

ALERT

Insurer Testimony Regarding Underwriting and Interpretation of Policies Deemed Irrelevant in Determination of Coverage

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The United States District Court for the Southern District of Florida has held that an insured is not entitled to depose an insurer's corporate representative regarding, among other topics, underwriting practices and the interpretation of policies at issue in coverage litigation where the court will resolve the coverage dispute based on the plain language of the policies. *Diamond State Ins. Co. v. His House, Inc.*, 2011 WL 146837 (S.D. Fla. Jan. 18, 2011). The court also held that the insurer, who was not a party to the underlying litigation, was allowed to depose a corporate representative of the insured on topics relevant to the coverage action even though the topics were largely duplicative of testimony given in the underlying action.

An insurer issued a professional liability policy and a commercial general liability policy to a nonprofit children's home. The nonprofit organization was named as a defendant in litigation arising out of the death of an infant placed at the organization. The insurer denied coverage under the professional liability policy on the ground that the underlying litigation did not allege a wrongful act in the provision of "professional social services." In addition, the insurer denied coverage on the separate ground that the organization knew of the infant's death prior to completing its application for the policy and could have reasonably foreseen that a claim against it would arise. The insurer also denied coverage under the commercial general liability policy because the injury to the infant occurred prior to the policy period. The insurer then filed the coverage action seeking a declaration that it did not have a duty to defend or to indemnify the insured for the underlying action.

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The insured moved to compel the deposition of a corporate representative of the insurer on numerous topics, including the issuance and procurement of the policies, the insurer's interpretation of the policies, the application for the policies, and the insurer's handling of the claim. The court agreed with the insurer that the topics were irrelevant to the coverage action. The court stated that, if it concluded that the policies were unambiguous, it would resolve the coverage issues "based upon the plain language of the policies without resort to extrinsic evidence" The court further stated that "in the event the Court determines the policy language is ambiguous, [the insured would] automatically prevail in the instant declaratory action." The court therefore denied the insured's motion to compel the deposition of the insurer's corporate representative.

The insured also moved to quash depositions of its corporate representatives or, alternatively, sought protective orders limiting such discovery. The insurer sought testimony on topics related to the death of the infant, the investigation of the death and the handling of the infant's case. The insured argued that a corporate representative had already testified about similar topics in this action, that the testimony was duplicative of depositions taken in the underlying litigation, and that the topics were not relevant to the coverage dispute. The court agreed with the insurer that the topics were relevant to the issue of whether "professional services" were provided to the infant and the issue of the insured's knowledge of the death of the infant. The court noted that the insurer was not a party to the underlying litigation and therefore should have the opportunity to depose the corporate representatives, even if such testimony would be duplicative. The court did, however, issue protective orders limiting the topics and the length of the depositions and advised that the insurer "only need[ed] to fill in the gaps left by the prior deposition."