Coughlin Midlige & Garland LLP

Alert

New York Courts Continue To Erode Attorney-Client Privilege

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Following on the heels of the First Department's decision last Summer in National Union Fire Ins. Co. v. TransCanada Energy, 119 A.D.3d 492 (1st Dep't 2014), a recent Fourth Department opinion could be construed to further erode the protection afforded to documents prepared by attorneys prior to an insurer's rejection of a claim. In Lalka v. ACA Ins. Co., 2015 N.Y. Slip Op 03995 (4th Dep't App. Div.), an insurance coverage litigation, the New York Appellate Division, Fourth Department, ordered disclosure of reports prepared by the insurer's counsel prior to the commencement of coverage litigation. Although the court's decision does not describe the documents at issue, it is clear that the insurer was ordered to disclose documents prepared by counsel.

In Lalka, the policyholder commenced an action to recover supplementary underinsured motorist coverage and later moved for an order compelling the defendant to disclose its entire claim file. The court declined to order disclosure of documents created after the commencement of the lawsuit, upholding the privileged nature of such communications. Documents created by attorneys prior to the commencement of the coverage litigation, however, were ordered to be disclosed. Indeed, the court stated that "reports which aid it [the insurer] in the process of deciding which of the two indicated actions to pursue [accept or reject a claim] are made in the regular course of its business." Relying upon two Appellate Division decisions from the Second Department, the court held, "the documents . . . constitute multi-purpose reports motivated in part by the potential for litigation with plaintiff, but also prepared in the regular course of defendant's business in deciding whether to pay or reject plaintiff's claim, and thus plaintiff is entitled to disclosure of those documents."

Policyholders will likely rely on Lalka to support their requests for all documents within an insurer's claim file prepared up to the time a decision is made to deny a claim. Given the absence of facts from the Lalka decision, its precedential value is questionable. Nevertheless, unlike the TransCanada decision, Lalka may further erode the ability of an insurer to shield documents prepared before a coverage decision is made by the insurer, even if such documents are prepared in anticipation of litigation. Notwithstanding the Lalka court's recognition that the documents, at least in part, were created in anticipation of litigation, disclosure was still required.

Ultimately, whether documents prepared by counsel are discoverable and subject to disclosure will be

an extremely fact-specific inquiry that must be viewed within the context of a specific matter at hand. Insurers should discuss with their coverage counsel the protections afforded to pre-coverage determination communications in the context of any particular claim.

Should you require additional details or information on this case or issue in general, please do not hesitate to contact us.