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Illinois Coverage Basics

Insurers Are Required To Produce Claim Files In Illinois Coverage and Bad Faith Litigation

Although the privacy interests of most citizens enjoy increasing protections, courts generally do little to protect the privacy interests of insurance companies in coverage and bad faith litigation. In Illinois, the operative presumption in coverage and bad faith litigation is that insurers must produce their claim files. With limited exceptions, everything in an insurer's claim file is discoverable. As a general rule, whatever goes into the claim file will come out in discovery.

In Illinois, the courts enforce a strong policy of encouraging disclosure in discovery. Insurance companies basically have only two theories to limit the discovery of their claim file materials: attorney-client privilege and the work product doctrine. It is important for insurers to understand what requirements must be satisfied in order to obtain the benefits of these protections.

The attorney-client privilege is one exception to insurers' general duty to disclose. However, the attorney-client privilege is limited solely to those communications which the claimant either expressly made confidential or which he could reasonably believe under the circumstances would be understood by the attorney to be confidential. Waste Management, Inc. v. International Surplus Lines Insurance Co., 144 Ill.2d 178, 190, 579 N.E.2d 322, 327 (1991). The Courts confine the privilege to its narrowest possible limits. 144 Ill.2d at 190, 579 N.E.2d 322. Illinois Supreme Court Rule 201(b)(2) governs the protection of attorney-client communications from discovery. The rule provides that "All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure."

To be entitled to the protection of the attorney-client privilege, a claimant must show that (1) a statement originated in confidence that it would not be disclosed; (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential. Cangelosi v. Capasso, 366 Ill.App.3d 225, 228, 851 N.E.2d 954, 957 (2nd Dist. 2006). The party who claims a privilege has the burden of coming forward with factual evidence to establish the privilege. Buckman v. Columbus-Cabrini Medical Center, 272 Ill.App.3d 1060, 1065, 651 N.E.2d 767, 770-771 (1st Dist. 1995).

The Illinois Supreme Court has ruled that the attorney-client privilege extends to communications between an insurer and an insured, where the insurer is under an obligation to defend the insured. People v. Ryan, 30 Ill.2d 456, 461, 197 N.E.2d 15 (1964) (holding that a communication given by an insured to its insurance company's investigator was entitled to the privilege). The Court's rationale for this extension of the privilege is that "the insured may properly assume that the communication is made to the insurer as an agent for the dominant

purpose of transmitting it to an attorney for the protection of the interests of the insured." 30 Ill.2d at 461, 197 N.E.2d at 18. A communication that falls within the insurer-insured privilege is immune from disclosure in Illinois coverage and bad faith litigation.

To establish the applicability of the insurer-insured privilege, the party asserting the privilege must prove: (1) the identity of the insured; (2) the identity of the insurance carrier; (3) the duty to defend a lawsuit; and (4) that a communication was made between the insured and an agent of the insurer. Pietro v. Marriott Senior Living Services, Inc., 348 Ill.App.3d 541, 551, 810 N.E.2d 217, 226-227 (1st Dist. 2004).

A communication is not entitled to protection under the insurer-insured privilege unless the dominant purpose of the communication is to obtain legal advice or representation. *See* Chicago Trust Co. v. Cook County Hospital, 298 Ill.App.3d 396, 409, 698 N.E.2d 641, 651-651 (1st Dist. 1998). A communication that otherwise might be entitled to the protection of the privilege will lose that protection if it is shared with others who are not necessary to the purpose of obtaining legal advice or representation. *See* Pietro. above.

The work product doctrine provides broader protection than the attorney-client privilege or the insurer-insured privilege. Western States Insurance Co. v. O'Hara, 357 Ill.App.3d 509, 517, 828 N.E.2d 842, 849-849 (4th Dist. 2005). The work product doctrine protects materials from disclosure in discovery that are prepared by or for a party in preparation for trial. Illinois Supreme Court Rule 201(b)(2). Under this rule, such materials are subject to discovery only if they do not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney. The work product doctrine "is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts." Waste Management, 144 Ill.2d at 196, 579 N.E.2d at 329.

Materials that are protected by the attorney-client privilege or the insurer-insured privilege are absolutely protected from disclosure. However, materials otherwise protected under the work product doctrine are discoverable "upon a showing of impossibility of securing similar information from other sources." Waste Management, 144 Ill.2d at 196, 579 N.E.2d at 330. In coverage or bad faith litigation, a claims file may be ordered to be produced even if it contains the theories, mental impressions, or litigation plans of a party's attorney, on the theory that the claim file is the only source of information revealing how the insurer handled the claim. *See* Transport Insurance Co. v. Post Express Co., 1996 WL 32877, *2 – 3 (N.D. Ill. 1996).

As a practical matter, it is best to assume that everything that goes into a claim file may later be produced in coverage or bad faith litigation in Illinois. However, the two best things that an insurer can do to secure the benefit of the attorney-client privilege or the insurer-insured privilege are (1) to bring its attorney into the communications loop as early and regularly as possible and (2) to exclude other persons from the chain of communications who might destroy the intended confidentiality of the communications.

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If you have questions or would like to discuss the implications of this report, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison, Suite 2200, Chicago IL 60606; 312-332-8494; jkh@crayhuber.com.