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The Relevance Of Underwriting Files In Insurance Disputes

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Law360, New York (May 5, 2017, 1:06 PM EDT) -- Insurance coverage disputes are about the interpretation and application of policy wording. One of the richest sources of information regarding the insurer's construction of its own policy language is the underwriting file. That is where underwriters often reflect their understanding of how a proposed endorsement to coverage will enhance (or restrict) coverage. Moreover, underwriters often explain why they have proposed specific policy wording to meet the insured's business needs, and how a provision would apply should a claim arise. The information is highly relevant, and therefore discoverable. If insurers raise concerns about the production of proprietary business information, or even potentially privileged communications, courts are well-equipped to take any necessary steps to protect such information while still permitting the discovery of relevant information from the insurer's underwriting file.

One area of frequent dispute in insurance coverage litigation involves whether a policyholder may seek, through discovery, the production of an insurer's underwriting file. Most often this question will arise, appropriately, when a provision of an insurance policy is ambiguous, or potentially ambiguous, and the policyholder seeks the production of documents that bear on the interpretation or application of that contested policy provision. If a policy provision is ambiguous, or the provision's application to a particular set of facts uncertain, what the insurer understood about the scope or application of that provision at the time of policy placement may be critical both to divining the intent of the parties to the contract and to determining the policyholder's reasonable expectations of coverage.

This topic was recently the subject of a short article published in Law360.[1] That article opens with a hypothetical request for production: "Produce the entire underwriter's file for underwriting the policy." Yet, sophisticated policyholder counsel do not usually seek such broad information. Policyholders are more interested in the information in the underwriting file relevant to, and that sheds light on, the interpretation of a contested policy provision. A discovery request can be tailored appropriately to seek

that information — and exclude the production of documents that might reveal an insurer's proprietary business information. Indeed, far from rejecting counsel's efforts to obtain this information, courts routinely permit policyholders to obtain through discovery documents from insurers' underwriting files.[2] When carefully crafted, discovery requests seeking information from an underwriting file are justified, relevant and should be permitted in coverage actions.

The Relevance of Underwriting Files

The underwriting file is created only as a result of the policyholder's desire to obtain insurance coverage. The documents contained in that file necessarily will involve an insurer's evaluation of the risks posed by the applicant's request for coverage and, typically, the underwriter's analysis and understanding of what the policy will and will not cover. Those analyses shed critical light on the meaning and intended reach of critical policy language. It is perfectly defensible to allow policyholders, through discovery, "to explore what risks [the insurer] expected to cover" when it drafted the policy.[3]

Take just one example. Claims-made policies often include a "Related Claims" or "Interrelated Claims" provision. Those provisions are frequently left undefined or, to the extent they are defined, the policy language is broad and open-ended. In the face of varying policy language, and different fact patterns, courts have struggled to articulate specific dividing lines between related and unrelated claims. Invariably, resolution of whether claims are "related" will depend on some combination of the specific policy wording involved, and the relationship between the two claims the insurer, or policyholder, assert are related. And it is reasonable to assume that an Insurer will have considered these types of issues — or at least the scope of a "Related Claims" provision — when issuing the policy at the time of placement.

An insurer's underwriting files may shed considerable light on the interpretation and application of policy wording. Thus, it should come as no surprise that "[m]any courts have already addressed the issue of the discoverability of underwriting files, and the general consensus is that they are discoverable."[4] A variety of courts have granted policyholders' motions to compel, or otherwise permitted policyholders to obtain, the production of insurers' underwriting files, claims manuals and guidelines and, particularly if policies incorporate form language, even documents relating to the handling of other insureds' claims.[5]

Nor is it necessary for the policyholder first to show that the policy language definitively is ambiguous. Questions of ambiguity are appropriately reserved for summary judgment. During discovery, parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."[6] Requiring policyholders to demonstrate definitively that a provision is ambiguous — even before obtaining the very materials that might bear on that determination — puts the cart before the horse. For that reason, courts frequently decline to rule on whether a provision is ambiguous before permitting a policyholder to obtain an underwriting file in discovery. As one court explained, "even if the Court were to ultimately conclude that the CGL policies at issue are unambiguous, this should not prevent the plaintiffs from discovering evidence which may present an ambiguity in the CGL policies at issue."[7] Similarly, another court remarked that, to support a claim of ambiguity, the plaintiff must "be allowed to explore the creation of the language and whether the intent of the drafter(s) is inconsistent

with its application."[8] This is true even in jurisdictions where extrinsic evidence is inadmissible in the face of a clear, unambiguous contract provision. As courts point out, at the discovery stage, the admissibility of evidence is not at issue.[9]

Indeed, discovery of underwriting files is even more justifiable in those jurisdictions where parties are permitted to invoke extrinsic evidence to demonstrate the threshold ambiguity of an insurance contract. For example, in California, because a court determines whether a provision is ambiguous by looking not only at "the face of the contract," but also at "any extrinsic evidence that supports a reasonable interpretation," "[e]ven apparently clear language may be found to be ambiguous when read in the context of the policy and the circumstances of the case."[10] The same appears to be true under both New Mexico[11] and Michigan law.[12]

To be sure, there may be some limitations to discovery of underwriting materials. Under Florida law, for example, many courts hold that claim files are not available in a coverage dispute, and may only be discovered when a policyholder asserts a bad faith claim.[13] Or a policyholder might not argue that any policy wording is ambiguous.[14] Regardless, in a typical coverage dispute, a policyholder can, and should, seek discovery of an insurer's underwriting files.

Courts Are Capable of Addressing Insurers' Concerns

Insurers will invariably object to such discovery requests on several grounds. For example, an insurer might contend that portions of its underwriting files or materials would disclose proprietary business information, or that certain documents are protected by the work product or attorney client privileges.

But courts are capable of resolving these issues — issues that arise in discovery in all contexts — while still ensuring that policyholders have access to critical, relevant information. The insurers' proprietary business information is not what policyholders seek, and its existence should not prevent disclosure of underwriting files altogether. Courts can issue protective orders or fashion other limitations that are tailored to providing policyholders with access to relevant policy-related interpretive materials while likewise protecting an insurer's confidential materials. To the extent an insurer invokes a privilege, courts should scrutinize those claims carefully. For one thing, documents relevant to the policy language are likely to have been created well before coverage litigation such that they were not created "in anticipation of litigation" and, therefore, do not constitute work product. For another, a court should closely consider the role in which an insurer's employee was acting when communicating internally during the underwriting process. To the extent underwriters and claims individuals, or even attorneys, are not providing legal advice, communications in the underwriting files should be produced.

These concerns, however, should not obscure the broader and more generally applicable point: an insurer's underwriting file is undoubtedly relevant when the interpretation or application of policy wording is in dispute. A policyholder should reasonably be permitted to seek discovery of those documents that are relevant to the resolution of those issues.

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[1] See Victoria Vish, The Insurer's Dilemma: To Produce, Or Not To Produce?, Law360 (April 19, 2017, 3:36 PM), available at https://www.law360.com/articles/915011/the-insurer-s-dilemma-to-produce-or-not-to-produce.

[2] See 12 New Appleman on Insurance Law Library Edition § 152.06[2] ("In jurisdictions that permit consideration of extrinsic evidence to interpret ambiguous policy language, courts often find that insurer's underwriting materials are relevant to determine the intent of the insurer and insured in issuing the policy.").

[3] Pentair Water Treatment (OH) Co. v. Cont'l Insurance Co., No. 08 Civ. 3604, 2009 WL 3817600 (S.D.N.Y. Nov. 16, 2009).

[4] Clean Earth of Md. Inc. v. Total Safety Inc., No. 2:10-cv-119, 2011 WL 4832381, at *8 (N.D.W.V. Oct. 12, 2011).

[5] See, e.g., Phoenix Insurance Co. v. Your Vitamins Inc., No. 2:12-cv-00564, 2013 WL 459226, at *2 (D. Nev. Feb. 5, 2013); Mariner's Cove Site B. Assocs. v. Travelers Indem., Co., No. 04Civ.1913, 2005 WL 1075400, at *1 (S.D.N.Y. May 2, 2005); Silgan Containers v. Nat'l Union Fire Insurance, No. C 09-05971, 2010 WL 5387748, at *8 (N.D. Cal. Dec. 21, 2010) ("Claims manuals also are relevant.").

[6] Fed. R. Civ. P. 26(b)(1).

[7] Young v. Liberty Mut. Insurance Co., No. 3:96-CV-1189, 1999 WL 301688, at *5 (D. Conn. Feb. 16, 1999).

[8] Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 135 F.R.D. 101, 105 (D.N.J. 1990).

[9] See, e.g., Mach. Movers, Riggers & Mach. Erectors, Local 136 Defined Contribution Plan v. Fidelity & Deposit Co., No. 06 C 2539, 2007 WL 3120029, at *3 (N.D. Ill. Oct. 19, 2007) ("If Plaintiffs secure the necessary threshold finding of ambiguity in the trial court, then their extrinsic evidence will be relevant. ... Defendants' arguments regarding the merits of Plaintiffs' ambiguity arguments would be more appropriate in opposing the admissibility at trial of any extrinsic evidence Plaintiffs may discover."); see also Fed. R. Civ. P. 26(b)(1) ("Information within this scope of discovery need not be admissible in evidence to be discoverable.").

[10] London Market Insurers v. Superior Court, 146 Cal. App. 4th 648, 656 (2008); see Am. Alternative Insurance Corp. v. Superior Court, 135 Cal. App. 4th 1239, 1246 (2006) ("Even language that may be plain and clear may be found to be ambiguous when read in the context of the policy and the circumstances of the case and, in order to give effect to the insured's objectively reasonable expectations, construed in the insured's favor.")

[11] Ponder v. State Farm Mut. Auto. Insurance Co., 129 N.M.698, 703 (2000) ("In abandoning reliance only on the four-corners approach, courts are now allowed to consider extrinsic evidence in determining whether an ambiguity exists in the first instance, or to resolve any ambiguities that a court may discover.").

[12] Stryker Corp. v. TIG Insurance Co., No. 1:05-cv-51, 2014 WL 198678, at *2 (W.D. Mich. Jan. 15, 2014) ("The policy provisions that now appear to be unambiguous on their face may be found to be subject to latent ambiguities, in light of industry standards, the policy's drafting history or TIG's application of the same policy language in other cases." (citing Shay v. Aldrich, 790 N.W.2d 629, 667-68 (Mich. 2010))).

[13] See, e.g., Seminole Cas. Insurance Co. v. Mastrominas, 6 So.3d 1256, 1258 (Fla. Ct. App. 2009). But see Century Surety Co. v. Lay, No. 6:14-cv-14-Orl-41TBS, 2014 WL 12614497, at *4 (M.D. Fla. Oct. 2, 2014) (explaining that "in non-bad faith cases [underwriting files] are irrelevant to the determination of coverage, *except where contract terms are ambiguous*" (emphasis added)).

[14] See Nat'l Union Fire Insurance Co. of Pittsburgh, PA v. Donaldson Co. Inc., No. 10-4948, 2013 WL 1881049, at *2 (D. Minn. May 6, 2013).

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