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Bernstein v. Travelers: Discovery of Property Loss Reserves

By Samuel H. Ruby

In *Bernstein v. Travelers Insurance Company*, 447 F.Supp.2d 1100 (N.D. Cal. 2006), a federal magistrate has ruled that loss reserves set in a first-party claim for property damage and business interruption may "lead to the discovery of admissible evidence" and are thus subject to discovery in at least some bad faith cases.

In the suit, the plaintiffs contend that the insurer unjustifiably delayed payments prior to an appraisal. When producing its claim file, the insurer redacted or withheld information regarding the loss reserves it had posted over the course of the claim. The plaintiffs moved to compel disclosure of the reserves.

This discovery dispute was set against the legal backdrop of two prior cases in California, *American Prot. Insur. Co. v. Helm Concentrates, Inc.*, 140 F.R.D. 448 (E.D. Cal. 1991) and *Lipton v. Superior Court*, 48 Cal. App. 4th 1599, 56 Cal. Rptr. 2d 341 (1996). In *Helm*, a federal magistrate judge denied a motion to compel disclosure of reserves in a first-party case, whereas in *Lipton*, a California Court of Appeal held that reserves are discoverable in a third-party case. In *Bernstein*, the court concluded that *Lipton* has undermined *Helm*.

It is not clear whether the court rejected or simply failed to appreciate comments in *Helm* about the differences between first-party insurance and third-party insurance disputes. Some commentators, however, are viewing the *Bernstein* decision as an inevitable extension of *Lipton* and are surprised only at how many pages it took the court to express its opinion. Others, including this law firm (which is handling the case), were optimistic that *Helm* would be reaffirmed and are disappointed with the ruling.

The decision is relevant only to bad faith cases, and it is not all bad news. The court expressed considerable skepticism that the reserves will be admissible at trial. It agreed that a reserve is not an admission of coverage or valuation. However, citing the broad standard for permissible discovery, the court determined that in view of the nature of the bad faith alleged in the case, it could not rule out that discovery into how, when, and why the reserves were set might lead to relevant evidence of the insurer's state of mind and the reasonableness of the timing of its payments.