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Trials and TRIBULATIONS

Is there an insurance investigation privilege?

Until recently, I had never been confronted with a claim at a deposition that a witness would not be permitted to testify on the grounds that he had been interviewed by an insurance investigator and the communications were privileged. The assertion of such an objection recently occurred in a case pending in a matter in which I am currently involved.

It so happens that one of the defendants is a self-insured entity who has employed a risk manager who conducts investigations of accident claims.

At the deposition of a defendant who is employed by the self-insured entity, the witness testified that he was contacted by the risk-manager shortly after the accident. When I questioned the witness about the discussions, I was surprised when the defendant's attorney, directed him not to answer my questions on the grounds of privilege. When I inquired as to the basis for the objection and the direction not to answer, I was advised that there was an insurance investigator privilege that applied and therefore, any conversation between the investigator and the witness was privileged. When I inquired further as to the basis of this privilege, I was advised that it was an accepted fact that a self-insured entity is treated the same as an insurance company and therefore, any conversation with the investigator was privileged.

A few months later, I filed a Motion to Compel regarding a number of items, including documents that had not been produced. In that motion I also included a request that the above-mentioned witness reappear for a deposition for the purpose of being questioned on the communications with the investigator. Although we were successful with 90 percent of what we sought in our motion, we were unsuccessful with respect to obtaining an order directing the witness to reappear for questioning. Although no case law was submitted in support of the existence of such a privilege, the Court denied our request and advised that it did not appear reasonable to have the investigator's work product subject to discovery.

The Court further advised that our motion with respect to this one issue was denied without prejudice and we were welcome to submit further argument in support of our request for full disclosure of the investigator's questioning of the witness.

By MICHAEL R. WOLFORD
Daily Record Columnist

I am, therefore, in the process of submitting a further argument to the Court, and I thought this issue would be an interesting subject for an article in our monthly column.

Searching for the privilege

Since there are a number of privileges that have been codified in the New York Civil Practice Law and Rules, it was only logical to begin my search there. In accordance with CPLR 3101(b), privileged matter shall not be obtainable.

Furthermore, pursuant to CPLR 3101(c) the work product of an attorney shall not be obtainable. In addition, CPLR 3101(d)(2) provides that materials otherwise discoverable and prepared in anticipation of litigation or for trial by a party or a party's representative may be obtained only upon a showing that the party seeking discovery has a substantial need of the materials and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.

CPLR 3101(g) provides that accident reports shall be subject to full disclosure so as long they have been prepared in the regular course of business operations, etc.

Although there is no CPLR provision that is directly on point, there are numerous cases that address the extent to which communications with an investigator and his work product may be discovered or is immune from discovery.

Based upon my review of relevant case law, it appears that no Court has held that there is an insurance investigator privilege. However, there are cases holding that an investigator's work product is privileged if it is prepared in anticipation of litigation.

For example, in *McCoy v. State of New York*, 52 AD3d 1212 (4th Dep't 2008), the Appellate Division, Fourth Department reversed the trial Court, and ruled that the senior investigator that the plaintiff sought to depose, who investigated the accident scene after the plaintiff had filed a Notice of Intention to file a claim, would be immune from being deposed since his report was investigation material and it was prepared in anticipation of litigation.

However, a different conclusion was reached in the case of *Merrick v. Niagara Mohawk Power Corporation*, 144 AD2d 878 (3d Dep't 1988). That case dealt with a natural gas explosion in which the defendant had hired a consultant to prepare a report, which contained findings with respect to the explosion. The Court ruled that the report should be produced. The decision was based on the fact that the report was prepared in the ordinary course of defendant's business operations, and at that point, no litigation had been commenced.

In *Landmark Insurance Company v. Beau Rivage Restaurant, Inc.*, 121 AD2d 98 (2d Dep't 1986), the Court dealt with a fire loss, which also caused injuries. After the fire, officials concluded that the fire was suspicious and, as a result, the insurance company immediately retained an independent adjustor and arson expert to investigate. The investigation concluded that the fire was arson; consequently, the insurance company commenced an action to declare the policy void by reason that the hazard was increased by means within the control of the insured. The defendant's insured sought to obtain the investigation report, and the Court concluded that the insurance company had failed to sustain its burden that the report was prepared exclusively in anticipation of litigation and ordered it produced.

The Court further concluded that the burden of demonstrating that the material was immune from discovery under CPLR 3101 rests with the party claiming the privilege. To fall under the protective umbrella of the privilege, the party is required to demonstrate that it was prepared solely in anticipation of litigation.

If the report is material that is prepared in the ordinary course of the insurer's business, it is not immune from discovery. Once the claim is rejected, then subsequent reports made to resist the claim would be protected by CPLR 3101(c)(d).

In *Advanced Chimney, Inc. v. Graziano,* 153 AD3d 478 (2d Dep't 2017), the Court also concluded that any investigation report that is prepared to determine whether or not the insurance company will pay or reject the claim is not privileged. Therefore, these reports are discoverable, even those which are a mixed/multi-purpose report where part of it is prepared for potential litigation with the insured.

Based upon the above cases and other similar decisions, it is evident that there is no blanket investigator privilege. A report by an investigator retained by a party is not immune from discovery, as long as the case has not yet risen to the level of litigation or at least threatened litigation.

Conclusions

Among the conclusions that can be derived from this research are the following:

There is no insurance investigator privilege;

Courts have ruled that the work product of an investigator is protected from discovery by the adversary when litigation has either been filed or threatened;

The party asserting the privilege has the burden of demonstrating why the work product should not be discovered; and

If the investigation is being conducted in the normal course of a company's business and no litigation has been commenced, the investigator's work product is normally discoverable.

In our case, which involves the deposition of a witness who spoke with an investigator a few days after the accident, the communication is discoverable. There was no threatened litigation at the time the witness and investigator spoke and, therefore, no privilege can be asserted by defendants.

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