Disclosure of Reinsurance Agreements Under Federal Rule of Civil Procedure 26

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December 29, 2014

Federal Rule of Civil Procedure 26(a)(1) governs parties' initial disclosures in litigation in federal courts. Among the things Rule 26 mandates must be disclosed are "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." Fed. R. Civ. P. 26(a)(1)(A)(iv). In cases involving insurance companies as insurers, the question that often arises is whether the requirement of subsection iv covers reinsurance agreements. As with many things, that depends.

The weight of judicial authority suggests that, as a general rule, the Rule's "any insurance agreement" language is broad enough to require the disclosure of reinsurance agreements as part of the insurer's initial disclosures. As one federal court has noted, however, "there is no true consensus either for or against producing reinsurance information." *Summit Towers Condominium Ass'n. v. QBE Ins. Corp.*, 2012 WL 1440894 *4 (S.D. Fla. April 4, 2012). While there may be no true consensus, the relevant federal case law suggests that, in general, in coverage actions, reinsurance agreements themselves must be disclosed as a part of the party-insurer's initial disclosures. *See, e.g., Isilon Sys., Inc. v. Twin City Fire Ins. Co.*, No. C10-1392MJP, 2012 WL 503852, at *3 (W.D. Wa. Feb. 15, 2012) ("With respect to reinsurance, the reinsurance policies themselves are discoverable under Federal Rule 26(a)(1)[]. The rule is absolute and does not require a showing of relevance."); *Lyon v. Bankers Life & Cas. Co.*, No. CIV 09-5070-JLV, 2011 WL 124629, at *18 (D.S.D. Jan. 14, 2011); *Suffolk Fed. Credit Union v. CUMIS Ins. Society, Inc.*, 270 F.R.D. 141, 142–143 (E.D.N.Y. 2010); *Hartman v. Am. Red Cross*, No. 09-1302, 2010 WL 1882002, at *2 (C.D. Ill. May 11, 2010) ("This Court has previously

held that reinsurance agreements are discoverable and, in fact, must be produced as part of initial disclosures under Rule 26(a)(1) . . . The majority of District Courts to have considered the question agree…"); *Imperial Trading Co., Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 06-4262, 2009 WL 1247122, at *2 (E.D. La. May 5, 2009).

A close reading of the applicable case law, however, suggests that the rule is not as absolute as some assert. An argument can be made that whether a reinsurance agreement must be disclosed in the insurer's initial Rule 26 disclosures depends on the less settled inquiry of whether reinsurance information, including the reinsurance agreement itself, *is discoverable*. The relevant case law suggests that discoverability depends on things like whether monetary damages are sought in the particular action (thus making reinsurance arguably relevant), whether the case includes claims of bad faith or disputes over the interpretation of coverage, and whether a "common interest" between the insurer and its reinsurer(s) should protect insurer-reinsurer communications.

Initial Disclosures

Rule 26(a)(1) sets forth the requirements for initial disclosures. The rule provides, in pertinent part:

> *In General*. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
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> * * *
>
> (iv) for inspection and copying as under Rule 34, *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.

Fed R. Civ. P. 26 (a)(1)(A)(iv) (emphasis added). As noted above, courts routinely find that the term "any insurance agreement" includes reinsurance agreements. Additionally, reinsurance provides a form of indemnification or reimbursement for the risks assumed by the ceding insurer. "Reinsurance is insurance purchased by one underwriter from another, the latter wholly or partially indemnifying the former against the risks that it has assumed." 2 Insurance Claims and Disputes § 7:10 (6th ed.); *see also Excess & Cas. Reinsurance Ass'n. v. Ins. Commissioner of the State of California*, 656 F.2d 491, 492 (9th Cir. 1981).

Discoverability

Despite the general rule requiring disclosure, not all courts have agreed, and, where the courts have not, it has been because they have found that the information would not ultimately be discoverable. A notable case out of a federal court in Indiana explained that:

> even if reinsurance contracts theoretically fall within Rule 26(a)(1)(A)(iv), their production is not required here. First, their production in this case does not fit the purposes the rule promotes . . . . Second, the Insurers' contractual relationships with reinsurers are sensitive business matters that the Insurers naturally may not wish even to share with each other. Third, the contracts themselves are not relevant to coverage or bad faith issues. For these reasons, the burden of producing the contracts outweighs any benefit. *See* Rule 26(b)(2)(C)(iii).[1]

Cummins, Inc. v. Ace Am. Ins. Co., No. 1:09-cv-00738-JMS-DML, 2011 WL 130158, at *10–11 (S.D. Ind. Jan. 14, 2011).

It appears that there are generally three areas courts have examined to determine if reinsurance information is discoverable: 1) where no monetary judgment is sought; 2) where there are no allegations of bad faith or disputes over coverage; 3) where communications between insurer and reinsurer are covered by the common

[1] Rule 26(b) covers the scope and limits of discovery.

interest doctrine. An insurer making initial disclosures in litigation in federal court should consider these factors in determining whether it wants to attempt to avoid disclosing reinsurance information as part of its initial Rule 26 disclosures.

Where an action does not seek a monetary award, the reinsurer arguably would not 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" necessitating disclosure under Rule 26. *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.* explains that "only when money damages are sought for which the insurer (or reinsurer) may become liable are the agreements automatically discoverable under rule 26(b)(2) . . . Further, only those insurers who are currently being sued for money damages under the policy need produce the reinsurance agreements." Civ. A. No. 88-9752, 1991 WL 237636 *2 (E.D. Pa. Nov. 7, 1991); *see also Medmarc Cas. Ins. Co. v. Arrow Int'l, Inc.*, No. CIV A CV 2394, 2002 WL 1870452, at *3 (E.D. Pa. July 29, 2002) ("[B]ecause a money award is sought . . . [Rule 26] mandates that AIG disclose the reinsurance agreement."); *Mo. Pac. RR Co. v. Aetna Cas. & Sur. Co.*, No. 3:93-CV-1898-D, 1995 WL 861147, at *2 (N.D. Tex. Nov. 6, 1995) (requiring disclosure of reinsurance agreement where "[i]n addition to its claim for declaratory relief, [plaintiff] seeks monetary damages for breach of contract."). If a small monetary award is sought, a court likely will not accept a defendant's own unilateral assessment[2] that the case is of such a value that the reinsurer will not, or will not likely, be called upon for any of the resulting judgment. *Hartman v. American Red Cross*, 2010 WL 1882002, at *2

Where there are no allegations of bad faith on the part of the insurer or disputes over interpretation of coverage, reinsurance information may not be discoverable. Where there are such allegations, however, it is likely to be deemed discoverable. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Donaldson Co., Inc.*, No. 10-4948 (JRT/JJG), 2014 WL 2865900, at *5 (D. Minn. June 24, 2014) ("As with reserve information, several courts have concluded that communications with reinsurers are relevant and discoverable in cases where a party brings claims for bad faith against an insurer."); *Isilon Sys., Inc.*, 2012 WL 503852, at *3 ("To obtain discovery of

[2] However, this is not to say that a Plaintiff's unilateral assessment would not be persuasive to a court.

[communications between insurer and reinsurer], plaintiff must demonstrate their relevance to the bad faith claim."); *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, Civ. No. 06-4262, 2009 WL 1247122, at *3 (E.D. La. May 5, 2009) ("[C]ommunications between Travelers and its reinsurers regarding plaintiff's insurance claims contain information that is relevant to Travelers' good faith to the extent that Travelers explained its reasons for granting or denying portions of plaintiffs' claims."); *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, 244 F.R.D. 638, 643 (D. Kan. 2007) (permitting discovery of reinsurance agreements in case involving bad faith).

Where communications between an insurer and reinsurer are covered by the common interest doctrine, discovery of reinsurance information may be unavailable. However, it is worth noting that attempted use of the common interest doctrine in this context is attenuated, at best. *See, e.g., Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 284 F.R.D. 132, 140–41 (S.D.N.Y. July 3, 2012) ("Unlike the relationship between a direct insurer and its insured, in which the 'direct insurer may have a duty to defend its insured, thus implying some level of cooperation in litigation,' in the reinsurance context, 'the interests of the ceding insurer and the reinsurer may be antagonistic in some respects and compatible in other. Thus, a common interest cannot be assumed merely on the basis of the status of the parties.'").

Although there is no hard-and-fast rule as to when reinsurance information will be discoverable, the relevant case law suggests that these factors should be considered by an insurer-litigant in formulating a response to a request for reinsurance information. The less relevant the ceding insurer's reinsurance program is to the claims at issue in the litigation at issue, the stronger the argument that reinsurance information should not be discoverable.

Protections from Discoverability

Even if reinsurance information – including simply reinsurance agreements themselves – may be discoverable, the producing insurer may consider seeking either a confidentiality agreement with the requesting party or a protective order from the court to limit the use and disclosure of reinsurance agreements and/or communications

between the ceding insurer and its reinsurer(s). In fact, Federal Rule 26 contemplates protective orders, and provides:

> A party or any person from whom discovery is sought may move for a protective order . . . . The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . restricting discovery in multiple ways, including "forbidding the disclosure or discovery.

Fed. R. Civ. P. 26(c)(1).

Although a reinsurance agreement's argued confidentiality does not necessarily create an exception to the initial disclosure rule, it may well merit the court's entry of a protective order. *See U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, 244 F.R.D. 638, 642, 646 (D. Kan. 2007) (requiring production of reinsurance agreements "subject to [the] protective order" prohibiting parties "from using or disclosing these documents outside the litigation"); *Country Life Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, No. 03-1224, 2005 WL 3690565, at *9-10 (C.D. Ill. Jan. 31, 2005) (requiring disclosure of reinsurance agreements "subject to a designation of 'for attorney eyes only,' as they are proprietary and confidential, and the parties hereto are competitors"); *Mo. Pac. RR Co. v. Aetna Cas. & Sur. Co.*, Civ. Action No. 3:93-CV-1898-D, 1995 WL 861147, at *2 (N.D. Tex. Nov. 6, 1995) (recognizing that "confidentiality regarding the identity of reinsurers and the terms of the policy may be appropriate").

Conclusion

While there may not be true consensus for or against disclosure of reinsurance information, it appears that the weight of authority favors disclosure. In fact, if insurance coverage is at issue, reinsurance information, that is, the fact of relevant reinsurance agreements, will likely have to be disclosed as part of an insurer's initial disclosures under Rule 26. That said, the initial inquiry should be whether the

reinsurance information will be discoverable in the long term of the case. If it is, then disclosure is probably mandated. If it is not, however, it should not be assumed that reinsurance agreements should automatically be disclosed as part of the insurer's initial disclosures. Instead, the insurer should consider the nature of the claims at issue and the relief being sought.

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This article reflects the views of the author, and does not constitute legal or other professional advice or service by Carlton Fields Jorden Burt, PA and/or any of its attorneys.

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