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HOW TO WAIVE ATTORNEY-CLIENT PRIVILEGE WITHOUT EVEN TRYING

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I. WHEN IS INSURER CLAIM HANDLING INFORMATION PRIVILEGED, AND WHEN IS IT OPEN TO DISCOVERY

In the business world, it is often assumed that if a lawyer is involved in a matter, a privilege from disclosure may automatically apply to that lawyer's materials. In the insurance context, however, the general perception that privileges (used generally to refer to both the attorney-client privilege and the work product doctrine) attach immediately upon the insurance company's retention of a lawyer could not be more wrong. In particular, materials that an insurance company's counsel generates during claim handling are analyzed differently than in almost all other circumstances in which an attorney is involved. That is because courts view claim handling to be part of the ordinary course of an insurance company's business. In addition, because lawyers are frequently or even exclusively involved in claim handling, courts apply a set of more restrictive principles to their work to determine if a privilege applies.

The materials generated by an attorney claim handler can be extremely beneficial to a policyholder looking to establish coverage for a disputed claim or prove bad faith. So how does an insurance company or a policyholder determine when an insurance company's claim handling material is likely to be privileged and when it is likely open for discovery? Analysis of this issue depends upon both a consideration of the facts of the claim as well as a number of legal doctrines.

Whether an insurer's claim handling materials are open or immune from discovery depends upon an examination of the particular circumstances of a given claim, including:

- What types of documents are at issue (*i.e.* are the materials communications between lawyer and client, materials related to the investigation or administration of claims, or materials related to an analysis of coverage)?
- Who created the materials and with whom were they shared (inside counsel, inside claim handlers, outside counsel, employees, consultants, other insurers)?
- When were the materials created (before denial of a claim, after denial of a claim or after any party contemplated or threatened litigation)?

- What is the nature of the dispute (for example, does it involve issues of policy interpretation regarding the scope of coverage, are there defenses related to the claim handling process (like cooperation and consent), are there allegations of bad faith (including statutory claims, refusal to settle/excess judgment, etc.))?

Similarly, a number of legal doctrines can affect the privilege analysis:

- The attorney-client privilege protects communications between the client and the attorney when the primary purpose of the communication is to seek or obtain legal (not business) advice. The communication must be made in confidence with a limited distribution, and there are different tests applied to determine if the privilege extends throughout an insurance company and to its outside consultants.

- The work product doctrine protects materials made in anticipation of litigation. Even if considered work product, it may still be subject to discovery if the policyholder demonstrates "substantial need" and an inability to obtain the materials without "undue hardship."

- When an insurer shares its claim handling materials with other insurers, questions arise regarding whether all privilege has been waived or whether a common interest/joint defense privilege may apply.

- Choice of law can be a significant issue because state-specific bodies of law may draw the privilege and waiver lines at different places. What law applies may depend upon the forum of the coverage dispute, the typical factors used for choice of law under the Restatement, and the locations of the individuals involved in communications (either the lawyer or the client). In addition, there are potential limitations on whether an insurance company's in-house counsel's advice is considered privileged, based upon whether the lawyer is licensed in the jurisdiction in which the lawyer is officed and/or in the jurisdiction in which the individual to whom the advice is given is officed.

II. LEGAL APPROACHES COURTS HAVE ADOPTED WHEN DETERMINING THE DISCOVERABILTY OF CLAIM HANDLING MATERIALS

In evaluating whether claim handling materials are discoverable, different courts consider different facts most relevant to the analysis. New York, for example, applies a general rule that materials generated in the course of handling a claim before a denial of coverage are not protected by either the attorney-client privilege or the work product doctrine. This rule is applied to coverage advice provided by outside counsel to the insurer used for purposes of deciding whether or not to accept coverage. However, insurers argue that there are limitations on this doctrine, and contend that materials that an insurer can demonstrate are primarily of a legal character may be entitled to protection even if they were generated before a denial of coverage. In New York, it is clear that the timing of the coverage denial is an important consideration in the privilege analysis.

In California, courts look at the "dominant purpose" of the representation in evaluating whether an insurer's claim handling materials are immune from discovery. To apply this test, California courts will first try to determine if the dominant purpose of the attorney's representation was to provide legal advice or to adjust a claim. If the dominant purpose of the

lawyer's work is of a legal character, then the materials may be protected. If, however, the dominant purpose is not legal, then the information may be subject to discovery.

Of course this issue does not always arise just in the context of an insurer's claim handling materials. Policyholders may seek to withhold from discovery in coverage litigation information generated by their counsel. Illinois courts recognize a common interest between an insurer and an insured in minimizing the insured's underlying liability. As a result, even when an insurer and insured are adverse regarding coverage issues, Illinois courts have sometimes permitted insurers to access materials related to the policyholder's defense and settlement of the underlying claim. However, the insurer may not be not entitled to the insured's coverage analysis.

The same approach generally applies in Illinois to materials generated by an insurer. Whether generated by the insurer's in-house claim counsel or outside counsel, materials that an insurer generates that relate to the defense and settlement of an underlying claim may be subject to discovery. By contrast, information related to an analysis of coverage, including whether a claim is or is not covered, may be protected from discovery

Finally, numerous states consider the existence of a bad faith claim to be a significant driver on the scope of discovery. For example, in Florida, the existence of a bad faith claim can open up the door to expansive discovery of the insurer's claim file. In Washington, in a first-party bad faith context, courts may presume that all information in the claim file (even privileged materials) is subject to discovery. Here, the insurer may have to rebut the presumption of discoverability by demonstrating that the materials were made not for purposes of investigating the claim but only for providing legal advice. Ohio provides a different approach to bad-faith claims. There, courts have held that the insured is entitled to work product and attorney-client materials generated prior to the denial of coverage but may not be entitled to materials created after coverage is denied.

III. FACTORS THAT MAY DETERMINE WHETHER INSURER OR INSURED CLAIM HANDLING MATERIALS SHARED WITH OTHERS ARE DISCOVERABLE

Ordinarily, as in any litigation, any privileges that apply to information are lost if the information is disclosed to a third party. However, there are certain circumstances in which courts have held that the privileged nature of the information remains, notwithstanding a disclosure to a third party.

The most common such situation is the distribution of information throughout a corporation. There is no bright line rule in determining whether the protection applies to all corporate employee communications. Some courts apply a "control group test", which provides that employees who communicate with counsel and who are in a position to control, or take a substantial role in the determination of the course of action are within the scope of a privilege. Other courts apply a "subject matter test", which provides that an employee who communicates about legal matters at the direction of a superior about a subject matter within the scope of an employee's responsibilities is within the scope of the privilege. The circumstance can get even more complicated with former employees. In general, any information that was privileged while the employee was employed by the organization likely retains its privileged status when the employee leaves the organization. However, to the extent that a former employee is contacted and exchanges information about a claim subsequent to when the employee left the company, that communication may not be privileged.

A common recurring issue arises on the insurance side with respect to third-party consultants. Many insurers use outside consultants to assist with adjusting and evaluating claims, and for actuarial and accounting purposes. In general, the attorney-client privilege only protects confidential communications between attorney and client (and employees of the client if applicable), and does not extend to third party communications. There are sometimes exceptions to this rule, however. If, for example, a consultant is performing tasks that are the "functional equivalent" of work done by employees of the client, insurers have successfully argued in some jurisdictions that a privilege may extend to communications that would be privileged if they were exchanged with an employee rather than a consultant. In addition, if an insurance company retains a consultant solely for a litigation-related purpose, then it may be more likely to convince a court that a work-product privilege may apply to the consultant's work. Again, however, these rules can vary widely depending on the jurisdiction, the facts of the claim, and the mindset of the jurist.

When claims implicate multiple policies, many insurers find themselves working with other insurers to understand the facts of the underlying claims as well as the coverage issues. In such circumstances, insurers may argue that the common interest or joint defense doctrine should apply to facilitate the communications. Less frequently this issue can also arise among policyholders who determine that they are negotiating or litigating similar coverage issues with the same insurer. It is important to note, however, that the common interest/joint defense doctrine is not a privilege in and of itself. Rather, the common interest doctrine simply provides that materials that are privileged remain privileged when they are shared with a third party. For the doctrine to apply, the materials must be privileged in the first instance. Assuming an initial privilege is established, the question will then be whether the information was shared in pursuit of a common interest. A documented common interest understanding – either informally through an email exchange or with a more formal agreement – will help to establish the applicability of a common interest privilege.

Finally, privileges can be lost when materials are disclosed intentionally or inadvertently. For example, insurance companies and policyholders may choose to disclose certain claim information to aid coverage negotiations. This approach, however, can result in a broader waiver if a court applies a "subject matter" or "at issue" approach to analyzing questions of waiver. Likewise, if an insurer relies on "advice of counsel" to justify a coverage position, courts may find that disclosure of all information related to that advice is necessary to prevent the adverse party from being prejudiced by an incomplete disclosure.

Production of privileged information in litigation can result in waiver unless the producing party can show that the production was inadvertent. Under the federal rules, an inadvertent disclosure will not result in a loss of privilege if reasonable steps were taken to protect the privileged information and prompt and reasonable steps were taken to correct the error. State courts usually apply a similar test, although some courts may also consider a fairness element in finding whether the inadvertent disclosure results in a waiver (so that if the information is only available in the inadvertently disclosed document, a finding of waiver will be more likely). Failing to conduct a quality control test prior to producing documents in discovery and failing to have an understanding regarding electronically stored information and an ability to "claw back" privileged materials are the types of things that can result in a finding that a party had not taken the reasonable steps necessary to prevent an inadvertent disclosure, thus resulting in a finding of waiver.

IV. LESSONS TO BE LEARNED FOR INSURERS AND POLICYHOLDERS

The law that has developed regarding insurer claim file materials represents an attempt on the part of the courts to balance two competing concerns. On the one hand, insurers have a need to communicate freely and openly with their attorneys about claims, including regarding whether the claims are covered and the nature of the underlying exposures. On the other hand policyholders have a need to understand fully the bases for an insurer's coverage position, and believe that such information should not be cloaked in privilege. This tension can be especially heightened when an insurer does little or no claims investigation on its own, and utilizes outside counsel to handle the claim for all purposes.

In 2014, courts throughout the United States issued numerous opinions on the scope of the attorney-client privilege and work product doctrine in coverage litigation. These cases demonstrate the difficulties litigants – and the courts – experience in determining whether an insurance company's counsel is acting as a legal advisor or a claims handler. Opinions vary, however, on whether the courts that have analyzed this issue have drawn the line in appropriate places given these competing concerns. There is no doubt, however, that where the line is drawn will be very fact dependent given the circumstances of the underlying claim.