THE CLAIMS FILE

FRIEND OR FOE?

Karen Painter Randall and Steven A. Kroll Connell Foley LLP

During litigation, aggressive plaintiffs' and policyholders' attorneys often consider an insurer's claims file to be a treasure chest of potentially valuable discovery. They may demand, for example, information that is privileged, irrelevant, overly broad, and/or not likely to lead to admissible evidence. Notwithstanding, insurers will often produce to their insureds the relevant, non-privileged portions of their claims files, such as documents which describe facts pertinent to the insurer's handling of a claim. However, insurers should be prudent in taking reasonable steps necessary to protect privileged, proprietary, and/or otherwise non-discoverable portions of their claims file materials from disclosure in litigation.

As set forth in more detail below, certain jurisdictions around the country have recently issued judicial opinions concerning the scope of privilege and discovery rights in the context of the "tripartite" relationship. The tripartite relationship describes the complex relationship among an insurer, the insured, and defense counsel retained by the insurer to defend against third-party claims. In the majority of jurisdictions, confidential communications between counsel and the insurer or the insured are generally protected, and both the insurer and the insured are holders of the privilege. In some circumstances, however, courts may closely examine and/or narrow the protections from discovery typically afforded among parties within the tripartite relationship.

For example, in a recent case from the U.S. District Court for the Northern District of Georgia, the Court rejected an insurer's attorney-client privilege and work product doctrine arguments holding that an insurer's communications with defense counsel retained for the insured in an underlying liability suit were discoverable.[1] Of note, the Court ordered the production of the insurer's entire claims file notwithstanding objections that portions were protected by the work product doctrine based on the specific facts of the dispute. However, while the Court permitted the production of the underlying claims file, it did limit said production and permitted redaction of any mental impressions, conclusions, opinions or legal theories of the insurer's in-house counsel and insurer's claims representatives handling the file regarding the litigation. In any event, this Georgia Federal District Court's ruling serves as a reminder that insurers should be careful in organizing and maintaining their claims files so that discoverable and non-discoverable materials do not overlap.

Conversely, a recent Court of Appeals decision from California applied the attorney-client privilege broadly with respect to confidential communications among claims counsel for a title insurer, its insured, and the insured's counsel appointed by the title insurer.[2] In a case involving a title insurer's retention of counsel to prosecute an equitable subrogation claim on behalf of the insured lender, the Court of Appeals confirmed the creation of a "tripartite attorney-client relationship" whenever an insurer retains counsel to defend its insured. That tripartite attorney-client relationship includes the insurer, the insured, and the counsel, which together form a unified front in the litigation. As such, confidential communications between either the insurer or the insured, on one hand, and counsel, on the other hand, are protected by the attorney-client privilege. Both the insurer and insured are holders of the privilege and either one can assert it. Moreover, the Court held that the counsel's work product retains its protection when it is transmitted to the insurer.

Next, a related developing question involves the duties of defense counsel when they acquire information from the insured that may impact the insured's insurance coverage. Generally, the litigation privilege exists to protect communications between the insurer and defense counsel concerning the defense of an insured. The litigation privilege is deeply rooted in the common law doctrine that attorneys are immune from civil suits for defamation or libel when they arise out of communications made in the course of judicial proceedings. This privilege is predicated upon the long-established principle that the efficient pursuit of justice requires that attorneys and litigants must be permitted to speak and write freely in the course of litigation without the fear of subsequent lawsuits. While the litigation privilege was originally used to protect against defamation suits, Court apply it today to most civil causes of action.

Some jurisdictions, such as Florida, appear to have taken a broad view of the litigation privilege as they held that "absolute immunity" must be afforded to any act during the course of a judicial proceeding, regardless of whether the act involved a

defamatory statement or "other tortious behavior" as long as the act has some relation to the proceeding.[3] Conversely, other jurisdictions have taken a narrower view of the litigation privilege. For example, the Supreme Court of West Virginia held that the litigation privilege should only be permitted in limited circumstances.[4] In addition, the Supreme Court of Idaho held that the litigation privilege does not provide attorneys with blanket immunity.[5]

Recently, the New Jersey Appellate Division ruled that the litigation privilege did not shield an attorney from a legal malpractice suit brought by his former client where the attorney was alleged to have acted in violation of the Rules of Professional Responsibility. In Buchanan v. Leonard, 2012 N.J. Super. LEXIS 162 (App. Div. Oct. 9, 2012), plaintiff asserted a claim for defamation and legal malpractice against the attorney appointed by his malpractice insurer to represent him in an underlying legal malpractice action. Plaintiff's former clients claimed that he was negligent in handling their bankruptcy filings, causing them to lose their home. When sued, Plaintiff's insurer appointed Defendant and his firm to represent and defend Plaintiff. As trial neared, Defendant requested settlement authority from the insurer and in doing so completed a settlement form discussing the basis for said request. In this form, Defendant stated that a correspondence from Plaintiff to his former clients demonstrated an admission of bankruptcy fraud, and that criminal conduct may have occurred. Defendant further warned that if the matter proceeded to trial and the letter was disclosed, Plaintiff could be subject to ethical discipline, and potentially a suspension of his license to practice law.

While intended to motivate the insurer to provide defense counsel with settlement authority, Defendant's settlement memo instead prompted the insurer to withdraw coverage to Plaintiff one week before trial pursuant to an exclusion in Plaintiff's policy for any claim arising out of dishonest, fraudulent, criminal or malicious acts or omissions. Thereafter, Plaintiff filed suit against Defendant and his law firm claiming legal malpractice and defamation. The trial court granted Defendant's summary judgment motion on the basis of the litigation privilege, but the Appellate Division reversed. While the New Jersey Appellate Division recognized that attorneys must be free to vigorously represent their clients without fear of being sued, the Court held that the privilege did not protect attorneys from discipline for violating the Rules of Professional Conduct. Moreover, the litigation privilege did not protect an attorney from a claim by his or her client based upon statements the attorney made in the course of a judicial proceeding where, as in this case, it was alleged that the attorney breached his duty to the client by failing to adhere to accepted standards of legal practice. Although the New Jersey Appellate Division did not address the issue of whether or not communications between the insurer and defense counsel, as well as the claim's file itself were discoverable, it will undoubtedly be an issue litigated during discovery. Moreover, this case demonstrates a situation in which the insurer and their claims file is dragged into subsequent litigation even without a claim of bad faith.

Overall, the tripartite relationship is one of the most difficult associations to define, as multiple duties exist and can present challenging actual or potential conflicts among the parties. Ultimately, the onus is on the parties to the "tripartite relationship" to be proactive in ensuring that the attorney-client privilege will be protected. In particular, insurers and defense counsel should make it clear at the outset of the "tripartite relationship" that they understand the defense counsel's ultimate obligation is to protect the interests of the insured. Thus, the parties should consider including appropriate language to this effect in any retainer agreements or other written communications between defense counsel and the insurer or the insured. This simple step can help to avoid misunderstandings as to the parties' respective roles.

Furthermore, in the context of providing periodic status reports, defense attorneys must be sure to exercise care in representing the insured, and remain conscious of that duty when communicating with the insurer. While the insurer may fund the defense and potentially any judgment or settlement, and therefore must be kept abreast of significant developments in the case, jurisdictions across the country have recognized that a defense attorney's first duty is to his or her client, the insured. Thus, insurers and defense counsel must balance the need to provide information to the insurer related to the defense of claims with defense counsel's obligation to avoid providing information that could be prejudicial to an insured's interests or adversely impact an insured's entitlement to coverage. As a practical matter, defense attorneys should provide the client with drafts of any significant development reports that may contain sensitive information for approval prior to sending it to the insurer. Additionally, to the extent a defense is being provided pursuant to a reservation of rights, the client should be advised to consider retaining personal counsel to protect his interests.

Finally, insurers must recognize that they cannot rely on defense counsel to provide them with information relating to coverage, but should instead conduct their own investigations if coverage issues exist. In these circumstances, insurers should consult with competent coverage counsel and make sure that mental impressions, conclusions, opinions or legal theories regarding the underlying litigation are kept separate from the claims file itself, or at the very least organized in such a manner to reflect the privileged nature and/or permit appropriate redactions. Ultimately, all parties involved in the tripartite relationship should remain mindful of the potential conflicts that may arise, and potential attempts to pierce the privileges between them.

1 *Camacho v. Nationwide Mut. Ins. Co.*, No. 1:11-CV-03111-AT., 2012 WL 6062029 (N.D. Ga., Dec. 3, 2012).
2 *Bank of America v. Superior Court*, 2013 WL 151153.
3 *Levin, Middlebrooks, Mabie, Thomas, Mayers & Mitchell, PA. v. U.S. Fire Ins. Co.*, 639 So.2d 606 (1994).
4 *Collins v. Red Roof Inns, Inc.*, 211 W. Va. 458 (2002).
5 *Taylor v. McNichols*, 149 Idaho 826 (2010).

Karen Painter Randall is a Partner with Connell Foley LLP, USLAW NETWORK's New Jersey Firm, and manages the Professional Liability and Director and Officer Litigation practice groups. Randall provides representation and advocacy services to a wide range of professionals in complex litigation; is a Certified Civil Trial Attorney; former Chair of the USLAW Professional Liability Practice Group; and a current member of its Leadership Committee. She frequently lectures and writes on defense, coverage and risk management issues and serves in leadership positions with the American Bar Association, Defense Research Institute and Council on Litigation Management.

Steven A. Kroll is an associate at Connell Foley LLP in the Professional Liability practice group. In addition to representing professionals in various areas, Kroll represents commercial landlords and tenants in matters related to premises liability. Kroll received his J.D. from Rutgers-Newark School of Law in 2009, cum laude, and received the distinguished award of Order of the Coif. For more information please visit www.connellfoley.com or call 973.535.0500.