Information Sharing Between Insurers and Policyholders

From the Experts
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Once a policyholder tenders a claim, an insurer is likely to request information and documentation from that policyholder about the underlying event, circumstance, occurrence or claim. The insured, however, may have legitimate concerns that sharing such information could result in the inadvertent waiver of evidentiary privileges and protections as to the insurer and third parties, or an adverse coverage determination. We discuss herein how insurers and insureds should approach information sharing under various scenarios.

The tender of an insurance claim often triggers an immediate, long-lasting tug of war between an insurer and an insurance policyholder ("insured"). At issue is access to information. In response to the tender, the insurer will often request extensive amounts of information and documentation. The insured, however, will face conflicting incentives. On the one hand, if the insurer ultimately agrees that coverage exists, then their interests should align, and information sharing will promote strategic decision-making. If, on the other hand, the insurer later denies coverage, then it could use the information it receives from the insured to defeat coverage in a subsequent declaratory relief action. Moreover, an insured may have legitimate concerns about sharing privileged or confidential information with the insurer, lest the insured later be deemed to have waived protections against disclosure of that information to third parties. Courts have addressed information-sharing disputes between insureds and insurers in a variety of postures. This article discusses these disputes at a high level to glean lessons for both insurers and policyholders.

The Cooperation Clause
"When an insurer investigates a loss claim, the insured has a duty to cooperate by submitting [information] … relevant to the claimed loss." Miles v. Great N. Ins. Co., 671 F. Supp. 2d 231, 238 (D. Mass. 2009). In this context, cooperation generally means that "there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense." Coleman v. New Amsterdam Cas. Co., 160 N.E. 367, 369 (N.Y. 1928) (Cardozo, J.). Judge Cardozo was referring to the insured's "defense" of the underlying, third-party action in the Coleman case. An insured's duty of cooperation most often arises from a specific "cooperation" clause, and consequently must be understood in context and interpreted to reflect the parties' intentions. Regardless of wording, however, an insured's duty to cooperate will virtually always include submitting to an under-oath examination in the first-party property damage context and providing documents. See Couch on Ins. § 199:37. Cooperation clauses generally also encompass a duty to provide notice and to forward suit papers. The purpose of
the cooperation clause is to enable the insurer to obtain all knowledge and facts concerning the [claim] ... while the information is fresh,” *Westbrook Ins. Co. v. Jeter*, 117 F. Supp. 2d 139, 141 (D. Conn. 2000), and, historically, the duty to cooperate has served as a mechanism to facilitate defense — not a vehicle to deny coverage.

Some courts have interpreted broadly phrased cooperation clauses to be expansive. Under Missouri law, for example, “a multitude of matters other than those specified in the policy might be said to be included under the term ‘cooperate’ depending upon the particular facts in the particular case.... [G]eneral cooperation clauses ... have been interpreted to require the insured to perform acts not explicitly stated in the insurance policy.” *Medical Protective Co. v. Bubenik*, 594 F.3d 1047, 1052 (8th Cir. 2010) (brackets, citations, and internal quotation marks omitted). But this does not appear to be a consensus approach, and is, indeed, overly simplistic; a court taking a more critical approach should consider whether the insured's purported duties “are responsibilities that the insurer must rely upon the insured to accomplish because it is conduct that cannot practically be completed by the insurer.” *SWC West LLC v. Westport Ins. Corp.*, 856 F. Supp. 2d 514, 526 (E.D.N.Y. 2012).

**Protections and Exceptions Governing Information-Sharing**

An insured, like any party in litigation, may prevent discovery of certain materials through a variety of doctrines and protections, including the attorney-client privilege and work-product protection. As relevant here, an attorney or client can waive either the privilege or the protection through disclosure or selective disclosure. There are also two relevant exceptions to these waiver rules in this context. First, courts have fashioned a "joint-client rule," which allows information sharing between clients represented by the same attorney without waiving privileges and protections as to others. Second, according to the “common interest doctrine," a party is entitled to share privileged or protected information with another party without waiver as to third parties, where the two parties, although not jointly represented, share a common legal interest. Note, however, that the common interest rule is an exception to the waiver rule; it is not itself a privilege or protection.

Separate from the attorney-client privilege and work product protection, confidentiality agreements are contractual commitments by parties not to disclose shared information to third parties. Often, such agreements expressly address how information should be handled, exchanged, and reproduced. These agreements — whether entered into when the insured and insurer are aligned in an underlying litigation or when the insured and insurer are adverse as to coverage but in negotiations — can “provide significant dual benefits by creating ... a means of preserving the confidentiality of shared information and augmenting the protections of legal privileges and protections." Scott D. Gilbert & Eric D. Greenberg, Information Sharing Between Policyholders and Insurers: Pitfalls and Protections (conference paper, on file with authors); see also *Employers Ins. Co. of Wausau v. Skinner*, No. 07-CV-0735, 2008 WL 4283346, at *7–9 (E.D.N.Y. Sept. 17, 2008). But confidentiality agreements are mere contracts, and some courts have found that these arrangements are not an absolute protection against waiver. See *Urban Box Office Network, Inc. v. Interfase Managers*, L.P., No. 01-CV-8854, 2004 WL 2375819, at *5 & n.5 (S.D.N.Y. Oct. 21, 2004).

**Various Defense Scenarios**

Information sharing between an insurer and insured is likely to be a continuous process. Immediately following the submission of a claim, an insurer may initially request only a handful of documents. But the insurer is likely to seek more information over time. While the sharing of factual information may not be problematic, more delicate issues arise when the insurer requests evaluative materials, especially materials prepared or reviewed by counsel defending the underlying action. See Jean A. O’Hare, *Information Sharing Between Insurance Companies and Policyholders* (conference paper on file with authors).

An insured's sharing of otherwise privileged or confidential materials with an insurer may be deemed a waiver with respect to the insurer, as well as other parties. And the insured must be aware that, in the event a coverage dispute results in a subsequent litigation, the insurer is almost certain to seek any legal memoranda or analyses generated by defense counsel.

After an insured tenders a claim, the insurer must determine whether the underlying event, occurrence or claim is covered under the policy pursuant to which it was tendered (or any other policy of which the insurer is aware and that might afford coverage). An insurer may make this determination quickly, and, in either event — acceptance or denial — the insured's course of conduct should be clear. If the insurer acknowledges the existence of coverage, the insured should typically share information broadly and regularly: Such information sharing promotes efficient representation. Moreover, as a general matter, independently privileged or protected information shared by an insured with an insurer that has acknowledged coverage should be exempt from the traditional waiver rules regarding evidentiary privileges under the joint client rule or the common interest doctrine.

It may nonetheless be prudent for the insurer and insured to enter into a confidentiality agreement. If, in contrast, the insurer formally denies coverage and refuses to defend, the
insured’s path is likewise clear: The insured may decline requests for additional information; an insurer’s rejection of coverage and refusal to defend generally excuses the insured’s obligations under the cooperation clause. See Am. Ref-Fuel Co. v. Hempstead v. Resource Recycling, Inc., 722 N.Y.S.2d 570, 574 (2d Dep’t 2001) (“[A]n insurer cannot insist upon cooperation … after it has repudiated liability. … Thus, [o]nce an insurer repudiates liability … the [in]sured is excused from any of its obligations under the policy.” (citations and internal quotation marks omitted)).

In the event that an insurer that has denied coverage and refused to defend later seeks production of privileged or protected materials in coverage litigation, courts in virtually every jurisdiction have held that neither the cooperation clause nor the common interest doctrine compels disclosure. Only one state has held otherwise.

In Waste Management, Inc. v. International Surplus Lines Insurance Co., 579 N.E.2d 322 (1991), the Illinois Supreme Court held that an insurer that has denied coverage is entitled to discover the insured’s privileged and protected information, finding that the duty to cooperate is tantamount to a waiver of the attorney-client privilege, see id. at 327–28, and that insurers and insured share a common interest, even in the event that the insurer rejects coverage. Id. at 328-29. The Illinois court also found that the insured could not claim work product protection as to documents from the underlying litigation; because the documents were produced before the insurer and insureds were adversarial, they were not prepared in advance of the coverage litigation and did not qualify as work product. See 579 N.E.2d at 329–31. But insureds can take comfort in knowing that Waste Management is an acknowledged outlier; it has been “assailed … as unsound and improperly reasoned” by “almost every foreign jurisdiction that has considered” it. Allianz Ins. Co. v. Guidant Corp., 869 N.E.2d 1042, 1053 (Ill. App. 2007). Furthermore, the Illinois court at least acknowledged in a Supplemental Order that its holdings with respect to the insurer’s right to access otherwise privileged and protected materials did not result in waiver as to the “party opponents in the underlying litigation.” 579 N.E.2d at 336. In other words, while an insurer in Illinois likely can compel production of privileged materials, that production does not result in a broader waiver.

Unfortunately, insureds typically cannot count on a fast claim determination; instead, they should be prepared to respond to information requests under a cloud of uncertainty. Indeed, in all likelihood, an insured will have to respond to multiple requests for materials before a formal coverage decision has been made — shortly after the insured tenders a claim and after an insurer offers to defend subject to a reservation of rights. Such requests leave an insured in a potential whipsaw: Failure to disclose the information, in extreme cases, could result in a denial of coverage based on an alleged “lack of cooperation,” but disclosure could result in both the denial of coverage and the waiver of privileges and protections as to third parties.

A court would most likely view independently privileged or protected information shared before a coverage decision has been made and while the insurer is defending subject to a reservation of rights to be exempt from traditional waiver vis-à-vis third parties under the common interest doctrine. But an insured should nonetheless insist that the insurer enter into a confidentiality agreement to govern any shared evaluative materials. Moreover, the insured’s in-house counsel should frankly assess whether the insurer ultimately will view the claim as covered. If coverage is legitimately ambiguous, or if the insurer has a history of vexatiously or frivolously denying and then litigating coverage issues, the insured should take a more cautious approach as to whether certain evaluative materials would fall within the cooperation clause. Cf. N. Ins. Co. of N.Y. v. Lamm, 212 F. App’x 868 (affirming finding of insurer’s bad faith based, in part, on its history of “litigating frivolous coverage-related issues”).

As stated above, it is all too often that an insurer will have doubts as to whether a purported triggering event, claim, or occurrence is covered, and the insurer accordingly offers to defend only subject to a “reservation of rights.” See, e.g., United States v. Hebsieh, 549 F.3d 30, 37 & n.7 (1st Cir. 2008). When an insurer offers to defend subject to a reservation of rights, the insured must either accept or reject the offer formally, and material consequences flow from this decision. If the insured accepts the conditional defense, then the insurer typically can control the defense of the underlying suit, and the insured likely will be found obligated to satisfy its reasonable cooperation duties. Under these circumstances, independently privileged and protected information and documents that the insured shares with the insurer will likely be safe from disclosure to third parties under the common interest doctrine. These and related materials, however, may, in limited circumstances, be subject to discovery by the insurer in any subsequent coverage dispute. If the insured rejects the offered conditional defense, then the insured generally will be excused from its information-sharing obligations, may retain independent counsel, and, upon prevailing in the coverage action, may seek indemnification from the insurer. Moreover, an insurer whose offer to defend subject to a reservation of rights has been rejected is unlikely to be able to compel production of privileged materials related to the underlying litigation in a subsequent coverage dispute.

As explained in Metropolitan Life Insurance Co. v. Aetna Casualty &
Surety Co., 730 A.2d 51 (Conn. 1999), "disclosure pursuant to [a] cooperation clauses possibly could be required only if and when the insurance company participates 'in the defense' of underlying cases;" id. at 58; where an insurer has "reserved [its] rights," and the insured has "retained its own attorneys and acted independently," in the underlying litigation, there is no basis for further cooperation. Id. at 59, 61-62. There is some authority, however, for the proposition that the withdrawal of a reservation of rights revives an insured's duty to cooperate. See Heubel Materials Handling Co. v. Universal Underwriters Ins. Co., 704 F.3d 558 (8th Cir. 2013). Moreover, as noted, in Illinois, an insured's information-sharing duties survive the rejection of a proffered defense subject to a reservation of rights, and, in New York and California, among other states, the operative question before an insured is entitled to independent counsel is not just whether the insurer has asserted a reservation of rights, but whether an actual conflict of interests exists. See, e.g., Federated Dept' Stores, Inc. v. Twin City Fire Ins. Co., 807 N.Y.S.2d 262, 266 (1st Dep't 2006); San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc., 208 Cal. Rptr. 494 (Cal. Ct. App. 1985).

Elements of a Cooperation Claim/Defense

Insurers have asserted cooperation clause arguments as offensive claims, as affirmative defenses, and in support of discovery. The threshold question raised by such a claim/defense is whether the insured's conduct violated the cooperation clause. In the information-sharing context this can be a surprisingly nuanced question: For example, does an insurer's innocent factual mistake in sharing information constitute a breach? See Couch on Ins. § 199:42 (answering in the negative). Moreover, courts evaluate even the breach element of a cooperation claim/defense under a test of reasonableness: Insurers are entitled only to information that is reasonably material to the claims in the underlying litigation, and the insured satisfies its duty if it provides reasonable assistance to facilitate the defense of a claim. See, e.g., Lodgenet Entm't Corp. v. Am. Int'l Specialty Lines Ins. Co., 299 F. Supp. 2d 987, 995 (D.S.D. 2003). And, as noted, where the cooperation clause is phrased broadly, the critical question may be whether the insured's purported duty is an act within the insured's exclusive control.

Beyond the question of breach, in most jurisdictions, a cooperation clause claim/defense involves several additional elements, including, "the existence of substantial prejudice ... and ... the exercise of reasonable diligence to secure the insured's cooperation." Bubenik, 594 F.3d at 1051. Both elements often preclude resolving such a claim/defense on summary judgment, because both are fact-intensive. For example, in many states, the prejudice element is tied directly to the outcome of the underlying litigation. Id. at 1053 (finding prejudice under Missouri law, where insured's testimony would have been important to the defense, and insured's refusal "made it impossible for [insurer] to produce an expert witness"). Indeed, some courts have held that prejudice can be determined only after the underlying action has concluded adversely to the insurer; other courts, however, have held that a prejudice finding need not wait for such a determination. See Charter Oak Fire Ins. Co. v. Interstate Mech., Inc., No. 10-CV-1505, 2013 WL 3809466, at *13 (D. Oregon July 23, 2013) (collecting cases).

Courts likewise often treat the diligence element as a question of fact, but an insurer that has communicated regularly with the insured may, as a matter of law, have satisfied this element. Finally, a court might find that even an insured's prejudicial breach can be cured. See WMC Mortgage Corp. v. Mass. Property Ins. Underwriting Ass'n, No. 09-CV-10437, 2010 WL 3734120, at *12 (D. Mass. Sept. 1, 2010). Whether the insured's breach, or any prejudice resulting therefrom, can be cured will also be a fact-specific inquiry. But an insured should exercise effort, diligence, and care to correct any mistakes in information or materials that it provides to an insurer.

Conclusion

An insured's duty to cooperate does not exist in the abstract. It most often arises from a vaguely phrased, specific but not carefully delineated provision in an insurance contract. Moreover, the nature and scope of the duty — particularly with respect to information sharing — will depend on the insured's and insurer's then-existing relationship, and other highly circumstantial and fact-intensive considerations. Whether an insurer has a viable claim/defense based on an insured's alleged breach of the duty to cooperate will turn on further, separate factual considerations. And finally, the relationship between an insurer and insured may be in constant flux, unfortunately requiring an insured to routinely respond to reasonable information and document requests under a cloud of uncertainty. Insurers' in-house counsel consequently must approach such requests in a flexible and dynamic manner, looking for opportunities to share information, but aware of the risks inherent to disclosure of evaluative, sensitive, or otherwise confidential materials to a potential adversary.

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