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Broken Records - Addressing Insurers' Improper Attempts to Evade Their Discovery Obligations Based on Their Own Poor Record Keeping Systems

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The **scope of discovery is a hotly contested issue in many insurance coverage disputes.** Discovery is an insured's opportunity to gather information to support its coverage claims, test an insurer's positions, and respond to an insurer's defenses. Some of the most valuable information an insured can gather during discovery concerns an insurer's handling of similar claims previously submitted by other insureds – what is commonly referred to as "other insurance information." Other insurance information can include policies, claim files, correspondence, litigation and arbitration documents, and deposition testimony regarding other insureds. Other insurance information is valuable because it may demonstrate an insurer's: (1) earlier reading of key provisions in comparable policies – which, if different from an insurer's present coverage position or policy interpretation, may be fatal to that position or interpretation; or (2) prior conduct in similar situations – which, if different from the insurer's conduct towards the present insured, may support a finding that the insurer's current conduct is in bad faith. This information is therefore relevant and discoverable.[1]

Because of its importance, insurers often strongly resist producing other insurance information, arguing that producing this information will be extremely burdensome and costly. In particular, insurers frequently argue that their extensive files are organized in such a way that any search at all would be unduly burdensome and costly – which they contend relieves them of the obligation to produce relevant other insurance information.

An insured should flatly reject these arguments. Courts across the country have held that an unwieldy record keeping system does not relieve a party of its discovery obligations. While discovery rules sometimes permit a modicum of relief for a party facing a significant burden, such considerations do not apply to hurdles created by a party's own record keeping system – rather, a party must produce all relevant information regardless of any burden of its "own making." Order, *Lou v. Ma Labs., Inc.*, No. 12-cv-05409 WHA (NC), Dkt. 67 (N.D. Cal. March 28, 2013) ("The Court finds that the burden defendants claim excuses them from producing such documents is of their own making, and thus not compelling."); *see also Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 611 (D. Neb. 2001) ("The fact that a corporation has an unwieldy record keeping system which requires it to incur heavy expenditures of time and effort to produce requested documents is an insufficient reason to prevent disclosure of otherwise discoverable information."); *Thomas v. Cate*, 715 F. Supp. 2d

1012, 1033 (E.D. Cal. 2010) *order clarified,* No. 1:05-cv-01198-LJO-JMD-HC, 2010 WL 797019 (E.D. Cal. Mar. 5, 2010) ("The fact that a responding party maintains records in different locations, utilizes a filing system that does not directly correspond to the subjects set forth in Plaintiffs' interrogatory, or that responsive documents might be voluminous does not suffice to sustain a claim of undue burden.") (quotations omitted). Any other approach would penalize parties seeking appropriate discovery for their adversaries' poor record keeping, and incentivize those adversaries to organize their files in ways that made production difficult.

These considerations are particularly acute in the insurance coverage context. Insurers' stock in trade is litigation, and requests for other insurance information that they would prefer not to produce are common. If insurers were permitted to limit their production of other insurance information to only those documents they could easily search for in the record keeping systems they designed themselves, they would become the arbiters of their own discovery obligations. This would, of course, be an invitation to mischief, as it would permit insurers to produce only what they choose to produce, rather than what is relevant. To allow an insurer to evade its discovery obligations solely because its files are poorly organized or unwieldy would ignore the principles and goals underlying discovery rules across the nation.

Multiple courts have rejected insurers' contentions that unwieldy record keeping systems should relieve them of their obligation to produce other insurance information. For instance, in*Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, the court granted an insured's motion to compel "'other insurance' information," even though the insurer submitted affidavits asserting that compliance with the discovery requests "even if feasible would be a herculean task that is unduly burdensome and expensive," due to the way the insurer's files were organized. Civ. A. No. 88-9752, 1991 WL 111040, at *1 (E.D. Pa. Jun. 17, 1991). The court observed that "[i]n cases involving similar discovery requests, courts have held that an unwieldy record-keeping system, which requires heavy expenditures in money and time to produce relevant records, is simply not an adequate excuse to frustrate discovery." *Id.* at *2 (collecting cases). The court found that:

> The defendant may not excuse itself from compliance with Rule 34, Fed. R. Civ. P., by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery, by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.

Id. (quoting *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976)). The court concluded that:

> Therefore, [the court] wishes to make clear that it will not be receptive to the insurance carriers impossibility contentions insofar as they are grounded in the peculiar manner in which defendants maintain their records and their computer systems. Every lawsuit is burdensome and expensive to the party litigants, but where it is found necessary to bring about a fair, impartial and thorough administration of justice, all sources of information must be made available regardless of expense or inconvenience resulting therefrom. The mere fact that compliance with a discovery request will cause significant expense does not of itself justify denial of the request.

Id. (internal citations omitted). The court ruled that it would "not penalize the party seeking discovery for the other parties unwieldy record keeping system." *Id.* at 3.

In *First American Title Insurance Co. v. Myers*, C. A. No. 9:09-cv-1202-SB (D.S.C.), the court addressed this same issue at length. In *Myers*, an insured sought discovery regarding other court cases involving similar claims and policies. The insurer argued that its claim files were organized only by claim number and state and date of issuance, and that responding to the insured's requests and locating files for claims concerning similar issues would therefore require a manual search that "would take an extraordinary amount of man-hours and expense, and would be a unduly burdensome task for [the insurer]." Aff. of John Reeves at 1-2, *Myers*, Dkt. 43-1 (Jul. 8, 2010); *see also* Mem. in Opp'n to Mot. to Compel at 1, *Myers*, Dkt. 43 (Jul. 8, 2010). The court rejected the insurer's argument that producing such information would be unduly burdensome, stating "[t]hat's really not [the insured's] problem. The problem is [the insurer's] problem, because of the way you keep your records. You can't just throw everything in a big box and say we can't find it." *See* Motion Hearing at 15, *Myers*, Dkt. 44 (July 14, 2010). The court further informed the insurer that "you can't stand there and say I don't know how they keep them, and they're just by claim number, and we throw them in this big box, and so we can't do it." *Id.* The court then instructed the insurer to produce the relevant records. *Id.* at 17.

In *Phillips v. Clark City School District*, the court likewise noted that an insurer cannot "rely on an inadequate records keeping system as an excuse for not locating and producing relevant information regarding other claims or lawsuits." No. 2:10-cv-0268 GMN-GWF, 2012 WL 135705, at *14 (D. Nev. Jan. 18, 2012).

In the modern age of electronic record keeping, it may seem absurd that an insurer would attempt to escape its obligations to produce relevant information on the grounds that its records are so byzantine and unwieldy as to be virtually unsearchable or otherwise incapable of production. However, insurers regularly assert that they are essentially incapable of producing any other insurance information at all. While insureds should be, and typically are, open to discussing with an insurer approaches that might reduce the potential burdens and costs of discovery while still eliciting all relevant documents, an insured must reject any argument by an insurer that it intends to produce no discovery regarding other insurance information, or limit a production's scope in such a way that undercuts its value, due to the nature and volume of its records. Because other insurance information may prove invaluable, an insured should be prepared to tackle this issue head-on whenever it arises.

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[1] *See, e.g.*, *Paolo v. Amco Ins. Co.*, No. 02-02367, 2003 WL 24027878, at *1-2 (N.D. Cal. Dec. 16, 2003) (finding "the relevance of claims handling practices to an action for bad faith breach against an insurer and claim for punitive damages is well established in case law");*Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 660 N.E.2d 765, 767 (Ohio Ct. Com. Pl. 1993) (finding other insurance information "relevant to the defendants' intentions as to asbestos coverage, as it will shed light on how the defendants have approached other asbestos issues and used exclusionary clauses"); *Owens-Brockway Glass Container Inc. v. Seaboard Sur. Co.*, No. S-91-1044, 1992 WL 696961, at *2-3 (E.D. Cal. May 27, 1992) (finding other insurance information relevant to interpretation of policy); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 106-07 (D.N.J. 1990) ("[other insured] information is relevant for purposes of discovery since it may show that identical language has been afforded various interpretations by the insurer"); *Minn. Mining & Mfg. Co. v. Commercial Union Ins. Co.*, Civ. No. A. 88-325 (MTB), 1989 WL 241716, at *2 (D.N.J. Oct. 13, 1989) (holding that other insurance information is relevant to the party's interpretation of its own insurance contract); *Colonial Life & Accident Ins. Co. v. Superior Court*, 31 Cal. 3d 785, 791-92 (1982) (allowing discovery of other insurance information).

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