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NEWSLETTER

Insurer Denied Discovery of Communications Between Insured and Defense Counsel

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The United States District Court for the Southern District of Texas has held that an insurer is not entitled to discovery of privileged communications between its insured and defense counsel. *Fugro-McClelland Marine Geosciences, Inc. v. Steadfast Ins. Co.*, 2008 WL 5273304 (S.D. Tex. Dec. 19, 2008).

The insurer had issued a professional liability policy to an engineering company. The policy included a provision requiring that the insured "[c]ooperate with [the insurer] in the investigation or settlement of the claim or defense against the suit." The insurer contended that the insured had breached this provision in connection with the defense of an action against it for negligence and breach of contract. On this basis, among others, the insurer refused to reimburse the company for amounts paid to defend and settle the claim.

In the coverage litigation that followed, the insurer sought the production of documents reflecting communications between the insured and its defense counsel. According to the insurer, although the documents might otherwise be protected from disclosure by the attorney–client and work–product privileges, the documents were not privileged as to it because: (i) the insurer and insured shared a common interest in the underlying action; (ii) the company was obligated to share privileged materials with the insurer pursuant to the policy's cooperation clause; and (iii) the insured had waived any privilege through offensive use. The court disagreed.

First, the court recognized that the common interest doctrine, which generally applies to protect confidential communications made for the purpose of facilitating the rendition of legal services and concerning a matter of common interest, ordinarily cannot be claimed by one party against the other in a subsequent dispute if the two parties previously were represented by the same counsel with respect to the matter in which they shared a common interest. According to the court, the issue is whether the party resisting disclosure had a reasonable expectation of confidentiality in the communications at the time they were made, and there can be no such expectation where the insured and the insurer shared representation in the underlying suit. In this regard, the court pointed out that the insured had retained separate counsel to defend the action and that the insurer was advised that counsel would not share with it opinions about the claims asserted against the company due to conflicts of interest raised by the coverage issues. Based on these undisputed facts, the court determined that the company reasonably expected its privileged communications to remain confidential and

concluded that the common interest doctrine did not compel their disclosure to the insurer.

Next, the court turned to the policy's cooperation clause and noted that a waiver requires a showing of an "intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." In the absence of evidence that the parties intended otherwise, the court refused to conclude that the provision operated as a contractual waiver of the insured's attorney-client and work-product privilege. According to the court, "[i]f the parties had intended the cooperation clause . . . to constitute a waiver of privileges in any third-party lawsuit, they could and should have said so in the policy."

Finally, the court declined to find that the insured had waived any privilege by affirmatively seeking relief in this case. According to the court, the "offensive use" doctrine applies only to communications that are outcome determinative. In this regard, the court held that the insurer was required to come forth with evidence establishing that the documents sought were "in all probability, outcome determinative," but instead the insurer offered only "conclusory allegations" that the insured was "working against [it]."