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"Insurers Beware: No Guaranteed Privilege in Legal Correspondence," by Michael L. Zigelman,Esq. Eric Stern,Esq. & Kathleen Mullins, Esq., published by Reuters, 10-17-2023

The recent New York federal district court decision, Cadaret Grant & Co. v. Great Am. Ins. Co., 2023 WL 4740184 (July 25, 2023), highlights an ongoing issue regarding the privileges and discoverability of documents exchanged between an insurance company and its coverage counsel.

This article will first look at the history of such privileges ascribed to coverage counsel-insurer communications, and then recent developments and rulings regarding those privileges, and finally, provide a road map for insurers and coverage counsel going forward, so as to avoid potential pitfalls that may expose documents to discovery even if those documents were intended to remain protected.

Caderet involved a declaratory judgment action in which the insured was seeking coverage under the terms of a Financial Institution Bond issued by the insurer. The insurer disclaimed coverage, and a lawsuit ensued. The insured moved to compel the production of correspondences between the insurer and its coverage counsel, which were withheld from discovery on the grounds of the attorney-client privilege and the work product doctrine.

The District Court, following an in camera review, found that the overwhelming majority of the documents at issue were subject to disclosure. Documents wherein coverage counsel requested information or facts regarding the claim were considered not protected. The only document protected was a "document show[ing] [coverage counsel's] legal analysis and opinions. It contains legal advice and is therefore primarily legal, rather than investigatory in nature. It is covered by the attorney client privilege." Id. at *6. It is important to note that correspondence after the disclaimer was issued were not part of the discovery dispute.

A review of a number of federal and state cases indicates that whether pre-disclaimer documents involving coverage counsel are privileged or subject to disclosure depends on several factors to determine if the coverage counsel was engaged in "claim investigation" or legal analysis.

For example, in Bertalo's Restaurant, Inc. v. Exchange Ins. Co., 240 A.D.2d 452 (N.Y. 2d Dept. 1997), the plaintiff, a fire insurance policyholder, contended that the defendant insurer failed to timely deny coverage of its fire damage claim. The plaintiff moved to compel discovery of certain documents from the insurer, and the trial court granted the motion in part and denied the motion in part.

On appeal, the Appellate Division explained that a party seeking to assert a valid claim of privilege, must show that the document at issue was a "'confidential communication' made between the attorney and the client in the context of legal advice or services." Id.(citing Matter of Priest v. Hennessy, 51 N.Y.2d 62, 69 (N.Y. Ct. of App. 1980); Coastal Oil N.Y. v. Peck, 184 A.D.2d 241 (N.Y. App. Div. 1st Dep. 1992)). In the case of coverage counsel for an insurance company, "the payment or rejection of claims is a 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." Id. at 454-55(citing Millen Industries, Inc. v. American Mutual Liability Ins. Co., 37 A.D.2d 817 (N.Y. 1st Dept. 1971)).

Consistent with this rationale, the Court determined that all documents prepared prior to the date that the insurer decided to deny coverage were not privileged and the plaintiff insured was therefore entitled to discovery of all of those documents. Id.

The District Court for the Western District of Washington recently held that there is a "presumption of no attorney-client privilege relevant between the insured and the insurer in the claims adjusting process." Canyon Estate Condominium Association v. Atain Specialty Insurance Company, 2020 WL 363379, at *1 (W.D. Wash. 2020). Nonetheless, the presumption can be overcome "by showing [the insurer's] attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim, but instead in providing the insurer with counsel as to its own potential liability; for example, whether or not coverage exists under the law."

The Court's decision in Canyon focused on the fact that the attorney "authored draft letters signed by [the insurer] and sent to the [insured] related to coverage and claims processing." The Court reasoned that, "Assisting an adjuster in writing a denial letter is not a privileged task." If coverage counsel engages in what the Court believes is "both quasi-fiduciary and coverage or liability capacities," then "waiver of the attorney-client privilege is likely since 'counsel's legal analysis and recommendations to the insurer regarding liability generally or coverage in particular will very likely implicate the work performed and information obtained in his or her quasi-fiduciary capacity.'" Id.

*Courts in Idaho and Louisiana have adopted a similar analysis. See, Stewart Title Guar. Co. v. Credit Suisse, Cayman Islands Branch, 2013 WL 1385264, at *4-5 (D. Idaho Apr. 3, 2013) (holding that coverage counsel performed a "mixed role" which included both providing coverage advice and investigating claims. However, because the claims file contained documents pertaining to both, the privilege was waived. The court suggested that the insurers "may wish to set up and maintain separate files" to avoid this issue); Shaw Grp., Inc. v. Zurich Am. Ins. Co., 2014 WL 199626 (M.D. La. Jan. 15, 2014) (documents were allowed to be produced, however, deposition of coverage counsel was quashed upon demonstration that involvement was limited to litigation strategy in defending the insurer.").*

However, in All Waste Systems v. Gulf Ins. Co., 295 A.D.2d 379 (N.Y. App. Div. 2d Dept. 2002), the New York Appellate Division held that "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." Id. at 380. Accordingly, the documents at issue there were protected from disclosure as they were deemed privileged.

*Other courts have found similar bases to exclude discovery of coverage counsel opinions from production. See, Barton Malow Co. v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. 509/QF004706, 2012 WL 4668868, at *2 (E.D. MI, Southern Div. 2012) (holding that documents which "communicate legal advice from Underwriter's counsel regarding the extent, if any, to which [the] claim was covered … show counsel's legal opinions regarding the scope of potential liability" and thus are protected by attorney client privilege); Workman v. Cincinnati Ins. Co., 2017 WL 6025999 (E.D.MO 2017) (documents "contain[ing] communications relating to ordinary business activities (e.g., internal communications about retaining counsel) and not made for the purpose of soliciting legal advice" were discoverable, but documents which "contain or memorialize communications between Defendant's representatives and legal counsel for the purpose of obtaining legal services and advice" were protected); Johnson v. RLI Ins. Co., 2015 WL 12699418 (D. Alaska 2015) (documents were barred from disclosure under the attorney-client privilege as they contained "communications made for the purpose of facilitating the rendition of legal services."); Rain v. Connecticut General Corp., 2022 WL 2294061 (D.Mass. 2022) (in-house attorney could not be deposed because it would, "by definition involve inquiry into [his] mental impressions, conclusions, opinions, or legal theories developed in his capacity as counsel for the defendants with respect to interpretation" of the policies).*

Based on the foregoing series of cases which span the country, it is important that an insurer and its coverage counsel be aware of the potential for discovery of correspondence and behave accordingly. To that end, engagement correspondence should clearly state that coverage counsel is retained to provide legal advice, opinions and analysis.

Further, the factual information provided to counsel by the insurer should be material that comes directly from its claims file, with the understanding that such may ultimately be deemed discoverable in a subsequent coverage dispute. Finally, and as always, any legal questions about the potential discoverability of items should be discussed with competent counsel before they are exchanged.

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