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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@portfoliomedia.com

Pay No Attention To The Insurer Behind The Curtain!

Law360, New York (December 08, 2009) -- Like that adage from political campaigns — if you repeat something often enough, it will be accepted as true — insurers in insurance coverage disputes with their policyholders assert time and time again that reinsurance documents are irrelevant to how their policy language should be interpreted and how the policyholders' claims should be covered.

With the rise in the number of reinsurance disputes being litigated in court, rather than behind closed doors in arbitrations, documents have become available that demonstrate the falsity of insurers' assertions of irrelevance.

Insurance companies fight to keep reinsurance documents from seeing the light of day in coverage disputes with their policyholders because reinsurance documents contain relevant, and likely unguarded, discussions of the appropriate insurance coverage for the claims, as illustrated by insurers' and reinsurers' publicly available briefs, pleadings and exhibits to court filings.

Rule 26 and Related State Court Rules Requires the Production of Reinsurance

The first place to start in an analysis of whether reinsurance documents are discoverable is the applicable rules of civil procedure for the court in which the coverage dispute is being litigated.

For example, Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure requires production of reinsurance agreements. The rule states:

"In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

"... for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." [1]

Note that the rule does not state "any insurance policy." Rather, it uses language broad enough to encompass reinsurance agreements.

Even if the language of the rule were read narrowly, reinsurance agreements would meet the definition nonetheless.

In explaining the concept of reinsurance, counsel for insurers and reinsurers have used language neatly tracking Rule 26, explaining that "reinsurance is liability insurance which provides cover for the reinsured in the event that it is liable to pay the original insured." [2]

Similarly, Lloyd's of London's Web site explains that insurance companies "want to have insurance," and that when insurance companies "insure a risk again, it is called reinsurance," which, "for [the] most part[,] ... work[s] in exactly the same way [as direct insurance] — it is just that the 'insured' is another insurer, known as the 'reinsured.'" [3]

Recognizing those parallels and the scope of Rule 26, several federal courts have held that reinsurance agreements are discoverable and must be produced in coverage litigation. [4]

Certain state courts, which have rules of procedure similar to Rule 26, have reached the same result. [5]

Reinsurance Documents are Relevant Because They Discuss the Policyholder's Claims, How Those Claims Fit Within the Disputed Insurance Policies, and Notice of the Claims

When insurers and policyholders dispute the meaning of policy terms in coverage lawsuits, what documents could be more relevant than those of insurance companies discussing the claims against the policyholder and the coverage provisions at issue?

Insurers and their reinsurers debate the application of those same insurance policy terms and conditions in the ordinary course of their business.

The standard for discovery is broad enough to encompass, under the Federal Rules of Civil Procedure, "any nonprivileged matter that is relevant to any party's claim or defense."^[6]

Clearly, discussions of policy provisions, coverage and the underlying claims against the policyholder should be considered relevant in a coverage litigation between a policyholder and its insurer in which questions of policy interpretation and how claims fall within policy coverages are in dispute.

The relevance of the documents is based on the nature of the (often contentious) insurer/reinsurer relationship.

First, an insurance company must demonstrate that claims for which it seeks reinsurance coverage are covered under the reinsurance agreement and under the insurance policy the insurers sold to the policyholder; discussions of how claims fall within insurance policy coverage certainly are relevant to coverage disputes regarding the same policies.

Second, just as insurers assert to their policyholders, reinsurers assert that proper notice of claims must be given to recover reinsurance for claims; discussions of notice and potential coverage also are relevant to coverage disputes with policyholders.

Third, reinsurers often have the ability to associate with insurers in the settlement of claims, if not the right to control them entirely, and have access to the insurer's records; it could hardly be argued that if the reinsurer can control the settlement of the policyholder's claim, or has reviewed all of the claims file records, that such information is not relevant.

Finally, the often adversarial nature of the insurer/reinsurer relationship reinforces the fact that the documents sought are not privileged or otherwise protected from disclosure.

Documents Discussing How Policy Provisions are to Be Interpreted and How Claims Should Be Covered are Relevant to Coverage Disputes

The nature of reinsurance law leads to insurers and reinsurers discussing both the reinsurance agreements and how the insurer's direct insurance policies provide coverage for the policyholder's claims.

The London insurance market is an international hub of reinsurance activity, and the United Kingdom's House of Lords' recent watershed decision of *Lexington Insurance Co. v. Wasa International Insurance Co.* discusses an insurer's obligation to prove that claims are covered under insurance policies and reinsurance agreements.

Lord Mance explained that "an insurer seeking indemnity under a reinsurance must, in the absence of special terms, establish both its liability under the terms of the insurance and its entitlement to indemnity under the terms of the reinsurance."^[7]

Moreover, the ceding insurer (the same party disputing coverage with the policyholder) "remain[s] obliged to show that the basis on which the claim had been settled was 'one which fell within the terms of the reinsurance as a matter of law or arguably did so'"; a key point for policyholders arguing about insurance coverage "where the insurance and reinsurance incorporated materially identical

terms with materially identical effect (and the issue was whether and on what basis the facts fell within such terms).”[8]

Thus, during the claims handling and coverage analysis processes that take place in the ordinary course of an insurer’s and reinsurer’s business, insurers and reinsurers, by necessity, exchange letters, memoranda and numerous other documents in which claims handlers and analysts review claims and coverage.

If an insurance company is obligated to show its reinsurers how the policyholder’s claims fall within the disputed insurance policy and reinsurance agreement, reinsurance files certainly contain claim summaries that detail the claims against the policyholder, the policyholder’s and the insurer’s position regarding coverage, and analyses of the insurance at issue, in addition to the reinsurance issues being discussed, as documents submitted in connection with reinsurance coverage actions reveal.[9]

Such insurance and reinsurance analyses likely are performed by the same claims personnel who handle the policyholders’ claims. Although insurers may deny the overlap, their own materials show otherwise.

For example, a 2009 job listing from ACE’s careers Web site sought a “claims specialist” whose responsibilities would include “[a]nalyz[ing] coverage and communicat[ing] coverage positions,” “direct[ing] investigation into loss facts,” and “[r]eport[ing] to reinsurers and facilitat[ing] the prompt collection of reinsurance on those matters where they are accountable.”[10]

Documents Discussing Notice are Relevant to Coverage Disputes

In addition to discussing the claims against the policyholder and how they fit within the insurer’s policy terms, reinsurance documents also discuss the question of notice.

Insurers' claims of late notice or prejudice from allegedly late notice may be belied by their correspondence with their reinsurers.

For example, in a recent reinsurance coverage action, Travelers Indemnity asserted in its first amended complaint against its reinsurers that Travelers' policyholder sued Travelers for coverage for environmental claims in 1993, and admitted that Travelers already had put its reinsurers on precautionary notice of the claims five years before that (in 1988).[11]

Documents Discussing Settlement of the Policyholder's Claims or Encompassing the Insurer's Claim File are Relevant to Coverage Disputes

Reinsurance involves the ceding a portion of the risk that insurers assumed. When the ceding of the risk is by all accounts in a particular year, it is called treaty reinsurance, and when it is for a particular account or risk, it is called facultative reinsurance.[12]

As part of that arrangement to cede risk from the insurer to the reinsurer, the reinsurer has the opportunity, at a minimum, to associate with the insurer in the handling of the policyholder's claim, as well as the settlement of the insurer's coverage with the policyholder.[13]

Some reinsurance agreements go further and grant control over the handling and settlement of claims against the policyholder exclusively to the reinsurer.[14]

Again, this is evidence that reinsurance documents are relevant, because they contain the ordinary course of business claims handling documents created by reinsurers that are involved with or completely handle the policyholder's claims.

In fact, insurers discuss with their reinsurers "strategies and procedures that [insurers] use[] today in dealing with asbestos claims," including the claims against various policyholders in the insurer's portfolio.[15]

Moreover, a policyholder should know who is handling its claims; that concern is even more pressing in the context of bad faith claim handling or refusal to settle allegations.[16]

As part of that claims handling arrangement, reinsurers have “access-to-records” clauses that allow the reinsurers to audit the insurers’ claims files, including information relating to the policyholder’s claims for coverage.[17]

Access-to-records clauses and the reinsurance relationship lead to reinsurers auditing the insurers’ “systems, policies, procedures and practices for the handling of ... claims”; having “meetings with [insurers’] internal claims management personnel” to discuss “claims handling organization, systems, practices and procedures of” insurers; and meet with “management and claims personnel to discuss specific claims, practices and procedures ... so that invalid ... claims are not compensated.”[18]

Other cases make plain that claims file documents are relevant and not privileged or work product; the same documents should not magically become irrelevant, privileged or work product because another insurance company (the reinsurer), which may be adverse to the ceding insurer, reviewed them.[19]

When a reinsurer has the exclusive ability to settle claims against the policyholder, and access to the insurer’s records of the claims against the policyholder, it is unclear how any insurance company can assert in good faith that such documents are irrelevant to how the policy language should be interpreted or claims should be covered.

The Contentious and Adversarial Relationship Between Insurers and Reinsurers Demonstrate That There Is No Privilege for Reinsurance Documents

Finally, it is noteworthy that the insurer/reinsurer relationship often turns adversarial, because, as one insurance company put it, “in the world of reinsurance, some reinsurer always complains.”[20]

That is confirmed by case law and other publicly available information, which reveals that other insurers and their reinsurers regularly discuss and litigate the same issues that insurers and policyholders litigate, such as the number of occurrences.[21]

Before there are arbitrations and court actions, of course, there are documents created in the ordinary course of business in which insurers and reinsurers discuss whether and how policy provisions apply and whether and how claims should be covered by the direct insurance policy.

Again, discussion of the proper interpretation of disputed policy provisions is relevant in lawsuits between insurers and policyholders.

Moreover, the adversarial nature of insurers and their reinsurers is further support for the principle that communications between them are not privileged.[22]

Conclusion

Insurance coverage disputes between policyholders and their insurers revolve around questions of policy interpretation, notice, and how claims against the policyholder fit within the terms of the insurance policies at issue.

Documents relating to those issues are relevant to the dispute and should be discoverable.

Recent court decisions and other materials reveal that reinsurance materials discuss those very issues and, therefore, should be discoverable.

--By Scott N. Godes, Dickstein Shapiro LLP

Scott Godes is counsel with Dickstein Shapiro's insurance coverage practice in the firm's Washington, D.C., office, as well as co-head of the firm's cyber security insurance coverage initiative and co-chair

of the American Bar Association Computer Technology Subcommittee of the Insurance Coverage Committee of the Section of Litigation.

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[1] Fed. R. Civ. P. 26(a)(1)(A)(iv).

[2] Angela S. Y. Yim, Tow Lu Lim, When Reinsurance May Not Be “Back to Back” — Wasa v. Lexington, (Oct. 19, 2009) www.mayerbrown.com/publications/article.asp?id=7736&nid=6.

[3] Lloyd’s, What Is Reinsurance? Lloyds.com, (Nov. 22, 2007) www.lloyds.com/About_Us/What_is_Lloyds/Insurance_for_beginners/What_is_reinsurance.htm.

[4] See, e.g., Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am., No. 06-4262, 2009 U.S. Dist. LEXIS 41372, at *6 (E.D. La. May 5, 2009) (“As a number of courts have held, reinsurance agreements fit within the plain language of this rule [26(a)(1)(A)(iv)] when the primary insurer is named as a party.”); G-I Holdings Inc. v. Reliance Ins. Co., No. 00-6189, at *12:9-10 (DMC) (D.N.J. Feb. 24, 2005) (“reinsurance agreements are insurance agreements within the literal coverage of Rule 26(b)(2)”).

[5] See, e.g., N.Y. C.P.L.R. 3101(f); Anderson v. House of Good Samaritan Hosp., 767 N.Y.S.2d 330 (App. Div. 4th Dep’t 2003).

[6] Fed. R. Civ. P. 26(b)(1).

[7] Lexington Ins. Co. v. Wasa Int’l Ins. Co., [2009] UKHL 40 (Mance, L) ¶¶ 35, 36 2009 WL 2207451 (emphasis added), appeal taken from: [2008] EWCA (Civ), 150 (H.L.).

[8] *Id.* (quoting *Assicurazioni Generali SpA v. CGU International Insurance plc* [2004] EWCA (Civ) 429; [2004] Lloyd's Rep. 457).

[9] See, e.g., *AIU Ins. Co. v. TIG Ins. Co.*, No. 07-7052, Declaration of Marc L. Abrams at 372-386 of 402 (S.D.N.Y. June 3, 2009) (document retrieved via PACER).

[10] The quoted job listings had been found at: ACE-INA, Claims Specialist (Job ID 296104), ACE Job Openings, www.aceusa.com/Careers/Pages/JobPostings.aspx, (visited on Feb. 23, 2009); see also Claims Specialist — LIU Casualty Claims — 05337, ComputerJobs.com, www.computerjobs.com/job_display.aspx?jobid=2300397, (visited on Feb. 23, 2009) (claims specialist job responsibilities include “participating in meetings with ... reinsurers”).

[11] See First Amended Complaint ¶¶ 36, 43 *Travelers Indem. Co. v. La Fonciere Compagnie D'Assurances*, No. 09-00426, (D. Conn) (complaint available publicly through PACER).

[12] See, e.g., Jeffrey Stempel, *Stempel on Insurance Contracts, The Nature of Insurance*, § 17.02 (3d ed. 2005).

[13] See, e.g., T. Darrington Semple, Jr. and Robert M. Hall, *The Reinsurer's Liability in the Event of the Insolvency of Ceding Property and Casualty Insurer*, originally published in 21 *Tort & Ins. L.J.* 407 (1980), republished on Robert M. Hall, www.robertmhall.com/articles/j.htm, § IV.A. (Oct. 20, 2009).

[14] See, e.g., Plaintiff's Motion to Seal Part #3 of Docket No. 63 *Travelers Indem. Co. v. La Fonciere Compagnie D'Assurances*, No. 09-00426, (D. Conn. July 31, 2009) (“the reinsurers ... would be able to control the defense and settlement of the underlying Goodyear case” because the reinsurance treaty establishes “that reinsurers shall have sole control of the negotiation, settlement and/or adjustment of any claim ... which exceeds [\$4,000,000 ...].”) (brief available publicly through PACER).

[15] Memorandum in Opposition to Defendants' Motion to Strike the Affidavit of Joanne Caprice and Certain Allegations in Plaintiff's Memorandum in Support of Motion to Remand, Affidavit of Joanne Caprice, Exhibit 3 at 1, Century Indem. Co. v. Certain Underwriters at Lloyd's, London, No. 2:05-cv-6004-SD (E.D. Pa. Jan. 31, 2006) (brief available publicly through PACER).

[16] See, e.g., Imperial Trading, 2009 U.S. Dist. LEXIS 41372.

[17] See, e.g., AIU Ins. Co. v. TIG Ins. Co., No. 07-7052, slip op. at 5 (S.D.N.Y. Aug. 28, 2008).

[18] Memorandum in Opposition to Defendants' Motion to Strike the Affidavit of Joanne Caprice and Certain Allegations in Plaintiff's Memorandum in Support of Motion to Remand, Affidavit of Joanne Caprice, Exhibit 2 at 1-2, Century Indem. Co. v. Certain Underwriters at Lloyd's, London, No. 2:05-cv-6004-SD (E.D. Pa. Jan. 31, 2006) (brief available publicly through PACER).

[19] See, e.g., R&R Sails Inc. v. Ins. Co., 251 F.R.D. 520 (S.D. Cal. 2008) (sanctions against insurer for failure to produce electronic claims log); Mass. Bay Ins. Co. v. Stamm, 700 N.Y.S.2d 707, 708 (App. Div. 1st Dep't 2000) (documents exchanged with reinsurer are not privileged).

[20] American Home's Motion for Leave to Appeal from the Appellate Division, First Department, at 14, Allstate Ins. Co. v. Am. Home Assur. Co., No. 602594/03 (N.Y. Feb. 4, 2008) (emphasis in original).

[21] See, e.g., Allstate Ins. Co. v. Am. Home Assur. Co., 837 N.Y.S.2d 584 (App. Div. 1st Dep't 2007) (reinsurance disagreement involving Allstate regarding number of occurrences for latent injury claims); N. River Ins. Co. v. Ace Am. Reins. Co., 361 F.3d 134 (2d Cir. 2004) (insurer disputing number of occurrences with its reinsurer for asbestos claims); Travelers Ins. Co. v. Keeling, 996 F.2d 1485 (2d Cir. 1993) (Travelers and London Market reinsurers disputing reinsurance coverage and number of occurrences for premises/operations ("nonproducts") asbestos claims); see also Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co., 837 N.Y.S.2d 616 (App. Div. 1st Dep't 2007) (insurer and reinsurer debated allocation and number of occurrences for asbestos claims); Hartford Accident & Indem. Co. v.

Ace Am. Reins. Co., 936 A.2d 224 (Conn. 2007) (illustrating insurer's discussion and litigation with its reinsurer regarding the number of occurrences for asbestos claims).

[22] See, e.g., Stamm, 700 N.Y.S.2d at 708; see also Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's London, 676 N.Y.S.2d (Sup. Ct. N.Y. County 1998), aff'd, (reinsurer cannot rely on privilege to withhold from insurer minutes of Environmental Claims Reinsurance Group) 692 N.Y.S.2d 384 (App. Div. 1st Dep't 1999).

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