When Should You Burn Your Coverage Counsel?

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Foland, Wickens, et al.
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When they’re wrong!

When Should A Carrier Reveal Its Coverage Counsel?

- Of course… IT DEPENDS

Various Stages of a Coverage Matter at Which Counsel May Be Revealed

- Which stages often present the question for consideration?
  - Issuance of the declination, reservation, or coverage statement
  - Response to push back on the declination, reservation, or coverage statement
  - Negotiation of a non-waiver agreement
  - Declaratory Judgment action, i.e. should your coverage counsel also be your coverage litigator?
  - Advice of counsel defense
  - Non-retained expert identification

Overriding Considerations

- Timing
- Coverage counsel's relationship with opposing or personal counsel
- The need for fact investigation, EUO, etc.
- Is this a case to negotiate, litigate, or try?
- Staffing considerations
- Will disclosure essentially disqualify counsel from future representation on the same claim?
- How will disclosure affect privilege?
- Do you intend to assert advice of counsel in defense of any resulting EC claim or lawsuit?
- Maximum effect

Common Situations Typically Do Not Require You to Burn Coverage Counsel

- Common Coverage Assessments
  - Construction/AI tenders
  - Permissive Use
  - Ownership
  - Intentional act
- Coverage position letter to be issued to an insured directly
- No prior coverage-related communications

Why Not Burn Coverage Counsel in Common Situations?

- The initial coverage position letter, i.e. RoR, Declination, etc. typically need not be issued by your coverage counsel.
  - When people receive letters from lawyers, they hire their own.
  - By disclosing that you have retained coverage counsel you may signal concern over your position.
  - Ghost-written letters may be appropriate if not written in legalese.
    - Typically we do not recommend citation to legal authority, whether or not ghost-written.
  - Unnecessarily opens the door to future issues of privilege and representation by your “go to” coverage counsel.

What about Common Coverage Situations Involving Personal Counsel for An Insured?

- This is a closer call.
  - Insured may already sense or have been advised on potential coverage issues
  - Mutually assured destruction on privilege issues, both lawyers could become witnesses
  - Some personal counsel are less likely to push back against experienced outside counsel.
  - Burning coverage counsel frees up the use of legal authority, without concerns over cross examination of non-lawyer issuing the letter regarding legal authority.
  - May allow for informal negotiation of positions before they become intractable

Which Situations Are Best To Use Outside Counsel?

- Time-limited demands from Plaintiff or Personal Counsel
- Tenders accompanying settlement demands
- Complex coverage issues requiring citation to legal authority
- Unfamiliar territory, either geographically or subject matter
  - e.g. D&O policy triggered for double homicide
    - Wait, what?

Another Situation That May Call On You to Burn Coverage Counsel is Push Back

When personal counsel for an insured pushes back against an RoR or declination, it may be time.

- Push back may be via phone, ghost letter, or on personal counsel's letterhead.
- Burning your counsel at this point may help you avoid unnecessary litigation.
- Your counsel needs to know your objective at this point.
  - Non-waiver, DJ, global settlement, etc.

Even If The Carrier Responds Initially To Push Back, Outside Counsel May Be Best To Negotiate.

- Assistance of counsel likely necessary to make sure you include all necessary terms in a settlement agreement or non-waiver
  - Non-standard contracts
  - Forms rarely suffice
- Use of outside counsel may limit discovery from carrier corporate representative, but at the expense of making counsel a witness.
- "If I'm going to have make the soup, I should get to shop the groceries." – Bill Parcels
  - It may be worth disclosing your coverage counsel to assist in negotiations designed to lead to an interim or final settlement that includes coverage resolution.

Should Coverage "Counsel" Also Act As Coverage "Litigator"?

- Has counsel's role been limited to legal analysis?
- Has counsel conducted a portion of the coverage investigation?
- Has counsel made any statements to the claimant or insured which may be construed as "admissions" on behalf of the carrier?
- Has the declaratory action induced any counter-claim to which advice of counsel may be a defense or coverage counsel may be a witness?

Advice of Counsel as a Defense

- Formal defense, i.e. pleaded as an affirmative defense or affirmatively asserted as a defense by some means other than in response to discovery
- The key issue pertains to privilege
  - In most jurisdictions is advice of counsel is pleaded as a defense, or if the insurer places the advice at issue in defense of a claim, privilege may be waived.
  - Plaintiff typically cannot put advice of counsel at issue in such a way as to trigger a waiver of privilege.

Rules in Most Jurisdictions

- "The mere fact that [insurer] relied on the opinion of coverage counsel in denying plaintiffs' claim does not waive the attorney-client privilege.
  - Botkin v. Donegal Mut. Ins. Co., No. 5:10CV00077, 2011 WL 2447939, at *6 (W.D. Va. June 15, 2011)(relying upon authority from the Third and Ninth Circuits, Maryland, and North Carolina); but see Lexington Ins. Co. v. Swanson, 2007 WL 2121730 (W.D. Washington July 24, 2007).

According to Seton Hall, a majority of jurisdictions follow the "Hearn" affirmative act test.

- (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975).
  - "The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication."
    - Steven Plitt, The Elastic Contours of Attorney-Client Privilege and Waiver in the Context of Insurance Company Bad Faith: There's A Chill in the Air, 34 Seton Hall L. Rev. 513 (2004)

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Thank You

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