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Look Closely At Insurer Allegations Concerning Privilege

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A recently unsealed decision from the United States District Court for the District of Maryland demonstrates that insurers cannot hide behind the attorney-client privilege and work-product doctrine to shield claim files from discovery. The court made clear that involving counsel in claim handling does not operate to make either doctrine automatically apply. Charter Oak Fire Ins. Co. v. Am. Capital Ltd., No. 8:09-cv-100 (D. Md. Nov. 6, 2013).

Insurers often engage counsel early in the handling of a claim to act as claims handlers and then argue, when litigation results, that documents from claim files are not discoverable based upon privilege. The dates when the insurer anticipated or expected litigation can be critical to evaluating whether such arguments are sound. Information concerning that date, however, is generally within the insurer's sole possession, and policyholders and the courts are, therefore, put in the position of relying upon insurer representations about whether the privilege assertion was correct. Charter Oak demonstrates the dangers of such an approach and establishes that courts need to look behind the insurer's contentions when evaluating whether to uphold an assertion of privilege.

Charter Oak concerned a demand by American Capital and other policyholders that their insurers provide defense and indemnity for numerous claims and lawsuits alleging injury and death from heparin. The insurers disclaimed coverage and commenced litigation against the insureds. When American Capital sought to discover the insurers' claims-handling material, the insurers refused to produce it, claiming privilege and forcing American Capital to file a motion to compel. In opposition to that motion, the insurers contended that they had anticipated litigation in September 2008. That contention was critical to the court's privilege evaluation. According to the court, to assert privilege the insurers had to establish that "(1) counsels' work on the underlying heparin claims was not performed for a typical business purpose, and (2) the documents were not prepared in the ordinary course of business." Moreover, to claim work-product protection, the insurers had to come forward with "specific evidentiary proof of objective facts demonstrating a resolve to litigation."

Generally, as the court recognized, investigative reports created before the insurers' coverage decision are not protected because such reports "are ... prepared in the ordinary course of business." For the same reason, having "counsel review coverage does not automatically convert the analysis from an ordinary business activity to a litigation-geared activity." Like other courts, the Charter Oak court refused to adopt a blanket rule that counsel's involvement necessarily allows insurers to validly assert privilege. Instead, the court recognized the general rule that where counsel performs claims-handling tasks, no privilege applies.

For instance, in Mehta v. Ace American Insurance Co., (D. Conn. June 18, 2013), the court refused to grant blank protection to emails to and from the insurer's claims specialist even though she was an attorney. The court explained that "an insurance company may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigations." The purportedly privileged documents were protected only if they were "truly confidential inquiries or responses to counsel concerning legal advice, rather than the insurance claims." Thus, the

court found that the attorney-client privilege did not necessarily apply to the claims specialist's work on the claims investigation, notwithstanding that she was an attorney.

Likewise, in National Union Fire Insurance Co. of Pittsburgh v. Transcanada Energy USA Inc., (N.Y. Sup. Ct. Aug. 15, 2013), the court recognized the general rule that "documents prepared in the ordinary course of business are not privileged, even if drafted by an attorney." The court explained that under that rule, insurers could not claim blanket privileges, because "insurance companies investigate claims and decide whether to accept or deny coverage as part of their regular business activities." Applying those principles to the documents at issue in that case, the court required the insurer to produce many that had been withheld under incorrect assertions of privilege. Although the documents involved the work of attorneys, the court reasoned, the "attorneys were primarily working to determine whether to deny coverage," which the court explained was "an ordinary business activity for an insurance company."

Applying these standards, the Charter Oak court examined the original evidence submitted by the insurer and found that the insurers had shown that litigation was anticipated as of Sept. 18, 2008. The court ruled, therefore, that the insurers had correctly asserted the privilege and properly withheld documents prepared from that date forward.
Subsequent discovery, however, showed that in fact the insurers had not anticipated litigation until three months later. The material submitted to the court to support the earlier date had, apparently, been misleadingly incomplete.

Subsequent depositions, the court eventually found, "[could not] be reconciled with ... previous deposition testimony and [an] affidavit, which formed the basis for [p]laintiffs' opposition to [d]efendants' motion to compel." The policyholders therefore renewed their motion to compel, seeking to present the new evidence to the court in support of obtaining discovering materials created between September and December.

The insurers attempted to avoid consideration of the renewed motion. As the court stated: "With considerable audacity, [p]laintiffs instead claim that [d]efendants' 'new' evidence should not be considered ... ." The court rejected the insurers' argument and claim of privilege, finding their argument that there was no new evidence to be "particularly puzzling." In addition, because the policyholders had been deprived of critical evidence about when the insurers actually anticipated litigation, the insurers' contention that the policyholders previously conceded anticipation of litigation by the insurers as of Sept. 18, 2008 failed, since any such concession occurred before the policyholders discovered the new evidence.

The decision illustrates several important points that should be kept in mind by policyholders litigating coverage disputes. Perhaps most importantly, the decision confirms the need for policyholders and courts to look behind the allegations of insurers concerning privilege. Because evidence of the date an insurer anticipated litigation is almost entirely within the control of the insurer, courts should permit policyholders leeway to discover evidence concerning that date. This may require permitting a broad range of discovery concerning the reasons counsel was hired, the insurer's activities after counsel was hired, and whether the insurer truly anticipated litigation or was merely attempting to shield its activities behind the attorney-client privilege or work-product doctrine. See, e.g., Royal Bahamian Ass'n Inc. v. QBE Ins. Corp., 268 F.R.D. 695, 698-699 (S.D. Fla. 2010) (reviewing evidence in first-party insurance case and finding that insurer failed to rebut presumption that work-product protection did not apply until it denied coverage). Although in other contexts discovery concerning such issues might be overbroad, in the context of a coverage dispute involving insurance attorneys engaged early on, it is needed to evaluate whether the insurer has taken an overbroad view of privilege.

Insurers are, in any event, obligated to treat their policyholders' interests equal to their own. See, e.g., Peckham v. Cont'l Cas. Ins. Co., 895 F.2d 830, 834 (1st Cir. 1990); St. Paul Fire & Marine Ins Co. v. Onvia Inc., 196 P.3d 664, 667 (Wash. 2008). Where required, therefore, policyholders should enforce their right to obtain a clear statement of their insurer's position and investigation. See, e.g., Wash. Admin. Code § 284-30-330 (requiring insurers to "provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement"); Va. Code § 38.2-510 (same). Insurers that screen their activities with overbroad assertions of privilege and who fail to provide adequate justification for the basis for any assertions of privilege may be violating those and other similar obligations, whether the assertion of privilege is made in litigation or not.

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