INSURANCE LAW

Discoverability of Attorney-Generated Documents in Insurance Company Files

By
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The issue of the discoverability of the contents of insurance company files is one that has vexed litigants and the courts for many years—particularly when the specific items sought to be discovered involve certain types of communications between the insurer and its attorney(s). In a series of recent cases, the courts have analyzed the insurer's obligation to disclose the contents of its files, including attorney communications with regard to the decision of whether to accept or reject a claim, notwithstanding the insurer's invocation of the "material prepared for litigation" and/or attorney-client privileges—with mixed results.

Early Case Law

In *Bombard v. Amica Mutual Ins. Co.*, 11 A.D.3d 647 (2d Dept. 2004), the court stated, as follows:

"The payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business. Reports prepared by insurance investigators, adjusters, *or attorneys* before the decision is made to pay or reject a claim are thus not privileged and are discoverable even when those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation with the insured." (citations and internal quotation marks omitted, emphasis added).

As explained further in *Bertalo's Restaurant v. Exchange Ins. Co.*, 240 A.D.2d 452 (2d Dept. 1997), "Merely because such an investigation was undertaken by attorneys will not cloak the reports and communications with privilege (citation omitted) because the reports, although prepared by attorneys, are prepared as part of the 'regular business' of the insurance company. Therefore, those communications which occurred before the date that the [insurer] had reasonable grounds to reject the claim (citations omitted) are not immune from discovery." See *Brooklyn Union Gas Co. v. American Home Assurance Company*, 23 A.D.3d 190 (1st Dept. 2005), wherein the court observed that "Documents prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and to evaluate the extent of a claimant's loss are not privileged and are, therefore, discoverable. In addition, *such documents do not become privileged merely because an investigation was conducted by an attorney* (citations omitted) (emphasis added)." See also *Westhampton Adult Home v. National Union Fire Ins. Co.*, 105 A.D.2d 627 (1st Dept. 1984).

> In a series of recent cases, the courts have analyzed the insurer's obligation to disclose the contents of its files.

The *Bertalo's* court also stated, with regard to the attorney-client privilege, that "In order to raise a valid claim of privilege, the party seeking to withhold the information must show that it was a 'confidential communication' made between the attorney and the client in the context of legal advice or services (citations omitted). Documents which are 'not primarily of a legal character, but [express] substantial nonlegal concerns' are not privileged (citation omitted). However, '[s]o long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters' (citation omitted)."

On the other hand, in *All Waste Systems v. Gulf Insurance Company*, 295 A.D.2d 379 (2d Dept. 2002), the issue was the discoverability of coverage opinion reports and draft disclaimer letters prepared by the insurer's legal counsel, which the insured sought to compel on the ground that they were prepared in the regular course of the insurer's business. Noting that "as long as the communication is primarily or predominantly of a legal character, the privilege is not lost because it contains or refers to some nonlegal concerns" (citing, inter alia, *Bertalo's*, supra), the court held that the subject documents were, in fact, "primarily and predominantly legal in nature, and in their full content and context, were made to render legal advice or services to the insurer. Accordingly, the documents in that case were deemed privileged and immune from discovery.

Recent Cases

In *Melworm v. Encompass Indem. Co.*, 112 A.D.3d 794 (2d Dept. 2013), involving a property damage claim for a vandalized boat, the plaintiffs commenced an action against the disclaiming insurer for breach of the insurance policy, and moved to compel the insurer to produce, inter alia, certain letters from the insurer's attorney to the insurer. The material sought by the plaintiffs had been created prior to the insurer's denial of the claim, and the attorney had drafted the letters while he conducted an investigation of the claim on behalf of the insurer. In opposition to the motion, the insurer argued that the material was protected by the attorney-client privilege. After conducting an in camera inspection, the Supreme Court granted the plaintiff's motion. The Second Department affirmed, reiterating that "Reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable, even when » Page 8

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Insurance

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those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation with the insured (citations omitted)."

The *Melworm* court also held that because "the materials sought by the plaintiffs were prepared as part of the insurer's investigation into the claim, and were not primarily and predominantly of a legal character," and the insurer failed to meet its burden of establishing that they were protected by the attorney-client privilege, full disclosure of the requested documents was required.

In *National Union Fire Ins. Co. of Pittsburgh v. TransCanada Energy, USA*, 114 A.D.3d 595 (1st Dept. 2014), the court affirmed the finding by a Special Referee that any documents sought by the defendants that pre-dated the rejection by the insurer of the claims were not protected from disclosure. As found by the court, "the majority of the documents sought to be withheld are not protected by the attorney-client privilege or the work product doctrine or as materials prepared in anticipation of litigation. The record shows that the insurance companies retained counsel to provide a coverage opinion, i.e., an opinion as to whether the insurance companies should pay or deny the claims. Documents prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so 'merely because [the] investigation was conducted by an attorney' (citation omitted)."

On the other hand, in *Nicastro v. New York Central Mutual Fire Ins. Co.*, 117 A.D.3d 1545 (4th Dept. 2014), motion for leave to appeal dismissed, 24 N.Y.3d 998 (2014), the court reversed an order that compelled production by the defendant insurer of approximately 200 pages of previously withheld or partially redacted documents on the basis that they were protected by the attorney-client and attorney work product privileges.

In that case, the court found that "the defendant did not retain counsel to perform the work of an adjuster or otherwise to handle claims." Rather, "Defendant itself evaluated plaintiff's claim and determined that it was obligated to pay and did pay him in excess of $100,000 as a result of a fire that damaged two insured properties. When it became clear that plaintiff believed that the value of his claim was far in excess of what defendant was willing to pay him, defendant retained counsel to protect its rights. Defendant's attorney expressly stated that he was retained to provide legal services to defendant, to advise defendant of its legal responsibilities, and to conduct the examination under oath of plaintiff." The court thus concluded that counsel was retained to provide legal advice and services to defendant with respect to plaintiff's claim and, as a result, the lower court erred when it ordered disclosure of documents of or relating to communications between defendant and its attorney and documents that constituted attorney work product.

Most Recent Cases

The past year has also seen a flurry of cases dealing with this issue—again with mixed results.

In *570 Smith Street v. Seneca Ins. Co.*, 148 A.D.3d 561 (1st Dept. 2017), an action for breach of contract based on the defendant insurer's failure to pay benefits under an insurance policy, plaintiffs objected, in a letter to the Supreme Court, to defendant's withholding of certain correspondence between it and its counsel on the ground that it was protected by the attorney-client privilege. Following an in camera inspection, the Supreme Court directed the defendant to produce the documents to plaintiff. Following its own *in camera* review of the correspondence between defendant and its counsel, however, the Appellate Division concluded that it was protected by the attorney-client privilege, insofar as it was "predominantly of a legal character."

On the other hand, in *Advanced Chimney v. Graziano*, 153 A.D.3d 478 (2d Dept. 2017), the plaintiff sought a declaration that the defendant insurer was obligated to defend and indemnify it in an underlying action, in which another insurer, as subrogee of a building owner, alleged that the insured was negligent with respect to a fire at the building. After the insurer was notified of the underlying action, it hired a law firm to investigate the claim, as well as the plaintiff's procurement of insurance with the insurer. A member of the law firm conducted the investigation, which included interviews with the plaintiff's representative and broker. After conducting the investigation, the law firm sent a letter to plaintiff notifying it that the insurer was rescinding the policy based on material misrepresentations made by the plaintiff in the procurement of the policy.

> As the courts continue to address these issues on a case by case basis, it will be interesting to attempt to discern any specific trends that may develop.

In the subsequently commenced declaratory judgment action, the plaintiff moved, inter alia, to compel the insurer to comply with discovery demands, including the production of the investigative file of the law firm for the period through and including the date of the above-mentioned letter. The insurer opposed, contending, inter alia, that the file was not discoverable since it was privileged, and constituted its work product.

The Appellate Division held that the Supreme Court properly compelled disclosure because the material sought was prepared by the law firm as part of the insurer's investigation into the claim, and was not primarily and predominantly of a legal character (citations omitted)." Nor was the file protected as the work product of the law firm. In *Venture v. Preferred Mutual Ins. Co.*, 153 A.D.3d 1155 (1st Dept. 2017), another dispute under a fire insurance policy, the plaintiffs claimed that during the investigation into the fire, the insurer and its attorney "attempted to develop incriminating evidence against them and their sons, in an effort to avoid the insurer's obligations under the policy and to subject plaintiffs to criminal prosecution." The insurer's counsel wrote the insurer a report containing his evaluation and analysis of certain testimony and evidence that, in his opinion, pointed to arson committed by plaintiffs or members of their family. Two weeks after receipt of counsel's letter, the insurer denied coverage, citing policy provisions relating to misrepresentation, concealment, fraud, and "intentional acts."

In their action against the insurer asserting claims of breach of contract and "bad faith insurance denial," plaintiffs served discovery demands seeking the entire claims file, as well as "all reports, memos, communications, and other documents generated by any person or entity performing the investigation on defendant's behalf, and any such documents showing that the fire was incendiary and that plaintiffs or their children had any involvement with causing the fire." In response to those demands, the insurer redacted certain documents due to "privilege," and withheld on the basis of the attorney-client privilege all correspondence between the insurer and its attorneys. Neither the "internal coverage opinion letter" described above, nor a privilege log was produced.

Plaintiffs moved, inter alia, for an order requiring the insurer to produce an unredacted version of the coverage memorandum, and other documents withheld on the basis of privilege, for an in camera review. The Supreme Court directed the insurer to produce the withheld documents as well as a privilege log, for in camera review, and, following such review, denied plaintiffs' motion, holding that the withheld or redacted documents

were subject to the attorney-client privilege, constituted attorney work product, were prepared in anticipation of litigation, or related only to the setting of reserves. Plaintiffs' subsequent motion to renew, based in part, upon evidence obtained in a deposition of an employee of its Special Investigations Unit that revealed that the attorney in question "played a more significant role in the claims investigation and denial than previously understood," was denied by the court.

On plaintiffs' appeal, the Appellate Division noted that "'Reports of insurance investigators or adjusters, prepared during the processing of a claim, are discoverable as made in the regular course of the insurance company's business' (citation omitted). 'Furthermore, attorney work product applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusion, legal theory or strategy'. 'Documents prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and to evaluate the extent of a claimant's loss are not privileged and are, therefore, discoverable. In addition, such documents do not become privileged merely because an investigation was conducted by an attorney'."

Based upon the foregoing, the court reversed the denial of plaintiffs' motion to renew, and remanded the case for a hearing "in which counsel for plaintiffs and defendant will be permitted to probe the issue of whether [the attorney] served as an investigator, solely as an attorney, or in some type of hybrid role, including examining [the attorney] under oath, and for the court to make a determination as to [the attorney's] role, supported by factual findings, and reconsider plaintiffs' motion based on its findings."

Most Recent Decision

Most recently, in *Celani v. Allstate Ins. Co.*, A.D.3d , NYS3d , 2017 N.Y. Slip Op. 67799, 2017 WL 5181637 (4th Dept., Nov. 9, 2017), an action arising out of an incident involving an accidental shooting of an infant by a gun owned by her father, the insurer, Allstate, disclaimed coverage for the infant's claim under a homeowner's policy issued to the father based on an exclusion for bodily injury to an "insured person," claiming that the infant was an "insured person" as a resident relative of her father's household. In an action against the father for negligence, and against Allstate for breach of the duty to indemnify, the plaintiff moved to compel disclosure of Allstate's entire claims file, including a legal opinion prepared by Allstate's outside counsel, and a claim investigation manual prepared by Allstate's employees. Allstate moved for a protective order to prevent the disclosure of, inter alia, the legal opinion of outside counsel and pre-disclaimer claim note related thereto. The Supreme Court granted plaintiff's motion to compel in its entirety.

On appeal, the Fourth Department, as pertinent hereto, agreed with Allstate that the legal opinion of outside counsel and pre-disclaimer claim notes related thereto should have been protected from discovery. As stated by the court, "Although reports prepared in the regular course of business are discoverable (see *Lalka v. ACA Ins. Co.*, 128 A.D.3d 1508, 1508-1509 (4th Dept. 2015), documents prepared by an attorney that are primarily and predominantly of a legal character, and made to furnish legal services, are absolutely privileged and not discoverable, regardless of whether there was pending litigation at the time they were prepared (citations omitted)."

As the courts continue to address these issues on a case by case basis, it will be interesting to attempt to discern any specific trends that may develop.