

By Brian Sande

**Avoid policyholders' attempts to enhance coverage position by educating the court about inappropriate use of extrinsic information.**

# Can Discovery Nets Be Avoided?

All too often, policyholder counsel embark on the proverbial “fishing expedition” during discovery in an effort to enhance their clients’ coverage positions. A wide net may be cast seeking information and documents relating

to all other claims handled by the insurer involving the same policy provision; all claims handling manuals, underwriting materials, etc.; all earlier and subsequent forms of the policy and materials relating to a provision’s “drafting history”; as well as communications with reinsurers involving the claims in question. They do so, of course, hoping to “prove” that policy language is ambiguous and, therefore, must be interpreted in favor of coverage.

Insurers understandably balk at these requests. Identifying all claims involving the same policy provision, gathering all underwriting material, and reviewing all correspondence with reinsurers entails countless hours researching old company records, which may be kept in an unheated warehouse off company property and are not indexed or organized. Consequently, counsel for carriers object to such requests as overbroad and unduly burdensome. If the parties cannot agree, courts may be inclined to

compromise and simply narrow the scope of the information to be provided.

Although limiting discovery is better than nothing, the question arises whether this kind of discovery should be permitted in the first place. After all, isn’t the interpretation of an insurance policy a legal question to be resolved by the court? If so, of what possible relevance is information about other claims or the drafting history of a particular policy provision? Unfortunately, courts confronted with these arguments may fall back on the mantra that “discovery is broad” and permit the requests.

The maxim that “any information that appears reasonably calculated to lead to the discovery of admissible evidence is discoverable” may, however, be transformed from a sword favoring the policyholder to a shield protecting the carrier. By effectively reminding the court of the basic rules of contract interpretation, explaining the pol-



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icyholder's intended use of the discovery, and citing to favorable authority on the issue, an insurer may be able to demonstrate that the policyholder's requests cannot lead to the discovery of admissible evidence and defeat the requests, or alternatively delay them until after the court has had the opportunity to construe the policy language in question. This article will examine some of the arguments to limit or defeat discovery. (Note: while this article discusses matters relating to discovery in the context of insurance coverage disputes, it does not address discovery in bad faith actions. Additional issues concerning discoverability of insurer information may exist in bad faith cases. In jurisdictions that bifurcate bad faith claims and delay them until after underlying insurance matters are first decided, the discovery issues discussed herein presumably would apply during the insurance coverage phase of litigation. See, e.g., *Dahmen v. Am. Family Mut. Ins. Co.*, 2001 Wis. App. 198, 635 N.W.2d 1 (Ct. App. 2001) (bifurcating bad faith claim and staying bad faith discovery).)

### The Rules of Contract Interpretation

At the outset, it is important to remind the court that an insurance policy is subject to ordinary principles of contract interpretation. *Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532, 537 (5th Cir. 2002); *Indiana Funeral Directors Ins. Trust v. Trustmark Ins. Corp.*, 347 F.3d 652, 654 (7th Cir. 2003); *Edgley v. Lappe*, 342 F.3d 884, 888 (8th Cir. 2003). There are several fundamental tenets of contract and insurance policy interpretation widely recognized across jurisdictions. First, the interpretation of an insurance contract is a question of law for the court to decide. *Nascimento v. Preferred Mut. Ins. Co.*, 513 F.3d 273, 276 (1st Cir. 2008); *Minges Creek L.L.C. v. Royal Ins. Co. of Am.*, 442 F.3d 953, 956 (6th Cir. 2006). Second, whether the salient policy language is clear or ambiguous is likewise a question of law for the court alone to determine. See *Freeman v. State Farm Mut. Auto. Ins. Co., Inc.*, 436 F.3d 1033, 1035 (8th Cir. 2006) (court's province to determine if ambiguity in policy exists); *Escobar v. United Auto. Ins. Co.*, 898 So. 2d 952, 954 (Fla. Dist. Ct. App. 2005) (quashing lower court determination that whether ambiguity existed was for jury to determine, and remanding

with instructions to determine whether ambiguity existed as matter of law); *Colorado Cas. Ins. Co. v. Sammons*, 157 P.3d 460, 465 (Wyo. 2007). Third, while the ultimate goal of any contract interpretation is to divine the intent of the parties, intent is to be determined from the language of the policy itself according to its natural and ordinary meaning. See *Key v. Allstate Ins. Co.*, 90 F.3d 1546, 1549 (11th Cir. 1996) (contract itself provides evidence of party intent). Thus, parol evidence is not allowed to alter the terms of a clear and unambiguous contract. See *ReliaStar Life Ins. Co. v. IOA Re, Inc.*, 303 F.3d 874, 880 (8th Cir. 2002) (policy terms given their plain, ordinary meaning without resorting to parol evidence).

### The Policyholder's Intended Use of the Proposed Discovery

After reviewing the fundamental rules of contract interpretation, it is important to explain to the court how the policyholder intends to use the discovery it is seeking. Without this explanation, the court may not fully appreciate why the discovery request cannot lead to the discovery of admissible evidence and instead will lead the court and the party into endless forays and sideshows. There are at least three different ways the policyholder may try to use the discovery responses. First, the policyholder may seek evidence of an inconsistency in the company's interpretation of the policy in an effort to "prove" the policy language is ambiguous. The policyholder may intend to comb through other claims files in order to locate an example of the company applying the language in question differently than in the policyholder's case. The policyholder will seize on this as "proof" that the provision at issue is subject to more than one interpretation and, therefore, is ambiguous. Similarly, if policy language has been updated, the policyholder will maintain that the earlier language is defective and incapable of unambiguously precluding coverage. Second, the policyholder may seek to use extrinsic information as an insurer admission, thus "proving" that coverage must be afforded. Third, the policyholder may seek information to create coverage by estoppel—to prevent the insurer from asserting a position the policyholder believes is contrary to the information obtained in discovery.

After highlighting the basic rules of contract construction, as well as the purpose of the policyholder's discovery requests, it is necessary to demonstrate to the court that the two are fundamentally incompatible—extrinsic evidence cannot be used to create ambiguity as a part of the court's assessment of contract language; employee conduct in other cases does not constitute

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an admission; and coverage cannot be created by estoppel by barring insurers from asserting the plain language of the contract. Therefore, discovery into each of these subjects will not lead to the discovery of admissible evidence, and the policyholder's discovery requests should be denied.

### Extrinsic Evidence May Not Be Used to Prove Ambiguity

In light of the fact that interpretation of an insurance policy is a question of law and governed by the terms of the contract, many jurisdictions do not allow extrinsic evidence to "prove" the existence of an ambiguity or to show that any alternative interpretation is reasonable when the policy is unambiguous on its face. See *Jacobs Constructors Inc. v. NPS Energy Services, Inc.*, 264 F.3d 365, 377 (3d Cir. 2001) ("[i]n the absence of ambiguity, the interpretation of an insurance policy must focus upon the terms of the agreement itself rather than extrinsic evidence"); *West American Ins. Co. v. Johns Bros. Inc.*, 435 F. Supp. 2d 511, 518 (E.D. Va. 2006) ("[t]he court is not only required to begin its analysis with the language of the contract, but if such language is unambiguous, that is also where inquiry should end"); *Commonwealth Ins. Co. v. Stone Container Corp.*, 351 F.3d 774, 779 (7th Cir. 2003) ("because the [policy language] is unambiguous in barring coverage, there is no need to ex-

amine any extrinsic evidence”); *Sheppard v. Allstate Ins. Co.*, 21 F.3d 1010, 1012 (10th Cir. 1994) (“[e]xtrinsic evidence will not be used to interpret a policy which is not ambiguous”).

A principal reason for disallowing the use of extrinsic evidence to prove ambiguity is grounded in the parol evidence rule. This doctrine is not a discretionary rule of evi-

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dence, but rather is a substantive rule of contract law. *Advanced Med., Inc. v. Arden Med. Sys., Inc.*, 955 F.2d 188, 195 (3d Cir. 1992). The rule is premised on the notion that when parties have reduced their agreement to writing, permitting extraneous evidence purportedly to learn what was intended may contradict what is written and, therefore, “would be dangerous and unjust in the extreme.” *Schilberg Integrated Metals Corp. v. Cont'l Cas. Co.*, 819 A.2d 773, 794 (Conn. 2003). In *Schilberg*, the trial court disallowed discovery related to the policy's drafting history. The Supreme Court of Connecticut affirmed, concluding that the information was only sought to support the policyholder's contention that the language was susceptible to more than one reasonable interpretation. The court determined the policy was clear and unambiguous, and such extrinsic evidence would be barred as an inappropriate effort to “contradict the plain meaning of the [language contained in the] exclusions.” *Schilberg*, 819 A.2d at 795.

### Evidence Regarding Other Claims

Some courts have not allowed informa-

tion concerning other claims handled by the insurer to be used in determining coverage. See *Ramirez v. Am. Family Mut. Ins. Co.*, 652 N.E.2d 511, 516–17 (Ind. Ct. App. 1995) (information regarding other claims by other policyholders not relevant as insurance coverage matters were a legal question based upon the terms of the insurance contract). Some courts note that evidence of an insurer's earlier allegedly inconsistent position concerning coverage is not relevant to an analysis of whether coverage is afforded under the plain language of the insurance contract. See, e.g., *Herron v. Schutz Foss Architects*, 935 P.2d 1104, 1108 (Mont. 1997) (insurer assertions concerning coverage in different case not binding in present litigation). Permitting the use of other claims handled by an insurer to assess whether ambiguity exists may lead to mini-trials about whether the insurer acted inconsistently, as the parties debate whether the other matters were substantially similar or substantively different than the instant coverage case. Moreover, statements in other files may be taken out of context, substantial coverage analysis may not have been undertaken and, in fact, incorrect decisions may have been made about coverage in other matters.

### Evidence of Drafting History and Changes to Policy Forms

Some courts have also disallowed the use of so-called policy “drafting history” information to prove ambiguity. See *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 373 (6th Cir. 1995) (declining to examine policy drafting history information); *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392, 396 n.6 (Mich. 1991) (court does not look to drafting history evidence when interpreting and applying unambiguous policy terms); *Detrex Chem. Indust., Inc. v. Employers Ins. of Wausau*, 746 F. Supp. 1310, 1319 (N.D. Ohio 1990) (parol evidence rule precludes drafting history evidence); *ACL Tech., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, 217–18 (Cal. Ct. App. 1993) (drafting history information irrelevant to demonstrate that ambiguity exists).

Similarly, some courts hold that a change in the policy form may not be used to interpret whether the policy at issue effectively precludes coverage. In *O'Brien v. Progres-*

*sive Northern Ins. Co.*, 785 A.2d 281, 289–90 (Del. 2001), the Supreme Court of Delaware held that alteration in policy language is not tantamount to an admission of ambiguity. The court reasoned that any contrary rule would discourage policy development and penalize insurers that reexamine even their most unambiguous policies in an attempt to stem costly litigation and improve consumer understanding of their policies. Modification of policy language should be encouraged, as clarifying insurance policy terms “will reduce the likelihood that policyholders will be tempted to debate terms of an insurance contract in order to obtain indemnification for which they have neither bargained nor paid. Not only will this help the insurers lower litigation costs, but it should also benefit insureds in the form of lower premiums.” *O'Brien*, 785 A.2d at 290; see also *State Farm Fire & Cas. Co. v. Eddy*, 218 Cal. App. 3d 958, 972–73 (Cal. Ct. App. 1990); *McKee v. State Farm Fire & Cas. Co.*, 145 Cal App. 3d 772, 777–78 (Cal. Ct. App. 1983).

### Use of Claims Handling Materials and Statements of Insurance Employees

Some courts do not allow claims-handling materials and other insurer internal documents to be used in an effort to demonstrate policy ambiguity. See *Indiana Gas Co., Inc. v. Aetna Cas. & Sur. Co.*, 951 F. Supp. 780, 786 (N.D. Ind. 1996), *vacated on other grounds*, 141 F.3d 314 (7th Cir. 1998) (rejecting use of information from claims-handling manual); *Am. Cas. Co. of Reading, Pennsylvania v. Baker*, 22 F.3d 880, 890 (9th Cir. 1994) (insurer correspondence and memoranda was not relevant to construe unambiguous policy language). Similarly, many courts also do not allow the testimony of insurer employees or agents to be used to interpret insurance contracts to determine whether there is ambiguity. In *Wackenhut Services, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 15 F. Supp. 2d 1314 (S.D. Fla. 1998), the policyholder sought to use testimony of insurer employees to establish ambiguity in policy language. The court noted that, under this analysis, policy interpretation “is apparently not a question of objective meaning, but rather is determined by reference to lay impressions.” Rejecting this, the court held that statements from insurer employ-

ees about coverage constituted “extraneous matters” that were “completely irrelevant” to the coverage determination. *Wackenhut*, 15 F. Supp. 2d at 1323; *see also Hotel Roanoke Conference Ctr. Comm’n v. Cincinnati Ins. Co.*, 303 F. Supp. 2d 784, 789, n. 7 (W.D. Va. 2004), *aff’d*, 119 Fed. Appx. 451 (4th Cir. 2005) (insurer agent deposition testimony admitting that facts at issue constituted an “occurrence” under the policy was irrelevant, as courts do not resort to extrinsic evidence where unambiguous contract must be given its plain meaning); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 496 n.53 (Del. 2001) (testimony of underwriters irrelevant); *Noran Neurological Clinic v. Travelers Indem. Co.*, 229 F.3d 708, 710 (8th Cir. 2000) (ambiguity cannot be created using testimony of insurance company employees); *Cutter & Buck, Inc. v. Genesis Ins. Co.*, 306 F. Supp. 2d 988, 999 (W.D. Wash. 2004), *aff’d*, 144 Fed. Appx. 600 (9th Cir. 2005) (testimony purporting to interpret a policy term is inadmissible “as a legal conclusion because contract interpretation is a matter of law to be determined by the court”); *Shelter Gen. Ins. Co. v. Siegler*, 945 S.W.2d 24, 28 (Mo. Ct. App. 1997) (admissions of agent irrelevant as policy terms were unambiguous). Thus, employee and agent opinions as to the meaning and application of policy terms may not be relevant or admissible to determine whether language is ambiguous.

### Discovery of Reinsurance

A policyholder may also attempt to obtain information concerning the insurer’s dealings with its reinsurers, arguing that because an insurer may have consulted with reinsurers while evaluating coverage positions, reinsurance information may reflect an intent to indemnify the underlying claims, may contain admissions concerning coverage, or otherwise may undermine the insurer’s position to disallow coverage. Some courts prohibit such discovery, especially when the purpose for obtaining this information is to seek information relative to the interpretation of the underlying insurer’s policy provisions. *See Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 139 F.R.D. 609 (E.D. Pa. 1991) (rejecting discovery of reinsurance agreements or communications with reinsurers for the purpose of interpreting the underlying policies), and on

reconsideration 1991 WL 237636 (Nov. 7, 1991 E.D. Pa.) (allowing discovery as relevant to other insurer affirmative defenses but affirming that such discovery was “irrelevant to determining the intent of the contracting parties”); *Medmarc Cas. Ins. Co. v. Arrow Int’l Inc.*, 2002 WL 1870452, \*4 (July 29, 2002 E.D. Pa.) (reinsurance materials irrelevant to determining intent of the contracting parties “or interpretation of an unambiguous insurance policy provision.”) *See also Potomac Elec. Power v. California Union Ins. Co.*, 136 F.R.D. 1, \*3 (D. D.C. 1990) (permitting discovery of reinsurance agreements themselves but not any other communications or documents because such discovery would constitute a “fishing expedition” and the requested information lacked “sufficient indicia of relevance”). Underlying the reluctance to compel production of reinsurance information may be the notion that while insurers believe their coverage position to be correct, reality dictates that they protect themselves from the unknown risk of an adverse determination. Thus, reinsurance information may not be appropriate evidence to attempt to ascertain the meaning of policy language.

### Insurer Employee Comments Do Not Constitute an “Admission” of Coverage

Just as information learned in discovery may not be admissible to prove ambiguity, it also may not constitute an “admission” that binds the insurer. In *Quan v. Truck Ins. Exch.*, 79 Cal. Rptr. 2d 134, 145–46 (Cal. Ct. App. 1998), the court held that insurance personnel statements and memos containing opinions as to whether a defense should be afforded, and questioning whether denial of coverage was proper under the policy, did not constitute proper “admissions” concerning the legal effect of the contract. *See also Kaplan v. Northwestern Mut. Life Ins. Co.*, 65 P.3d 16, 22 (Wash. Ct. App. 2003) (testimony of insurer’s senior benefits consultant admitting clause was subject to two reasonable interpretations was not an appropriate admission against interest; whether policy language was ambiguous was legal, not factual, question for court to determine as a matter of law); *Chatton v. Nat’l Union Fire Ins. Co.*, 13 Cal. Rptr. 2d 318, 331 (Cal. Ct. App. 1992) (statements of insurer’s employees purportedly admitting

coverage under policy was not an admission of coverage and was “completely irrelevant to interpret an insurance contract” as interpretation was a legal, not factual, determination for the court); *Lincoln Liberty Life Ins. Co. v. Goodman*, 535 S.W.2d 7, 11 (Tex. Civ. App. 1976) (letter from insurer’s claim manager construing exclusion could not constitute admission concerning legal effect of the policy language; conclusions of law are not admissible as admissions by a party). Thus, some courts will not allow use of such extrinsic evidence to establish legal conclusions concerning coverage; otherwise, the information would simply become a substitute for the court’s own independent analysis of policy language.

### Coverage Can Not Be Created by Estoppel

Policyholders also seek to use the information that may be learned through these discovery requests effectively to ask the court to prohibit the insurer from relying upon the contractual language of the insurance policy. In other words, the policyholder in essence is asking the court to ignore the plain language of the policy because the insurer purportedly took a different position in a different case, because an employee may have questioned the interpretation of a term, or because the policy form had been modified over time. Many jurisdictions reject the notion that estoppel can be utilized to create or expand coverage where it does not otherwise exist under the plain terms of the contract. *See, e.g., Minnesota Commercial Railway Co. v. General Star Indemn. Co.*, 408 F.3d 1061, 1063 (8th Cir. 2005). Consequently, certain information learned in discovery cannot be utilized to preclude the insurer from asserting its coverage position based upon the application of unambiguous policy language. *See Shannon v. Great Am. Ins. Co.*, 276 N.W.2d 77, 78 (Minn. 1979) (insurer not estopped from relying upon policy despite insurer’s agent’s statements; imposing coverage liability for risks not undertaken and for which no premium was paid was “wholly improper”); *Admiral Ins. Co. v. Little Big Inch Pipeline Co., Inc.*, 523 F. Supp. 2d 524, 544–45 (W.D. Tex. 2007) (underwriter statements in correspondence that coverage is afforded did not estop insurer from asserting coverage position); *Woodruff v. Southeastern Fire*

*Ins. Co.*, 426 F.2d 555, 559 (5th Cir. 1970) (statements of insurer's general agent that house was covered by policy during process of dismantling for relocation were not relevant to whether coverage was afforded as terms of policy cannot be extended or enlarged to create coverage by estoppel or waiver); *Parris & Son, Inc. v. Campbell*, 196 S.E.2d 334 (Ga. Ct. App. 1973).

Many courts also do not allow the testimony of insurer employees or agents to be used to interpret insurance contracts to determine whether there is ambiguity.

### The Proposed Discovery May Not Lead to the Discovery of Admissible Evidence

If the issue of whether a policy is clear or ambiguous is a purely legal analysis conducted by the court, and if extraneous information from the insurer to "prove" ambiguity is inadmissible to create an ambiguity, as an admission, or to create coverage by estoppel, then such discovery requests simply do not lead to the discovery of admissible evidence. In light of the fact that such information is not admissible as a part of the court's interpretive process, some courts have denied efforts to discover the information in the first place. See *Allstate Ins. Co. v. Swain*, 921 So. 2d 717, 718-19 (Fla. Dist. Ct. App. 2006) (quashing trial court order to compel discovery of insurer's drafting, marketing, policy interpretive materials, employee training materials and other claims made under similar policies; information was "completely unnecessary to the determination" of the coverage issues, which would be resolved as a matter of law). In *Heyman Assoc.'s No. 1 v. Ins. Co. of the State of Pennsylvania*, 653 A.2d 122 (Conn. 1995), the policyholder was denied discovery seeking to show the intent of

the drafters of the exclusion, to obtain the insurer's filings with state insurance regulators and to learn representations made in marketing the policies at issue. The policy exclusion was unambiguous, and thus discovery into such matters was deemed inappropriate because "any evidence possibly derived from [the discovery] would be inadmissible" as it would "necessarily serve to contradict or vary" the policy language. As the extrinsic evidence was neither relevant to the case nor likely to lead to admissible evidence, the Supreme Court of Connecticut concluded that the trial court properly denied discovery of the requested materials. *Heyman*, 653 A.2d at 134-36.

### Strategic Considerations

#### Make summary judgment motions promptly or seek to delay discovery until after the court assesses policy language

One way the insurer may avoid burdensome, irrelevant discovery is by filing dispositive motions concerning the coverage matters as early in the litigation process as can reasonably occur. This would allow the court to make its determination about whether the policy language is ambiguous before such discovery is undertaken, or may allow insurers effectively to argue for delay or substantial limitations on discovery until such court determinations are made. See, e.g., *North River Ins. Co. v. Mayor and City Council of Baltimore*, 680 A.2d 480, 496 (Md. 1996) (noting that although trial court had discretion to allow discovery to proceed before deciding whether policy language was ambiguous, proceeding in that fashion may be inefficient.)

This may be an effective tactic even in jurisdictions where some courts have otherwise allowed certain discovery to occur. In *Cement and Concrete Workers Dist. Council Pension Fund v. Ulico Cas. Co.*, 387 F. Supp. 2d 175 (E.D. N.Y. 2005), the policyholder was prevented from discovering the insurer's internal information concerning the drafting history of the policy's definition of "wrongful act." While noting that other district courts in the circuit had sometimes allowed such discovery, the court concluded summary judgment was nonetheless proper without this discovery because the information sought could not be used by the court to assess coverage. "Because ... none of the relevant policy

terms is ambiguous, the documents detailing the drafting history of the Ulico policy cannot be considered 'essential' to the plaintiffs' opposition; to the contrary, this extrinsic information could not have been included in [the court's] consideration of the policy's meaning." Thus, summary judgment was ripe "notwithstanding the plaintiffs' inability to reach documents and conduct depositions detailing the drafting history of the Ulico policy form." *Cement and Concrete Workers*, 387 F. Supp. 2d at 182-83.

#### Assess whether policyholder arguments for allowing discovery constitute a waiver of the application of *contra proferentem*

In jurisdictions that might allow evidence to determine the parties' mutual intent after a court has first determined language to be ambiguous, one can expect an argument that if the evidence may at some future time become relevant, discovery should be allowed. Aside from the fact that the information may never be utilized and, thus, dispositive motions should be allowed to proceed before the waste of substantial resources, this argument may also not be effective if a court were to employ the doctrine of *contra proferentem* upon a finding of ambiguity. Under its strict application, policyholders argue that the penalty for contract ambiguity is the insurer automatically loses. If the policyholder simply prevails after a court assesses policy language and finds ambiguity, then there is no analysis of party intent thereafter. Moreover, any argument by a policyholder to allow discovery for its potential use after a finding of ambiguity might be seen as a waiver of any later assertion of *contra proferentem* against the insurer in the event the policyholder prevailed on its ambiguity quest. Of course, if such policyholder discovery is allowed, then similar discovery of internal policyholder information, such as claims submitted to other insurers, communications with brokers, etc., to "prove" the lack of ambiguity in policy language (and that the policyholder was aware of the various boundaries of the coverage being purchased) should likewise be allowed.

#### Limit the discovery

Even if a given court is inclined to allow such discovery to proceed, courts do rec-

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ognize that limitations may be appropriate under Federal Rule of Civil Procedure 26(b)(2)(C)(iii) and analogous state rules of procedure. Courts are generally receptive to the notion of limiting unduly burdensome requests by balancing the burden or expense upon the insurer, the probative value of the evidence sought, and the economic significance of the claim being presented. See *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2007 WL 3376831 (Nov. 8, 2007, S.D. Ohio) (discovery seeking information related to insurer's treatment of other policyholders with similar claims overbroad and unduly burdensome, and burden and expense of

responding outweighed any likely benefit); *Clark Equip. Co. v. Liberty Mut. Ins. Co.*, 1995 WL 867344 (April 21, 1995, Del. Super. Ct.) (discovery of other policyholder claims would impose undue burden, especially given that the information obtained would likely contain other variables that would create "extended mini-trials"). Moreover, even courts that are inclined to allow some discovery may place limitations on the scope of the requests. See, e.g., *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 135 F.R.D. 101, 107 (D.N.J. 1990) (production of "other claims" files limited to 10 earliest and 10 most recent concerning environmental pollution claims).

## Conclusion

While substantively fighting policyholder discovery requests may sometimes feel like swimming upstream, some fishing expeditions can be avoided through educating the court about the limited, if not complete lack of appropriate use of the extrinsic information sought. At the end of the day, a court will be making coverage determinations based upon its review of the language of the parties' contract as a matter of law. Wide discovery nets may be narrowed, postponed, or entirely circumvented, given the nature of the basic rules of insurance policy interpretation. 