The Attack on Attorney-Client Privilege in Insurance Cases

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Policyholder lawyers are a creative group. One of the more recent manifestations of this creativity is the attempt to attack the attorney-client privilege in the context of insurance coverage disputes. While these attacks usually prove fruitless, there has been a slow but steady drumbeat on this issue for some time.

One experienced policyholder lawyer I know boldly stated in a recent insurance seminar I attended that *any* involvement by counsel in a claim presuit should be considered part of the adjustment process and not protected by the attorney-client (or work product) privilege. He had no authority for this proposition, of course, and it strains credulity. But there it is.

A colleague of Chip Merlin, at Merlin Law Group, also posted a recent blog on his website positing, essentially, that coverage opinions should be discoverable because they are something that insurance companies “regularly assemble in the ordinary course of business.”[1]

I have a different view.

As a lawyer who has represented property insurers for over two decades, my experience is that carriers hire counsel to provide legal advice. From my vantage point, carriers do not hire counsel unless there are particular issues or concerns that require legal advice and input. Otherwise, frankly, they wouldn’t spend the money.

While a carrier may hire counsel to provide coverage advice or opinions, this is not the “ordinary course of business” of an insurer. Coverage lawyers on both sides of the bar only see claims that are disputed. Yet, as the saying goes, “if you are a hammer, everything looks like a nail.” But what coverage lawyers see is just a small fraction of the many thousands of insurance claims that are presented and handled without issue.[2] The situation is analogous to a doctor who treats sick people on a daily basis and then concludes that everyone in the world must be ill.

The “ordinary course of business” for an insurer is to measure a loss and issue payment consistent with the policy terms and conditions. The sooner they can do that and close their file, the happier they are. Insurers only hire counsel if the circumstances warrant. Sometimes, it’s because they have been sued; sometimes it’s because the insured has said or done something that causes the insurer to recognize that there may be a disputed coverage issue; and sometimes it’s simply because the adjuster or the company have a question about how the policy should respond in a particular circumstance.

Carriers may retain counsel for a variety of other reasons. These can include, among other things, seeking advice on state-specific statutory deadlines and requirements; assistance in reviewing and responding to communications from the insured that have coverage or other...
legal implications; reviewing the claims handling on a particular file under the applicable legal standards; and providing settlement advice and recommendations. Responding to the client on these and other issues necessarily involves the exercise of professional judgment by the lawyer and the communication of the attorney’s mental impressions and opinions.

**Communications with Adjusters**

One argument frequently made is that coverage counsel’s communications with an adjuster — particularly presuit — are simply part of the adjustment process and are therefore not privileged. But the attorney-client privilege, although subject to state-specific rules, typically applies to communications between the attorney and the client or a representative of the client.[3] Courts have specifically held that, in addition to encompassing in-house adjusters, confidential communications with independent adjusters are also protected by the attorney-client privilege.[4]

In *Residential Constructors*, for example, the plaintiffs sought to compel production of confidential communications between coverage counsel and the independent adjuster. After reviewing the existing case law, the district court concluded that “an independent adjuster handling the investigation of a claim for the insurer is the functional equivalent of a claims employee of the insurer.”[5] The court found no principled basis for distinguishing between the two types of adjusters:

> The court sees no rational distinction between applying the attorney client privilege to confidential communications between the insurer’s counsel and its claims employee ... but refusing to apply the privilege to counsel’s confidential communications with an independent insurance adjuster who performs the same functions as an “in-house” claims employee. The court, therefore, finds that confidential communications between the defendant’s coverage counsel and the defendant’s adjuster GAB Robins North America Inc. for purposes of providing legal advice or to obtain information in order to render legal advice to the defendant, are entitled to protection under the attorney-client privilege.[6]

Similarly, in *Safeguard*, the district court refused to compel production of confidential communications between an outside adjuster and coverage counsel, stating as follows:

> We agree with North American that [outside adjuster] Rizzo was its agent and his communications with Henry are protected by the attorney-client privilege. The presence of a third party who is an agent of the client will not destroy the attorney-client privilege.[7]

To summarize, whether the adjuster is an employee of the insurer or an outside adjuster, confidential communications between coverage counsel and the adjuster are protected from disclosure. Nevertheless, continued attempts by policyholders to distinguish between counsel’s communications with employee-adjusters and communications with outside adjusters may reasonably lead insurers or counsel to choose to treat the two differently simply to avoid the issue altogether.
Attorney Involvement During the Claim

Another argument sometimes asserted by policyholders is that an attorney involved in the investigation of a claim is merely performing an investigation that the company is required to conduct as part of the ordinary course of its business, and therefore the attorney’s communications and work product are not entitled to the protection of privilege. This argument has also been routinely rejected.

In *Dunn*, for example, the plaintiff sued her insurer for punitive damages in connection with her homeowners’ claim.[8] The plaintiff sought to compel production of documents prepared by the insurer’s counsel while they were investigating the claim. [9] In rejecting the plaintiff’s argument, the Fifth Circuit held that the attorney-client privilege protected these documents, stating:

> The [attorney-client] privilege extends to all communications between State Farm and the attorneys it retained for the purpose of ascertaining its legal obligations to the Dunns. The privilege is not waived if the attorneys perform investigative tasks provided that these investigative tasks are related to the rendition of legal services.[10]

As noted by one Texas court, it is not possible to give “a legal opinion without performing an investigation or collecting information.”[11] Moreover, “if the attorney performs tasks of an investigator or adjustor in the process of providing legal services, she is still functioning as an attorney ... [a]n attorney can play an important role in adjusting an insurance claim, especially since an insurer can be assessed punitive damages for ignoring its legal obligations to the insured.”[12]

While it is true that the underlying facts of a claim may be discoverable, and are typically disclosed by insurers, the involvement of coverage counsel during the adjustment does not waive privilege as to the attorney’s confidential opinions, conclusions or mental impressions in the course of rendering legal advice.

It should also be noted that while insurers have a duty to investigate claims, policyholders have their own obligations. These include the general requirements to plead and prove a covered claim, and to provide factual information reasonably requested by insurers. Policyholder counsel are often involved early on in the claims process in advising clients, writing letters to insurers, gathering information, working with consultants and presenting claims — especially in large, complex commercial claims. It is also the case that policyholders sometimes file suit before an adjustment is complete.

Policyholder counsel who take the position that coverage counsel involved in the investigation of a claim have waived privilege may find themselves defending their own assertions of privilege in connection with their presuit involvement, or in the context of an ongoing adjustment.[13]

Privilege and “Bad Faith” Allegations

Finally, it is sometimes argued that, merely by alleging “bad faith,” policyholders are entitled to discovery of an attorney’s otherwise privileged coverage opinion so that they
have a “complete understanding” of the insurer’s state of mind in making a claims determination. This argument has also been repeatedly rejected by courts.[14]

In *Aetna v. Superior Court*, for example, the plaintiff contended that simply by filing a bad faith action, he put the insurer’s state of mind at issue and thus the attorney-client privilege did not apply. The court rejected this argument, stating:

>This argument is palpably untenable. If we were to adopt such a rule, the attorney-client privilege would have no application in a myriad of actions where state of mind is an issue or could easily be made one.[15]

It is true that if an insurer specifically relies on an attorney’s opinion to prove that it acted reasonably (the “advice of counsel” defense), then a basis may exist to assert that an implied waiver has occurred. But while insurers may seek advice of counsel, they typically make their own claim decisions. This does not invoke the “advice of counsel” defense or waive privilege. As the court noted in the *Aetna* case:

>As set forth in its brief in support of the instant petition, "Aetna is not saying that their conduct was reasonable because their counsel opined so, but rather that their conduct was reasonable because the facts indicated that no valid claim existed." (Italics in original.) Stated differently, Aetna claims it acted as it did not because it was advised to do so, but because the advice was, in its view, correct; and it is prepared to defend itself on the basis of that asserted correctness rather than the mere fact of the advice. Such a defense does not waive the attorney-client privilege.[16]

**Conclusion**

It is likely that attacks on the attorney-client privilege will continue in the context of insurance coverage disputes. Whether they succeed or not, these attacks drive up the cost of litigation and can create some discomfort for the carrier (perhaps that’s the entire purpose of the attacks). But the fact remains that insurers retain counsel to provide legal advice that is privileged and should remain so, a fact that courts have routinely recognized. The privilege rules can’t be used as both a sword and a shield in discovery. Policyholder counsel who persist in these kinds of attacks and who involve themselves in claims prelitigation may find their own assertions of privilege questioned.

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memorandum opinion contains some helpful discussion of the parameters of these privileges under Texas law, it arose in the context of an employment dispute, not in a coverage context. The issues presented there were wholly unrelated to any issues of coverage or loss adjustment. Moreover, the District Court, after reviewing documents in camera, determined that the privileges attached and denied the Plaintiff’s Motion to Compel. See Butler v. American Heritage Life Ins. Co., No. 4:13-CV-199, (E.D. Tex. Jan. 29, 2016).

[2] In Hurricane Katrina, for example, the largest single loss event in the history of the property insurance industry, less than 2% of the more than 1.7 million claims were disputed in mediation or litigation; and 99% percent of claims were settled by the second anniversary of the loss. The private insurance industry paid out $41.1 billion. Robert Hartwig & Claire Wilkinson, Hurricane Katrina: the Five Year Anniversary, Insurance Information institute (July 2010).


[6] Id. at *15 (citations omitted).

[7] Safeguard, (citing In Re Grand Jury Investigation, 918 F.2d 374, 386 n. 20 (3d Cir. 1990)).


[9] Id.

[10] Id.


[13] This is a particular concern with the disturbing new trend of policyholder attorneys in certain kinds of claims providing initial notifications of a claim and demanding that all communications be through their office.


[16] Id. at 473. See also 2,022 Ranch, L.L.C., 113 Cal. App. 4th at 1396-1397.