DECLARATORY JUDGMENT ACTIONS, DISCOVERY & TRIAL

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Insurance Coverage Update 2015: Coverage Disputes and Litigation

Declaratory Judgment Actions, Discovery & Trial

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WHERE AND HOW TO START
A DECLARATORY JUDGMENT ACTION
IN AN INSURANCE DISPUTE

Generally, until the insurer advises of its intention not to pay a claim (under a first party policy) or not to defend and/or indemnify (under a third-party policy), no declaratory judgment action should be commenced. There are, however, instances when the declaratory judgment complaint itself can function as the insurer's denial of coverage. For instance, in New York, a defending insurer must bring a declaratory judgment action ("DJA") to terminate the defense upon obtaining information that there is no coverage, usually from developments in the underlying action. Compliance with N.Y. Ins. Law § 3420(d) may still be a consideration in such circumstances.

Denial of coverage. When the policy of insurance does not provide coverage for claim in first instance (e.g.., no accident or occurrence, no personal injury, no insured auto involved).

Disclaimer. Coverage was triggered, but an exclusion to coverage (e.g., intentional act, known loss, pollution) applies, or the insured breached a policy condition (e.g., insured did not promptly notify insurer of lawsuit).

Review the policy provisions in depth. Policy forms and terms can change, and sometimes there are venue provisions, shortened time limits, etc. contained in the policy forms.

- Commenced by the filing of either a Summons and Complaint or a Summons with Notice. A Summons and Complaint is always your safest bet if you are not under any time constraints.
- In State or Federal Court? Usually, diversity jurisdiction available to get case into Federal Court. If there is a state action pending, and then the DJA is commenced in Federal Court, the Federal District Court may exercise discretion and elect to abstain from hearing the DJA and can dismiss the coverage DJA. *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) (court will look to whether the state has a strong interest in having issues decided in state court, whether state court would be more efficient, whether overlapping issues of state and federal court actions would create unnecessary entanglement between the courts, and whether the plaintiff in the DJA is forum shopping). In practice, this seldom occurs and is dependent on the nature of the coverage issue.

    - C.P.L.R. § 3001. Declaratory Judgment
      The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a

justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

- C.P.L.R. § 3017(b). Demand for Relief.
  In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations upon which a declaration is requested and state whether further consequential relief is or could be claimed and the nature and extent of any such relief which is claimed.

- FRCP Rule 57. Declaratory Judgment.
  These rules govern the procedure for obtaining a declaratory judgment under 18 U.S.C. § 2201. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory judgment action.

- Declaration sought to determine the insurance issues and appropriate relief
- Generally, a DJA should not be commenced as third party actions to a liability action
- No motions for joint trial of a declaratory judgment action and underlying personal injury action should be made (to permit an insurance coverage dispute to be tried before the same jury charged with making determinations in the tort action is prejudicial to the insurance company, as it brings before the jury the fact of the existence of insurance coverage). C.P.L.R. 1010; *Kelly v. Yannotti*, 4 N.Y.2d 603 (1958); *Christensen v. Weeks,* 15 A.D.3d 330 (2d Dep't 2005).

Who may bring a declaratory judgment action? The insurer or the insured may commence the action. Generally, the injured party lacks standing to commence an action against the insurer. However, an injured party may commence the action where it has obtained a judgment against the insured (N.Y. Ins. L. 3420(b)), or, where the insurer has disclaimed coverage on the basis of late notice, the injured party may commence an action 60 days after the disclaimer solely for the purpose of challenging the late notice disclaimer, if an action has not already been commenced by the insurer or the insured within 60 days of the disclaimer (N.Y. Ins. L. 3420(a)(6)).

The plaintiff chooses the forum.

It is important to look at policy provisions relative to suits and time period clauses.

Be careful that the DJA is not actually a breach of contract action.

The DJA in itself does not create a conflict of interest between the insurer and the insured if one does not already exist by virtue of the coverage issue. A best practice for insurers is to separate the defense file from the coverage file and have them handled by separate individuals, which generally suffices to allay any conflict concerns. Where such practice is followed, the insurer may continue to conduct the defense of the insured during the pendency of the DJA.

The plaintiff in the DJA should also consider who are proper party defendants. Generally, any person or entity with potential rights under the policy is a proper party defendant in the DJA. This includes the underlying plaintiff and cross-claimants against the insured in the underlying action. Inclusion of such proper party defendants in the DJA may raise special confidentiality and privilege concerns at the discovery stage, however.

Choice of law is almost always an issue in coverage cases. The choice of a New York forum for coverage litigation does not mean New York law will apply to substantive coverage issues, although New York choice of law rules will apply. This requires careful analysis before commencing the DJA.

An additional consideration is who pays for insured's counsel in the DJA:

- When insurer commences the DJA and loses, insured can collect attorneys' fees expended in defense of the DJA, *Mighty Midgets v. Centennial Ins. Co.*, 47 N.Y.2d 12 (1979), even if the insurer has provided a defense for the insured in the underlying action. *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 598 (2004).
- However, where an insurer disclaims coverage to an insured and refuses to provide a defense in the underlying action, and the insured thereafter commences a successful DJA seeking coverage from the insured, the insured is not entitled to recoup the attorneys' fees incurred in commencing the DJA. *Mighty Midgets, 47 N.Y.2d 12; Madison 96th Assocs v. 17 East Owners Corp.,* 43 Misc. 3d 1210(A) (N.Y. Sup. Ct, J. Kornreich 2014).
- In other contexts, such as life insurance, attorneys' fees may be recoverable by an insured. E.g., "Any person who has been injured…the court may award reasonable attorney's fees to a prevailing plaintiff." N.Y. Ins. Law § 7816(e).

DISCOVERY IN A DECLARATORY JUDGMENT ACTION

If there is an underlying tort action pending, it occasionally occurs that the court will stay the DJA pending outcome of underlying tort action prior to discovery. This is dependent on the nature of the coverage issue and the facts that will be decided in the underlying tort action. C.P.L.R. §§ 2201, 5519; *Prashker v. United States Guar Co.*, 1 N.Y.2d 584 (1984); *Allstate Ins. Co. v. Kemp*, 144 A.D.2d 853 (3d Dep't 1988); *State Farm Fire & Cas. Co. v. Joslyn*, 99 A.D.2d 631 (3d Dep't 1984).

If the DJA is based on a question of law, you want to make a motion for summary judgment as soon as possible (to keep costs down). If there is a question of fact involved, you may have to conduct some discovery before you can make such a motion. Generally speaking, most courts will allow some discovery of the coverage issues before entertaining motion practice.

New York is liberal when it comes to its discovery, and will permit full disclosure of all matters that are "material and necessary" in the prosecution and/or defense of the DJA. N.Y. Civ. Prac. L & R 3101(a); F.R.C.P. Rule 26. Court will permit discovery of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403 (1968).

The party seeking discovery must only show that requested disclosure is reasonably calculated to lead to the discovery of information relevant to the claim.

- Discovery should be as broad as possible, but parties need to be specific as to the particular claims and provisions involved. Discovery can include the use of:
    (1) Interrogatories. Should ask about the underlying facts, policy procurement, provisions, expert witness and witness information, the identity of all potentially responsible parties, and the theory of the claim and all defenses. C.P.L.R. § 3131; F.R.C.P. Rule 33. Be aware of any applicable limits on the number of interrogatories.
    (2) Notice for Discovery & Inspection. C.P.L.R. Rule 3120; F.R.C.P. Rule 34.
- Typical documents to be demanded by both parties:
    (1) Reports regarding the underlying claim prepared by experts, investigators, and adjusters;
    (2) Certified copy of the insurance policy and all endorsements;
    (3) Communications between the insurer and the insured, and their representatives and any other parties or witnesses;
    (4) Documents supporting alleged damages;
    (5) All pleadings, discovery, depositions transcripts, and documents in underlying action, if any; and

(6) All and any documents relating to the claim.

- Other documents which may be sought:
  - Drafting history
  - Other claims files
  - General underwriting materials
  - Insurer claims manuals, training manuals, company policy, guidelines, etc.
  - Many such items are subject to dispute. For instance, "other claims" evidence is rarely relevant unless the insured has a colorable claim under N.Y. Gen. Bus. Law § 349, or similar statute.
- Consider service of a Notice to Admit (C.P.L.R. § 3123; F.R.C.P. Rule 36) for basics, such as:
  - The attached insurance policy is a true and complete policy in effect on the date of loss or accident; or
  - The accident/loss occurred on DATE; and
  - The insured provided notice to the insurer under the policy on DATE; and
  - The insurance company issued its denial/disclaimer on DATE.

Possible objections that can be made to discovery:

- Relevancy. C.P.L.R. § 3101(a). Look to nature of coverage issue
- Overbreadth. *See generally* C.P.L.R. § 3101; *Vividize, Inc. v. Modern Litho, Inc.*, 59 A.D.2d 616 (1st Dep't 1977).
- Unduly burdensome.
- Attorney-client privilege. N.Y. Civ. Prac. L & R 4503(a).
  "A party asserting that material sought in disclosure is privileged bears the burden of demonstrating that the material it seeks to withhold is immune from discovery." *Melworm v. Encompass Indemnity Co.,* 112 A.D.3d 794 (2d Dep't 2013) (*citing Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991).
- Attorney Work product/Material Prepared for Litigation.
  N.Y. Civ. Prac. L & R 3101(d)(2) states: "materials otherwise discoverable. . .and prepared in anticipation of litigation. . .may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal

theories of an attorney or other representative of a party concerning the litigation."

F.R.C.P. Rule 26(b) (3) provides: "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party. . . ."

The party objecting to producing documents in discovery by claiming privilege must "identif[y] the particular material with respect to which the privilege is asserted and establish[] with specificity that the material was prepared exclusively in anticipation of litigation." *Bombard v. Amica Mut.Ins. Co.,* 11 A.D.3d 647 (2d Dep't 2004) (citations omitted).

Depositions. Typically, a coverage DJA will involve the depositions of the handling claims professional and the policyholder. Other possible witnesses are the broker, the retail agent, and the underwriter. The need for a particular witness's testimony should be evaluated based on the nature of the coverage issue.

HOW TO HANDLE OVERLAPPING ISSUES IN AN INSURANCE CLAIM AND A DECLARATORY JUDGMENT ACTION

If there are overlapping issues, a stay of the DJA may be the best course of action.

Usually, the only overlapping issues are factual ones, for example, did an insured act intentionally to cause injury or damage to the plaintiff in the underlying action.

The Court will usually permit a jury in the underlying action to resolve the issues of fact in the first instance, and a stay of the DJA may be warranted where such overlapping issues exist. In practice, however, such stay seldom occurs, and the decision to do so is fact-sensitive. If the factual issue in the DJA will not necessarily be resolved in the underlying action, a stay generally will not be granted.

UNDERSTANDING THE CONTENT OF AN INSURANCE CLAIMS FILE AND NOTES

The claims file should be the first priority for the parties—for the insurer, the claims file should be put in order prior to commencement of a DJA, or should be put into order as soon as a suit seeking coverage is filed. Care on the part of the carrier's attorney to secure the file is recommended, and the record must be clear that there has been no spoliation.

Different rules apply to the discovery that may be obtained from an insurance carrier's claims file in litigation involving first party claims, where a policyholder files a claim against his or her own insurance company, and third party claims, where an injured person files a claim against an allegedly at-fault person or entity who/which may be covered by an insurance policy.

For the most part, if the carrier follows appropriate procedures, most material in the claims file generated after the DJA is commenced will be immune from discovery because it is irrelevant and is protected by one or more privileges, most clearly attorney client privilege, attorney work product, and material prepared for litigation.

Claims file typically will include:

- Notices
- Acknowledgments
- Claim correspondence
- Investigative materials
- Defense materials
- Legal opinions/correspondence
- Adjuster reports
- Expert reports
- Damage evaluation reports
- Field notes
- Correspondence with insured and injured party
- Medical information

If relevant, claims files may be fully discoverable. Objections and other privileges may be available to protect against discovery of the claims file or to a particular document in the claims file. Issues include whether a document was prepared in ordinary course or in anticipation of litigation, or whether the requested document is relevant (i.e., in a rescission or reformation or cancellation case, may not be). Whether a particular document is prepared in the ordinary course of an insurer's business is a frequently litigated issue and its outcome is fact sensitive.

In a DJA, much of the claims file is generally not privileged material and the insurer cannot claim confidentiality to avoid discovery by the insured. Where it is alleged that the insurer has breached a duty to its insured, the insurer may not necessarily be able to use the attorney-client or work product privilege to shield from disclosure material relevant to the insured's action. *Woodson v. American Transit Ins. Co.*, 280 A.D.2d 328 (1st Dep't 2001), although material generated by attorneys is often still protected (*see* discussion regarding privilege below). The inclusion of third parties as defendants in the coverage action may raise special confidentiality and privilege concerns shared by both insurers and insureds.

THE CONCEPT OF "RESERVE PRACTICES" IN THE INSURANCE INDUSTRY

- A loss reserve is the money that the insurance company estimates that it would have to pay a claim. The reserve is essentially the value that the insurance company places upon the potential exposure for the matter. If relevant, the reserve may be discoverable in DJA.
- Statute may require and could also be helpful when it comes to budgeting.
  (1) Loss or claim reserves. "Every insurer shall…maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date…and also in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims." N.Y. Ins. Law § 1303.
  (2) Valuation reserves. "Every insurer [shall]…maintain reserves on all of its life insurance policies or certificates of annuity contracts in force…reserves for disability benefits…and for accidental death benefits; and any additional reserves prescribed by the superintendent as necessary on account of such insurer's policies, certificates, and contracts." N.Y. Ins. Law § 1304.
  (3) Unearned Premium Reserves. "Every authorized insurer shall…maintain reserves equal to the unearned portion of the gross premiums charged on unexpired or unterminated risks and policies." N.Y. Ins. Law § 1305.
- Depending on the nature of the DJA (coverage case v. bad faith), the loss reserve may be available to establish a high potential liability, although its relevancy for this purpose is a disputed issue.
- An insured will be interested to seek discovery of the loss reserve, arguing that the information reflects the insurer's assessment of coverage.
- Insurers may oppose a request for discovery of the reserves, arguing that the loss reserve information is protected by the work product doctrine, the reserves are not

relevant, and setting a reserve does not necessarily reflect that the insurer thought that coverage existed.

THE CONTENT OF AN INSURANCE UNDERWRITING FILE

Underwriting file typically will include:

- Application for insurance policy (containing insured's representations)
- Loss History
- Pre-loss photographs
- Additional submission documents
- Rating worksheets
- Appraisal or evaluation reports
- Premium payment records and/or finance agreements
- Cancellation/non-renewal notices
- Dun & Bradstreet reports on insured's business
- Credit reports
- Broker correspondence
- Applicants business information
- Audit materials
- History of past policies and changes in coverage
- Quotes and binders
- Broker and agent documents
- Representations made by the insured in procuring insurance.

Underwriting files are generally not kept in the claims department. Usually, the underwriting department is a completely separate department of an insurance company.

The underwriting file may not be relevant in all DJAs (e.g., applicability of an exclusion, breach of a condition precedent). Review particular claims to make a determination as to relevancy. Additionally, the underwriting materials may contain an insurer's proprietary business information. Generally, however, a court will require disclosure of the underwriting file in any coverage DJA on the basis that it may lead to the discovery of admissible evidence. As such, and as with the claims file, carrier counsel should probably secure the underwriting file in all matters and assure that no one may assert spoliation.

HOW TO RAISE AND PROTECT PRIVILEGES IN AN INSURANCE DECLARATORY JUDGMENT ACTION

When a discovery demand calls for privileged documents or materials, a motion for a protective order under C.P.L.R. 3103(a) should be considered. Upon such motion, the court may deny, limit, or condition the disclosure. The party claiming the privilege has the burden of demonstrating that the material is, in fact, privileged. *See Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 376-77 (1991). Service of a motion for a protective order automatically suspends discovery on the particular matter in dispute. C.P.L.R. 3103(b).

Alternatively, a party may object to disclosure demand served upon it under C.P.L.R. 3122(a), within 20 days of service of the disclosure demand, by responding to same, outlining their objections and the basis for each objection. C.P.L.R. 3101(b) provides that "[u]pon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable."

C.P.L.R. 4548 provides, with respect to privileged communications made by electronic means, that "[n]o communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."

Privileges:

- Attorney-Client Privilege
  - In order for attorney-client privilege to apply, the communication from an attorney to client must be a confidential communication "made for the purpose of facilitating the rendition of legal advice or services, in course of a professional relationship." *Nicastro v. N.Y. Cent. Mut. Fire Ins. Co.*, 117 A.D.3d 1545, 1546 (4th Dep't 2014) (*citing Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (1989)).
  - "In order for attorney-client communications to be privileged, the [communication] must be primarily or predominantly a communication of a legal character." *Brooklyn Union Gas Co. v. Am. Home Assur. Co.*, 23 A.D.3d 190, 191 (1st Dep't 2005); *VGFC Reality II, LLC v. D'Angelo*, 114 A.D.3d 765, 766 (2d Dep't 2014). In contrast, "[d]ocuments which are 'not primarily of a legal character, but [express] substantial nonlegal concerns' are not privileged." *Bertalo's Rest. v. Exchange Ins. Co.*, 240 A.D.2d 452, 454 (2d Dep't 1997). However, "as long as the communication is primarily or predominantly of a legal character, the privilege is not lost because it contains or refers to some nonlegal concerns." *All Waste Sys. v. Gulf Ins. Co.*, 295 A.D.2d 379, 380 (2d Dep't 2002).

- Attorney-client privilege is "not tied to the contemplation of litigation," and therefore may apply to communication made before litigation is anticipated. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 380 (1991) ("Legal advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct. Proximity to litigation . . . may itself reveal that the motive in a lawyer's communication was to give legal advice, but the absence of pending or prospective litigation does not otherwise bear on the privilege legal analysis.")

- Attorney Work Product & Material Prepared in Anticipation of Litigation
  - C.P.L.R. 3101(c) provides that "[t]he work product of an attorney shall not be obtainable." Attorney work product is absolutely privileged. Attorney work product privilege is "narrowly applied to 'materials prepared by an attorney, acting as an attorney, which contain his [or her] analysis and trial strategy." *King v. State*, 302 A.D.2d 667, 670 (3d Dep't 2003) (*quoting Salzer v. Farm Family Life Ins. Co.*, 280 A.D.2d 844, 845 (3d Dep't 2001)); *see also Brookyln Union Gas Co. v. Am. Home Assur. Co.*, 23 A.D.23d 190, 191 (1st Dep't 2005) ("[A]ttorney work product applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy.").
  - C.P.L.R. 3101(d) provides that "materials otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."
  - "Documents prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become to 'merely because [the] investigation was conducted by an attorney.'" *Nat'l Union Fire Ins. Co of Pittsburgh, Pa. v. TransCanada Energy USA, Inc.*, 119 A.D.3d 492 (1st Dep't 2014). "'[T]he payment or rejection of claims is part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business. Reports prepared by insurance investigators, adjustors, or attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable, even when those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation with the insured.'" *Melworm v. Encompass*

Indemnity Co., 112 A.D.3d 794 (2d Dep't 2013) (*quoting Bombard v. Amica Mut. Ins. Co.,* 11 A.D.3d 648, 648 (2d Dep't 2004)).

- Communications by a lawyer may be privileged, however, even if they incorporate reports of investigations that are not privileged, so long as the communications are primarily or predominantly of a legal character. *See Nicastro v. New York Cent. Mut. Fire Ins. Co.*, 117 A.D.3d 1545 (4th Dep't 2014) ("[T]he payment or rejection of claims is part of the regular course of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business. Notably, while information received from third persons may not itself be privileged . . . , a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on a different footing. The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client."); *see also 34-06 73, LLC v. Seneca Ins. Co., Inc.*, 2013 N.Y. Misc. Lexis 5633, *2 (Sup. Ct. N.Y. County Dec. 4, 2013) ("Courts have consistently held that when insurance companies use attorneys to investigate claims and decide whether to accept or deny coverage as part of their regular business activities, such use does not cloak the documents in privilege. However such documents may be protected by attorney-client privilege, even if made before the insurance company denies coverage, if they are primarily of a legal, as opposed to investigatory, character and not related to an insurance company's routine business activities.").
- Thus, materials prepared by an insurer prior to accepting or rejecting a claim generally are not privileged and will be discoverable, unless such materials constitute attorney-client communications.

Common Interest Doctrine: Communications between an insured and its counsel generated in litigating the underlying claims may not be withheld from the insurers in a subsequent action seeking coverage for such claims. *See U.S. Fire Ins. Co. v. Phoenix Assur. Co.*, 1992 N.Y. Misc LEXIS 709, *9 (N.Y. County Aug. 18, 1992) ("[W]hen an attorney is retained to represent a primary insurer and an insured, attorney-client communications are not privileged if they play a role in a subsequent action between the insured and the primary insurer.") (*citing Goldberg v. Am. Home Assur. Co.*, 80 A.D.2d 409 (1st Dep't 1981).

Many courts have held that claims manuals or guidelines are discoverable in actions alleging bad faith or unfair trade practices. Claims manuals are not ordinarily protected by the work-product doctrine because they contain directions for resolving claims in the ordinary course of

business. Typically, their relevancy is limited, although this objection may not protect them from disclosure.

PROTECTIVE ORDERS

C.P.L.R. 3122 provides that objections to discovery demands shall be made within twenty (20) days of receipt and must state with "reasonable particularity" the nature of the objection.

The court may, on motion or its own initiative, grant a protective order denying, conditioning, limiting or regulating the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or to the court. C.P.L.R. 3103(a).

You can request the Court to perform an in camera review of the materials prior to final decision as to discovery.

DISCOVERY AND PROTECTION OF ELECTRONICALLY STORED DATA

a) Volume
   - Almost 800 megabytes of recorded information is produced per person each year, 92% of which is magnetically stored form, on computers or computer storage media.
     (1) It would take 30 feet of books to store the equivalent.

b) Replication
   - Replication or moving the documents accounts for a majority of the volume out there.
     (1) Similar to paper media being moved from a desk to a file cabinet.
   - "Sending" an email message initiates an electronic process by which a pattern of positively and negatively charged electrons on one computer hard drive is replicated on several other computer hard drives, perhaps around the world, until it reaches the destination hard drive and is rendered as an image on the recipients screen.

c) Electronic Communications
   - Replacing the phone, postal service, and face-to-face meetings.
   - Each time an instant message is being used, Voice Over Internet Protocol, collaboration software, or web-based meeting technology, we create a digital file, subject to the same replication.

d) Digital Information Defies Deletion
   - Simply pressing the delete key does not delete the file.

e) Metadata

f) Legacy Date

g) Backup Media

- Replicating electronically stored information in wholesale fashion at regular intervals for the purpose of restoring the information in the event of catastrophic computer system failure.

h) ESI and the Law: New York State and Federal Overlap

- Background (Statutes, Secondary Sources, etc.)
  (1) CPLR 3101
  (2) Material and Necessary
  (3) The question of which party is responsible for the cost of searching for, retrieving and producing discovery has become unsettled because of the high cost of locating and producing electronically stored information (ESI). The CPLR is silent on the topic. Moreover, while our courts have attempted to provide working guidelines directing how parties and counsel should prepare for discovery, including ESI, these guidelines generally abstain from recommendations concerning the issue of cost allocation. *U.S. Bank Nat. Ass'n v. GreenPoint Mortgage Funding, Inc.*, 94 A.D.3d 58, 62 (1st Dep't 2012).
  (4) The First Department's Adoption of the Federal Approach to cost-shifting and other procedures relating to ESI
    (a) *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).
      (i) We are now persuaded that the courts adopting the *Zubulake* standard are moving discovery, in all contexts, in the proper direction. *Zubulake* presents the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing ESI. As noted, *Zubulake* requires, consistent with the Federal Rules of Civil Procedure, the producing party to bear the initial cost of searching for, retrieving and producing discovery, but permits the shifting of costs between the parties. When evaluating whether costs *64 should be shifted, the IAS courts, in the exercise of their broad discretion under article 31 of the CPLR (*see e.g. Allen v. Crowell–Collier Publ. Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430 [1968]), may follow the seven factors set forth in *Zubulake*. *U.S. Bank Nat. Ass'n v. GreenPoint Mortgage Funding, Inc.*, 94 A.D.3d 58, 63–64 (1st Dep't 2012).
      (ii) We find these arguments unavailing. First, requiring the producing party to bear its own cost of discovery, including the *65 searching, retrieving and producing of ESI, supports "the strong public policy **400 favoring resolving disputes on their merits" (*Zubulake*, 217 F.R.D. at 318). The alternative of having the requestor pay "may ultimately deter the filing of potentially meritorious claims" particularly in circumstances where the

requesting party is an individual (*Zubulake* at 318). Finally, the adoption of the *Zubulake* standard is consistent with the long-standing rule in New York that the expenses incurred in connection with disclosure are to be paid by the respective producing parties and said expenses may be taxed as disbursements by the prevailing litigant *U.S. Bank Nat. Ass'n v. GreenPoint Mortgage Funding, Inc.*, 94 A.D.3d 58, 64–65, 939 N.Y.S.2d 395, 399-400 (1st Dep't 2012).

(b) Availability of ESI

(i) While producing readily-available electronically-stored information will not warrant cost-allocation, the retrieval of archived or deleted electronic information has been held to require such additional effort as to warrant cost allocation. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc. 3d 1061, 1075–76 (Sup. Ct. 2010).

(ii) Unavailable ESI is generally that which has been deleted or archived. *See generally id.*

(c) Who bears the burden of production

(i) There, the Appellate Division directed plaintiff to produce all of its claims files, adding that it saw "no reason to deviate from the general rule that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc. 3d 1061, 1075 (Sup. Ct. 2010) (*citing Clarendon Natl. Ins. Co. v. Atlantic Risk Mgt., Inc.*, 59 A.D.3d 284, 286 (1st Dep't 2009); *Waltzer v. Tradescape & Co., L.L.C.*, 31 A.D.3d 302 (1st Dep't 2006)).

- Litigation Hold

(1) Courts generally finding gross negligence when it comes to spoliation sanctions based on the failure to issue a written litigation hold . . . because that failure is likely to result in the destruction of relevant information" (*Pension Comm*., 685 F.Supp.2d at 465) is not entirely the case. "Failure to institute a litigation hold, in all cases and under all circumstances, constituting gross negligence per se, has been disapproved by the Second Circuit (*see Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir.2012), *cert. denied* —— U.S. ——, 133 S.Ct. 1724, 185 L.Ed.2d 785 (2013)). The per se rule apparently articulated in *Pension Comm.*, and followed by the motion court has not been adopted by a New York state appellate court. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 118 A.D.3d 428, 432 (1st Dep't 2014).

- Preliminary Conference

(1) 22 NYCRR 202.12

(a) A non-exhaustive list of considerations for determining whether a case will have electronic discovery and matters to be considered at the preliminary conference regarding electronic discovery.
(b) This is to be strictly construed.

(2) Commercial Division – 22 NYCRR 202.70

- Demand
- Produce
  (1) CPLR 3122(c): Whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.
  (2) It is implicit that where a party seeks electronic discovery, the responding party will produce the information sought by some form of electronic means (*Waltzer v. Tradescape & Co., L.L.C.*, 31 A.D.3d 302, 819 N.Y.S.2d 38 [2006]). In federal practice, the courts have held that the production of documents by electronic files must be made in a reasonably usable form, such as "a pdf format-a for electronic files that is easily accessible on most computers" which has been held to be presumptively a "reasonably useable form" (*see, Rahman v. The Smith & Wollensky Restaurant Group, Inc., citing Autotech Technologies Ltd. v. Automationdirect.com, Inc.*, 248 F.R.D. 556 [2008]). While CPLR 3122 does not explicitly authorize the production of documents by electronic files, such production is not prohibited. Under subdivision c of section 3122, a person is required to produce documents for inspection ". . . as they are kept in the regular course of business or shall organize and label them to correspond with the categories in the request." Subdivision d of section 3122, states that unless required by a subpoena, ". . . it shall be sufficient for the custodian or other qualified person to deliver complete and accurate copies of the items to be produced." Such language does not limit the delivery of a "complete and accurate copy" to a paper copy. Objectants may produce documents by electronic files. Such production shall be accompanied by an index wherein each objectant identifies the document(s) produced in response to each demand and the electronic file where the document has been stored. Without an index, it would be unduly burdensome to require the trustees to read 6,000 documents, some of which may not bear upon the objections. *In re Tamer*, 24 Misc. 3d 768, 771, 877 N.Y.S.2d 874, 876–77 (Sur. Ct. 2009)
- Protect/Sanctions/Spoliation
  (1) **Protect**: Attorneys often assume that emails sent to and from their clients fall squarely within the attorney-client privilege. CPLR 4548 explicitly provides

that[n]o communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication. Upon enacting CPLR 4548, the Legislature made a "finding that when the parties to a privileged relationship communicate by email, they have a reasonable expectation of privacy." Nevertheless, some New York courts have recently found that attorney-client emails were not privileged or, even if they were privileged, the client had waived the privilege by emailing his attorney on a monitored email account. Joseph Capobianco & Gabrielle R. Schaich-Fardella, *Electronic Age Changes in Legal Practice, Which No Attorney Can Ignore*, N.Y. ST. B.J. (March/April 2012), at 30, 33–34

(2) **Spoliation**: *Strong v. City of New York*, 112 A.D.3d 15, 17 (1st Dep't 2013), decided whether to use New York law to determine proper procedure for spoliation sanctions or whether to use *Zubulake*.

(3) As the foregoing establishes, plaintiffs' spoliation claim can be fully addressed under New York's common-law spoliation doctrine. However, because plaintiffs rely exclusively on the *Zubulake IV* rule that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' " to preserve evidence (220 F.R.D. at 218), we briefly address the question of whether we need to import *Zubulake*'s rules into the established New York common-law rules as to spoliation of non-ESI evidence. The cases in which this Court has explicitly adopted the *Zubulake* rulings have involved ESI discovery (*see U.S. Bank N.A. v. GreenPoint Mtge. Funding, Inc.*, 94 A.D.3d 58, 939 N.Y.S.2d 395 [1st Dep't 2012]; *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 939 N.Y.S.2d 321 [1st Dept. 2012]; *Tener v. Cremer*, 89 A.D.3d 75, 931 N.Y.S.2d 552 [1st Dept. 2011]; *Ahroner v. Israel Discount Bank of N.Y.*, 79 A.D.3d 481, 913 N.Y.S.2d 181 [1st Dept. 2010]). The usefulness of the *Zubulake* standard in the e-discovery arena, is, as the *Voom* Court observed, that it "provides litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered" (93 A.D.3d at 36, 939 N.Y.S.2d 321). At the same time, as the *Voom* opinion also observed, *Zubulake* "is harmonious with New York precedent in the traditional discovery context" (93 A.D.3d at 36, 939 N.Y.S.2d 321). This is an area that did not need greater certainty or clarification. We are aware that a few recent decisions by this Court, in cases involving destruction of non-ESI evidence, quote the *Zubulake* or *Voom* formulation, implicitly employing the federal standard for spoliation of

non-electronic evidence (*see New York City Hous. Auth. v. Pro Quest Sec., Inc*., 108 A.D.3d 471, 970 N.Y.S.2d 21 [1st Dept. 2013] [part of surveillance video destroyed]; *Suazo v. Linden Plaza Assoc., L.P.,* 102 A.D.3d 570, 571, 958 N.Y.S.2d 389 [1st Dept. 2013] [surveillance video automatically recorded over]; *Harry Weiss, Inc. v. Moskowitz,* 106 A.D.3d 668, 669, 966 N.Y.S.2d 76 [1st Dept. 2013] [entire computer disposed of]). We nevertheless conclude that reliance on the federal standard is unnecessary in this context. *Zubulake* interpreted federal rules and earlier federal case law to adapt those rules to the context of ESI discovery. However, the erasure of, and the obligation to preserve, relevant audiotapes and videotapes, can be, and has been, fully addressed without reference to the federal rules and standards. *Strong v. City of New York*, 112 A.D.3d 15, 23 (1st Dep't 2013).

(4) CPLR 3122, 3124, 3126

PUTTING IT ALL TOGETHER AT TRIAL

The vast bulk of coverage issues are resolved on motion before trial. Coverage trials do occur, however, and the parties should consider the following factors in preparing for trial:

Burdens of Proof: The insured bears the burden of proving coverage in the first instance, whereas the insurer bears the burden of proving an exclusion, breach of a condition, etc.

The allocation of burdens of proof may be altered by the relative positions of the parties in the DJA. For instance, where the policyholder is the plaintiff, she has the burden of proving an alleged breach of contract, which may require proof that the exclusion does *not* apply or the condition was *not* breached.

Case in Chief: Each side should consider the information needed to establish its case in chief. In terms of documents, the policy and coverage communications will typically be part of any case in chief. Testimony of the parties previously deposed will likely be required both to authenticate and admit documents and to provide context and meaning. A notice to admit can be a useful tool in resolving admissibility issues.

Other witnesses: Others whose testimony may be useful at trial are investigators, underwriters, managing general agents, third-party administrators, and others involved in the claims or underwriting process, depending on the facts of the case.

Use of examinations under oath/sworn statements: If the insurer took an examination under oath or sworn statement of the insured before the litigation commenced, or if the insured submitted an affidavit or verified discovery responses, such information can be used for impeachment.

Expert witnesses: Rarely, a coverage or underwriting issue calls for expert testimony, for instance, the availability of a particular type of coverage in the market, the state of the insurance market at a particular time, industry practices, etc. Use of expert witnesses is subject to the applicable procedural rules. Both sides should consider whether opinion evidence will be helpful and should designate experts as warranted in compliance with applicable court rules.

Documents/demonstratives: Insurance documents are dense and daunting for the uninitiated. The parties should consider excerpting or highlighting the key wording in policies and other documents for publication to the jury. The typical coverage case hinges on the construction of a few words in the policy, and these should be brought into the foreground for the jurors.

Practical trial advice: As stated above, insurance documents are dense and daunting for the uninitiated, such as jurors. In addition, the Pattern Jury Instructions for Insurance Contracts, PJI Sections 4:45 through 4:80A, are not perceived to be "insurer friendly." The insurance practitioner in a DJA should consider trying the case to the bench. This affords both the insured and the insurer's counsel two benefits: First, the judge will likely have experience in insurance disputes that the average juror will not have, and may draw upon his or her legal training and acumen in deciding the case. Second, trying the case to the bench allows both sides to serve post trial briefs and proposed findings of fact, which gives the parties another opportunity to persuade the court to see things his or her way. Of course, many factors go into the calculation of whether to opt to try the case to the bench versus a jury. Those may include the willingness of the other side to agree to try the case to the bench, as well as the reputation and nature of the assigned judge, and the substance of the facts in dispute. Remember, only a factual dispute will warrant a trial. Legal disputes are decided on summary judgment.

If the case is to be tried to a jury, counsel representing the insurer has to do his or her utmost during jury selection to obtain promises from the prospective jurors that they will not be biased against the insurance company in their deliberations. This is a difficult task, but it is possible. The practitioner must use his or her best voir dire skills to make sure that the jurors agree that the insurance company stands on an equal footing with the policyholder at the start of trial, and the jurors understand that the insurance company is entitled to the same consideration as a party as the policyholder during the trial and subsequent deliberations. At closing, counsel representing the carrier must remind the jurors of their promises made during jury selection to give the insurer the same consideration as they give the policyholder, and to be fair and unbiased.