

Insurance Law Update

Federal Court: Reinsurance Documents Discoverable in Bad Faith Claims

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PRACTICAL POLICYHOLDER ADVICE

Policyholders should seek production of reinsurance-related documents during discovery as they might provide valuable information about the timing of when the insurer actually received notice and the insurer's frank and honest evaluation of the claim. Contradictions in communications between an insurer and its reinsurer, as compared to the positions asserted by an insurer in litigation, can be used to prove both the existence of coverage for a disputed claim as well as the insurer's bad faith in denying that claim.

In a recent ruling from the U.S. District Court for the Western District of Louisiana, a federal judge held that reinsurance documents and related communications were discoverable because they were relevant to the insured's claim of bad faith under Louisiana law. *Leevac Shipbuilders LLC v. Westchester Surplus Lines Ins. Co.*, Case No. 2:14-cv-00399, 2015 WL 224890 (W.D. La. Jan. 15, 2015).

According to its petition, plaintiff Leevac Shipbuilders LLC is the owner and operator of a shipbuilding and repair facility in Louisiana; Leevac had obtained insurance from defendant Westchester Surplus Lines Insurance Company, which protected Leevac against property damages and business income losses. *Leevac Shipbuilders LLC v. Westchester Surplus Lines Ins. Co.*, Case No. 2:14-cv-00399, Dkt. 1-1, Petition for Damages at 3. On January 12, 2013, Leevac's shipyard flooded, and Leevac sustained substantial property damage; as a result of the clean up and restoration, Leevac's business was suspended. *Id.* at 4. Leevac then initiated a claim with Westchester pursuant to the policy for the cleanup and restoration costs, property damages and business income losses. *Id.* Westchester agreed to pay for some of the property damage costs, but not all the business losses. *Id.* at 5. On December 23, 2013, Leevac filed suit in Louisiana state court; Westchester removed the case to federal court. *Leevac Shipbuilders LLC v. Westchester Surplus Lines Ins. Co.*, Case No. 2:14-cv-00399, Dkt. 1, Notice of Removal.

On July 16, 2014, Leevac served on Westchester its request for production, including a request for reinsurance files related to its claim. *Leevac Shipbuilders LLC v. Westchester Surplus Lines Ins. Co.*, Case No. 2:14-cv-00399, Dkt. 22-2, First Set of Request for Admissions, Request for Production of Documents and Interrogatories at 9. Westchester produced delayed and, according to Leevac, insufficient responses. Leevac then filed a motion to compel with the court, claiming that Westchester's production was deficient and untimely, and Westchester waived all objections as a result. *Leevac Shipbuilders LLC v. Westchester Surplus Lines Ins. Co.*, Case No. 2:14-cv-00399, Dkt. 22-1, Memorandum in Support of Motion to Compel Responses to Discovery. Leevac also moved to compel the production of categories of documents asked for in their initial request but not produced by Westchester; these included reinsurance files relating to Leevac Shipbuilders' policy. *Id.* at 4.

Leevac requested all reinsurance files and documents, citing *Imperial Trading Co. v. Travelers Property Cas. Co. of America*, No. CIV.A. 06-4262, 2009 WL 1247122 (E.D. La. May 5, 2009) in support. In that case, the court held that reinsurance agreements and related communications are relevant and discoverable in cases in which a plaintiff seeks bad faith damages against an insurance company based on its claims-handling conduct under La. Rev. Stat. 22:658. *Id.* at *3. First, the *Imperial Trading* court looked at what Louisiana law required of plaintiffs seeking to make out a bad faith claim; plaintiffs must show that the “insurer’s failure to tender payment within the statutory period was arbitrary, capricious, or without probable cause.” *Id.* The court discussed how “a plaintiff may seek to prove the insurer’s bad faith by showing that the insurer’s privately expressed reasons for denying coverage differed from those stated in public.” *Id.* For this reason, communications between an insurer and its reinsurers might “contain information that is relevant to [the insurer’s] good faith to the extent that [the insurer] explained its reasons for granting or denying portions of [the insured’s] claims or otherwise described or explained its handling of [the insured’s] claims.” *Id.*

Westchester argued that it was not required to produce reinsurance documents and attempted to distinguish *Imperial Trading*. According to Westchester, unlike the insurer in *Imperial Trading* which initially advanced a sum to the insured but then withdrew, Westchester maintained that it never withdrew, but “made repeated requests for information to Plaintiff, engaged with Plaintiff in the joint effort to resolve Plaintiff’s claim, investigated Plaintiff’s claim to the fullest extent possible, and paid all covered and undisputed amounts.” *Leevac Shipbuilders LLC v. Westchester Surplus Lines Ins. Co.*, Case No. 2:14-cv-00399, Dkt. 28, Memorandum in Opposition to Plaintiff’s Motion to Compel Responses to Discovery at 22. Westchester also argued that reinsurance information is irrelevant to Leevac Shipbuilders’ claim, citing *American Medical Systems, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Inc.*, No. Civ.A. 98-1788, 1999 WL 781495 (E.D. La. Sept. 29, 1999) (reinsurance information might only show the insurer’s “subjective belief” about the underlying claims). *Id.* at 22 n. 43.

The district court credited Leevac’s reliance on *Imperial Trading*, holding that it saw “no reason to break from such precedent,” and ordered Westchester to produce “any files or documents in its possession evidencing any re-insurance agreement or communications related thereto provided such documents pertain to Leevac’s policy or claim that is the subject of the present lawsuit.” *Leevac Shipbuilders*, 2015 WL 224890 at *8.

This decision is very promising for policyholders seeking documents reflecting claims communications between insurers and their reinsurers. Communications between reinsurers and insurers often contain important information about when the insurer actually received notice of a claim, which could prove critical in rebutting a “late notice” defense, as well as an insurer’s honest evaluation of the claim; in fact, the insurer’s communications with its reinsurers can, and often are, contrary to the official claims position asserted during coverage litigation. An insurer will fight aggressively to protect this information from production, asserting that it is highly confidential or that there is no relationship between the policyholder and the reinsurer to support discovery. But as the *Leevac Shipbuilders* court rightly recognized, communications with reinsurers are clearly relevant to a policyholder’s claims, especially when those claims include allegations of bad faith claims handling.

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