

Discoverability of Confidential Settlement Agreements in Insurance Coverage Disputes

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I. Whether Confidential Insurance Coverage Settlement Agreements Are Discoverable Is a Common Issue.

Any insurance coverage litigator who practices long enough—whether representing policyholders or insurers—will likely find himself or herself in a situation where the discoverability of a confidential settlement agreement of an insurance coverage dispute is at issue. The lawyer will either be advocating for maintaining the confidentiality of a settlement agreement or advocating for disclosure of the confidential settlement agreement.

- In the first situation, the lawyer, on behalf of a client, will have previously settled an insurance coverage dispute and the parties—policyholder and insurer—included a

confidentiality term in the agreement precluding disclosure of the settlement agreement to others. A non-party to the agreement later comes along and seeks discovery, through requests to produce documents¹ or subpoenas², of the settlement agreement. The lawyer for one (or both) of the parties to the confidential settlement agreement will then have to resist disclosure of the settlement agreement through objections and / or motion practice to protect what the parties to the agreement consider confidential information that could prejudice them in some respect if disclosed to non-parties to the agreement.

- The second situation is the reverse. It arises where a lawyer represents a non-party to a confidential settlement agreement. That lawyer will determine someone else's confidential settlement agreement or its terms are important to litigation involving the lawyer's client. The lawyer for the non-party to the agreement will then seek discovery of the settlement agreement from one or both of the parties to the agreement to obtain information the lawyer considers necessary to resolve a dispute involving his or her client. The lawyer in this situation will likely encounter objections from one or both of the parties to the settlement agreement and will obtain disclosure of the agreement, if at all, only after difficult negotiation or motion practice.

If the lawyer cannot negotiate a resolution of the confidentiality of the settlement agreement, often the dispute will head to court. When courts have decided whether confidential settlement agreements are discoverable, they have decided the issue in three basic ways.

- First, some courts have gone almost so far as to hold confidentiality clauses in settlement agreements are *per se* invalid.
- Second, other courts have outright prohibited the disclosure of confidential settlement agreements.
- Finally, some courts have balanced the interests of the parties to the confidential settlement agreement with the need of the non-party seeking discovery of the agreement to determine whether the confidential settlement agreement is discoverable.

The balancing approach is by far the best and most practical in most cases because it protects the privacy interests of the parties to a confidential settlement agreement when a non-party to the agreement has no valid reason to learn of the parties' confidential agreement. At the same time, this approach recognizes there are situations, especially in complex, interrelated insurance relationships, where the terms (or certain terms) of a settlement agreement are necessary to resolving insurance coverage issues relating to non-parties to the settlement agreement.

II. There Are a Variety of Reasons Parties to a Confidential Settlement Agreement May Want to Keep the Agreement Confidential.

When parties settle an insurance coverage dispute, one or more of the parties frequently insists on including a confidentiality clause in the agreement for any of a number of reasons. Policyholders and insurers sometimes, but not always, cite different reasons for preventing disclosure of their confidential settlement agreement to non-parties to the agreement.

¹ See, e.g., Fed. R. Civ. P. 34.

² See, e.g., Fed. R. Civ. P. 45.

A. Policyholder Reasons Commonly Asserted for Preventing Disclosure of Confidential Settlement Agreements.

A policyholder that has several insurers that may cover the same liability or loss often negotiates separate agreements with different insurers over time. If the policyholder has settled with one insurer and is forced to disclose the terms of a confidential insurance settlement agreement to other insurers that have not settled, the policyholder may find itself at a disadvantage when negotiating settlement terms (including the amount) with insurers that have not settled.³

In this situation, an insurer that has not settled will often take the position that its settlement has to be at least as good as the earlier settlement with another insurer, which may or may not fully take into account differing circumstances or issues. Disclosure of a confidential insurance settlement to an insurer that has not settled, therefore, may place the policyholder in what it considers an unfavorable and unfair negotiating position with an insurer that has not settled. The policyholder may find itself negotiating against an insurer that takes the position that the starting point for the negotiation price is an amount comparable to what the settled insurer paid.

Policyholders also cite another reason for maintaining confidentiality of insurance settlement agreements: frequently, settling insurers insist on the confidentiality term, whether it is important to the policyholder or not.⁴ Thus, if one insurer that has not settled will not settle without a confidential settlement agreement and another insurer that has not settled insists that all insurers' settlement agreements be disclosed, this situation may chill the policyholder's negotiations with the insurer that insists upon a confidential settlement of the dispute.

B. Commonly Asserted Insurer Reasons for Preventing Disclosure of Confidential Settlement Agreements.

An insurer may insist on a confidential settlement agreement because disclosure of the terms of the agreement may frustrate the insurer's broader commercial goals. As put by one insurer, it:

[c]annot permit settlements with one policyholder to serve as a model for settlements with others, nor can it allow its competitors to become familiar with the terms on which it will compromise [coverage] disputes. Were [a settlement] to become known to other insurers, those competitors would have an advantage in litigation with other policyholders in [similar] coverage disputes. They could use that information to anticipate and frustrate [the insurer's] settlement strategy; to develop their own settlement proposals, with a view toward reaching a bilateral settlement with a policyholder ahead of [the insurer]; or to use the information, in multi-lateral negotiations among insurers, in their efforts to require [the insurer] to shoulder a larger proportion of any liability.⁵

Another consideration is that in many insurance coverage settlements today, insurers and policyholders bargain for judgment reduction provisions or the insurer's release of equitable

³ *UMC / Stamford, Inc. v. Allianz Underwriters Ins. Co.*, 276 N.J. Super. 52, 67-71, 647 A.2d 182, 190-192 (1994).

⁴ *UMC / Stamford*, 276 N.J. Super. at 70, 647 A.2d at 191.

⁵ *UMC / Stamford*, 276 N.J. Super. at 70, 647 A.2d at 191.

reapportionment claims (subrogation, contribution, or equitable indemnity) against other insurers. Obviously, if a non-settling insurer learns that the settling insurer is limited in its ability to pursue equitable reapportionment claims against non-settling insurers, the settling insurer may find itself at a disadvantage in later reapportionment litigation between insurers.

A final consideration is that an insurer that discloses a confidential settlement agreement with its policyholder to a non-party to the settlement agreement may face a breach of the implied covenant of good faith and fair dealing (bad faith) lawsuit from the policyholder.⁶ If an insurer discloses a settlement agreement the policyholder considers confidential (whether or not a confidentiality term was included in the agreement), the policyholder may claim the insurer has breached its fiduciary duty to the policyholder, giving rise to a bad faith claim against the insurer for disclosing information the policyholder claims is confidential.

C. Third-Party Claimants May Also Have Reasons for Resisting Disclosure of Confidential Settlement Agreements.

Finally, where an insurance settlement involves not only the policyholder and the insurer, but also a third-party claimant (such as a tort plaintiff that has sued the policyholder), that claimant may have confidentiality concerns ranging from not wanting the public to know the amount the claimant received in settlement of the claim to guarding confidential personal information protected by state or federal law.⁷

III. There Are a Variety of Reasons Why Non-Parties to Confidential Settlement Agreements Seek Disclosure of the Agreements.

Whereas parties to confidential settlement agreements contend the agreements should remain confidential on several grounds, non-parties to settlement agreements who seek discovery of those agreements have arguments for disclosure. Often, non-parties to the agreement argue disclosure is necessary because of the complex relationships and legal responsibilities that stem from relatively complex insurance programs.

Non-parties to a confidential settlement agreement seeking discovery of the agreement may include other insurers of a common policyholder; policyholders that consider themselves similarly situated to other policyholders with which the insurer has previously settled; or non-parties to the confidential settlement agreement contesting allocation of insurance proceeds or amounts paid in defense of claims.

Non-parties to confidential settlement agreements cite a variety of reasons for not maintaining the confidentiality of the agreements, including a non-settling insurer's concern that a policyholder does not receive a windfall or double recovery from more than one insurer⁸; whether claims

⁶ See, e.g., *Hartford Accident & Indem. Co. v. Doe Run Resources Corp.*, 2009 WL 1124945, at *1-6 (E.D. Mo. Apr. 27, 2009).

⁷ See, e.g., Health Insurance Portability and Accountability Act of 1996. Pub. L. No. 104-191, 110 Stat. 1936 (1996); Title 45 Code of Federal Regulations Parts 160 and 164; Cal. Fin. Code § 4050 *et seq.* See also *Cook v. Med. Savings Ins. Co.*, 2006 WL 687126, at *1-2 (W.D. Okl. Mar. 17, 2006) (ordering limited disclosure of information from a confidential settlement agreement to address objections based on the Health Insurance Portability and Accountability Act).

⁸ *UMC / Stamford*, 276 N.J. Super. at 68, 647 A.2d at 190.

should be assigned to particular years of coverage⁹; a non-settling excess insurer's concern that the underlying insurance is exhausted before the excess insurer pays¹⁰; and non-settling primary insurers' concerns that a settled primary insurer paid something less than its full limits¹¹. In circumstances such as these, the non-parties to the confidential insurance coverage settlement agreement often contend that their rights and obligations are dependent on or affected by the settlement and, therefore, disclosure of the settlement agreement is necessary to resolve coverage issues relating to the non-party to the settlement agreement.

IV. Courts Have Resolved Disputes Over Discoverability of Confidential Settlements of Insurance Coverage Disputes in Three Ways.

With colorable arguments on both sides (confidentiality versus disclosure), it is not surprising that courts are quite often called upon to determine whether confidential settlement agreements of insurance coverage disputes are discoverable. The courts have decided the issue in three basic ways: finding the agreements discoverable; finding the agreements not discoverable; or balancing the interests of the various parties involved to determine whether the settlement agreement, or part of it, is discoverable.

A. Certain Courts Have Taken the View that Confidential Settlement Agreements Are Absolutely Discoverable.

Certain courts have decided that confidential insurance settlement agreements are absolutely discoverable or apply such a low standard for ordering disclosure that they might as well have held that such agreements are absolutely discoverable.¹² One good example is *In re Continental Insurance Company*.¹³ In that case, the policyholder had settled with certain of its insurers. An excess insurer that had not settled sought disclosure of the settlement agreements between the policyholder and the insurers that had settled. The excess insurer believed the settled excess insurers had already paid the policyholder for the full amount of the loss and that it needed the settlement agreements with other excess insurers to prove the policyholder was entitled to no

⁹ *UMC / Stamford*, 276 N.J. Super. at 68, 647 A.2d at 190.

¹⁰ *UMC / Stamford*, 276 N.J. Super. at 68, 647 A.2d at 190.

¹¹ See, e.g., *Employers Ins. Co. of Wausau v. Travelers Indem. Co.*, 141 Cal. App. 4th 398, 401-406, 46 Cal. Rptr. 3d 1, 2-6 (2005).

¹² There is also a body of case law holding confidential insurance settlement agreements are discoverable when they involve the government or a public entity. See, e.g., *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. App. 2006); *Tribune-Review Publ'g Co. v. Westmoreland County Hous. Auth.*, 574 Pa. 661, 833 A.2d 112 (2003). These cases frequently turn on "right to know" statutes that seek to give citizens a transparent look into the workings of government.

¹³ 994 S.W.2d 423 (Tex. App. 1999).

further coverage.¹⁴ The policyholder objected to disclosure, citing the confidentiality provisions in the settlement agreements.

The Texas Court of Appeals ordered disclosure of the confidential settlement agreements. In a strongly worded opinion, the court held:

Individuals cannot protect relevant information from discovery by confidentiality provisions in contracts, even settlement agreements. The private agreement between two individuals does not override the discovery rules. The rules of civil procedure specifically allow for a method to produce relevant information to the opposing party in litigation while at the same time keep the information confidential. [Citation omitted.]

A contractual provision which requires a party to assert improper and baseless objections to a proper discovery request is void as against public policy. Likewise, any provision in a contract, including a confidentiality provision, that requires a party to refuse the production of discoverable information or documents, including the contract, until a court of competent jurisdiction has specifically ordered production, violates public policy. Parties to a contract cannot require a litigant to raise frivolous objections or grounds for refusing to produce discoverable information. If information is otherwise discoverable, a party abuses the discovery process if the only reason they resist discovery is because they have agreed not to surrender the information without a court order. Production of information in response to a proper discovery request under the rules of discovery is effectively based upon an order of the Texas Supreme Court, and the information should be produced without asserting objections that have no merit.¹⁵

Other courts have also held that, where a confidential insurance settlement is relevant to the issues in subsequent litigation, the agreement is discoverable, despite the confidentiality term. For instance, courts have reached this result where one insurer's settlement affects the obligations of another insurer. For example, a United States District Court,¹⁶ a California court,¹⁷ and an Ohio court¹⁸ have determined that confidential settlement agreements between a policyholder and a primary insurer must be disclosed to excess insurers so the excess insurer can determine whether the primary insurance is exhausted and, therefore, whether the excess insurer has any

¹⁴ *In re Cont'l Ins. Co.*, 990 S.W.2d 941 (Tex. App. 1999).

¹⁵ 994 S.W.2d at 425-426.

¹⁶ *Argonaut Ins. Co., Inc. v. Hartford Accident & Indem. Ins. Co.*, 687 F. Supp. 911, 913-914 (S.D.N.Y. 1988).

¹⁷ *Home Ins. Co. v. Superior Court (Atl. Richfield Co.)*, 46 Cal. App. 4th 1286, 1291-1295, 54 Cal. Rptr. 2d 292, 294-297 (1996).

¹⁸ *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc. 2d 174, 180, 660 N.E.2d 765, 768-769 (Ct. Common Pleas, Lucas County 1993).

obligation to the policyholder.¹⁹ In these courts' view, the information contained in the confidential settlement agreement is critical to resolution of a dispute involving a non-party to the agreement and the need for information necessary to resolve the dispute overrides any interest the parties to the confidential settlement agreement have in keeping the agreement or its terms secret.

B. Other Courts Have Taken the View that Confidential Settlement Agreements Are Absolutely Not Discoverable.

Other courts have found that confidential insurance settlement agreements are not discoverable. Perhaps the best example is *UMC / Stamford*.²⁰ In that case, a non-settling insurer sought discovery of settling insurers' confidential settlement agreements with the common policyholder. The non-settling insurer seeking discovery of the confidential settlement agreements argued it was entitled to disclosure of the settlement agreements because it could not otherwise determine whether the settling insurers had already paid all of the policyholder's alleged damages.

The policyholder and certain of the settling insurers resisted disclosure. The Superior Court of New Jersey held the confidential settlement agreements were not discoverable. The court held that confidentiality encourages settlement, which is socially desirable and good public policy. Moreover, if parties bargain for confidentiality in their settlement agreement, that private decision to keep the details of the settlement from other parties should be respected.²¹ In cases such as these, the courts appear to place the parties' bargained-for privacy above all else.

C. A Third Approach: Balancing Privacy Interests Versus Need To Know.

There is a third general approach. A number of courts have weighed the privacy rights of the parties that contracted for confidentiality of their settlement agreement versus the rights or needs of others to know the contents of their settlement agreement. A good example is *Young v. State*

¹⁹ See also *Bank of Am. v. Travelers Indem. Co.*, 2009 WL 529235 (W.D. Wash. Mar. 2, 2009) (holding, without much comment, that where a confidential insurance settlement agreement is relevant in subsequent litigation, it is discoverable); *Atchison Casting Corp. v. Marsh, Inc.*, 216 F.R.D. 225 (D. Mass. 2003) (holding insurance broker was entitled to settlement agreement between policyholder and insurer where agreement was relevant in the policyholder's suit against the broker for failing to procure adequate insurance); *Morse / Diesel Inc. v. Fid. & Deposit Co. of Maryland*, 122 F.R.D. 447 (S.D.N.Y. 1988) (holding confidential insurance settlement agreement discoverable as long as the agreement met the very liberal "reasonably calculated to lead to the discoverability of admissible evidence" standard of Fed. R. Civ. P. 26).

²⁰ 276 N.J. Super at 67-71, 647 A.2d at 190-192.

²¹ See also *In re AT&T Fiber Optic Cable Installation Litigation*, 2002 WL 1364157 (S.D. Ind. June 5, 2002) (holding confidential settlement agreement was not discoverable as an insuring agreement under Fed. R. Civ. P. 26 (a) (1) (D) and where parties seeking disclosure only articulated a vague assertion that knowledge of the policyholder's finances might help them formulate a strategy for settlement negotiations); *Scottsdale Ins. Co. v. James L. Gardner Trust*, 2001 WL 132954 (D. Kan. May 16, 2001) (denying disclosure to claimant of amounts different insurers paid to resolve claim where claimant had previously "agreed that the amount each insurer contributed would remain *confidential* and *not disclosed or disseminated in any manner by any party*." *Id.* at *2 (emphasis in original)).

*Farm Mutual Automobile Insurance Company*²² In that case, fired attorneys who had represented an automobile passenger brought an action to recover attorneys fees to which they claimed they were entitled after new attorneys settled the case. The attorneys argued that the confidential settlement agreement between the insurer and the claimant was relevant to their fee claim. The insurer argued that, because the settlement agreement was confidential, the attorneys were not entitled to it.

The court balanced the interests of the parties and then ordered disclosure of the agreement.²³ The court determined that, while the confidentiality of the agreement was important, the court could not resolve the fee dispute without reference to the settlement agreement and, therefore, it was discoverable.

In contrast, in *Travelers Indemnity Company v. Liberty Medical Imaging Associates*,²⁴ the district court judge *sua sponte* declined to adopt the magistrate's recommendation that a confidential insurance settlement be unsealed. The district court judge determined:

the parties' mutual interest in maintaining the confidentiality of settlement negotiations outweighs the general public interest in disclosure of the particulars of judicial proceedings, especially given the apparent lack of prejudice to any particular party should the record remain sealed. [Citation omitted.]²⁵

As a further safeguard of everyone's interests, courts that balance the competing interests of the proponents of disclosure versus those seeking to prevent disclosure can review confidential settlement agreements *in camera* to make a threshold determination as to whether disclosure is necessary and / or whether it will prejudice the party seeking to prevent disclosure.²⁶ By reviewing the settlement agreement *in camera*, the court can disclose only the necessary provisions of the agreement to the proponent of discovery of the agreement.

V. Commentary: the Balancing of Interests Is the Best Approach.

Although every case is different, generally, the best approach is for courts to weigh the interests of the parties when the court is asked to determine whether a confidential insurance coverage settlement agreement should be disclosed to non-parties to the agreement. This approach protects

²² 169 F.R.D. 72 (S.D. W. Va. 1996).

²³ See also *Huffy Corp. v. Superior Court (Winterthur Swiss Ins. Co.)*, 112 Cal. App. 4th 97, 4 Cal. Rptr. 3d 823 (2003) (weighing interests and ordering disclosure of confidential settlement agreement); *Employers Ins. of Wausau v. Am. Home Prods. Corp.*, 238 A.D.2d 154, 655 N.Y.S.2d 950 (1997) (same).

²⁴ 2009 WL 962788 (E.D.N.Y. Apr. 8, 2009).

²⁵ 2009 WL 962788, at *2. While the district court judge ordered that the settlement agreement remain sealed, the judge ordered other documents submitted during the course of the proceedings unsealed.

²⁶ See, e.g., *Morrison Enter. LLC v. Dravo Corp.*, 2009 WL 2462215, at *5-6 (D. Neb. Aug. 10, 2009); *State v. The Hon. John Lewis Marks, Jr.*, 223 W. Va. 452, 459-460, 676 N.E.2d 156, 163-164 (2009); *Am. Home Prods. Corp.*, 238 A.D.2d at 154, 655 N.Y.S.2d at 950.

the privacy interests of the parties to the confidential insurance coverage settlement agreement where non-parties to the agreement are impermissibly and unjustifiably fishing for information.²⁷ At the same time, it allows courts to tailor narrow disclosure of certain features of confidential insurance coverage settlement agreements when information in the agreement is truly necessary to the rights and obligations of non-parties to the agreement on an as-needed basis.²⁸ For instance, one option is for the court to review the settlement agreement *in camera* to protect against unnecessary disclosure of features of the agreement that are not relevant to the dispute.²⁹

On the one hand, there are situations where parties are just seeking information that might be intriguing or marginally useful to them but that is not relevant or even reasonably calculated to lead to the discovery of admissible evidence. For example, where one of several similarly situated liability insurers settles with the policyholder and one or more non-settling insurers seeks discovery of the settlement agreement because that insurer has not performed its own settlement evaluation or wants to make sure it does not overpay (that is, pay more than the settling insurer), without a better explanation of need for the settlement agreement or amount, the non-settling insurer's attempt to force discovery of the settlement agreement should be denied.

As explained above, allowing non-settling insurers access to the policyholder's confidential settlement agreements with other insurers may prejudice (or, at the least, unnecessarily complicate) the policyholder's efforts to settle with other non-settled insurers. Further, if the settling insurers released rights of reapportionment against other non-settling insurers in the settling insurer's confidential settlement agreement with the policyholder, disclosing the agreement to non-settled insurers may give the non-settled insurers advantages in subsequent litigation between the insurers over apportionment of the loss.

On the other hand, where an excess insurer's policy provides that it does not provide coverage unless the underlying (settled) primary insurer has paid its full limits, the excess insurer has a compelling argument that it needs to know whether the primary insurer paid full limits because the excess insurer may have defenses to coverage if the primary insurer paid less than full limits in settlement of its claim.

In a non-insurance case, the California Court of Appeal set forth a well articulated and workable balancing test to determine whether a non-party to a confidential settlement agreement is entitled to discovery of the agreement.³⁰ In doing so, the court based its decision on a limited constitutional right of privacy. In *Hinshaw*, the court explained:

The court in [*Board of Trustees v. Superior Court (Dong)*, 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981)] outlined the weighing process governing discovery of private documents. "Article I, section 1's, 'inalienable right' of privacy is a 'fundamental interest' of our society, essential to those rights "'guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the U.S. Constitution.'" [Citations omitted from quote.] But another state interest lies in "'facilitating the

²⁷ See, e.g., *In re AT&T Fiber Optic Cable Installation Litigation*, 2002 WL 1364157, at *2.

²⁸ *Owens-Corning*, 74 Ohio Misc. 2d at 180, 660 N.E.2d at 768-769.

²⁹ See, e.g., *Owens-Corning*, 74 Ohio Misc. 2d at 180, 660 N.E.2d at 768-769.

³⁰ *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court (Kauffman)*, 51 Cal. App. 4th 233, 58 Cal. Rptr. 2d 791 (1996).

ascertainment of truth in connection with legal proceedings”. . . .’ [Citations omitted from quote.] The constitutional right of privacy is ‘not absolute’; it may be abridged when, but only when, there is a ‘compelling’ and opposing state interest. [Citations omitted from quote.] [¶] In an effort to reconcile these sometimes competing public values, it has been adjudged that inquiry into one’s private affairs will not be constitutionally justified simply because inadmissible, and irrelevant, matter sought to be discovered might lead to other, and relevant, evidence. [Citation.] When compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information. [Citations.]” (119 Cal. App. 3d at p. 525, 174 Cal. Rptr. 160, italics in original.)

Thus, given the private nature of a confidential settlement of a lawsuit, the burden rests on the proponents of discovery of this information—the plaintiffs here—to justify compelling production of this material. They must do more than show the possibility it may lead to relevant information. Instead they must show a compelling and opposing state interest. (*Board of Trustees v. Superior Court*, supra, 119 Cal. App. 3d at p. 525, 174 Cal. Rptr. 160.)³¹

By recognizing that parties to confidential settlement agreements (including, by extension, confidential insurance coverage settlement agreements) have a constitutionally protected privacy interest (as opposed to lesser privacy interests other courts have considered³²), the *Hinshaw* case protects the parties to the settlement agreement against unjustified and unnecessary discovery. At the same time, where a litigant has more than a mere curiosity in a settlement agreement and can show a “compelling” need for information, the court can fashion a narrowly tailored disclosure where the information is absolutely necessary to resolve the issues of non-parties to the settlement agreement.

Balancing the constitutional right of privacy of parties to a confidential insurance coverage settlement agreement against the need for information to adjudicate legitimate disputes fairly is the best approach in most cases to determine whether confidential settlement agreements should be discoverable.

³¹ *Hinshaw*, 51 Cal. App. 4th at 239, 58 Cal. Rptr. 2d at 794-795.

³² *Young*, 169 F.R.D. at 73-79.