BURR ALERT

Making Adjustments: Insurers, Counsel, and the Attorney-Client Privilege

By Corban Snider and John Morrow December 2020

Insurers often rely on counsel, external or otherwise, when addressing the validity and/or strength of claims filed by their insureds. However, there is a trend in the courts which makes the extent and nature of such reliance something worth watching carefully, as there are circumstances in which that reliance could lead to the discoverability of otherwise privileged materials in the face of bad-faith denial claims. Therefore, one of the key questions for insurers and counsel when giving or receiving counsel's advice at the outset of the claims process is this: **Is counsel somehow acting in the ordinary role of the insurance adjuster, or is counsel strictly providing legal advice?**

1. A Developing Trend Undermining the Attorney-Client Privilege

The United States District Court for the District of Colorado's case, *Menapace v. Alaska Nat'l Ins. Co.*, 2020 WL 6119962 (D. Colo. 2020), provides a recent example of the difficulties insurers may face when trying to protect their correspondence with counsel during the claims adjustment process. In *Menapace*, the insurer retained local Colorado counsel during its adjustment process due to its relative unfamiliarity with Colorado law. *Menapace*, at *1. Local counsel assisted in taking an examination under oath of the plaintiff, oversaw the request for an independent medical examination, coordinated a mediation with opposing counsel, and became opposing counsel's primary contact with the insurer. *Id*. at *2. After these investigations and settlement efforts, the insurer tendered $150,000 of the plaintiff's $500,000 settlement demand, stating that, while it was interested in reaching a reasonable resolution, the insurer believed that the amount tendered represented "fair and reasonable compensation" for the plaintiff's injuries. *Id*. Plaintiff filed suit alleging, *inter alai*, bad-faith breach of contract, and sought discovery of the correspondence between the insurer and its Colorado counsel during the claims process. *Id*. at *2-3. The insurer raised the attorney-client and work-product privileges in defense. *Id*.

In addressing the defendant's privilege assertions, the District Court looked to Colorado precedent holding that an insurer waives the attorney-client privilege with respect to correspondence, documentation, or other materials which are the result of its counsel occupying, in whole or in part, the ordinary role of an insurance adjuster. *Id*. at *5-7 (collecting cases). A few notable functions which the precedent deemed as falling within the ordinary role of an adjuster are: **(1)** investigating the underlying facts of the claim; **(2)** asserting/concluding/or otherwise analyzing whether an insured's claim should be paid or denied; and **(3)** requesting claimant's medical records and summarizing those records (where the associated legal advice regarding potential liability based on those records was privileged) *Id*. at *5-6 (collecting cases). Ultimately, the court held that the evidence be addressed document-by-document, and the portions that related to the ordinary functions of a claims adjuster would not be protected by the attorney-client privilege. *Id*. at *12.

Another recent example comes from the Mississippi Supreme Court in *Travelers Property Casualty Co. v. 100 Renaissance, LLC*, NO. 2019-IA-00586-SCT (Miss., Oct. 29, 2020). There, the insurer's adjuster ("Duncan") sought the advice of counsel in rejecting an insured's claim under an Underinsured Motorist

("UM") policy in Mississippi, where Mississippi has a statute stipulating minimum UM coverage requirements. Prior to the initiation of suit, Duncan issued rejection letters to the insured asserting, in relevant part, that the insurer was not required to cover the insured's loss of its flag pole under either its UM policy or Mississippi's UM statutes. At Duncan's deposition, it became apparent that Duncan did not have any familiarity with Mississippi's UM statutes, or how those statutes might require the insurer to tender coverage for its insured's claims. The Court determined, based on that evidence, that the insurer's rejection of its insured's claims was based substantially or wholly on the advice of legal counsel. Accordingly, the Court held that the attorney-client privilege was waived with respect to the correspondence regarding the insurer's evaluation and rejection of its insured's claim.

Critically, the Court cited several cases with approval which assert that an insurer impliedly waives the attorney-client privilege in bad-faith cases where the insurer asserts that it relied upon legal counsel in denying an insured's claim. However, based upon that cited precedent and the Mississippi Supreme Court's own conclusion, it would seem that this principle may is limited to situations where the insurer's ultimate rejection is based substantially or wholly on counsel's advice, and not where counsel's advice is merely one factor alongside the insurer's own investigations and evaluations.

These two recent examples reflect been a continuing trend of courts, federal and state, which have adopted these and similar viewpoints in both the first-party and third-party claims context. *See* https://bit.ly/3g92GrV, §§II.B; III.B (2015) (noting that "courts generally hold that the attorney-client privilege . . . does not apply where outside counsel acts as a claim adjuster and not as a legal advisor." at p.22). Some courts, such as the court in *Cedell v. Farmers Insurance Co. of Washington*, 176 Wn. 2d 686, 696-99, 295 P.3d 239 (2013), have even adopted a framework where there is a presumption *against* the attorney-client privilege in first-party bad-faith claims by an insured. *Id*. at p.19. However, some courts have expressly rejected such an analysis, providing much-needed protection for the attorney-client privilege in these contexts. *Id*. at p.20 (citing, among others, *Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal. App. 3d 467, 200 Cal. Rptr. 471, 474 (1st Dist. 1984) as stating: "[A]n insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communications necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage."). Where courts disagree, it is important that clients and counsel alike take steps to eliminate the risk of waiving privilege.

2. What Should Insurers, and Counsel, do to Avoid Privilege Waiver?

Insurers often rely on their counsel throughout the claims process, causing counsel to wear many different hats and perform many different functions. Where determinations need to be made regarding whether counsel was acting as an attorney or as a claims adjuster, most courts apply a "dominant purpose" test. https://bit.ly/3g92GrV, p.22 (collecting cases and enumerating factors[1]). Given the important development

[1] Some factors include:

(1) whether outside counsel serves as the intermediary between the insured and the insurer;

(2) the scope of outside counsel's retention or engagement; and

(3) whether outside counsel has decision making power or direct influence over the coverage determination.

Id. (collecting cases).

of the above trends, however, it is necessary now more than ever that insurers and their counsel be clear and explicit in counsel's role as a legal advisor.

At the outset, insurers and counsel should be clear in their correspondence that counsel's role is to provide *legal advice* in anticipation of potential legal claims. The insurer should highlight its need for the applicable *law* and an assessment of potential, future liability based on those laws and potentially similar, past cases. By stating these expectations up front, featuring them in email subject lines and other prominent spaces, and by carefully avoiding placing its counsel distinctly in the shoes of a claims adjuster, an insurer should be able to rely on these communications as evidence that it sought only legal advice from its counsel, and did not implicate its counsel in an adjuster-type role. If and when legal issues do arise, insurers should be careful that they are not substantially relying, or only relying, on counsel in their decisions to reject a claim. Such a defense, in a bad-faith claim context, is a seemingly quick way to waive the attorney-client privilege with respect to the relevant communications.

Counsel should likewise be diligent in setting forth the contents of its communications as privileged as legal advice, and should take care to ensure that the advice it offers does not bring counsel too close to, or within, the ordinary role of a claims adjuster. Specifically, counsel should avoid making hard and fast determinations as to whether the insurer should tender coverage, opting instead to focus on the insurer's potential future liabilities based on the applicable laws and relevant precedent. While counsel may, and often will, take a role in the factual investigation process, counsel ought to frame its analysis of such findings in terms of the insurer's potential legal liabilities and exposures, rather than focusing on adjuster-like decisions such as whether to tender coverage or how much coverage to tender. Counsel should focus its language and correspondence on the client's *legal* concerns, not the client's business concerns.

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