

Discovery of Reserve and Reinsurance Communications – Part III

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In Part III, we discuss discovery of reinsurance information.

Discovery of Reinsurance Documents and Communications

Federal Rule of Civil Procedure 26(a)(1)(A)(iv) requires, as part of the parties' initial disclosures, the production of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." Most federal courts have held that reinsurance agreements must be produced under Rule 26(a) where the primary insurer is a named party, because the reinsurer may have a duty to indemnify the primary insurer. Reinsurance agreements, however, need not be produced under Rule 26(a) when the primary insurer is not a party. They also may not need to be produced in state court actions where Rule 26(a) does not apply.

Most courts hold that communications and other documents between an insurer and its reinsurer are generally not relevant and not discoverable. Reinsurance information reflects a business decision by the primary insurer to spread risk or to satisfy statutory reserve requirements, so it is not typically relevant to the claims in a case. As with loss reserves, reinsurance communications are discoverable in certain cases where they may have relevance to the issues raised. Courts have held that they may be relevant (and are thus discoverable) to show the insurer's interpretation of the policies at issue, whether the insurer believed the claims were covered by the policies, the thoroughness of the insurer's claims investigations, or combat defenses such as lost policy, late notice, or misrepresentation. In arguing that reserves are not relevant, an insurer may choose to describe the contents of the communications or request an in camera review to demonstrate lack of relevance.

Insurers may also object to the production of reinsurance communications if they are protected by the attorney-client or work product privileges.

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