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Traub Lieberman Partner Brian Bassett Co-Authored the Article, "Preserving Privilege," Featured in *CLM Magazine*

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Two recent cases show coverage counsel communications aren't always protected.

An insurer's duty to afford coverage to an insured may depend, in large part, upon the nature of the claim asserted against the insured in an underlying demand or complaint as compared to the language of the policy. Those documents will usually be the focal point of any initial coverage determination, and a decision on coverage may be evident from those documents alone.

Oftentimes, however, nuances of insurance-coverage law in certain jurisdictions may play a pivotal role in determining whether a claim is covered. Choice of law rules, policy-interpretation standards, and public-policy considerations may not be uniform between courts in every state. Given the variations in policy language and the diverse views of courts from jurisdiction to jurisdiction on policy interpretation, carriers will frequently seek the advice of coverage counsel to assist in making a determination of their legal obligations to their policyholders. In that scenario, the insurer is justified in expecting that communications with that counsel remain protected by the attorney-client privilege.

When coverage litigation ensues, plaintiffs' attorneys will usually seek production of an insurer's claims files, which will contain these protected communications. Whether that request is relevant to the coverage dispute will largely depend on the nature of the claim asserted against the insurer. In a pure declaratory judgment action or breach-of-contract claim, the only pertinent documents may be the underlying complaint and the policy. Accordingly, the threshold question is whether any portion of the claims file has a relationship to the claims asserted against the carrier. The insurer's first line of defense to that discovery request may, therefore, come in the form of a relevance objection and a decision to withhold the claims file in its entirety.

Where bad-faith or extra-contractual claims are properly pled and remain a part of the suit, however, attorneys for the insured will argue that the entire claims file is relevant to show the insurer's defective decision-making process and malfeasance. In responding to that discovery request, insurers and their counsel may produce portions of the claims file, but withhold communications with inside or outside coverage counsel as protected by the attorney-client privilege (unless they are asserting an "advice of counsel" defense, which is not the subject of this article). After all, those communications were exchanged with counsel for the purpose of providing legal advice and may have been generated in anticipation of litigation.

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