Walking the High Wire

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The Discoverability of Insurer/Reinsurer Communications in Insurance Coverage Litigation

In insurance coverage litigation, cedants and reinsurers have a common financial interest in the investigation and adjustment of complex, high-dollar or questionable claims. In the real world, a joint financial interest is the firmest of foundations for expectations of confidentiality. Cedants have a duty to keep reinsurers informed, and reinsurers may decide to join in the claims process.

Quality plaintiffs' attorneys know this and, therefore, often seek reinsurance information through discovery. Cedants and reinsurers naturally resist disclosure for a variety of reasons. For example, placement information may reveal confidential financial and marketing information. Claim information may include statements and opinions that, with the benefit of hindsight, portray the claims process in an unflattering light.

A useful logical flowchart in evaluating discovery requests for reinsurance information is (a) whether the information is potentially relevant to the litigation or is otherwise discoverable, (b) whether the information is protected by (i) the attorney-client privilege or (ii) as materials prepared in anticipation of litigation, and (c) if so protected, whether the protections have been waived via voluntary disclosure to a third party. *See Parkdale Am., LLC v. Travelers Cas. & Sur. Co. of Am.*, No. 3:06CV78-R, 2007 WL 4165247, at *8 (W.D.N.C. Nov. 19, 2007); *Harper-Wyman Co. v. Connecticut Gen. Life Ins. Co.*, No. 86 C 9595, 1991 WL 62510, at *2 (N.D. Ill. Apr. 17, 1991). Disputes over the discoverability of reinsurance information typically involve relevance or whether protection has been waived by the cedant's disclosure to the reinsurer. Decisions and guidelines on these issues are discussed below.

As a threshold matter, under Fed. R. Civ. P. 26(a)(1)(A)(iv) and its state analogs, the cedant must produce any reinsurance coverage under which a cedant may be reimbursed. *See U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, 244 F.R.D. 638, 641 (D. Kan. 2007); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Continental Illinois Corp.*, 116 F.R.D. 78, 83–84 (N.D. Ill. 1987). The existence and terms of reinsurance coverage are generally not controversial and to some extent should be in the insurer's statutory filings.

Claimants may also seek reinsurance placement and claims information. In federal courts and most state courts, this information will be discoverable if the claimant can show that it is reasonably calculated to lead to the discovery of admissible evidence, unless protected from disclosure by a privilege or other protection. *See, e.g.,* Fed. R. Civ. P. 26(b)(1), O.C.G.A. § 9-11-26(b)(1). Under this generous standard, claimants may discover "any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978).

With respect to reinsurance placement information, courts generally hold such information irrelevant to coverage disputes, reasoning that the decision to purchase reinsurance – particularly when done via a broad treaty – sheds little light on the specific terms of coverage. *Heights at Issaquah Ridge Owners Ass'n. v. Steadfast Ins. Co.*, No. C07-1045RSM, 2007 WL 4410260, at *4 (W.D. Wash. Dec. 13, 2007); *Great Lakes Dredge and Dock Company v. Commercial Union Assurance Company*, 159 F.R.D. 502, 504 (N.D. Ill. 1995). Nevertheless, some courts have permitted discovery of placement information where relevance can be specifically shown. For example, courts have allowed discovery of reinsurance placement information in cases involving rescission, ambiguous policy language, failure to disclose relevant underwriting risks, or the reconstruction of a lost policy. *See Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 284 F.R.D. 132, 137 (S.D.N.Y. 2012); *Medmarc Cas. Ins. Co. v. Arrow Int'l, Inc.*, No. CIV A 01 CV 2394, 2002 WL 1870452, at *4 (E.D.

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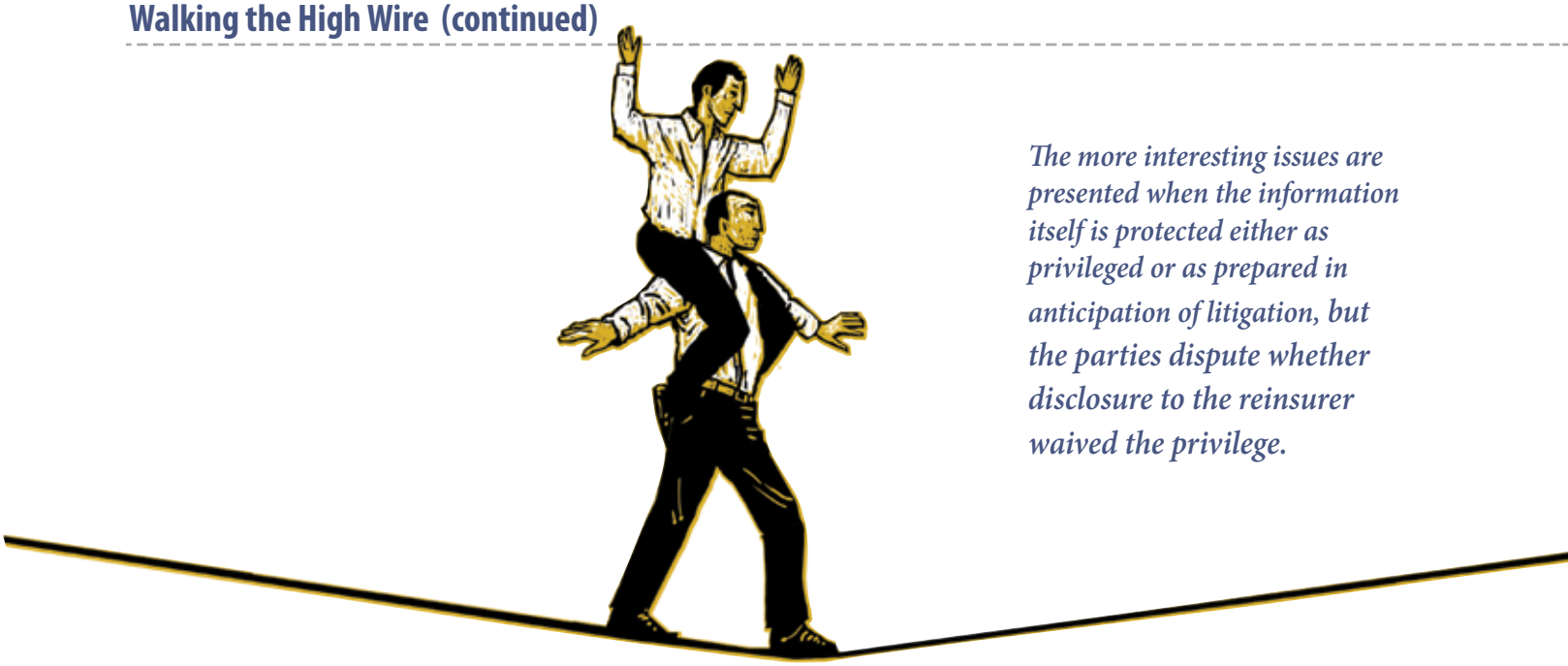

The more interesting issues are presented when the information itself is protected either as privileged or as prepared in anticipation of litigation, but the parties dispute whether disclosure to the reinsurer waived the privilege.

Pa. July 29, 2002); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 139 F.R.D. 609, 612 (E.D. Pa. 1991).

With respect to claims-related information — *i.e.*, communications with reinsurers about the claim and the setting of reserves — courts are likely to grant discovery when bad faith claims are at issue. Courts allow discovery into communications with reinsurers on the grounds that such communications may disclose the reasoning and motivation behind the cedant's conduct toward its insured. *Progressive Cas. Ins. Co. v. F.D.I.C.*, 298 F.R.D. 417, 424-25 (N.D. Iowa 2014); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Donaldson Co.*, No. CIV. 10-4948 JRT/JJG, 2014 WL 2865900, at *5 (D. Minn. June 24, 2014). Similarly, they allow discovery of information about the setting of reserves on the basis that reserve amounts may reflect the insurer's private acknowledgement of at least the potential for coverage, as well as the insurer's internal estimate of potential exposure. *See Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 284 F.R.D. 132, 138 (S.D.N.Y. 2012); *U.S. Fire Insurance Co. v. Bunge North America, Inc.*, 244 F.R.D. 638, 645 (D. Kan., 2007). *But see Safeguard Lighting Sys., Inc. v. N. Am. Specialty Ins. Co.*, No. CIV.A.03-4145, 2004 WL 3037947, at *3 (E.D. Pa. Dec. 30, 2004) (denying discovery of reserves); *Leksi, Inc. v. Fed. Ins. Co.*, 129 F.R.D. 99, 106 (D.N.J. 1989) (denying discovery of reserves).

In simple coverage disputes that lack allegations of bad faith, courts are less likely to grant requests to discover claims-related information. *See Mirarchi v. Seneca Specialty Ins. Co.*, 564 F. App'x 652, 655 (3d Cir. 2014); *Am. Protection Ins. Co. v. Helm Concentrates, Inc.*, 140 F.R.D. 448 (E.D. Cal 1991). In some cases, courts have acknowledged that claims-related information may ultimately lead to relevant information but that the benefits of discovery are outweighed by the burden or expense of the proposed discovery. *Progressive Cas. Ins. Co. v. F.D.I.C.*, No. 2:12-CV-00665-KJD, 2013 WL 5947783, at *9 (D. Nev. Nov. 1, 2013); *Champion Int'l Corp. v. Liberty Mut. Ins. Co.*, 128 F.R.D. 608, 612 (S.D.N.Y. 1989).

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Where the document is privileged, the insurer and reinsurer will argue that the privilege was not waived because they share a "common interest." In a departure from economic reality, most courts hold that while cedants and reinsurers hold a common economic interest, they do not necessarily hold a common legal interest. *See Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 284 F.R.D. 132, 140 (S.D.N.Y. 2012); *Progressive Cas. Ins. Co. v. F.D.I.C.*, 49 F. Supp. 3d 545, 558 (N.D. Iowa 2014). That is reasoning that only a lawyer could love. In reality, the cedant and reinsurer have aligned interests, and every desire and expectation that their communications will remain confidential. The reinsurer is relying on the cedant's judgment but certainly wants to know the extent of its risk.

Even those courts that might otherwise recognize a common interest between a cedant and a reinsurer may require protected information to be produced in bad faith cases on the grounds that the claimant has a substantial need for the information. *See Ivy Hotel San Diego, LLC v. Houston Cas. Co.*, No. 10CV2183-L BGS, 2011 WL 4914941, at *8 (S.D. Cal. Oct. 17, 2011); *Clausen v. Nat'l Grange Mut. Ins. Co.*, 730 A.2d 133, 142 (Del. Super. 1997).

What are cedants and reinsurers supposed to do? Given the volume of claims handled by cedants and the risk of a later dispute between the cedant and the reinsurer, avoiding the use of written communications is not practicable. Vague, overly optimistic, or vacuous reporting to a reinsurer may render those communications less valuable to a claimant in discovery, but they also render the cedant at risk for the denial of reinsurance.

One potential solution is for the reinsurer to be involved in the claims process. While various cases deem protected information to be waived if shared with a reinsurer, other courts have applied a different rule where the reinsurer is involved actively in the claim process. *See Minnesota Sch. Boards Ass'n Ins. Trust v. Employers Ins. Co. of Wausau*, 183 F.R.D. 627, 632 (N.D. Ill. 1999); *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.*, No. 88 CIV. 6457 (JFK), 1989 WL 82415, at *3 (S.D.N.Y. July 20, 1989). Those courts consider the sharing of information in that context to be more of a joint defense situation. *See Minnesota Sch. Boards Ass'n Ins. Trust v. Employers Ins. Co. of Wausau*, 183 F.R.D. 627, 632 (N.D. Ill. 1999). Of course, the reinsurer's involvement in the claims process should pre-date the sharing of sensitive information.

Cedants and reinsurers served with discovery requests should not panic, but broad boilerplate objections are likely to fail. *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005); *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 187 F.R.D. 528, 530 (E.D. Pa. 1999). Objections should be detailed based on the specific requests and the reasons each request is flawed. Cedants and reinsurers should not hesitate to request an *in camera* inspection when privilege or relevance is in dispute. *Lipton v. Superior Court*, 48 Cal. App. 4th 1599, 1619, 56 Cal. Rptr. 2d 341, 352 (1996); *Fireman's Fund Ins. Co. v. Cmty. Coffee Co.*, No. CIV.A.06-2806, 2007 WL 647293, at *1 (E.D. La. Feb. 28, 2007). Many judges do not understand the nature of reinsurance reporting and a cedant's legitimate fears of required production. An attorney's written opinions are entitled to special protection, so an objecting party should particularly highlight those communications for protection. *Cedell v. Farmers Ins. Co. of Washington*, 176 Wash. 2d 686, 699, 295 P.3d 239, 246 (2013); *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283, 285 (N.D. Ga. 1971). ●

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