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Attorney-Client Privilege on the Ropes—In 'Sum' and Substance

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By **Marc A. Schulz** | October 30, 2018

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The Appellate Division, Fourth Department, issued a decision in *Rickard v. New York Cent. Mut. Fire Ins. Co.*, 2018 NY Slip Op 06333 (Sept. 28, 2018), that by its terms opens up insurance carriers' litigation files to judicial in-camera inspection, and insurers as well as

others ought to be worried. The decision also appears to be a departure from established New York law.

Background

Plaintiff Rickard brought an action for supplementary underinsured motorist (SUM) benefits under his insurance policy against New York Central Mutual Fire Insurance Company (New York Central). In the course of discovery, Rickard served a Notice to Produce, seeking New York Central's entire SUM claim file. The insurer produced its claim file up until the date Rickard filed this action, relying on *Lalka v. ACA Ins. Co.*, 128 A.D.3d 1508 (4th Dept. 2015). New York Central extended a settlement offer. Plaintiff's counsel responded with a letter seeking New York Central's entire claim file, including documents and information dated after Rickard sued its insurer.

The *Lalka* decision was already of concern to the insurance industry. In that case, the same court held that reports in an insurance carrier's files, including, potentially, "reports prepared by … attorneys before the decision is made to pay or reject a claim" might be discoverable, even if motivated, in part, by the potential for litigation with the insured. However, the Fourth Department in *Lalka* held that the trial court "properly denied that part of plaintiff's motion seeking disclosure of documents in the claim file created after commencement of the action."

Surely, the protection of litigation material AFTER an action is commenced would be absolutely privileged.

To invoke the attorney-client privilege, insurers must show that "the information sought to be protected from disclosure was a 'confidential communication' made to the attorney for the purpose of obtaining legal

services" and "directed to an attorney who has been consulted for that purpose" *Nicastro v. New York Cent. Mut. Fire Ins. Co.*, 117 A.D.3d 1545, 1546 (4th Dept. 2014).

It has long been the rule that:

> 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. However, once it has rejected the claim, [albeit that decision may not yet be communicated to the insured] reports made to it to aid in the resistence [sic] of the claim are made for the purpose of litigation and are protected by CPLR 3101 (subds [c], [d])" (*see, Millen Ind. v. American Mut. Liab. Ins. Co.*, 37 A.D.2d 817, 324 NYS2d 930, supra; E*. Cuker, Inc. v. New York Prop. Ins. Underwriting Assn.*, 98 A.D.2d 621, 469 NYS2d 364, supra [and cases cited therein]). Consequently, in distinguishing between an expert's report prepared in the regular course of business to aid an insurance carrier's decision in evaluation of a claim and an expert's report prepared exclusively for anticipated litigation, the date a firm decision to disclaim coverage is made is the relevant date, rather than the date a carrier has reason to investigate the legitimacy of the loss.

Landmark Ins. Co. v. Beau Rivage Rest., 121 A.D.2d 98, 101 (2d Dept. 1986).

Where an attorney also participates in the investigation of a claim, the attorney-client privilege is not automatically lost as *Bertalo's Rest. v Exchange Ins. Co.*, 240 A.D.3d 452, 454-55 (2d Dept. 1997) held those portions of mixed-use reports that are "primarily or predominantly of a legal character" retain the attorney-client privilege.

Accordingly, 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." *Bombard v. Amica Mut. Ins. Co.*, 11 A.D.3d 647 (2d Dept. 2004) (citing *Landmark Ins. Co.*, 121 A.D.2d at 101).

More recently, courts have held "documents relating to insurance reserve information, claims expenses, subrogation interests, expenses incurred by attorneys, *and documents created after commencement of the action*" are protected from disclosure and thus are not "material and necessary" under CPLR §3101(d). *Celani v. Allstate Indem. Co.*, 155 A.D.3d 1524 (4th Dept. 2017); *Nicastro v. New York Cent. Mut. Fire Ins. Co.*, 117 A.D.3d 1545 (4th Dept. 2014) (emphasis added).

Holding

This background highlights why *Rickard*'s holding is fundamentally problematic for insurers and is inconsistent with established law. In *Rickard*, New York Central moved for a protective order and, in the alternative, for an *in-camera* review of the materials created after litigation was commenced. The Supreme Court denied the motion for a protective order and granted Rickard's cross-motion to compel disclosure of the entire claim file. The trial court directed the insurer to produce "any and all documents in the claim file pertaining to the payment or rejection of the subject claim including those prepared after the filing of this lawsuit up to the time the settlement offer was made … *including reports prepared by [d]efendant's attorney(s).*" (emphasis added).

An appeal was taken to the Fourth Department, which started its analysis by noting that New York Central *did not challenge plaintiff's Notice to Produce without identifying any documents or types of documents on the grounds that such request was palpably improper because it was overbroad or sought*

information not "material and necessary" for the prosecution of plaintiff's action. Instead, New York Central only asserted that any documents in the claim file after the date of plaintiff's lawsuit were materials protected from discovery. As a result, the sole issue before the Court was whether the insurer met its burden in demonstrating that the information withheld contained material protected from disclosure.

In *Rickard*, the Fourth Department unanimously held the insurer failed to meet its burden of establishing *any right* to protection because it relied *solely* upon the conclusory characterizations of its counsel that those parts of the claim file withheld from discovery contained protected material. Most troubling was the court's discussion of *Lalka* because rather than limiting its breadth, the court abrogated the protection of material maintained by the insurer after litigation was commenced:

> To the extent that *Lalka* (128 AD3d at 1508) holds that any documents in a claim file created after commencement of an action in a SUM case in which there has been no denial or disclaimer of coverage are per se protected from discovery, it should not be followed. Rather, a party seeking a protective order under any of the categories of protected materials in CPLR 3101 bears "the burden of establishing any right to protection" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]; *see Heimbach*, 114 AD3d at 1222). "[A] court is not required to accept a party's characterization of material as privileged or confidential" (*Optic Plus Enters., Ltd. v Bausch & Lomb Inc.*, 37 A.D.3d 1185, 1186 [4th Dept. 2007]). Ultimately, "resolution of the issue whether a particular document is … protected is necessarily a fact-specific determination … , most often requiring in camera review (*id.*, quoting *Spectrum Sys. Intl. Corp.*, 78 NY2d at 378).

Accordingly, material maintained by the insurer, including correspondence between the insurer and its counsel may be subject "most often" to in-camera review.

However, the court further held that the trial court abused its discretion and should have granted defendant's alternative relief, resulting in a privilege log pursuant to CPLR §3122(b) followed by the trial court's in camera review of the subject documents.

Takeaways

This case contains several good practical pointers for practitioners and insurance companies alike. *First*, one needs always to be cognizant of who bears what burden with respect to the various privilege issues. Here, the Fourth Department reiterated the rule that "the burden of establishing any right to protection is on the party asserting it, the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." *Optic Plus Enterprises v. Bausch & Lomb*, 37 A.D.3d 1185 (4th Dept. 2007).

That means the "burden of showing that specific material is conditionally immune from discovery under CPLR §3101(d) because it was prepared solely in anticipation of litigation, is upon the party asserting the immunity." *Landmark Ins. Co. v. Beau Rivage Rest.*, 121 A.D.2d 98, (2d Dept. 1986). To do so, one must identify "the particular material with respect to which the privilege is asserted" and establish "with specificity that the material was prepared exclusively in anticipation of litigation." *Bombard v. Amica Mut. Ins. Co.*, 11 A.D.3d 647 (2d Dept. 2004).

Second, when asserting a privilege, counsel cannot merely rely on his or her conclusory assertions without more. In *Rickard*, the insurer needed not only to object to plaintiff's demands as it did, but also to designate those documents

or categories of documents by way of a privilege log "on the ground that such request was palpably improper because it was overbroad or sought matter not 'material or necessary' for the prosecution of plaintiff's action."

Third, under CPLR §3101(b), only "a person entitled to assert the privilege[d matter]" can assert the objection, and only then is such privileged matter not obtainable. Had there been an affidavit from the insurer's claims representative, rather than its counsel, explaining the withheld information is exempt from discovery since it does not contain material that is necessary in the prosecution or defense of plaintiff's SUM action, the result may well have been different.

The *Lalka* case, along with the Second Department's decision in *Melworn v. Encompass Indem. Co.*, 112 A.D.2d 794 (2d Dept. 2013), have been of great concern to insurers seeking to protect material traditionally protected from discovery:

> These cases represent a growing and disturbing trend that impacts the ability of insurers to secure privileged legal advice. It is one thing to find the investigative reports are of the "mixed use" variety and therefore discoverable if generated before a claim is denied. It is quite another to compel production of communications between counsel and the insurer when the attorney assisting the insurer in developing a strategy to respond to a request for coverage.

Dan D. Kohane & Audrey A. Seeley, "Insurance Law," 66 Syracuse L. Rev 999, 1003 (2016).

Indeed, insurers have been most concerned about the eradication of the attorney-client privilege in SUM cases.

The message for the insurer's counsel is clear—to protect the privilege, timely assert it and do so properly or expect the worst!

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