DEVELOPING A DISCOVERY AND LITIGATION PLAN FOR BAD FAITH CASES

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I. INTRODUCTION

Discovery in a bad faith case, particularly in cases based on breach of a duty to settle or defend, is involved, intense and requires a great deal of planning at the onset of the litigation. Bad faith cases involve a number of potential witnesses on the insurance industry side who made decisions concerning the claim which form the basis of the allegations of bad faith made by claimant's counsel. These individuals include the initial claims adjuster, litigation adjusters, claims and litigation supervisors and other senior personnel responsible for making decisions about coverage, settlement or the evaluation of the claim. In addition, numerous documents including, claims files, written and electronic communications, claims manuals, claims evaluation software and training materials are the subject of discovery and require early identification, careful management and precise legal objections when appropriate. Thus, it is incumbent upon counsel representing the insurance carrier to identify all the important players and documents that will be the subject of discovery.

This paper will focus on developing an initial discovery plan in bad faith cases, objections to production based upon attorney-client and work product privileges, preparing and defending depositions of insurance carriers' representatives and, using targeted discovery to obtain admissions, exact specifications of bad faith and claimed damages and important

documents from the policyholder. Although this paper is based upon my experiences defending bad faith cases based upon a breach of a duty to settle or defend and coverage disputes, these principles can apply when defending insurance carriers in both first and third party bad faith lawsuits.

II. DEVELOPING THE INITIAL DISCOVERY PLAN

Although most bad faith cases involve allegations of bad faith concerning a single claim, counsel for policyholders often try to expand the scope of discovery beyond the single instance of alleged bad faith to establish a course of conduct on the insurance carrier that puts the carrier or insurance industry on trial. Counsel for policyholders attempt, through discovery, to show an institutional pattern of denying or delaying payment of claims which constitutes bad faith to increase their damages which include punitive damages and attorney's fees that are typically claimed in bad faith litigation. The first order of business for counsel representing the insurance carrier is to manage and limit the scope of discovery to the single claim which is the subject of the involved bad faith complaint.

Second, counsel for the carrier must identify all players on both the sides of the litigation that made decisions, know the most about the case, and can get you the documents that you need to learn about the handling of the claim. It is important to immediately identify all individuals who will be asked to give depositions. Counsel should also determine who will ultimately be the company representative sitting at the defense table if the case goes to trial. Initially, counsel must identify each and every person from initial claims adjusters, litigation adjusters, retained and in-house counsel, and supervisors who participated in the handling of the claim or made decisions concerning settlement or coverage. Counsel must immediately identify what witnesses they will need to depose on the policyholder's side to establish their version of the facts, get a

description and basis of their claimed damages and develop facts which may be beneficial to their defense. Once this roster of candidates is developed, counsel for the insurance carrier should immediately meet face to face with their witnesses to learn about the handling of the particular claim and to begin to prepare them for depositions.

Last, counsel needs to obtain all documents and materials that will be the subject of written discovery and depositions, will educate him about the facts of the case, the players involved and what decisions will be scrutinized by plaintiff's counsel. Certainly the claims file is the first and most important evidence to obtain since it will show the handling of the claim from its infancy through the entire claims process. Underwriting documents, correspondence, and any other documents generated which demonstrate an evaluation of the claim for settlement or decision about coverage must be obtained and reviewed. Since these documents will be numerous, a well-organized Bates' stamped document file that can be easily utilized throughout the discovery process is of the upmost importance.

III. USING WRITTEN DISCOVERY TO THE PLAINTIFF TO DEFEND YOUR CASE

Targeted written discovery to the bad faith plaintiff will allow counsel to understand the basis of the claim, obtain any and all documents and communications which they contend demonstrates bad faith and identify all witnesses that may be the subject of depositions. In initial interrogatories, counsel should require the policyholder to spell out in detail, the basis of the bad faith claim. Specific interrogatories requiring the plaintiffs to describe all events or decisions that they contend constitute bad faith are essential to learn about the claim. Obtaining exact details including dates, times, subject matter and all persons involved must be drafted. Last, interrogatories should ask the policyholder to identify all decisions, documents and communications which show any event which they consider constitutes bad faith.

Next, require policyholders to identify all specific policy provisions applicable to the events which form the basis of their bad faith claim. The policyholders contend the insurance company violated code sections, ethical standards or internal or general claims handling guidelines they must be asked to identify the same. A description of each and every instance in which a policy provision was violated should be described in detail.

The policyholder must also be required to describe all elements of their damages claim. The recent trend in breach of settlement and duty to defend cases is to greatly expand the scope of damages claimed by the policyholder. *Thomas v. Atlanta Cas. Co.*, 253 Ga. App. 199, 558 S.E.2d 432 (2001) describes the scope of damages a policyholder may claim as a result of a breach of a duty to defend and failure to timely settle. In addition to obtaining the amount of the excess judgment and interest, the policyholder may recover consequential damages against the insurer including damage to their credit or financial status, mental and emotional suffering if accompanied by a physical injury, attorney's fees and punitive damages. *See also State Farm Mut. Auto Ins. Co. v. Smoot*, 381 F.2d. 331 (5th Cir. 1967) and *Alexander Underwriters Gen. Agency v. Lovett*, 182 Ga. App. 769, 772-773, 357 S.E.2d 258 (1987). Targeted interrogatories requiring a description of each specific item of special and general damages, how special damages have been calculated and the basis for each item of claimed damages are essential. Last, early identification of any policyholder's experts and, their opinions will allow counsel to plan for targeted *Daubert* motions as well as depositions.

Document requests must be sent to the plaintiff which requires them to produce all documents which support their damages or form the basis of a bad faith claim. In particular, all communications between the policyholder and the insurer in the possession of the plaintiff must be obtained. In addition, in negligent failure to settle cases involving an assignment of a bad

faith claim communications between the policyholder and underlying claimant's counsel, must be identified and requested early in the litigation.

Requests for admissions may also be used to establish facts and the authenticity of documents and to set up potential motions to either dismiss the claim or narrow the issues and scope of the damaged claimed. Once the policyholder's allegations of bad faith are determined through interrogatories one can use requests for admissions to limit the scope of the bad faith claim to prevent it from expanding later in the litigation.

IV. DEFENDING THE INSURANCE CARRIER AGAINST WRITTEN DISCOVERY

Obtaining all relevant documents and thoroughly understanding the involved insurance carrier's claims handling procedures and decisions are of utmost importance in defending a bad faith claim arising from a breach of a duty to settle or to defend. It is essential that the attorney identify a contact within the company to quarterback the collection and organization of documents that will be requested in discovery. Early meetings with the individuals who made decisions regarding the evaluation of claims, especially as to time limited policy limits demands, or whether coverage existed, are essential to familiarize oneself with the decisions which led to the filing of the bad faith claim and to prepare these important players for depositions.

Obtaining and thoroughly reviewing a complete copy of the claims file including claims notes, underwriting documents, reservations of rights letters and internal communications within the company is essential to defending the case and understanding how decisions were made relative to the specific claim. A review of the claims file will also help one to identify all persons who made decisions or reviewed the file to determine whether they are still with the company and available for deposition. These persons should also be interviewed to determine what facts they can attest to and to thoroughly understand why they made certain decisions that

ultimately led to the filing of a bad faith lawsuit. Once the claims file and communications are reviewed, the attorney should build a list of the documents that will be requested by plaintiff's counsel to determine what materials must be produced and which may be subject to privilege. This is the first step to build a privilege log to make objections based upon the work-product doctrine and the attorney-client privileges.

Counsel must also develop an early plan for asserting privileges against the production of certain documents. The assertion of the work-product doctrine and attorney-client privilege become complicated in a bad faith litigation due to the nature of bad faith litigation and attorneys' roles in either evaluating the case, defending the underlying claim or providing advice about coverage or responses to time limited demands. Attorneys play different roles which may affect whether the protection of the attorney-client privilege or work-product doctrine can be asserted.

The first consideration is to determine what documents may be subject to the work-product doctrine. Counsel needs to determine the date the insurer first began to anticipate bad faith litigation and began to prepare to defend against a bad faith claim.

The scope of protection provided by the work product doctrine is a procedural question and governed by federal law in a diversity action. *See Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663 (N.D. Ga. 2008). Fed. R. Civ. P. 26(b)(3) sets forth the work product doctrine for Federal Court cases. This rule protects documents and tangible things prepared in anticipation of litigation or trial by or for another party or its representative. The work product doctrine provides a qualified immunity for materials prepared in anticipation of litigation by a part, an attorney, or other representatives of the party. *Hickman v. Taylor*, 237 U.S. 495, 67 S. Ct. 385, 91 L.Ed. 451 (1947). Under Rule 26(b)(3), documents prepared in anticipation of

litigation will be protected unless the requesting party "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." To determine whether a document has been prepared in anticipation of litigation, courts generally ask whether the document was prepared because of a parties' subjective anticipation of litigation rather than the ordinary course of business, and whether that subjective anticipation of litigation was objectively reasonable. *See In re Professionals Direct Insurance Company* 578 F.3d 432, 439 (6th Cir. 2009).

Federal courts generally hold that the work-product doctrine can provide protection to an insurer in a bad faith case upon the insurer's initial contemplation of a coverage action against its insured. The work-product doctrine begins when an insurer first begins to contemplate a declaratory judgment action against the insured and its attorneys begin performing legal work in anticipation of filing the suit. Although claims files generally do not constitute work product in the early stages of litigation, because it is in the ordinary course of business for an insurance carrier to investigate a claim, once litigation arising from the handling of the claim is imminent, its contents are protected by the work product doctrine. *See Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663 (N.D. Ga. 2008).

Unlike the work product doctrine, the attorney-client privilege is governed by state law in federal diversity cases. *See* Fed. R. Evid. 501. The law of the jurisdiction in which the action is filed will apply to claims of attorney-client privilege.

The assertion of the attorney-client privilege presents its own unique issues. Attorneys can wear many hats prior to litigation being filed which include providing advice to the insurance company concerning coverage or acting as a claims examiner in investigating and evaluating specific injury claims. The courts generally look as to whether the attorney is

providing advice to the company rather than evaluating a claim in determining whether an attorney-client privilege exists.

Moreover, many different counsel may be involved in making decisions that ultimately lead to a bad faith claim. In-house counsel provides internal advice or evaluates the claim in the ordinary course of business. Outside coverage counsel provides analysis and opinions concerning coverage for claims under policy provisions. In third party litigation, the insurance carrier retains counsel for the policyholder who may then later bring a bad faith action against the carrier for a breach of a duty to settle or to defend, if the carrier withdraws its defense based on a lack of coverage.

Most state courts hold that the attorney-client privilege applies if the holder of the privilege is a client and the person to whom the communication was made is an attorney and the attorney is acting as a lawyer. The communication must also relate to the matter for which the attorney was retained and made confidentially for the purposes of securing an opinion on law or assistance in legal proceedings. *See generally United States v. United Shoe Machinery Corporation*, 89 F. Supp. 357 (D. Mass. 1950). The courts also recognize that attorneys frequently play roles other than providing legal advice or acting as a lawyer in litigation. Generally, attorneys who merely monitor a claims investigation are not able to invoke the attorney-client privilege.

If objections are raised and documents withheld, the early preparation of a detailed privilege log is necessary. Fed. R. Civ. P. 26(b)(5)(A) requires that any person asserting attorney-client privilege should prepare a log that describes the nature of the documents, communications or tangible things not produced or disclosed in a manner that does not reveal the information claimed to be protected, but will enable other parties to assess the claim of privilege.

Failing to assert the attorney-client privilege in the log may result in the waiver of the privilege. As the party asserting the work product privilege, the insurance carrier bears the burden of establishing its application over the documents and the privilege "must be specifically raised and demonstrated rather than asserted in a blanket fashion." *Carnes v. Crete Carrier Corp.*, 244 F.R.D. 694, 697-8 (N.D. Ga. 2007).

Therefore, counsel must take the time to prepare a functional and detailed privilege log. A privilege log which identifies the document, states the nature of the privilege claim, the name of the person making or receiving a communication, the date and place of the communication and the document's subject matter is essential to successfully asserting this privilege. Moreover, preparing a detailed privilege log supported by evidence and supporting case law helps the judge evaluate your objections.

A frequent problem in defending discovery in bad faith claims is overreaching discovery from the policyholder's counsel in which they seek discovery of documents and information of the insurance carrier's institutional procedures for handling all claims when the lawsuit concerns a single occurrence or instance of bad faith. Essentially, the policyholder's counsel frames their complaint and written discovery to show that the insurer has a corporate plan to unreasonably evaluate or delay payment of claims or deny coverage. Seeking discovery of this information and making these arguments at trial goes way beyond the claim which is the subject of the particular lawsuit and performed to support claims for punitive damages and attorney's fees against an insurance carrier that has sizable assets and most often will not be a sympathetic defendant at trial. Minimizing and managing this institutional discovery is essential to the defense of a bad faith claim.

The majority of most bad faith cases are suits about whether an insurer unreasonably handled a single claim involving one policyholder. Therefore, objections based upon relevance or that the written discovery is not reasonably calculated to lead to the discovery of admissible evidence at the trial of a case concerning a single claim must be raised. Challenge claimant's counsel to show how their broad and unduly burdensome discovery relates to the single claim that is the subject of the lawsuit that they filed. *See Southard v. State Farm*, 2012 W.L. 2191651 (S.D. Ga. 2012). In particular, efforts by claimant's counsel to seek information or documents related to claims that concern unrelated policy provisions, policies issued in different states or different causes of action, must be challenged and fought on the basis of relevance. However, many courts hold that discovery of the handling of other claims may be relevant to prove punitive damages in that bifurcated phase of the trial.

Another concern when defending bad faith cases is discovery which seeks personal and confidential information of the adjusters and other claims professionals involved in the claims handling and decisional process. Frequently personnel files are requested which contain personal and confidential information. Objections based on confidentiality and assertion of a right of privacy must be made to protect this information and claimant's counsel should be requested to narrow their requests for personnel files to facts and training which concerns the subject matter of the bad faith claim.

V. *CAMACHO V. NATIONWIDE:* THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN GEORGIA

Camacho v. Nationwide Mut. Ins. Co., 287 F.R.D. 688 (N.D. Ga. 2012) provides a blueprint for what Georgia federal courts sitting in bad faith diversity cases will do when faced with discovery objections based upon the attorney-client privilege and work product doctrines. This lengthy opinion thoroughly discusses what documents and communications may be subject

to production based upon both state and federal law. Moreover, *Camacho* provides a good history and governing principles of how federal courts may decide discovery disputes in bad faith cases.

Camacho was a federal diversity case arising from Nationwide's alleged bad faith failure to settle claims against an insured in an underlying state court tort action. In the underlying action, the insured was hit with a verdict in favor of the plaintiffs in a wrongful death case in excess of the insurance policy limits. Nationwide's insured then assigned the claims for bad faith failure to settle to the successful plaintiffs. The assignment of the claim included a waiver provision in which the insured agreed to waive both the attorney-client privilege and the protection provided by the work-product doctrine in exchange for the successful plaintiffs agreeing to forego any collection of the excess judgment against him.

After several attempts to resolve discovery disputes amongst the parties failed, the Court was called upon to decide what documents and communications were protected by the attorney-client privilege and work-product doctrine. Specifically, the parties presented the following matters were the subject of the discovery disputes:

1. Plaintiff's request for Nationwide's complete claims file which included communications with its in-house counsel and its retained outside litigation counsel relating to the defense of the tort claims against the insured;

2. Plaintiff's attempt to obtain information regarding Nationwide's handling of the death claim during depositions of its claims adjusters; and

3. Nationwide's request for communications between the plaintiffs and their trial counsel in the underlying state court action relating to the settlement offer which included documents which contained the mental impressions of the attorneys.

The *Camacho* Court first examined plaintiff's requests seeking all materials within Nationwide's claims file including attorney-adjuster communications relating to their claims for damages against Nationwide's insured arising from the date of the accident until the judgment became final at trial. Plaintiffs, citing to the fact that Nationwide's insured had waived his attorney-client privilege, asserted that no privilege existed when a retained attorney represents both the insurer and the insured. The Court noted that the attorney-client privilege was construed narrowly under Georgia law and that the privilege belonged to the client and which was his to waive. *Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000). The Court also noted that Georgia recognized an exception to the exclusion of evidence based upon attorney-client privilege when the attorney jointly represented two or more clients whose interests subsequently became adverse. The Court then examined decisions from other states to determine whether the privilege existed in third party bad faith cases.

The Court first considered *Nationwide Mutual Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 617 S.E.2d 40 (2005). Relying upon *Bourlon*, the Court noted that communications relating to the defense of this case were not protected due to the existence of a triparte attorney-client relationship created when the insurance company hires an attorney to represent the insured. Adopting the joint defense/common interest doctrine, the *Camacho* Court held that Nationwide could not claim the protection of the attorney-client privilege over its communications with outside litigation counsel regarding the defense of the insured in the underlying action. These communications were discoverable in third-party bad faith actions. The Court held that communications related to an issue of coverage were not discoverable and any communications Nationwide had with its in-house claims counsel involving the rendering of legal services were protected by the attorney-client privilege. However, to the extent the insurer's communications

with its in-house counsel were mixed with communications to outside retained counsel, those communications were not privileged and discoverable by the successful plaintiffs now standing in the shoes of Nationwide's insured.

The Court then examined Nationwide's assertion of protection of its claims file pursuant to the work-product doctrine. Nationwide contended that its claims file was created in anticipation of litigation of claims arising out of the car accident which resulted in the death of the underlying plaintiff's family member. First, the Court cited *Underwriters Insurance Company*, supra 248 F.R.D. 667 and held that insurance claims files generally do not constitute work product in the early stages of investigation when the insurance company is concerned with deciding whether to resist or pay the claim. The Court noted that claims files "often straddle both ends of this definition because it is in the ordinary course of business for an insurance company to investigate a claim with an eye towards litigation." However, once bad faith litigation was probable, the claims file is generally protected by the work product doctrine.

The Court then held that third-party claims files, unlike first party claims, generally anticipate litigation and therefore may be subject to more protection. However, a different situation existed in a claim for bad faith. The *Camacho* Court stated that an insurance claim file may be discoverable in a claim for bad faith if the plaintiff can show a substantial need of the materials and an inability without undue hardship to obtain the materials by other means. The *Camacho* Court relied upon the Supreme Court of Arizona case of *Brown v. Superior Court*, 137 Ariz. 327, 670 P.2d 725 (1983) for instruction. *Brown* specifically held that a claims file was integral to proving a bad faith claim and therefore an insured can meet the substantial need burden to defeat a work product doctrine objection. *Brown* held that the documents in the claims file are the "only reliable indication of whether the allegedly bad faith occurred." *Brown* further

held that "bad faith actions against an insurer can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did." *Brown* further stated that the claims file was a unique prepared history of the company's handling of the claim and that the need for the information contained in the claims file was not only substantial, but overwhelming. Thus, the *Camacho* Court held that the plaintiff's need for information in the insurance company's claims file in a third-party bad faith claim is substantial and often the only reliable indication of whether the insurance company acted in bad faith.

However, the *Camacho* Court held that the insurer was not required to disclose the mental impressions of its attorneys or other representatives. The Court still must protect against the disclosure of the mental impressions, conclusions, opinions or legal theories of a parties' attorney or other representative concerning the litigation. Therefore, the Court held that those mental impressions, conclusions or opinions would be protected subject to an in camera inspection.

The *Camacho* Court then demonstrated how a federal court sitting in a diversity third-party bad faith case will carefully conduct an in camera inspection and require the insurer to carry its burden to prove the application of the work product doctrine. The privilege must be specifically raised and demonstrated rather than asserted in a blanket fashion. The carrier had the duty to satisfy its burden of proof to show that the work product doctrine applied in a privilege log. The Court noted that when documents contained a mixture of potentially privilege mental impressions and discoverable information, the work product protection would provide no shield against discovery.

Next, the *Camacho* Court examined exactly when the work product doctrine would apply. Nationwide contended that the relevant portion to the production of its claims file concerned only the time period from the date of the inception of the underlying claim until the date Nationwide refused to accept the offer to settle the claim within policy limits. However, the Court disagreed and looked to *Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992) and held that an insurance company's liability for failure to settle was not based solely on its failure to settle the claim within the timeframe specified by plaintiff's counsel. Instead, the reasonableness of an insurer's response in a bad faith failure to settle claim depends upon the totality of the circumstances and is a question for the jury. *See Butler v. First Acceptance Ins. Co., Inc.*, 652 F. Supp. 2d 1264, 1277 (N.D. Ga. 2009). Therefore, Nationwide's entire claims file including those containing entries made after the rejection of the plaintiff's offer of settlement were subject to production.

Last, the *Camacho* Court rejected Nationwide's attempt to discover communications between the successful plaintiffs and their underlying tort litigation attorney concerning the attorney's mental impressions relating to the policy limits demand. Nationwide contended that these communications and impressions should be discoverable due to the filing of the bad faith action which centered upon a demand letter drafted and sent by tort counsel. Nationwide sought to discover the motive behind the plaintiff's settlement demand to determine whether or not that attorney intended to set up Nationwide for bad faith by sending a policy limits demand. The *Camacho* Court was unpersuaded.

The motivation of plaintiff's counsel in sending a settlement demand is not relevant to the issue of whether the insurer acted in bad faith in its handling of the claims presented to it. *State Auto Prop. and Cas. Co. v. Griffin*, 2012 WL 1940797 (M.D. Ga. 2012). Thus, Nationwide was

not entitled to discover the underlying plaintiff's attorney-client communications with the underlying tort counsel or his mental impressions relating to the policy limits timed demand.

In summary, *Camacho* sets a framework for which materials and communications will likely be protected and which will not. *Camacho* broadly holds that any communications between the insurer and outside retained counsel concerning the defense of the underlying litigation are not subject to the attorney-client privilege. Communications between in-house counsel and outside retained counsel with respect to the conduct of the litigation are also not protected by the attorney-client privilege. However, communications between the insurer and in-house or coverage counsel are protected. Production of the claims file in a third-party bad faith action will be permitted. However, the mental impression and legal strategies will be protected from production, but the insurer must carefully and specifically raise these objections and be careful not to mix these opinions with other information that may be subject to discovery.

VI. PREPARING AND DEFENDING DEPOSITIONS IN BAD FAITH CASES

Defending a deposition in a bad faith case requires early and continued preparation of all potential witnesses. Identifying and preparing the important players at early meetings is essential to the defense of the bad faith claim. These individuals must review all documents that they authored or reviewed and must familiarize themselves with the entire claims notes because entries in claims notes are scrutinized and questioned in detail at bad faith depositions. Bad faith depositions are document-intensive in which counsel will review each and every claim file entry picking apart the language and asking the deponent to describe exactly why certain decisions were made. The potential deponent must be ready to explain why specific decisions were made or not made and what they reviewed and relied upon to determine why coverage was not

provided under the policy or how they evaluated the value of a claim in the face of a time limited demand.

After initial meetings with the potential deponents, practice depositions are strongly encouraged. Videotaping the potential deponent well in advance of their discovery deposition which will in all likelihood also be videotaped is important. Taking the deponent through the process and reviewing all of the documents that they will most likely be questioned about gets them comfortable with the procedure and their explanations as to certain decisions they made which are memorialized in the claims file and other documents.

Depositions of the claims professional should also take place away from the claims office and in a place where the deponent is comfortable. If the insurance claims representative cannot be present at their counsel's office, taking the deposition at any place other than the claim's office conference room is strongly suggested to focus on the task. In addition, off campus depositions avoids the problem of claimant's counsel frequently asking the person to either review documents or computer screens which may be in the office which will greatly expand the length and the scope of the deposition.

VII. IDENTIFYING DEPONENTS WHO WILL TELL THE CLAIMANT'S STORY AND STRATEGIES FOR DEPOSITIONS

The policyholder's side of the case also has its own cast of characters. In a negligent failure to settle or failure to defend case, many persons are involved including the policyholder, the defense attorney who represented the policyholder in the underlying case, the attorney who represented the tort claimant against the policyholder and persons who may be able to support the policyholder's claim for damages. Determining who these individuals are and in which order the depositions should be taken should be part of developing a plan for proactive discovery in bad faith litigation.

Determining the order of depositions depends on the facts of the case. For instance, in a negligent failure to settle case it may be best to take the deposition of counsel who represented the underlying claimant to get a detailed version on what information he provided to the insurance carrier to evaluate the claim when a time limited policy limits demand was presented. Special attention must be made to determine what information and documentation was provided to the insurance carrier and, what was not provided. Underlying claimant's counsel must be examined thoroughly on why he or she made decisions not to provide certain information or rejected requests to grant extensions when reasonably requested by the carrier. In addition, examining counsel for the tort plaintiff reveal facts concerning how the policyholder either assigned their claim to the successful plaintiff or made his or her way to bad faith counsel in exchange for an agreement with underlying claimant's counsel to forego all personal claims against them.

Typically, the policyholder's deposition should come next. Determining how his or her story may conflict with the story of claimant's counsel especially as to how they came to assign a bad faith claim against the carrier should be determined. Focus on communications the policyholder had with underlying claimant's counsel concerning how they made their way to bad faith counsel or made a decision to assign a bad faith claim against the insurance carrier. It is also important to determine what the policyholder may have done or failed to do to participate in the claim's evaluation process. Determine whether or not the policyholder was informed by the insurance carrier about any policy limits demands or what information they were provided or asked to give to evaluate the claim. This is especially critical where liability may have been disputed.

In coverage cases, determine what facts that policyholder claims to have provided to the carrier in the coverage investigation that went beyond the allegations contained within the tort complaint. Generally in Georgia, coverage is determined by the four corners of the policy and the tort complaint. The insurer is under no obligation to independently investigate the claims against its insured. However, if the insured notifies the carrier of factual contentions which may place the claim under coverage, the insurer then has an obligation to give due considerations to the information provided by the policyholder and base its coverage decision on the true facts. *See Colonial Oil Industries Inc. v. Underwriters*, 268 Ga. 561, 491 S.E.2d 337 (1997).

Last, examine the policyholder on all decisions or communications that he or she contend constitute bad faith on behalf of the insurer. Also focus on all elements of claim damage and how they are supported.

VIII. CONCLUSION

Bad faith cases are often won or lost during the discovery process. Effectively managing this process at an early stage allows counsel to know their case, whether good or bad, and prepare potential deponents for long and tiresome depositions. Identification and management of all documents relating to the claim will assist counsel in preparing detailed privilege logs to assert the protection of the attorney-client privilege and work product doctrine. However, as the decision in *Camacho* demonstrates, the insurer's claims files and decisions about the handling of the claim will often be an open book and subject to discovery.