ALL DOCUMENTS, COMMUNICATIONS and investigative reports regarding the Policy, including inter-office memoranda or notes pertaining to the issuance of the Policy; and any and ALL DOCUMENTS, COMMUNICATIONS or statements made between defendant and other parties, regarding the issuance of the Policy.

REQUEST NO. 4:

Pursuant to Evidence Code section 1550, a true and correct copy of the following item which has been kept in the regular course of business: The complete claims manuals and/or procedures manuals, policy statements, DOCUMENTS, bulletins, COMMUNICATIONS or memoranda which set forth company practices or policies regarding the handling, processing and/or investigation of claims submitted by Your insureds and which were in effect or which were utilized by You at the time the Claim was handled, processed and/or Investigated.

REQUEST NO. 5:

Pursuant to Evidence Code section 1550, a true and correct copy of the following item which has been kept in the regular course of business: All additions, revisions, deletions or other changes that have been made in the claims manuals and/or procedures manuals from the time the claim was submitted up to and including the present.

REQUEST NO. 6:

Pursuant to Evidence Code section 1550, a true and correct copy of the following item which has been kept in the regular course of business: Any other DOCUMENTS or COMMUNICATIONS including, but not limited to, inter-office memoranda, notes, files or reports outlining or describing procedures for claims handling, processing and investigation and which were in effect or which were utilized by you at the time the claim

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was handled, processed and/or Investigated.

REQUEST NO. 7:

Any and ALL DOCUMENTS or COMMUNICATIONS regarding written standards for the prompt investigation and processing of claims adopted by Company in compliance with 10 Cal C. Regs. § 2695.6(b) which were in effect since XXXX.

REQUEST NO. 8:

Pursuant to Evidence Code section 1550, a true and correct copy of the following item which has been kept in the regular course of business: The complete underwriting manual and/or procedures manuals, policy statements, bulletins, DOCUMENTS, COMMUNICATIONS or memoranda which set forth company practices or policies regarding the handling, processing and/or investigation of applications for insurance submitted to and which were in effect or which were utilized by you at the time Plaintiffs' applications were submitted, handled, processed and/or Investigated.

REQUEST NO. 9:

Pursuant to Evidence Code section 1550, a true and correct copy of the following item which has been kept in the regular course of business: All additions, revisions, deletions or other changes that have been made in the underwriting manual and/or procedures manuals from the time Plaintiffs' applications were submitted up to and including the present.

REQUEST NO. 10:

Pursuant to Evidence Code section 1550, a true and correct copy of the following item which has been kept in the regular course of business: Any other DOCUMENTS or COMMUNICATIONS including, but not limited to, inter-office memoranda, notes, files or reports outlining or describing procedures for underwriting handling, processing and investigation and which were in effect or which were utilized by you at the time Plaintiffs' applications were handled, processed and/or Investigated.

REQUEST NO. 11:

All DOCUMENTS that support Your decision not to accept the XXXX offer to settle the Underlying Action for $XXXX.

REQUEST NO. 12:

All DOCUMENTS that support Your decision not to accept the XXXX offer to settle the Underlying Action within policy limits.

REQUEST NO. 13:

All COMMUNICATIONS between You and Defense Firm regarding all offers to settle the Underlying Action.

REQUEST NO. 14:

All COMMUNICATIONS between You and Defense Firm regarding the value of the Underlying Action.

REQUEST NO. 15:

All COMMUNICATIONS between You and Defense Firm regarding the liability of Underlying Defendant in the Underlying Action.

REQUEST NO. 16:

If You are relying on advice of counsel as a defense in this case, produce all DOCUMENTS that demonstrate the advice upon which You relied.

REQUEST NO. 14:

If You are relying on advice of counsel as a defense in this case, produce all COMMUNICATIONS between You and the attorneys upon whose advice You relied.

Using these materials as a guide, you should be able to obtain the information you need to bring your bad-faith case to trial.

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