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Policyholder's Duty to Cooperate: Advocating or Defending Against Loss of Coverage for Breach

Navigating Scope of the Duty, Privilege Issues, Settlement, and Consequences of Insured's Failure to Cooperate

THURSDAY, MARCH 23, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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POLICYHOLDER'S DUTY TO COOPERATE

STRAFFORD CONTINUING EDUCATION WEBINARS

MARCH 23, 2017

BY:

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APPLICATION AND SCOPE OF THE INSURED'S DUTY TO COOPORATE

- "When an insurer investigates a loss claim, the insured has a duty to cooperate by submitting [information] … relevant to the claimed loss." *Miles v. Great N. Ins. Co.*, 671 F. Supp. 2d 231, 238 (D. Mass. 2009)

APPLICATION AND SCOPE OF THE INSURED'S DUTY TO COOPORATE

- In this context, cooperation generally means that "there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense." *Coleman v. New Amsterdam Cas. Co.*, 160 N.E. 367, 369 (N.Y. 1928) (Cardozo, J.). Judge Cardozo was referring to the insured's "defense" of the underlying, third-party action in the *Coleman* case.

APPLICATION AND SCOPE OF THE INSURED'S DUTY TO COOPORATE

- "The purpose of the cooperation clause is to enable the insurer to obtain all knowledge and facts concerning the [claim] … while the information is fresh." *Westbrook Ins. Co. v. Jeter*, 117 F. Supp. 2d 139, 141 (D. Conn. 2000).

APPLICATION AND SCOPE OF THE INSURED'S DUTY TO COOPORATE

- If the insurer acknowledges the existence of coverage, the insured should typically share information broadly and regularly: Such information sharing promotes efficient representation.

APPLICATION AND SCOPE OF THE INSURED'S DUTY TO COOPORATE

- If, in contrast, the insurer formally denies coverage and refuses to defend, the insured's path is likewise clear: The insured may decline requests for additional information; an insurer's rejection of coverage and refusal to defend generally excuses the insured's obligations under the cooperation clause. See *Am. Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc.*, 722 N.Y.S.2d 570, 574 (2d Dep't 2001) ("[A]n insurer cannot insist upon cooperation … after it has repudiated liability. … Thus, [o]nce an insurer repudiates liability … the [in]sured is excused from any of its obligations under the policy."
- This is often why insurers issue "Reservation of Rights" letters rather than deny a claim outright.

APPLICATION AND SCOPE OF THE INSURED'S DUTY TO COOPORATE

- Indeed, in all likelihood, an insured will have to respond to multiple requests for materials before a formal coverage decision has been made – shortly after the insured tenders a claim and after an insurer offers to defend subject to a reservation of rights.

First-Party v. Third-Party Claims

- Other jurisdictions that require a prejudice showing on a noncooperation defense do not distinguish between third party and first party claims.

Boardwalk Apts., L.C. v. State Auto Prop. & Cas. Ins. Co., 2015 U.S. Dist. LEXIS 4432 (Kan. Jan. 14, 2015)

First-Party v. Third-Party Claims

- Although an insurer seeking to disclaim coverage for breach of a cooperation clause generally "bears a heavy burden to show that the insured's failure to cooperate was deliberate," the purpose promoted by this burden applies more readily to third-party, as opposed to first-party, insurance claims…. ("[a] distinction may be drawn, however, between a court's natural reluctance to see an accident victim deprived of his source of payment because a liability carrier claims that its assured has failed to cooperate, and an indemnity carrier denying payment to its insured because the insured failed to cooperate in discovering a possible arson").

Eagley v. State Farm Ins. Co., 2015 U.S. Dist. LEXIS 132184 (W.D.N.Y. Sept 29, 2015)

Third-Party Claims

- Notably, the language of the cooperation clause in this case, as in many other policies, requires cooperation in both the investigation and settlement of claims. Of course, in the third party context, this duty arises most often in conjunction with the settlement of the claim.

Boardwalk Apts., L.C. v. State Auto Prop. & Cas. Ins. Co., 2015 U.S. Dist. LEXIS 4432 (Kan. Jan. 14, 2015)

Third-Party Claim

- Other Potentially Applicable Contexts:
  - Providing Timely Notice of Suit
  - Not Admitting Liability/Fault
  - Not Assuming an Obligation to Pay
  - Not Assigning Rights w/o Carrier's Consent
  - Providing Documents/Information Pertinent to Lawsuit
  - Attending Depositions/Hearings/Trial as Needed
  - Assisting Defense Counsel with Defending Lawsuit

First-Party Claim

- Potentially Applicable Contexts:
  - Providing Timely Notice of Loss
  - Preserving Property for Inspection/Remedial Measures to Protect Property from Further Damage/Not Performing Substantial Repairs w/o Carrier's Consent
  - Providing Documents/Information Pertinent to Claim
  - Allowing Inspection/Testing of Property

First-Party Claim

- When a policy contains a general cooperation clause, the information request submitted by the insurer must be "material to the circumstances giving rise to the insurer's liability."

- An insured may also respond to a non-cooperation argument by establishing that he "substantially complied" with the request for an EUO or other required production

Staples v. Allstate Ins. Co., 176 Wn.2d 404, 413, 295 P.3d 201 (2013); *Dien Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 224, 961 P.2d 358 (1998).

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- There are two exceptions to normal "waiver" rules that would otherwise apply through the sharing of information.
- First, courts have fashioned a "joint-client rule," which allows information sharing between clients represented by the same attorney without waiving privileges and protections as to others.

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- Second, according to the "common interest doctrine," a party is entitled to share privileged or protected information with another party without waiver as to third parties, where the two parties, although not jointly represented, share a common legal interest.

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- Confidentiality agreements -- whether entered into when the insured and insurer are aligned in an underlying litigation or when the insured and insurer are adverse as to coverage but in negotiations -- can "provide significant dual benefits by creating … a means of preserving the confidentiality of shared information and augmenting the protections of legal privileges and protections."

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- Confidentiality agreements are mere contracts, however.
- Some courts have found that these arrangements are not an absolute protection against waiver. See *Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, No. 01-CV-8854, 2004 WL 2375819, at *5 & n.5 (S.D.N.Y. Oct 21, 2004).

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- While the sharing of factual information may not be problematic, more delicate issues arise when the insurer requests evaluative materials, especially materials prepared or review by counsel defending the underlying action.

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- An insured's sharing of otherwise privileged or confidential materials with an insurer may be deemed a waiver with respect to the insurer, as well as other parties.

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- As a result, the insured must be aware that, in the event a coverage dispute results in a subsequent litigation, the insurer is almost certain to seek any legal memoranda or analyses generated by defense counsel.

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- In the event that an insurer that has denied coverage and refused to defend later seeks production of privileged or protected materials in coverage litigation, courts in virtually every jurisdiction have held that neither the cooperation clause nor the common interest doctrine compels disclosure.
- One Significant Exception:
  Waste Management, Inc. v. International Surplus Lines Ins. Co., 579 N.E.2d 322 (1991)

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- A court would most likely view independently privileged or protected information shared before a coverage decision has been made and while the insurer is defending subject to a reservation of rights to be exempt from traditional waiver vis-á-vis third parties under the common interest doctrine.

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- When an insurer offers to defend subject to a reservation of rights, the insured must either accept or reject the offer formally, and material consequences flow from this decision.

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- Under these circumstances, independently privileged and protected information and documents that the insured shares with the insurer will likely be safe from disclosure to third parties under the common interest doctrine.

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- If the insured rejects the offered conditional defense, then the insured generally will be excused from its information-sharing obligations, may retain independent counsel, and, upon prevailing in the coverage action, may seek indemnification from the insurer.

ATTORNEY-CLIENT PRIVILEGE AND DISCLOSURE OF CONFIDENTIAL INFORMATION

- In *Metropolitan Life Insurance Co. v. Aetna Casualty & Surety Co.*, 730 A.2d 51 (Conn. 1999), the court held that "disclosure pursuant to [a] cooperation clause possibly could be required only if and when the insurance company participates 'in the defense' of underlying cases," *id.* at 58; where an insurer has "reserved [its] rights," and the insured has "retained its own attorneys and acted independently," in the underlying litigation, there is no basis for further cooperation. *Id.* at 59, 61-62.

Claim Settlement: First-Party

- Duty to Provide Expert Reports RE: Damage?
- Duty to Provide All Pertinent Medical Records?
  - Bad Faith Set-Up to Entice Low Settlement Offer?

Claim Settlement: Third-Party

- Fully Covered?
- Defending under ROR?
- Prior Breach of Duty to Defend/Indemnity by Carrier?
  - Implications of Stipulated Judgment and Assignment of Rights
- Settlement in Excess of Policy Limits?

Consent to Settle Clause

- Type of Policy at Issue?
  - Many Professional Lines Policies Provide Final Settlement Decision with Policyholder
- Prejudice Required?
- [W]e have required a showing of prejudice for many non-general cooperation clauses, including a clause requiring the insured to obtain the insurer's consent before settling

Staples v. Allstate Ins. Co., 176 Wn.2d 404, 417–18, 295 P.3d 201 (2013).

Hobson's Choice for Carriers

- Policyholders may stonewall (intentionally or inadvertently) the insurer's investigation by refusing to help or provide documentation.
- This can lead to a "Hobson's choice" of either paying a suspected fraudulent claim or exposing itself to bad-faith liability

ELEMENTS OF A COOPERATION CLAUSE CLAIM/DEFENSE

- Insurers have asserted cooperation clause arguments as offensive claims, as affirmative defenses, and in support of discovery. The threshold question raised by such a claim/defense is whether the insured's conduct violated the cooperation clause.

ELEMENTS OF A COOPERATION CLAUSE CLAIM/DEFENSE

- Insurers are entitled only to information that is reasonably material to the claims in the underlying litigation, and the insured satisfies its duty if it provides reasonable assistance to facilitate the defense of a claim. *See, e.g.,Lodgement Entm't Corp. v. Am. Int'l Speciality Lines Ins. Co.*, 299 F. Supp. 2d 987, 995 (D.S.D. 2003)

ELEMENTS OF A COOPERATION CLAUSE CLAIM/DEFENSE

- Beyond the question of breach, in most jurisdictions, a cooperation clause claim/defense involves several additional elements, including, "the existence of substantial prejudice…and … the exercise of reasonable diligence to secure the insured's cooperation." *Bubenik*, 594 F.3d at 1051.

ELEMENTS OF A COOPERATION CLAUSE CLAIM/DEFENSE

- Indeed, some courts have held that prejudice can be determined only after the underlying action has concluded adversely to the insurer; other courts, however, have held that a prejudice finding need not wait for such a determination. *See* *Charter Oak Fire Ins. Co. v Interstate Mech. Inc.*, 958 F. Supp. 2d 1188 (D. Ore. 2013), vacated due to settlement, 2014 WL 9849553 (Jan. 6, 2014).

ELEMENTS OF A COOPERATION CLAUSE CLAIM/DEFENSE

- Finally, a court might find that even an insured's prejudicial breach can be cured. *See WMC Mortgage Corp. v. Mass. Property Ins. Underwriting Ass'n*, No. 09-CV-10437, 2010 WL 3734120, at *12 (D. Mass. Sept. 1, 2010).

Thank You

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