DISCOVERY OF OTHER CLAIMS- PATTERNS AND PRACTICES IN INSURANCE

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I. WHAT ARE WE TALKING ABOUT?

Is evidence of an insurance company's treatment of coverage issues in handling other similar claims discoverable and/or relevant in an action for contractual and extra-contractual liability against the insurer? For example, a carrier is suspected of having repeatedly paid and/or defended claims under primary or excess employers liability coverage for claims against an insured for committing torts that were "substantially certain" to result in harm, despite the "accident" requirement and the intended or expected harm exclusion. The suspected reason is that assertion of these policy defenses and denying coverage would result in the employer's liability coverage being illusory and could potentially lead to class actions for return of premiums.

For a policyholder, evidence the carrier has previously settled or defended similar claims is relevant and illustrates that the insured's interpretation of the policy presents a reasonable alternative construction and thus illustrates that the policy is ambiguous. Evidence that the carrier has carefully tried to obtain confidentiality agreements in other cases where such claims have been settled reflects knowledge that the policy is ambiguous or the coverage illusory. Moreover, where the insured or its agents have raised the issue of the carrier's inconsistent treatment of claims, the failure of the carrier to consider the issue and determine if it has acted inconsistently would seem to be evidence of knowledge of the lack of a reasonable basis for denial or delay and thus evidence of bad faith.

One thing is for sure: seeking evidence regarding the treatment of other claims is sure to draw an avalanche of objections and a prolonged and intense discovery battle. It gets the carrier's attention, and for policyholders, that is always a good thing. In this paper, we will seek to provide some relevant background information on the insurance industry and some practical tips for inquiring into "other claims." Our focus will ultimately be on legal bases for obtaining and admitting such evidence in a coverage and/or bad faith action.

For the reader's convenience, we have attached an appendix including critical evidentiary rules set forth in the Federal Rules of Evidence.

II. THE COVERAGE DECISION-MAKING PROCESS AND SOURCES

A. DECISION-MAKERS

The adjuster has a number of persons available to assist in coverage decision-making:

- Outside coverage counsel
- Supervisor
- Underwriting

- Corporate legal

- In-house captive coverage counsel

B. SOURCES OF DOCUMENTS REFLECTING VARYING POSITIONS

In addition, there are a number of potential documentary or digital sources:

- Individual adjuster collections of prior coverage opinions in other cases

- Other similar coverage cases being handled by the adjust; the same adjuster may use a coverage opinion from one case to decide a coverage issue in another case, avoiding the cost of hiring another coverage lawyer for the second repeat case involving the same coverage issue.

- Company coverage data banks of prior coverage opinions

- Litigation information kept by corporate management, the adjuster, or corporate counsel involving the carrier and the same or similar coverage issues

- Records relating to company decisions on significant national coverage questions, such as trigger of coverage and/or how the company intends to approach the insurability of punitive damages.

- Information regarding subrogation cases where the company may have taken a contrary position regarding coverage against another carrier.

- Underwriting files relating to the development of new policy forms and endorsements, which are sometimes kept in the corporate legal department. In our employer's liability example, the company developed forms that had an express exclusion for "substantial certainty" torts in addition to intended and expected acts or omissions. If "substantial certainty" torts were not covered as something less than intended harm, then why develop the express exclusion?

- The files of outside coverage counsel, which are certainly subject to privilege issues, will often be rich sources since the carriers will often use the same firm in the same jurisdiction on the same coverage question.

C. UNDERSTANDING THE INCONSISTENCIES AND WHERE THEY CAN BE FOUND

1. Big Picture Issues

a. Jurisdictional Variations—Take It As You Find It

Because many states vary in their approach to particular coverage issues, some carriers adopt a "take it as you find it" approach, taking one coverage position in one jurisdiction and another position in other jurisdictions on the same coverage issue. Other carriers seek to achieve some form of consistency.

b. Excess/Primary Positions

Regarding trigger, many quickly found that they could take positions as primary carriers against excess carriers that would be harmful if used against them when they were in the position of the excess carrier. The same was true regarding issues such as joint and several liability, horizontal versus vertical exhaustion, etc.

c. Subrogation

In some circumstances, carriers will take positions regarding coverage in connection with subrogation claims that are different from positions taken directly to the policyholder. We have seen multiple cases where a carrier sought punitive damages and argued for coverage for punitive damages in a subrogation action, while at the same time they would fight their own policyholders wherever there was a chance coverage for punitives would be found at least against public policy. We have also seen cases where an insured settled claims involving potentially uncovered punitive damages and then sought such damages in a subrogation action, in one instance an action for malpractice against the defense lawyer. Paying uncovered damages can make the suing carrier subject to the volunteer doctrine and thus defeat such inconsistent claims.

d. Different Adjusters and Worsening Circumstances

We have encountered many situations where an initial adjuster on the case found coverage existed, rejecting particular policy interpretations. The opposite can occur as well, where coverage is contested and then accepted depending on the adjuster at the helm. We have also seen situations where the underlying suit was thought to be a no-liability suit, and it later turned out to be a potential high exposure case. Coverage issues that were ignored and not even reserved will all of a sudden rear their ugly heads in such cases.

e. Using A Coverage Opinion In One Case To Resolve A Different Case

We recently encountered a situation where the adjuster chose not to seek a coverage opinion in case number 1. Instead, she chose to use an earlier opinion she received in case number 2. The circumstances in case number 1 were very different from number 2. The opinion

wound up being discussed in some detail in an email produced from a "personal file" kept by the supervisor of the adjuster in question. As a result, the court found the privilege had been waived and require production of the coverage opinion, all supplements, and all reservation of rights letters and drafts. The initial draft reservation in case number 1 was cut and pasted from the reservation letter in case number 2. As a bonus, materials produced from other cases can be used to show corporate knowledge and appreciation of rules that were violated, such as the need to provide a timely reservation of rights and consequences of the failure to timely reserve.

D. Targeting Relevance

The most obvious targets for making "relevant" discovery requ3ests regarding other claims include the following:

- Pattern, practice or scheme
- Inconsistent coverage positions
    - Shows ambiguity
    - Discrimination
- Improper coverage decisions
    - Use of opinions in other claims to decide the one at hand
- Motive or intent
- Habit
- Bad faith
    - Lack of reasonable basis based on inconsistency
    - Pretext
    - Use of experts in other cases
        - Cookie cutter opinions
        - Result-oriented
    - Frequency/Repeated bad acts
    - Carrier acted knowingly
- Punitive damages
    - Standard factors

- The nature of the wrong
- The character of the conduct involved.
- The degree of culpability of the wrongdoer.
- The situation and sensibilities of the parties concerned.
- The extent to which such conduct offends a public sense of justice and propriety.

- Review factors under *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003):
  - The degree of reprehensibility of the defendant's misconduct
    - 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.
  - The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
  - The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

From a due process standpoint, the focus of analysis should be the conduct directed towards the plaintiff, not nationwide conduct to a vast number of other policyholders. *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra*, at 420. A state cannot punish a defendant for conduct that may have been lawful where it occurred. *Gore*, *supra*, at 572, 116 S.Ct. 1589; *Bigelow v. Virginia*, 421 U.S. 809, 824, 95 S. Ct. 2222, 44 L.Ed.2d 600 (1975). Nor, as a general rule, does a State have

a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. *Campbell*, *supra*, at 421. Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction **1523 where it occurred." *Campbell*, *supra*, at 422.

III. Leading Texas Decision—*In re National Lloyds*

A. Background

1. Nature of Claims

The Supreme Court in *In Re National Lloyds Insurance Company*, In re National Lloyds Insurance Company, 449 S.W.3d 486, 487 (Tex. 2014) (orig. proceeding) (per curiam), the Court framed the issue presented as "whether a trial court abused its discretion in ordering the defendant insurer to produce evidence related to insurance claims other than the plaintiff's." The insured in that case suffered storm damage and sued the carrier because the carrier allegedly "performed an outcome based investigation of Plaintiff's claims and grossly undervalued her claims." The causes of action included:

- breach of contract,
- breach of duty of good faith and fair dealing,
- fraud, conspiracy to commit fraud, and
- violations of the Texas Deceptive Trade Practices Act and chapters 541 and 542 of the Texas Insurance Code.

2. Discovery Sought Regarding Other Claims

The discovery sought by the policyholder included the following:

- "production of all claim files from the previous six years involving three individual adjusters";
- "all claim files from the past year for properties in Dallas and Tarrant Counties involving Team One Adjusting, LLC, and Ideal Adjusting, Inc., the two adjusting firms that handled" the plaintiff's claims.
- "via interrogatory the names, addresses, phone numbers, policy numbers, and claim numbers associated with the requested claim files."

Id. at 489.

3. Objections

The carrier lodged the following objections to the discovery sought:

- overbroad,
- unduly burdensome, and
- seeking information that was neither relevant nor calculated to lead to the discovery of admissible evidence.

Id.

4. Trial Court Disposition and Mandamus

The trial court "ordered production of the files for claims handled by Team One and Ideal Adjusting, "the adjusting firms that assessed the damage to [the policyholder's] home." The trial court also limited the order to claims related to properties in Cedar Hill, where the claimants were located and to the storms that caused the damage to the policyholder's home. *Id.*

5. Briefs on the Merits

The tone for *National Lloyds* was set early on by the Brief on the Merits filed by former Supreme Court Justice Scott Brister:

> ***Bad-faith claims against insurers in hail and windstorm cases in Texas are out of control.*** After every storm, a small group of attorneys file hundreds of lawsuits asserting bad-faith claims in pleadings so nearly identical that many lead to MDL proceedings. They routinely seek discovery of every other claim file relating to that storm, and often many others. This turns every property claim, small or large, into expensive litigation that often exceeds the value of the insureds' property.

In re National Lloyds, Relator's Brief on the Merits, at 4 ("RBOM")(footnotes omitted). Judge Brister's brief for the carrier went on to state:

> First, a person's claim stands on its own merits; better, worse, or different treatment of someone else doesn't change that. For example, in the biblical Parable of the Generous Employer, laborers who got exactly what they bargained for grumbled when other laborers who worked less got paid the same amount; yet as the vineyard owner explained, he did them no wrong by his generosity to someone else.[FN19 See Matthew 20: 1-16.] The highest authorities have recognized this principle for millennia: whether Ms. Erving has been wronged depends on the handling of her case, not the handling of others.

Id. at *7. Insurance law by parable is something only Woody Allen could fully appreciate. The problem is that the parable does not deal with the situation where one worker is paid nothing

and the other gets full pay. It also does not deal with the situation where premiums are paid by one worker for coverage against unfortunate events. As Woody Allen once observed in his own parables, "The lion and the sheep shall lie down together, and the sheep will be very nervous." Also, the second Allen parable is that "the wicked know something."

> The carrier's brief on the merits adds:
>
> Second, allowing discovery on other claims changes the discovery process, making it more expansive and thus more expensive. It shifts pretrial investigation from what happened in the plaintiff's case to what happened in all the others. It drags other people into the process who may not want to be involved in a lawsuit against their own insurer.
>
> Third, it changes the dynamics of trial. Other claims or incidents are admissible at trial only if they are shown to be ***reasonably similar***.[FN20 *See Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 138 (Tex. 2004).] But that means proving the facts in each of those other cases. A mini-trial about other incidents is likely "to distract a jury's attention from what happened in the case at hand."[FN21 Id.]
>
> Fourth, fishing for patterns in a stack of claim files may turn coincidence into conspiracy. By way of example, several double-sales of cemetery plots are no evidence of intentional misconduct when different employees and different companies were involved in the different incidents.[FN22 *See Service Corp. Int'l v. Guerra*, 348 S.W.3d 221, 235 (Tex. 2011).] In this case, different adjusters were involved in Ms. Erving's two claims, so the trial court compelled production from two different adjusting firms. Independent acts by different adjusters and firms are no evidence of a scheme.
>
> For these and other reasons, this Court has repeatedly held that until a plaintiff establishes a relevant connection, discovery in one case should not include discovery in numerous others.[FN23 *See, e.g., In re Allstate County Mut. Ins. Co.*, 227 S.W.3d at, 670 (holding discovery requests overbroad as to time, location, and scope where plaintiff sought every court order finding wrongful adjustment in value of a damaged vehicle among other things); *KMart Corp.*, 937 S.W.2d at 431 (holding overbroad a request for every criminal act that occurred on the defendant's premises for the last seven years); *Dillard Dep't Stores*, 909 S.W.2d at 491-92 (holding overbroad a request for every false imprisonment case in the last five years throughout twenty states).] That rule applies to hail and windstorm claims too.

Id. at *7-*8.

The frustrating thing in reviewing the *In re Lloyds* decision and the related briefing is that ***the precise purpose of the discovery was not clearly stated and emphasized***. ***Thus, from the outset, the rule of the case must be understood as disallowing discovery of other claims***

where examination of those other claims provides no assistance in the analysis and determination of breach of contract, bad faith and statutory claims.

B. The Supreme Court's Decision—Rule 401 Relevance

The Court began by observing that "National Lloyds objected to the requests as [A] overbroad, [B] unduly burdensome, and [C] seeking information that was neither relevant nor calculated to lead to the discovery of admissible evidence." The court resolved the case on the basis that the discovery requested was "overbroad," not that it sought irrelevant material or that it was unduly burdensome. *Id.* Again, the problem was that the reason given for the discovery did not make sense. The court noted:

> Essentially, then, Erving has proposed to compare National Lloyds' evaluation of the damage to her home with National Lloyds' evaluation of the damage to other homes to support her contention that her claims were undervalued. *But we fail to see how National Lloyds' overpayment, underpayment, or proper payment of the claims of unrelated third parties is probative of its conduct with respect to Erving's undervaluation claims at issue in this case.*

Id. at 487 (emphasis added.) The payments did not identify something as definitive as an interpretation of a policy clause that could then be used to show that interpretations urged as unreasonable by the carrier have actually been used by them as a basis for making payment. Further, the evidence sought, while geographically and temporally limited, was wide-open as to the type of damage. One would think that something more precise, with an identifiable purpose, would have succeeded. For example, a carrier accepting coverage for replacement of all carpet, some physically damaged and some not, because the carpet could not be matched would show an inconsistent policy interpretation in a later case where the carrier urged that the inability to match did not justify replacement of the undamaged portion of the carpet.

The court appears to have gone to significant lengths to avoid any impression it was adopting the Book of Matthew rule urged by the insurance company:

> Scouring claim files in hopes of finding similarly situated claimants whose claims were evaluated differently from Erving's is at best an "impermissible fishing expedition." Sanderson, 898 S.W.2d at 815. *Without more*, the information sought does not appear reasonably calculated to lead to the discovery of evidence that has a tendency "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." TEX. R. EVID. 401; TEX. R. CIV. P.. 192.3(a).

Id. (emphasis added). Importantly , the court added:

> ***We do not hold that evidence of third-party insurance claims can never be relevant in coverage litigation.*** We simply hold that, in this case, on this plaintiff's allegations, there is at best a remote possibility that such claims could

> lead to the discovery of admissible evidence. That possibility is not sufficient to render the claims discoverable under Rule 192.3(a).
>
> . . . .
>
> Because the information Erving seeks is not reasonably calculated to lead to the discovery of admissible evidence, the trial court's order compelling discovery of such information is necessarily over-broad. TEX. R. CIV. P. 192.3(a).

Id. (emphasis added). The court of appeals granted mandamus relief and vacated the trial court's order compelling production of the requested discovery "to allow RPI the opportunity to tailor the requests for production as discussed at the hearing on the motion to compel [more narrowing tailoring request number 4], to allow Relators to file a privilege log for the documents that they claim are privileged, and to allow Respondent the opportunity to then review the documents in camera to determine which are not privileged." The court found the reference to "all" documents in the request to be facially overbroad.

IV. Other Texas Cases

A. *In re Allstate Ins. Co.*—Rules 401 and 404

The supreme court in *In re Allstate Mutual Insurance Company*, 227 S.W.3d 667 (Tex. 2007), held the requests from the policyholder in that case were (a) not justified or explained, and (b) were not reasonably tailored or limited to an appropriate time and geographical area. The insurance claim involved the carrier reneging on a $13,500 settlement. "The plaintiffs sent the insurer and its adjuster a total of 89 requests for production, 59 interrogatories, and 65 requests for admission, including requests for:"

- transcripts of all testimony ever given by any Allstate agent on the topic of insurance;
- every court order finding Allstate wrongfully adjusted the value of a damaged vehicle;
- personnel files of every Allstate employee a Texas court has determined wrongfully assessed the value of a damaged vehicle; and
- legal instruments documenting Allstate's status as a corporation and its net worth.

Id. at 669. The *Allstate* court noted that the cause of action upon which the discovery was sought was barred as a matter of law by its decision in *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 149 (Tex.1994) (prohibiting unfair settlement claims by third parties).

The court held that "all those requests, the plaintiffs' requests here are overbroad as to time, location, and scope, and could easily have been more narrowly tailored to the dispute at hand." *Id.* at 669. The court also found that it found the requests sought information that sought

proof of "other wrongs" in order to "show action in conformity therewith." *Id.* at 669-70. The court noted that while such "evidence might be discoverable in some cases (e.g., to prove motive or intent, see id.), it is hard to see why reneging on some other settlement offer makes it more or less probable that the insurer reneged on this one. TEX.R. CIV. P. 192.3; TEX.R. EVID. 401." As reflected by Tex. R. Evid. 404, "American jurisprudence goes to some length to avoid the spurious inference that defendants are either guilty or liable if they have been found guilty or liable of anything before." *Id.* at 669.

In the end, the court was moved to bar the discovery because it was in no way tailored to the case presented below. ***"Reasonable tailoring" and some sense of proportion must be considered in drafting such discovery.*** *Id.* at 670.

B. ***In re Farmers***

The court in *In re Texas Farmers Ins. Co.*, 2014 WL 345677 (Tex. App.—Fort Worth 2014), the following discovery was requested:

> *Request No. 4:* Please produce complete copies of all claims manuals or training materials, or other materials that address the handling of liability claims under homeowners policies.
>
> ….
>
> *Request No. 6:* Please produce all documents pertaining to the "Motor Vehicle" exclusion in the homeowners policy issued to the Jarvis[ ] family.
>
> ….
>
> *Request No. 9:* Provide all documents pertaining to any and all liability claims for which a ***defense was provided with reservations*** to one of your insureds because of the exceptions to the "Motor Vehicle" exclusion in the homeowners policy with the language used in the policy issued to the Jarvis [ ] family.
>
> . . . .
>
> *Request No. 10:* Provide all documents pertaining to any and all liability claims for which a ***defense was provided without reservation*** to one of your insureds because of the exceptions to the "Motor Vehicle" exclusion in the homeowners policy with the language used in the policy issued to the Jarvis [ ] family.
>
> ….
>
> *Request No. 11:* Provide all documents pertaining to any and all liability claims for which ***indemnity payments were paid on behalf of your insured because of the exceptions to the "Motor Vehicle" exclusion*** in the homeowners policy with the language used in the policy issued to the Jarvis[ ] family.

. . . .

> *Request No. 12:* Provide all documents pertaining to the types of vehicles for which ***liability coverage was provided*** because of the language of the exceptions to the "Motor Vehicle" exclusion in the homeowners policy with the language used in the policy issued to the Jarvis[ ] family.

. . . .

> *Request No. 13:* Provide all documents pertaining to any [sic] and motor vehicles included as an exception to the "Motor Vehicle" exclusion in the homeowners policy since the vehicle was lawn, garden or farm equipment.

Id. at *1-*3.

C. *Underwriters Life v. Cobb*--Admissibility

In *Underwriters Life Ins. Co. v. Cobb*, 746 S.W.2wd 810 (Tex. App.—Corpus Christi 1988, no writ), the trial court admitted evidence of denials of other similar claims by the defendant insurer. The carrier challenged the admissibility of this evidence and evidence of complaints about the insurer to the Texas Department of Insurance. The court disagreed, noting:

> Underwriters' denial of other claims around the same time as its denial of the Cobbs' claim, and on the same basis, was admissible to show that Underwriters' refusal to pay the Cobbs' claim was " 'commit[ted] or perform[ed] with such frequency as to indicate a general business practice.' " *Chitsey*, 738 S.W.2d at 643. ***Such a showing was necessary to recover under the Cobbs' pleaded cause of action for breach of Underwriters' duty to reasonably investigate. Id. It is also relevant and material under Arnold to prove the Cobbs' cause of action for Underwriters' breach of duty of good faith and fair dealing; these routine denials on the same grounds were sufficiently similar to indicate a failure by Underwriters to determine whether there was any basis to deny the Cobbs' claim.*** *See Arnold*, 725 S.W.2d at 167; *see also Texas Farm Bureau Mutual Insurance Co. v. Baker*, 596 S.W.2d 639, 643 (Tex.Civ.App.—Tyler 1980, writ ref'd n.r.e.); *cf. Group Hospital Services, Inc. v. Daniel*, 704 S.W.2d 870, 879–80 (Tex.App.—Corpus Christi 1985, no writ).

Id. at 815 (emphasis added). Importantly, the court found the evidence admissible despite the fact that the "frequency" requirement of *Chitsey*, which has been deleted from the board order in question, was not the basis of recovery. Instead, the common law duty of good faith was the theory of recovery used at the court of appeals.

The *Cobb* court flatly rejected arguments that the doctrine of *res inter alios acta* prevented admissibility:

> Further, the doctrine of *res inter alios acta* does not prevent admissibility, as Underwriters asserts. This rule provides that each act or transaction sued on must be established by its own particular facts and circumstances. *State v. Buckner Construction Co.*, 704 S.W.2d 837, 848 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). However, an exception to this rule exists; ***prior acts or transactions with other persons are admissible to show a party's intent where material, if they are so connected with the transaction at issue that they may all be parts of a system, scheme or plan.*** *See, e.g., Baker*, 596 S.W.2d at 642–43; *Payne v. Hartford Fire Insurance Co.*, 409 S.W.2d 591, 594 (Tex.Civ.App.—Beaumont 1966, writ ref'd n.r.e.); *Texas Osage Co–Operative Royalty Pool, Inc. v. Cruze*, 191 S.W.2d 47, 51 (Tex.Civ.App.—Austin 1945, no writ). Underwriters' intent in denying the Cobbs' claim was an important issue in the instant case.

Id. (emphasis added).

D. *Aztec*—Other Claims and Complaint Log

The court in *Aztec Life Ins. Co. of Texas v. Dellana*, 667 S.W.2d 911 (Tex. App.—Austin, 1984, no writ), examined whether the trial court abused its discretion in ordering (a) the production of an insurance claims denial journal and (b) refusing to compel the production of certain other claims files pursuant to TEX. R. CIV. P. ANN. 167. The insured in that case sued for breach of a credit life and disability insurance policy. The insured that he became disabled after the purchase of the insurance policy, but Aztec Life refused to pay the benefits to which he was entitled. He sought relief under contract, common law good faith, the Insurance Code and the DTPA.

The insured in Aztec sought recovery based on a common plan or scheme, specifically identifying the need for discovery of other claims:

> [Aztec's] selective and prejudicial handling of [Jennings'] claim evidences a common scheme and design on [Aztec's] part to avoid liability. [Aztec's] insureds are all purchasers of credit life and disability policies from automobile and truck dealerships throughout Texas owned in many instances by the same persons who owned [Aztec]. All such claims are reviewed by [Aztec's] informal "claims committee," which is made up of two of [Aztec's] employees and two attorneys whose firm represents [Aztec] and the automobile and truck dealerships [Aztec] owns. This committee routinely handles disability claims in a way that weighs the subjective interpretation of medical data in favor of [Aztec] and against the insured, which [Jennings] believes is done with the intention of denying legitimate claims.

Id.

The insured sought the following from Aztec in discovery:

> First, the request sought production of a "claims denial journal" which contains entries for the years 1977 to date Second, the request called for production of all files maintained by Aztec which related to claims which had been denied under the same pre-existing illness or condition exclusion under which Jennings' claim had been denied.

Id. at 913. The court noted: "The claims denial journal reveals the names of Aztec's insureds who have had claims denied, their business dealings with Aztec, their physical or mental illnesses and injuries, and their insurance policy numbers. Apparently, the policy claimants' addresses are not contained in this document." *Id.* n.1. As further justification for the discovery, the insured explained:

> "Aztec's claims handling in connection with the [exclusion] is a decision-making process that places a high premium on analysis and the exercise of judgment. Built into the procedure is the danger of a subjective and self-serving evaluation of medical data that, when applied to the technical language of the exception, may demonstrably lead to an inordinate number of improper disability claims denials. How claims decisions are made generally within the scope of the [exclusion] bears heavily upon how a decision was made in any particular case."

Id. at 915.

The court of appeals held that the evidence sought was discoverable to show (a) a plan or scheme and (b) in proving intent. The court reasoned:

> [T]his Court knows of no bar to the admission of evidence, if such exists, that Aztec had consistently denied claims upon the basis of the exclusion without reasonable investigation. Such character evidence is generally admissible when the other acts are so closely connected with the act charged so as to disclose a plan or scheme. 2 Ray, Texas Law of Evidence § 1522 (3rd ed. 1980). Moreover, a showing that Aztec consistently follows such a claims practice could be relevant as tending to show that the company had purposely denied Jennings' claim without reasonable investigation.

Id. The court added that if there were privacy concerns regarding other insureds, then in camera review could be used to protect against unwarranted disclosures. *Id.* The court also found the claims denial journal was discoverable, noting:

> As this Court understands, the claims denial journal is no more than an index identifying the name of each claimant, the date of each claim, and the policy exclusion under which each claim was denied. We understand further that by use of the journal, it is possible within a short time to identify those claims which the company denied pursuant to the pre-existing illness or condition exclusion. To our knowledge, there is no privileged information contained in the claims denial journal.

Id.

E. *Paramount*—Admissibility of Other Lawsuits and Complaints

In *Paramount Nat. Life Ins. Co. v. Williams*, 772 S.W.2d 255 (Tex. App.–Hou. [14 Dist.],1989, no pet. hist.), the insurer asserted on appeal that the trial court erred in "admitting petitions, pleadings and discovery from lawsuits filed against [it], as well as complaints to the State Board of Insurance regarding the company's actions on claims of other insureds." The court of appeals emphasized that the trial "court admitted the evidence 'not for the truth of the matter stated therein, but for the purpose of aiding you, if they do, in determining whether the Defendant has a custom of denying things because of prior existing medical conditions.'" *Id.* at 259-60. The court held that the trial court did not err in admitting the evidence, reasoning:

> Based on the rationale of [*Underwriters Life Ins. Co. v. Cobb*, 746 S.W.2d 810, 815 (Tex.App.—Corpus Christi 1988, no writ)], and the trial court's limiting instruction, the evidence was properly admitted. In the ***Aztec*** case, the court noted that the evidence in dispute "is generally admissible when the other acts are so closely connected with the act charged so as to disclose a plan or scheme." 667 S.W. 2d at 915. The court also stated that a showing that Aztec consistently followed such a claims practice could be relevant as tending to show that the company had *purposely denied the subject claim without reasonable investigation.* ***Id.*** Furthermore, Paramount had the opportunity to refute or mitigate the evidence of the lawsuits and complaints and show if there had been some favorable resolution. The relevancy of the evidence outweighed any prejudicial effect. Point of error one is overruled.

Id. at 260.

F. *In re Interinsurance Exchange of the Automobile Club*—Discovery Of Expert Opinions in Other Claims Of The Same Expert Used

In *In re Interinsurance Exchange of the Automobile Club*, 2016 WL 144784 (Tex. App.—Houston [1st Dist.] 2016, no pet.), the carrier denied the claim based on the finding of its expert, Hancock, that the foundation problems were the result of settling rather than a plumbing leak. The policyholders sued the insurer and other entities, claiming fraud, conspiracy to commit fraud, breach of contract, negligent misrepresentation, gross negligence, and violations of the Deceptive Trade Practices Act and Insurance Code. The plaintiffs deposed the expert used by the insurer, who had done over 50 evaluations for the carrier, resulting in denial 70-80% of the time. The insured sought discovery of all reports prepared by this expert for the insurer. *Id.* at *1. The carrier objected to the request on the ground that it was overly broad, unduly burdensome, and an impermissible fishing expedition. The policyholders moved to compel, arguing that the information was necessary to prove bias. *Id.*

The court held that the trial court erred in ordering the discovery in question. ***It must be noted that the sole claim to which the discovery related was breach of contract, with the trial court abating the bad faith claims.*** Thus, the court found that discovery of

information directly relating to the claim was proper and all else unnecessary. The court does not a[[ear to have recognized the fact that no explanation was provided as to the relevance of the information sought in *In re National.* The court refused to allow the discovery in order to reveal the methodology of the expert. The court also found that evidence of bias had already been in the deposition of the expert, where he admitted he had testified to having found70-80% of the time in favor of no coverage. *Id.* at *2.

G. *In re Nolle* and *Engleke*—Discovery Of Other Lawsuits

In *In re Nolle*, 265 S.W.3d 487 (Tex. App.—Houston [1st Dist.] 2008, no pet.), the court held that in order for discovery of other lawsuits against the defendant to be discovered, there must have "a direct, material connection to the instant litigation." *Id.* at 496; *see* Allen v. Humphreys, 559 S.W.2d 798 (Tex.1977); *Humphreys v. Caldwell*, 881 S.W.2d 940, 945 (Tex.App.-Corpus Christi 1994, orig. proceeding) (concluding that relator failed to meet burden to show that responding to interrogatory "regarding all lawsuits in Texas within the last five years involving similar claims in which State Farm had been a party" was overbroad or unduly burdensome); *State Farm Mut. Auto. Ins. Co. v. Engelke*, 824 S.W.2d 747, 751 (Tex.App.-Houston [1st Dist.] 1992, orig. proceeding) (compelling answer to interrogatory about lawsuits for five-year period).Even where such discovery is permitted, it may not involve information found to be confidential or protected under a confidentiality order in the other litigation. *Nolle, supra,* at 496.

The court in *State Farm Mut. Auto. Ins. Co. v. Engelke*, 824 S.W.2d 747 (Tex. App.—Houston [1st Dist.] 1992, no pet.), the claimant requested the following:

> Identify fully each and every lawsuit filed against you in the past five (5) years involving an allegation of "bad faith," Deceptive Trade Practices, unfair practices in the business of insurance, unconscionable action or course of action, violations of Article 21.22 of the Texas Insurance Code, breach of the duty of good faith and fair dealing, or any violation of any statute, rule or regulation relating to the business of insurance, or any similar claim, state the following:
>
> a) the style, cause number, court, county, and state of the lawsuit;
>
> b) the identity of the person(s) bringing suit against you;
>
> c) the identity of the attorney representing the person(s) who brought suit against you;
>
> d) the nature of the claims against you;
>
> e) the resolution, if any, to such lawsuit (e.g., the type of judgment rendered, the amount of any judgment, or the amount of any settlement);
>
> f) whether or not Dr. Gary C. Freeman had performed independent medical examination in the case.

Id. at 749. State Farm objected to this interrogatory based on burdensomeness. At a hearing, a company representative admitted a substantial portion of the information could be generated by a computer report. Thus, the court held:

> Based upon this evidence, we hold that the trial judge did not abuse his discretion in ordering State Farm to answer interrogatory seven *insofar as that order requires State Farm to provide the requested information for the state of Texas in the form of a computer generated response.*

Id. at 751.

H. *In re National Lloyds Insurance Company*—Using MDL

In *In re National Lloyds Insurance Company*, 2015 WL 3751701 (Tex. App.—Corpus Christi 2015, no pet.), the trial court ordered National Lloyds, in multi-district litigation combing multiple claims related to the same weather events, to produce fifteen categories of management reports and associated emails that were responsive to specific requests for production pertaining to the hail litigation that is the subject of this lawsuit. The court noted:

> The plaintiffs in the underlying cases, real parties herein, alleged that National Lloyds violated the Texas Insurance Code by, inter alia, refusing to pay their claims without conducting reasonable investigations and by failing to affirm or deny coverage of the claims or submit a reservation of rights within a reasonable period of time. The plaintiffs further alleged that their experiences were not "isolated case[s]" and that the "acts and omissions" that National Lloyds committed in these cases, or similar acts and omissions, occur "with such frequency that they constitute a general business practice" with regard to handling these types of claims. According to plaintiffs, National Lloyds' "entire process is unfairly designed to reach favorable outcomes for the company at the expense of the policyholders."

Id. at *1. The requests at issue were as follows:

> 11. All documents reflecting ***summaries of total payments*** made by Defendant on claims for claims arising out of the Hidalgo County hail storms occurring on or about March 29, 2012 and/or April 20, 2012.
>
> 12. All documents regarding the ***generalized assessment, review, evaluation and/or summary of Defendant's handling of claims*** arising out of the Hidalgo County hail storms occurring on or about March 29, 2012 and/or April 20, 2012.
>
> 13. ***Any document general in nature*** which applies to more than one claim created, gathered, or reviewed by Defendant relating to Hidalgo County hail storm claims occurring on or about March 29, 2012 and/or April 20, 2012, including any analysis of the ***total amount paid on claims, time open, responsiveness, compliance with company policies and procedures, compliance with Texas Insurance Code, the number of reopened claims, the***

> ***reason for reopening the claim, and the total amount paid on reopened claims. This request includes any follow-up documents.***

Id. at *2 (emphasis added).

In a deposition of a claims adjuster, it was discovered that there were responsive documents that were not produced: "Excel accounting reports delineating the claims filed as a result of the Hidalgo County hailstorms, and institutional job descriptions utilized to determine specific employees' job duties and responsibilities." *Id.* at *2. The carrier revised its objections upon discovery of some copies of reports including Hidalgo County information and also other claims in other counties not involved in the litigation. The trial court ordered production, noting the "other claims" information could be redacted.

The court noted the guiding rules for discovery in Texas:

> The scope of discovery includes any unprivileged information that is ***relevant to the subject of the action,*** even if it would be inadmissible at trial, as long as the information is reasonably calculated to lead to the discovery of admissible evidence. TEX.R. CIV. P. 192.3; *In re CSX Corp.*, 124 S.W.3d at 152; *see In re Natl Lloyds Ins. Co.*, 449 S.W.3d at 488. ***The phrase "relevant to the subject matter" is to be "liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial."*** *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009); *see In re Nat'l Lloyds Ins. Co.*, 449 S.W.3d at 488; *In re HEB Grocery Co.*, 375 S.W.3d 497, 500 (Tex.App.–Corpus Christi 2012, orig. proceeding). Information is relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the information. TEX.R. EVID. 401.

Id. at *5. The court found that the over-breadth objections were waived. The court also noted that even if not waived, they were not well taken. Conflicting evidence from a claims supervisor indicated that the reports at issue were used on the Hidalgo claims. The same adjuster testified to the contrary in an affidavit. The court held the conflict supported the trial court's decision and thus it was not an abuse of discretion to require the production. The court distinguished the supreme court's opinion *In re National Lloyds:*

> Both in the trial court and in this original proceeding, National Lloyds cites *In re National Lloyds Insurance Company*, 449 S.W.3d 486, 487 (Tex. 2014) (orig. proceeding) (per curiam), in support of its allegations that the order at issue requires the production of irrelevant information. In that case, the Texas Supreme Court held that a trial court abused its discretion in ordering the defendant insurer to produce unrelated third-party claim files. *Id.* at 487. In so holding, the supreme court stated that it "failed to see how National Lloyds' overpayment, underpayment, or proper payment of the claims of unrelated third parties is probative of conduct with respect to Erving's undervaluation claims at issue in this case." *Id.* at 489. Although National Lloyds asserts that our resolution here is controlled by this case, we disagree. In *In re National Lloyds*, the insurer timely

> objected to the requests for production on grounds that they were overbroad, unduly burdensome, and sought information that was not relevant or calculated to lead to the discovery of admissible evidence, *see id.* at 488, and National Lloyds did not timely assert these objections herein. Moreover, in *In re National Lloyds*, an individual plaintiff sought the discovery of unrelated third-party claim files, *see id.* at 487, but in this case plaintiffs seek the production of documents expressly limited to "claims "arising out of" or "relating to" "the Hidalgo County hail storms occurring on or about March 29, 2012 and/or April 20, 2012."

Id. n. 2.

V. War Stories—The *Cactus* Experience in Oklahoma

In *Cactus Drilling Corp. v. National Union Fire Ins. Co., et al.*, 5:12-CV-00191-M (Okla. W.D.), we were successful in obtaining documentary discovery of the handling of other claims in an case involving an excess employer's liability policy. In our case, the carrier denied that there was coverage for "substantial certainty" torts under an excess employer's liability policy. We looked to show that the carrier in our case, and other carriers, had frequently defended and/or paid similar claims. In fact, the primary carrier in our case had paid its underlying limits for such claims. We believed that the evidence showed:

(1) The policyholder's interpretation of the policy was consistent with the interpretation of the defendant carrier and other carriers, primary and excess, had used in other claims, and was thus a "reasonable" alternative interpretation of the policy supporting a finding of ambiguity.

(2) The carrier had paid other claims because it allegedly feared that a court would find the coverage illusory if it failed to recognize coverage, and thus the carrier's interpretation was itself unreasonable.

(3) The carrier acted in bad faith in ignoring its own prior actions in handling similar claims when it decided to deny coverage in the Cactus case.

The defendant carrier had a typical response, objections and motions for protection asserting irrelevance and burdensomeness.

> In response, Cactus argued:
>
> As to breach of contract, a multitude of cases hold that other claims files can lead to admissible <u>*evidence of ambiguity*</u>. As to bad faith, the Tenth Circuit and the Western District have found discoverable other claims files as evidence of business practices.
>
> In *Broadway Park*, this Court applied *Vining v. Enterprise Fin. Group*, 148 F.3d 1206, 1218–19 (10th Cir. 1998), in holding that the claims files for similar claims were discoverable. *Broadway Park, L.L.C. v. Hartford Cas. Ins. Co.*, 2006 U.S. Dist. LEXIS 55914, at *4–5 (W.D. Okla. Aug. 9, 2006) (Miles-LaGrange, J., opinion) (citing

> Vining for the rule that "evidence of an insurance company's general business practices is relevant in a bad faith case"). In *Broadway Park*, the insured sought discovery of similar claims against the insurer following a hail storm. *Id.* at 4. The request was limited geographically and temporally, as is Cactus' request here, and the Court compelled the insurer to comply with the Request for Production. *Id.* at 4–5.
>
> In *Sullivan v. USAA Gen. Indemn. Co.*, 2006 U.S. Dist. LEXIS 32670, at *6–7 (W.D. Okla. May 10, 2006) (Miles-LaGrange, J., opinion), this Court held that several years' worth of claims files were discoverable where the same software and adjuster were used in adjusting the plaintiff's claim and claims in years past. The Court allowed discovery of *three years' worth of claims* files where the particular adjuster was used and that had relied on the same software the Plaintiff was contesting. Id. at *7. Here, Cactus' claim shares important policy language and adjuster/supervisor similarities with numerous other claims.
>
> In *Metzger v. Am. Fid. Assur. Co.*, 2007 U.S. Dist. LEXIS 90235 (W.D. Okla. Dec. 7, 2007), the plaintiff sought discovery of similar claims denied by the insurer. This Court found that "evidence regarding [similar] policies within the state of Oklahoma is relevant and is therefore, admissible." *Id.* at *4 (emphasis added). The Court's order was limited to Oklahoma-insureds and similar policies. *Id.* Plaintiff Cactus seeks discovery of similar claims within the bounds set by this Court. These Western District cases upheld discovering other insurance claims files.

(Cactus Response to Motion for Protection (footnotes omitted)).

In *Cactus*, the District Court held that evidence of other claims was discoverable, but the court required substantial topical, temporal and geographical limitations to address the burdensomeness issues raised by the defense:

> First, defendants contend that these requests are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Specifically, defendants assert that whether National Union may have defended, indemnified, or paid or denied coverage for other substantial certainty claims has no bearing on whether there is coverage for this claim because Cactus did not rely on any payment of any other substantial certainty claim in purchasing this policy and the language of the policy is clear and unambiguous under Oklahoma law and, thus, extrinsic evidence is not allowed.
>
> Second, defendants contend that these requests are overbroad and seek documents that are privileged, or contain trade secrets, proprietary and confidential business records, and/or other protected materials. Specifically, defendants contend that these requests are overbroad because the requests have no geographic limitation, and Request 7 is unbounded by time. In addition, defendants assert that Request Nos. 7 and 8 are not reasonably tailored because

> they seek documents relating to all affiliates of National Union and Chartis – which includes ten AIG member insurance companies, primary employer liability policies which have no bearing on the pertinent commercial liability umbrella policy at issue, and to other claims and lawsuits, with no limitation on the type of documents or information sought.
>
> Lastly, defendants assert that complying with these requests would be oppressive and disproportionally costly. Specifically, defendants assert that they have no method of conducting a computer search for files containing "substantial certainty torts", and as such, searching for these documents through 210,461 identified claim files of National Union and its affiliates would cost approximately $4,200,000. In addition, the production of such documents involves confidential, privileged, and private information gathered in other claims, and such screening will cost additional money. Moreover, even if the requests were to be limited to excess or umbrella policies, opened between January 1, 2005 through January 22, 2013, for losses in Oklahoma, a search for such documents would still require searching 1,839 files. Thus, defendants conclude that the burden and expense of responding, even if limited by the Court, outweigh any relevant benefit to Cactus. To the extent the Court orders defendants to produce such documents, defendants seek to be allowed to redact privileged, confidential, and other legally protected documents and provide a privilege and confidentiality log to support the redactions.
>
> Having carefully reviewed the parties' submissions, the Court finds that Request for Production Nos. 7 and 8 seek relevant documents. Specifically, *the Court finds the documents requested are relevant to plaintiff's breach of contract and bad faith claims as they bear directly on whether the policy's language at issue is clear and unambiguous as defendants assert and may also show that Chartis has held coverage positions that are not advanced by the original drafters of the policy at issue.* The Court also finds that these requests are overbroad and not reasonably tailored in scope. Specifically, the Court finds that these requests should be limited to commercial employers excess or umbrella liability policies opened between January 1, 2005 and January 1, 2011, for losses in Oklahoma.

(Cactus, Order on Motion for Protection and to Quash (10-3-13) [Doc. 208] at 5 (emphasis added).)

Fortunately, the Court reconsidered its ruling restricting the production and discovery to excess policies. Because the excess policy "followed the form" of the primary policy, Cactus moved to clarify the Court's initial order as to whether depositions could examine knowledge of those with knowledge as to whether they were aware of other primary and excess claims for "substantial certainty" torts where either Chartis/AIG or other insurers had paid employers liability indemnity dollars towards settlement or defense. The Court reasoned:

> Plaintiff may depose witnesses regarding the witnesses' personal knowledge/involvement with primary employment liability claims in the context

> of substantial certainty claims. There is no undue burden to defendants resulting from the deponents responding to plaintiff's questions during deposition.
>
> Accordingly, the Court finds plaintiff may re-depose [various claims and claims liaison personnel]. The Court also instructs the parties that plaintiff may depose said witnesses on discoverable knowledge of the claim and related matters, including deponents' knowledge of or involvement with other substantial certainty claims in Oklahoma involving primary or excess/umbrella liability.

(Cactus, No. 5:12-CV-00191-M, [Doc. 263] at 2.)

V. Other Jurisdictions—Trends

A. Ambiguity and Reasonableness of Interpretation

In addition to Oklahoma, numerous other jurisdictions have clearly permitted discovery regarding ambiguity and the reasonableness of the policy interpretation. *See Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 106–107 (D.N.J. 1990) (Evidence of insurer's varying interpretations of policy "could undermine defendants' position that the language in question is clear and unambiguous."), *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, Civ. A. No. 88-9752, 1991 WL 78200, at *3-4 (E.D. Pa. May 7, 1991) (information regarding other insureds with similar claims was "relevant for the purposes of discovery since, 1) it may show that identical language has been afforded various interpretations by the insurer and 2) the interpretations suggested by the insurers may not be the same as those intended by the original drafters"), *modified on other grounds*, 1991 WL 111040 (E.D. Pa. June 17, 1991); *Westport Ins Co. v. Wilkes & McHugh, P.A.*, 264 F.R.D. 368, 371–74 (W.D. Tenn. 2009); *Polygon Northwest Co. LLC v. Steadfast In. Co.*, 2009 U.S. Dist. LEXIS 130238, 2009 WL 1437565, at *3–6 (W.D. Wash. May 22, 2009) ("The manner in which [the insurer] has handled the claims of other insureds with identical policy language is potentially relevant" to the ambiguity issue.), *National Union Fire Ins. Co. v. Stauffer Chem. Co.*, 558 A.2d 1091, 1095 (Del. Super. Ct. 1989) ("[T]he claim files and the interpretive materials are relevant to the determination of ambiguity and should be the subject of discovery that is structured to lessen the burden on insurers while protecting the confidentiality of other insureds.") *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 1991 U.S. Dist. LEXIS 6215, at *8 (E.D. Penn. May 7, 1991) (finding that handling of other claims was relevant because it could show that identical language had been interpreted in various ways by the insurer and that the insurer's interpretation may not be similar to that intended by the drafters), *J.C. Assocs. v. Fid. & Guar. Ins. Co.*, 2006 U.S. Dist. LEXIS 32919, 2006 WL 1445173, at *1 (D. D.C. May 25, 2006) ([I]nformation as to how defendant interpreted the [particular exclusion . . . is] relevant to the claim presented by plaintiff if that interpretation is difference from the interpretation that the defendant is asserting in this case."), *Owens-Brockway Glass Container v. Seaboard Sur. Co.*, 1992 U.S. Dist. LEXIS 10337, 1992 WL 696961, at *9 (E.D. Cal. May 28, 1992) ("[S]imilar insurance claims asserted by other insureds against defendant [insurers] may be relevant to the interpretation of the insurance policy language of this case."); *see also Potomac Elec. Power Co. v. Cal. Union Ins. Co.*, 136 F.R.D. 1, 3 (D.D.C. 1990) (ordering insurers to "provide information on third party claims that were either litigated or ultimately paid" where the policies and claims involved were similar to one another); *Champion*

Int'l Corp. v. Liberty Mut. Ins. Co., No. 87 Civ. 1634 (WCC), 1989 WL 299156, at *2 (S.D.N.Y. Oct. 31, 1989) (authorizing depositions of defendant insurers regarding recordkeeping and filing procedures regarding other claim information); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 283, 287 (D.D.C. 1986) (granting motion to compel production of documents concerning dioxin claims of other policyholders), aff'd, No. Civ. A. 83-3347, 1987 WL 8512, at *2-4 (D.D.C. Mar. 9, 1987); *Carey-Can., Inc. v. Cal. Union Ins. Co.*, 118 F.R.D. 242, 245-46 (D.D.C. 1986) (ruling that insurers must produce certain "policies themselves [of non-party insureds] and all claims and underwriters' files concerning these policies").

B. Evidence of Bad Faith

Numerous courts have found that evidence regarding other claims is admissible to show bad faith. *See, e.g., Poneris v. Pa. Life Ins. Co.*, No. 1:06-cv-254, 2007 WL 3047232, at *1 (S.D. Ohio Oct. 18, 2007) (discovery regarding other policyholders relevant to claim for bad faith denial of coverage; claims information regarding other insureds "is relevant to establish whether Defendant had a pattern or practice" of improperly denying claims); *Paolo v. AMCO Ins. Co.*, No. 02-02367 JW (HRL), 2003 WL 24027877, at *1 (N.D. Cal. Sept. 17, 2003) (ordering production of other policyholder information in bad faith breach of contract action); *Fridkin v. Minn. Mut. Life Ins. Co.*, No. 97 C 0332, 1998 WL 42322 (N.D. Ill. Jan. 29, 1998) (same); *First Fid. Bancorp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*, Civ.A. No. 90-1866, 1992 WL 6859 (E.D. Pa. Jan. 13, 1992) (ordering National Union to produce other policyholder files because, "there is no other way for [plaintiffs] to obtain the requested pattern and practice information"); *Colonial Life & Ace. Ins. Co. v. Sup. Ct.*, 647 P.2d 86, 89-90 (Cal. 1982) (same).

C. Exemplary Decisions Involving Discovery and Admission of Other Claims

1. Arizona

In *Hawkins v. Allstate Insurance Company*, 733 P. 2d 1073 (Ariz. 1987), the insured for contract and bad faith in connection with a claim for property coverage. The jury found bad faith. On appeal, Allstate challenged the admissibility of testimony from three former Allstate employees regarding Allstate's claims practices and procedures, although none of the witnesses had any involvement with the plaintiffs' claim. The court found that evidence regarding the handling of other claims by these witnesses was relevant and admissible regarding bad faith. ***"Evidence of previous, similar acts alters the probability that the conduct in question was unintentional; the more frequently an act occurs, the more probable it is intentional."*** *Id.* (emphasis added). Additionally, the court found that the testimony was properly admitted as "other crimes, wrongs, or acts" evidence pursuant to Rule 404(b), for the purpose of showing Allstate's "motive, intent, or absence of mistake or accident." *Id.* at 1082. The court held that whether the defendant intended to injure the plaintiff or consciously disregarded the plaintiff's rights may be suggested by a pattern of similar unfair practices. *Id.* at 1081 (citations omitted); *accord Moore v. American United Life Ins. Co.*, 150 Cal.App.3d 610, 197 Cal. Rptr. 878 (1984). Finally, the testimony was relevant both to establish a case for recovery of punitive damages. It was also used to evaluate the amount of punitive damages found by the jury.

2. Delaware

In *J.C. Associates v. Fidelity & Guaranty Insurance Company*, a policyholder sought discovery regarding "other claims and litigation related to the policy language upon which the defendant relies for its denial of coverage." 2006 WL 1445173, at *1 (D.D.C. May 25, 2006). The court ruled the information sought was "clearly relevant," explaining: "For example, the information as to how defendant interpreted the ... exclusion would qualify as an admission under Rule 801 of the Federal Rules of Evidence and [is] relevant to the claim presented by plaintiff if that interpretation is different from the interpretation that the defendant is asserting in this case." *Id.* *See also S.N.A. Nut Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, Pa., No. 95 C 3999, 1996 WL 31155, at *4 (N.D. Ill. Jan. 24, 1996) (approving Bankruptcy Court's order sanctioning insurer for failing to produce 50 claim files relating to other policyholders); *Owens-Brockway Glass Container, Inc. v. Seaboard Sur. Co.*, No. CIV. S-91-1044 DFL, 1992 WL 696961, at *3 (E.D. Cal. May 27, 1992) ("similar insurance claims asserted by other insureds against defendants may be relevant to the interpretation of the insurance policy language in this case . . . [and] are appropriate for discovery").

3. New York

In *Zurich American Ins. Co. v. Ace American Reinsurance Co.*, 2006 WL 3771090 (S.D. N.Y. 2006), Zurich alleged that its reinsurer, as part of an ongoing pattern of behavior, did not pay its share of a settlement reached with Zurich's policyholder. Zurich moved to compel the reinsurer to produce documents from two claims against it for wrongful denial of such payments. Noting that motive and, thus, "similar acts" evidence is usually immaterial to breach of contract claims, the court nevertheless found that the other claims could provide evidence of how the reinsurer interpreted its duty to settle and 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." The court agreed with Zurich and held the requested information regarding other claims relevant and discoverable.

In typical fashion, the reinsurer also opposed the production of "other" claims files on ground that the production would be unduly burdensome, noting that its computer system was incapable of segregating and identifying claims by type or otherwise. While the computer system was clearly inadequate, the court chastised the reinsurer, noting that it should anticipate frequent litigation when it operates a multi-million dollar business with an "opaque data storage" system. The court then held that the parties should propose a "propose a protocol for sampling" the reinsurer's claim files in order to obtain examples of claims files in question.

4. West Virginia—Discovery of Other Lawsuits

The court in *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577, 584 (1992), addressed discovery requests seeking "information on all bad faith, unfair trade or settlement practices, and excess verdict claims filed against State Farm throughout the entire country since 1980." *Id.* "The plaintiffs also requested data on all complaints filed against State Farm with insurance industry regulators nationwide for the same period." *Id.* The court limited the discovery to other lawsuits and Insurance Commission complaints in the state where the

primary action was pending. The court held that a nationwide request to State Farm was overbroad.[1] The court rejected arguments that the request involved irrelevant information, noting that the unfair claims handling act required proof of more than one violation of the act. *Id.* The court recognized that this "type of related-acts evidence is admissible at trial under Rule 404(b) of the West Virginia Rules of Evidence.11 See generally F. Cleckley, Handbook on Evidence for West Virginia Lawyers § 6.6 (1986 & Cum.Supp.1992)." *Id.*

[1] The court noted numerous decisions finding less broad requests to be unduly burdensome: "***State Farm Mut. Auto. Ins. Co. v. Superior Court,*** 167 Ariz. 135, 804 P.2d 1323 (App.1991)(request for documents relating to any bad faith lawsuits against insurer); ***Mead Reinsurance Co. v. Superior Court,*** 188 Cal.App.3d 313, 232 Cal.Rptr. 752 (1986)(request for information on every bad faith claim made against insurer in six and one-half year period); ***Leeson v. State Farm Mut. Auto. Ins. Co.,*** 190 Ill.App.3d 359, 137 Ill. Dec. 837, 546 N.E.2d 782 (1989)(request for information concerning all medical exams conducted by auto insurer for medical benefits claims within prior year); *State ex rel. Bankers Life & Casualty Co. v. Miller*, 160 Mont. 256, 502 P.2d 27 (1972)(request for names and addresses of all persons within state whose claims for health and accident disability benefits against insurer were rejected or not fully paid over three-year period)." *Stephens, supra,* at 583.

APPENDIX

1. **Federal Rules of Evidence Rule 401**:

   Evidence is relevant if:

   It has any tendency to make a fact more or less probable than it would be without the evidence; and

   The fact is of consequence in determining the action.

2. **Federal Rules of Evidence Rule 402**:

   Relevant evidence is admissible unless any of the following provides otherwise:

   - The United States Constitution;
   - A federal statute;
   - These rules; or
   - Other rules prescribed by the Supreme Court

   Irrelevant evidence is not admissible.

3. **Federal Rules of Evidence Rule 403**;

   The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

4. **Federal Rules of Evidence Rule 404**;

   (a) Character Evidence.

   Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

   Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

   a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

   subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

   offer evidence to rebut it; and

   offer evidence of the defendant's same trait; and

   in a homicide case, the prosecutor may offer

evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) **Crimes, Wrongs, or Other Acts.**

Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

5. **Federal Rules of Evidence Rule 405**;

(a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

6. **Federal Rules of Evidence Rule 406**;

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

7. **Federal Rules of Evidence Rule 407**;

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of

the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or--if disputed--proving ownership, control, or the feasibility of precautionary measures.

8. **Federal Rules of Evidence Rule** 408,

(a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

furnishing, promising, or offering--or accepting, promising to accept, or offering to accept a valuable consideration in compromising or attempting to compromise the claim; and

conduct or a statement made during compromise negotiations about the claim except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.