

Policyholders Should Reach For Reinsurance Documents

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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 Insurance Co.*, Case No. 2:14-cv-00399 (W.D. La. Jan. 15, 2015).



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According to its petition, plaintiff Leevac Shipbuilders is the owner and operator of a shipbuilding and repair facility in Louisiana; Leevac had obtained insurance from defendant Westchester Surplus Lines, which protected Leevac against property damages and business income losses.

On Jan. 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. Leevac then initiated a claim with Westchester pursuant to the policy for the cleanup and restoration costs, property damages and business income losses. Westchester agreed to pay for some of the property damage costs, but not all the business losses. On Dec. 23, 2013, Leevac filed suit in Louisiana state court and Westchester removed to federal court.

On July 16, 2014, Leevac served on Westchester its request for production, including a request for reinsurance files related to its claim. Westchester produced delayed and, according to Leevac, insufficient responses. Leevac then filed a motion to compel with the court, claiming Westchester's production was deficient and untimely, and Westchester waived all objections as a result. 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.

Leevac requested all reinsurance files and documents, citing *Imperial Trading Co. v. Travelers Property Casualty Company of America*, No. CIV.A. 06-4262 (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.” 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.” 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.”

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.” Westchester also argued that reinsurance information is irrelevant to Leevac Shipbuilders’ claim, citing *American Medical Systems Inc. v. National Union Fire Insurance Company of Pittsburgh Inc.*, No. Civ.A. 98-1788 (E.D. La. Sept. 29, 1999) (reinsurance information might only show the insurer’s “subjective belief” about the underlying claims).

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 reinsurance agreement or communications related thereto provided such documents pertain to Leevac’s policy or claim that is the subject of the present lawsuit.”

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 either highly confidential or that there is no relationship between the policyholder and 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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