

# INSURANCE LITIGATION STRATEGIES

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## **Past Practices, Negligence and Bad Faith**

We were recently engaged in an insurance controversy which involved the application of a complex and ambiguous (as many are) insurance coverage. Our client's posture was that the insurer was being unreasonable in their interpretation of the coverage, and believed that the promised protection should have been resolved in their favor.

The coverage in question was produced on a common form and widely sold to the insurer's market niche. We concluded that determining the carrier's past interpretations of coverage were crucial to proving the existence of insurance protection, inconsistent claims practices, negligence, and bad faith conduct.

We learned that while courts are careful to balance an insurance company's concerns of privilege, confidentiality and the burdensome nature of discovery, they have allowed insureds to obtain the information of other policyholder's claim files. Insurance companies will often respond by objecting to record production on the grounds that:

1. Other claims files contain confidential information
2. There are inherent factual differences between the claim in question and other claims; consequently, there is little relevance of one claim file to another; and
3. It is burdensome for the insurer to comply with such a request for information.

When such collateral information is deemed relevant to the facts of the case, courts may address the confidentiality issue by requiring the insurer to redact the confidential information and generate a privilege log before turning over the requested documents.

The "burdensome production" aspect of the request can be overcome by limiting the scope and extent of the production to those claim files which address a particular type of coverage. In such instances, it will be beneficial to present the court with a protocol for sampling the requested files.

While determining the past practices of an insurance carrier is time consuming, it can be instrumental in proving a lack of consistency in claims handling practices and support allegations of negligence and bad faith conduct.