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CASE BRIEFS

DISTRICT COURT REJECTS INSURER'S ATTEMPT TO CLOAK ORDINARY CLAIMS HANDLING DOCUMENTS

Joining a number of other jurisdictions, the U.S. District Court for the District of Maryland recently overruled an insurer's objection to, and thus affirmed, a magistrate's ruling that an insurer may not use attorney-client privilege and work product protections to shield from discovery documents created in the ordinary course of the insurer's business. See *The Charter Oak Fire Ins. Co. v. American Capital, Ltd.*, Case No. DKC 09-100, 2013 WL 6844359 (D. Md. Dec. 24, 2013). As policyholders often assert, and *American Capital* confirms, such documents are not protected simply because the insurer has involved counsel in the claims handling process.

Defendants, American Capital, Ltd. ("American Capital") and its alleged subsidiary, Scientific Protein Laboratories ("SPL"), were targeted in numerous underlying suits involving the allegedly defective drug heparin. Defendants tendered the claims to American Capital's liability insurer, seeking both a defense and indemnity. After denying any duty to defend or indemnify, the insurer filed a declaratory judgment action against its policyholders. During discovery, the insurer produced limited documents from its claims file, asserting that the remaining documents were protected from disclosure by the attorney-client privilege and work product protections due to counsel's involvement and the insurer's anticipation of litigation.

Granting American Capital's subsequent motions to compel, the magistrate held that "claims handling is an ordinary business function of an insurer" such that an insurer may not withhold documents as privileged

or otherwise protected unless it can present "specific evidentiary proof" that the documents were: 1) created outside the ordinary course of its business; or 2) in anticipation of litigation. *American Capital*, Dkt. No. 255-1, Memorandum Opinion at 1-2 (entered July 24, 2013, redacted version unsealed Nov. 6, 2013) ("July 24, 2013 Opinion").

By statute, Maryland law requires insurance companies to adopt and implement reasonable policies and procedures for the prompt investigation and handling of claims. See Md. Code Ann. Ins. § 27-304(3). Accordingly, "[f]unctions performed pursuant to this statutory mandate occur in the ordinary course of business without the protection of attorney-client privilege or the work product doctrine." July 24, 2013 Opinion at 2.

Specifically included in an insurer's ordinary course of business, then, are factual investigations to determine coverage. The district court agreed with the magistrate's determination that such investigations are not protected, even where performed by in-house or outside counsel. *American Capital*, 2013 WL 6844359, at *2 (quoting Dkt. Nos. 147 and 148, Hearing Transcript and Order (entered December 21, 2012)). These types of documents typically include facts and non-legal opinions about the facts, which are not privileged or otherwise protected. *Id.* Sharing these documents with, or having them created by, counsel does not automatically cloak them in privilege or work product protections. *Id.* For the same reason, a claims handler's request that counsel review a coverage determination "does not convert the analysis from an ordinary business activ-

ity to a litigation-gearred activity." July 24, 2013 Opinion at 7. Even American Capital's insurer did not dispute that, as a general practice, it and many other insurers retain outside counsel who are "simply acting as a claim handler." *Id.* The magistrate expressly addressed this practice, cautioning that when insurers choose to engage in it, "privilege and work product protection are not available." *Id.*

American Capital encourages policyholders to look behind an insurer's initial privilege or work product claims, rather than rely upon the insurer's assertions that its designations are correct. Policyholders should seek, and be granted, broad discovery in order to test an insurer's privilege assertions, including the date and reason counsel was retained and the nature of the insurer's own activities following the retention of counsel. An insurer's claims handling files often contain valuable facts that indicate how and why the insurer arrived at its coverage determination and can reveal inconsistencies, errors, and even bad faith activity. Insurers often improperly apply privilege designations in an attempt to withhold such facts from its policyholder. *American Capital* provides policyholders with further precedent to defeat such practices. — **Matthew L. Jacobs, Brian S. Scarbrough and Jan A. Larson**, Jenner & Block



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