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Attorney-Client Privilege in Insurance Disputes: Preserving Confidentiality, Meeting Legal Ethics Standards

Waiver and Exceptions to the Privilege, the Tripartite Relationship, and the Role of Counsel in Claims Handling and Litigation

WEDNESDAY, JANUARY 22, 2020

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Attorney-Client Privilege in Insurance Disputes: Preserving Confidentiality, Meeting Legal Ethics Standards

Waiver and Exceptions to the Privilege, the Tripartite Relationship, and the Role of Counsel in Claims Handling and Litigation

January 22, 2020 – 1:00 p.m. – 2:30 p.m.

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Introduction to the Attorney-Client Privilege and Attorney Work Product Privilege in Insurance Disputes

The Attorney-Client Privilege

Common Elements

(1) Where legal advice of any kind is sought

(2) from a professional legal adviser in his capacity as such

(3) the communications relating to that purpose

(4) made in confidence

(5) by the client

(6) are at his instance permanently protected

(7) from disclosure by himself or by the legal adviser

(8) except the protection be waived.

8 John Henry Wigmore, Evidence § 2292, at 904

Attorney-Client Privilege and the Two Hat Problem

- Attorneys must be careful of what hat they are wearing
- In-house counsel – business vs. legal role
- Investigative work
  - "[N]o privilege attaches when an attorney performs investigative work in the capacity of an insurance claims adjusted rather than as a lawyer…. The relevant question is not whether [the attorney] was retained to conduct an investigation, but rather, whether this investigation was related to the rendition of legal services"
    In re Allen, 106 F.3d 582, 602-603 (4th Cir. 1997)
  - When the attorney's involvement relates to the rendition of legal services, the privilege protects communications between her and the lawyers assisting her, the staff, the client, its agents, and its employees. *Connecticut Indem. Co. v. Carrier Haulers, Inc.*, 197 F.R.D. 564, 573 (W.D.N.C. 2000)

The Work Product Doctrine - Overview

In federal diversity cases, the attorney-client privilege is governed by state law and the work product doctrine by federal law

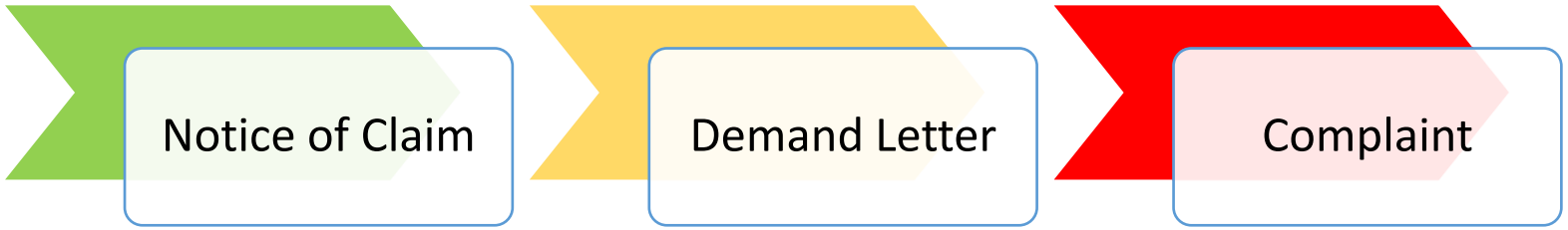
FRCP 26(b)(3)

> (A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)

The key question is when was litigation reasonably anticipated?

Work Product – Anticipation of Litigation

- When was litigation reasonably anticipated?



- "In the early stages of claims investigation, management is primarily concerned not with the contingency of litigation, but with 'deciding whether to resist the claim, to reimburse the insured and seek subrogation of the insured's claim against the third party, or to reimburse the insured and forget about the claim thereafter.' At some point, however, an insurance company's activity shifts from mere claims evaluation to a strong anticipation of litigation." *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982)

The Work Product Doctrine – Opinion vs. Ordinary

- FRCP 26(b)(3)

  (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

  (i) they are otherwise discoverable under Rule 26(b)(1); and

  (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means

  (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation

The Tripartite Relationship

- Defined
  - The triangular relationship between defense counsel, the insurer, and the policyholder when defense counsel is hired by an insurer to defend a suit against the policyholder
- Insured-Insurer Privilege?
  - There is no insured-insurer privilege *per se*. However, communications between a policyholder and its insurer may be protected by the attorney-client privilege in certain situations
  - Case Law
    - However, "[m]erely because a communication is between an insurer and its insured does not render it privileged." *Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, 2002 WL 31729693, at *8 (S.D.N.Y. Dec. 5, 2002)
    - "Federal courts have never recognized an insured-insurer privilege as such." *Aiena v. Olsen*, 194 F.R.D. 134, 136 (S.D.N.Y. 2000). "Rather, the communication must satisfy the elements of attorney-client privilege." *Calabro v. Stone*, 225 F.R.D. 96, 98 (E.D.N.Y. 2004)

The Tripartite Relationship

- Insurer Access to an Insured's Privileged Materials
  - **Scenario #1: Unconditional Defense**
    - When a policyholder and its insurer share the same defense counsel, communications among the three (insured, insurer, and counsel) that relate to the litigation and otherwise satisfy the requirements of attorney-client privilege will likely be privileged
    - Analogous to joint client privilege
  - Case Law
    - In such cases, the party asserting the privilege must prove:
      - The identity of the insured,
      - The identity of the insurance carrier,
      - The duty to defend the lawsuit, and
      - That a communication was made between the insured and an agent of the insurer
      - *See Chicago Tr. Co. v. Cook Cty Hosp.*, 698 N.E.2d 641, 649 (Ill. App. 1998) (quoting *Rapps v. Keldermans*, 628 N.E.2d 818 (Ill. App. 1993))

The Tripartite Relationship

- Insurer Access to an Insured's Privileged Materials
  - **Scenario #2: Reservation of Rights**
    - When the insurer elects to defend a policyholder where the interests of the insurer and the policyholder are sufficiently aligned, communications among counsel, the insured, and the policyholder that otherwise satisfy the requirements of attorney-client privilege will likely be privileged
    - Analogous to the common interest doctrine
  - Case Law
    - Where "there is a single, common goal shared by an insurer and its insured of minimizing or eliminating liability to a third party . . . a unique tripartite relationship exists among those parties (the insurer and the insured) and the defense counsel hired to defend against third-party liability." *Cont'l Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510, 519 (E.D. Cal. 2010)

The Tripartite Relationship

- Insurer Access to an Insured's Privileged Materials
  - **Scenario #3: Denial of Defense**
    - When an insurer takes on an *adversarial position*, such as denying coverage for an underlying claim or filing a declaratory judgment to not defend an action, the insurer <u>will rarely be able to access privileged communications</u>
    - In such cases, the ability to compel production may be based on:
      - The cooperation clause in an insurance policy,
      - The at-issue doctrine, or
      - Exceptions to work product privilege

    (Such waivers will be discussed later in the presentation)

Maintaining Privilege & Bad Faith and the At Issue Doctrine

- Waiver
  - "Disclosure of even a part of" privileged communication waives privilege to the entire communication. *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 825 (Del. 1992)
- Four Forms of Waiver to Consider:
  - Cooperation clauses
  - Privilege logs
  - Bad faith litigation
    - Attorney-client privilege
    - Work product privilege
  - At-issue doctrine

Maintaining Privilege & Bad Faith and the At Issue Doctrine

- Cooperation Clauses
  - Contractual Waiver
    - Most insurance policies contain a standard cooperation clause
    - Such clauses base a policyholder's right to indemnify an insurer on the policyholder's reasonable cooperation with the insurer in defending or settling a claim
    - Most states analyzing cooperation clauses in the privilege context have found that a cooperation clause does not automatically waive attorney-client privilege. Instead, the clause must explicitly waive privilege rights to waive privilege
    - Case Law
      - *US Fire Ins. Co. v. City of Warren*, 2012 WL 2190747 (E.D. Mich. June 14, 2012) (noting that waiver must be an intentional act under Michigan law and a cooperation clause could not expressly waive attorney-client privilege)

Maintaining Privilege & Bad Faith and the At Issue Doctrine

- Privilege Logs
  - Failing to prepare an adequate privilege log may result in full or partial waiver
- Delaware Law on Privilege Logs
  - Delaware maintains rigorous standards for logging privileged documents
  - However, a good faith attempt to provide meaningful descriptions will not be penalized, but may require supplemental entries
  - Case Law
    - *Klig v. Deloitte LLP*, 2010 WL 3489735, at *5 (Del. Ch. Sept. 7, 2010)
    - *State, Dept. of Transp. v. Figg Bridge Eng'rs, Inc.*, 79 A.3d 259, 266 (Del. Super. Ct. 2013) (applying the *Klig* standard to work product privilege logs)

Maintaining Privilege & Bad Faith and the At Issue Doctrine

- Preparing an Adequate Delaware Privilege Log
  - As quoted from *Klig*, privilege logs must include:
    - The date of the communication
    - The parties to the communication
      - Including names and corporate positions (Chancery Court)
    - The names of the attorneys who were parties to the communication
    - The subject matter of the communication sufficient to show why the privilege applies
      - The log must show facts "as to bring the identified and described document within the narrow confines of the privilege"
  - Ultimately, a privilege log must be sufficiently detailed to allow an opposing party "to assess the privilege claim and decide whether to mount a challenge"

Maintaining Privilege & Bad Faith and the At Issue Doctrine

- Bad Faith
  - Insurance policies are contracts
    - Like most contracts, insurance policies include an implied covenant of good faith and fair dealing
  - Under Delaware law, an insurer who acts in bad faith in dealing with a claim may incur liability:
    - Damages under the policy,
    - Insured's uncovered economic losses,
    - Insured's emotional distress damages,
    - Attorney's fees, and
    - Punitive damages in limited circumstances
  - Case Law
    - *Clausen v. Nat'l Grange Mut. Ins. Co.*, 730 A.2d 133, 140 (Del. Super. Ct. 1997)

Maintaining Privilege & Bad Faith and the At Issue Doctrine

- Attorney-Client Privilege in Bad Faith Litigation
  - In Delaware, a bad faith claim, without more, does not waive an insurer's attorney-client privilege
  - Court's policy goal is to stop "gold mine" expeditions based solely on a complaint and answer
  - **But** privilege may be waived when "factual assertions to defend a claim …incorporate legal advice"
    - The assertion may be expressed or implied
  - Case Law
    - *Tackett v. State Farm Fire & Cas. Ins. Co*., 653 A.2d 254, 259 (Del. 1995) (holding an insurer had implicitly waived the attorney-client privilege in a bad faith litigation action)
      - Implicit waiver requires: (1) partial disclosure of facts and (2) "that the partial disclosure place the party seeking discovery at a distinct disadvantage due to an inability to examine the full context of the partially disclosed information." *Id.* at 260
    - *Clausen*, 730 A.2d at 143

Maintaining Privilege & Bad Faith and the At Issue Doctrine

- At-Issue Doctrine
  - Privilege cannot be used as both a "sword and shield" in litigation
  - Some courts waive privilege when a party places an otherwise privileged communication "at issue" in the litigation
  - In other courts, attorney-client privilege may be waived under the at-issue doctrine if the underlying files are *relevant* to the insured's claims
  - Delaware's At-Issue Test:
    - (1) Party injects the privileged communications into the litigation themselves, **OR**
    - (2) Party injects an issue into the litigation that requires an examination of confidential communications to be truly resolved
  - Case Law
    - *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010)

Maintaining Privilege & Bad Faith and the At Issue Doctrine

- Case Law
  - *Arch Ins. Co. v. Murdock*, C.A. No. N16-01-104 EMD [CCLD]
    - Dole Food Company, Inc. had several insurance policies with the plaintiff insurers covering directors, officers, and corporate liability
    - In an earlier dispute in the Delaware Court of Chancery, a vice chancellor found that Mr. Murdock and Michael Carter, two of the defendants in the Superior Court action, breached their duty of loyalty through fraud
    - Following settlements in the underlying action, the insurers sought a determination in the Delaware Superior Court that they were not required to provide insurance coverage to Messrs. Murdock or Carter
    - In connection with discovery, the insurers sought the production of documents and communications relating to the settlements of the underlying actions
    - This request implicated the at-issue exception, and the Court was required to evaluate whether the insureds had injected the communications into the litigation or whether resolution of the issues implicated in the litigation required disclosure

Maintaining Privilege & Bad Faith and the At Issue Doctrine

- Case Law, cont'd
  - *Arch Ins. Co. v. Murdock*, C.A. No. N16-01-104 EMD [CCLD]
    - As to the first issue, the Court found that the insureds had not attempted to inject any attorney-client communications directly into the litigation
    - However, the Court held that "the truthful resolution of the reasonableness of the settlements does require an examination of the confidential communications"
    - To the extent the claim of privilege involved work product, the Court held that an *in camera* review was needed
    - Even though the insurers had established a "compelling need" for the documents, the Court must first undertake an *in camera* examination of the materials to fully determine whether the particular document actually satisfied the requirement of "compelling need" before ordering production

Maintaining Privilege & Bad Faith and the At Issue Doctrine

- Case Law, cont'd
  - *Arch Ins. Co. v. Murdock*, C.A. No. N16-01-104 EMD [CCLD]
    - As highlighted by the Court's decision in *Arch*, sometimes the disclosure of privileged information is necessary to facilitate the truthful resolution of certain issues
    - Parties should be careful in drafting pleadings to not put privileged communications at issue

Use of Consultants by Insurance Companies

Consultants are third parties that will break privilege but for an exception (e.g., environmental consultants, private investigators)

The *Kovel* Privilege

- Originated in *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)
- Court found that privilege can protect communications with accountant if the accountant's role was to help facilitate the rendition of legal advice
- Analogous to interpreter-type relationship

*Privilege vs. Work Product…

The Use of Consultants – Work Product

- Opinion vs. Ordinary Work Product
- "Ordinary work product includes raw factual information and cannot be discovered unless the party requesting discovery has demonstrated a substantial need for the materials and the party cannot obtain the substantial equivalent of the materials by other means. Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories, 'enjoys almost absolute immunity,' and can be discovered 'only in very rare and extraordinary circumstances....'" *Carlson v. Freightliner LLC*, 226 F.R.D. 343, 366 (D. Neb. 2004)
- "Risk management documents prepared by investigators may not themselves be considered 'prepared in anticipation of litigation,' but to the extent that they disclose the individual case reserves for files and any mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim, they are [protected]" *Id.*

The Use of Consultants – Work Product

- Bad faith claim can affect the analysis – First-party claims
  - "[W]here state law permits 'bad faith' damages, as is the case in Georgia (O.C.G.A. §33-34-6), such materials take on additional relevance." *Joyner v. Continental Ins. Cos.*, 101 F.R.D. 414, 416 (S.D. Ga. 1983) (also quoting from a case which concluded that "[t]he information sought will to some degree demonstrate the thoroughness with which defendant investigated and considered plaintiff's claim and thus is relevant to the question of the good or bad faith of defendant in denying the claim")
  - *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 14 (D.Md. 1980) ("Thus, as to plaintiffs' claim of bad faith, the documents in question may constitute quite important evidence as to whether Aetna conducted a diligent investigation of plaintiffs' claim and whether Aetna acted in good faith in denying the claim")
  - *Brown v. Superior Court*, 670 P.2d 725, 734-36 (Ariz. 1983) (mental impressions of counsel, agents or other representatives recorded in the claims file are discoverable in bad faith action because the claims file is relevant to how the insurer handled claim)

The Use of Consultants – Work Product

- Bad faith claim can affect the analysis – Third-party claims
  - Stronger presumption that investigation of claim, if denied, will lead to litigation but claim file may still be discoverable in a third party claim for bad faith if plaintiff can show a "substantial need for the materials" and an inability "without undue hardship" to obtain the materials by other means. *See Camacho v. Nationwide Mut. Ins. Co*., 287 F.R.D. 688, 694 (N.D. Ga. 2012)
- Courts often will "split the baby"
  - Allow production of claims file but permit insured to redact opinion work product

The Use of Consultants – Work Product

- Can the insurer turn the tables?
  - In *Camacho*, insurer sought communications between insured and its counsel in the underlying tort suit because "the motive behind plaintiff's settlement demand is relevant and vital to the defense of a third-party bad faith claim" in light of *Holt* (insurer does not act in bad faith solely because it fails to accept a settlement offer within deadline set by plaintiff because otherwise the insurer could be "set up")
  - Rejected by the court because motivation of plaintiff's counsel in sending settlement demand is irrelevant to whether insurer acted in bad faith

The Interplay With Reinsurance and Reporting to Reinsurers

- Introduction to Reinsurance
  - Risk Spreading and Sharing
    - How reinsurance works
    - Reinsurer relationship to reinsured insurance company
      - Contractual privity
      - Not a fiduciary relationship
  - Contract of Indemnity
    - Reinsurer pays after reinsured pays
      - Reinsured must be legally obligated to pay damages
    - Loss must be within the terms of the reinsured contract and the reinsurance contract

The Interplay With Reinsurance and Reporting to Reinsurers

- Obligations Insurance Company Has to Reinsurer
  - Reporting
    - Bordereaux
    - Large loss
    - Specific loss criteria
    - Are communications in the ordinary course of claims administration?
  - Access to Records
    - Reinsurance contracts typically grant reinsurer right to see files
      - Does that mean defense counsel reports?
      - Does that mean coverage counsel reports?
      - Does that mean in-house counsel or claims counsel analyses
    - Does reinsurer access to reinsured's records waive attorney-client privilege?

The Interplay With Reinsurance and Reporting to Reinsurers

- Is There a Common Interest?
  - Common Interest Doctrine
    - Exception to waiver of attorney-client privilege
    - Communication must be a privileged communication
    - In furtherance of a shared common legal interest
    - Relating to pending or anticipated litigation
  - Case Law
    - *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.,* No. 10-cv-1653, 2012 U.S. Dist. LEXIS 92701 (S.D.N.Y. Jul. 3, 2012)
    - *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.,* 27 N.Y.3d 616 (2016)

Meeting Legal Ethics

- Who Is the Client?
  - Where the Insurance Company Appoints Defense Counsel
  - Ethical Rules do not expressly say
    - Many jurisdictions insurance company is client
    - Others not so clear
      - Is the insurance company a client or a payor?
  - Conflict of Interest
    - Rules 1.7 and 1.8
      - Current clients
        - Adversity
    - Rule 1.9
      - Former clients

Meeting Legal Ethics

- Rule 1.6 – The Duty Not to Disclose
  - A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent
  - A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
- Application to
  - In-house counsel
  - Defense counsel
  - Coverage counsel

Thank You

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