Illinois Association of Defense Trial Counsel
Springfield, Illinois | www.iadtc.org | 800-232-0169
IDC Quarterly | Volume 21, Number 1 (21.1.26)

Feature Article

By: Rachael G. Winthrop and Jared K. Clapper
SmithAmundsen, LLC

The Aftermath of *Illinois Emcasco v. Nationwide Ins. Co.*: Continuing to Protect the Privileged Communications Between an Insurer and Its Coverage Counsel

Background: Application of the Attorney-Client Privilege and Work Product Doctrine to an Insurer's Communications With, and Work Product Generated By, Coverage Counsel

Under Illinois law, confidential communications between an insurer and its coverage counsel, as well as the work product generated by coverage counsel, are protected from discovery. *Waste Management Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 579 N.E.2d 322 (1991). In *Waste Management*, the Illinois Supreme Court distinguished between non-privileged communications regarding the underlying litigation, and privileged communications regarding the coverage issues that may arise in a subsequent declaratory judgment action. The court held that the attorney-client privilege and work product doctrine bar disclosure of an insurer's communications with its coverage counsel, as well as coverage counsel's work product relating to a declaratory action. *Waste Management*, 144 Ill. 2d at 201, 579 N.E.2d at 332; *see also Federal Ins. Co. v. Economy Fire & Cas. Co.*, 189 Ill. App. 3d 732, 739, 545 N.E.2d 541, 547 (1st Dist. 1989)(coverage attorney's notes and memoranda of oral conversations, including any opinions to the insurer, are protected under the attorney-client privilege).

The necessary protection afforded to an insurer's communications with its coverage counsel, as well as any work product generated by counsel, is consistent with Illinois Supreme Court Rule 201(b)(2), which expressly limits the discovery of privileged communications between an attorney and client and the attorney's work product in preparation for trial. Indeed, such protection reinforces the public policy underlying the attorney-client privilege, which is to encourage candid discussions between an attorney and his client by removing the fear of compelled disclosure of information. *People v. Adam*, 51 Ill. 2d 46, 48, 280 N.E.2d 205, 207 (1972).

The *Emcasco* Court's Open Criticism and Refusal to Follow *O'Hara*

While carriers and their attorneys often rely upon *Waste Management* to support the privileged nature of their communications and work product, policyholders and third-party claimants continue to seek ways to circumvent the insurer's attorney-client privilege pursuant to *Western States Insurance Co. v. O'Hara*, 357 Ill. App. 3d 509, 828 N.E.2d 842 (4th Dist. 2005). In *O'Hara*, the insurer appointed defense counsel for its insured

and sought legal advice from coverage counsel with respect to settling multiple serious injury claims where the total damages could exceed the policy limit. After conducting an *in camera* inspection, the court held that the communications between the insurer and its attorney relating to the declaratory judgment action were subject to disclosure because the insurer and its insured shared a "common interest" in settlement of the claims. The Fourth District found that by contending the settlements exhausted the policy limits, the carrier placed its good faith "at issue," entitling the policyholder to review communications with the attorney from whom the insurer sought settlement advice. *O'Hara*, 357 Ill. App. 3d at 520, 828 N.E.2d at 851.

However, in *Illinois Emcasco v. Nationwide Ins. Co*., 393 Ill. App. 3d 782, 913 N.E.2d 1102 (1st Dist. 2009), the First District openly criticized *O'Hara* and, following the *Waste Management* decision, expressly preserved the attorney-client privilege for communications between the insurer and its attorneys regarding coverage issues arising in a declaratory judgment action. The First District recognized that the *O'Hara* court mistakenly assumed that an insurer seeking advice of counsel, other than defense counsel, would always seek such advice for the mutual benefit of both the insurer and its insured. The court remanded the case back to the trial court for an *in camera* inspection of the insurer's materials in order to resolve the dispute over which communications were privileged.

Emcasco's Unintended Side Effect: The *In Camera* Inspection

While *Emcasco* effectively limited *O'Hara*, it may have had an unintended side effect of encouraging routine *in camera* inspection requests in coverage litigation. Policyholders and third-parties seeking production of an insurer's privileged communications and work product generated by coverage counsel have frequently seized upon this portion of the *Emcasco* decision and requested an *in camera* review whenever the attorney-client privilege is asserted.

Although the *Emcasco* court did not mandate *in camera* inspections whenever privilege is at issue, trial courts may nonetheless feel compelled to grant such requests before denying a motion to compel in light of the *Emcasco* court's ruling. However, an *in camera* review should not be conducted merely to ease the mind of opposing counsel. The Illinois Supreme Court has set forth the following factors for trial courts to consider when determining whether to exercise their discretion to perform an *in camera* inspection: the volume of materials it is asked to review, the relative importance of the materials to the case, and the likelihood that the review, along with other evidence will support a finding that the attorney-client privilege does not protect the disputed materials. *In re Marriage of Decker*, 153 Ill. 2d 298, 323, 606 N.E.2d 1094, 1107 (1992). While *Decker* involved the application of the crime-fraud exception to the attorney-client privilege, its approach is not limited to such situations.

The Power Of The Privilege Log

While the Seventh Circuit has found it reasonable for a trial court to review each document contained in a half-box and has strongly discouraged arbitrary sampling methods, *American Nat'l Bank v. Equitable Life Assurance Society*, 406 F.3d 867, 879-80 (7th Cir. 2005)(Illinois law), whether to conduct an *in camera* inspection, and what exactly that entails, is left to the trial court's discretion. When a court decides to conduct an *in camera* inspection, it may cause unnecessary delay in the litigation, not to mention frustration for the court. A court will likely rely upon the adequacy and level of detail in the privilege log submitted to identify the materials at issue. If a privilege log is not sufficiently detailed and does not properly reflect the privileges being asserted, the court may be more likely to scrutinize each document, or grant a motion to compel without reviewing each and every document. However, if a privilege log can readily demonstrate why the documents must be protected from disclosure, a court can rely upon the adequacy of the privilege log to deny any motion to compel. The quality and accuracy of the privilege log may ultimately prove to be an insurer's most powerful weapon in the fight to keep coverage materials protected from discovery.

About the Authors

Rachael G. Winthrop is an attorney in the Chicago office of *SmithAmundsen LLC*. She represents insurers in all aspects of their business, including claims counseling, litigation, and dispute resolution. Her practice includes the handling of issues involving commercial, primary, umbrella, excess and surplus lines, and reinsurance. She concentrates her practice specifically in the areas of bad faith, fraud, and complex insurance coverage issues.

Jared K. Clapper is an associate at *SmithAmundsen's* Chicago office and is a member of the firm's Insurance Services Practice Group. Since joining SmithAmundsen, Jared has represented insurers in many aspects of their businesses. His practice involves insurance coverage matters in the areas of professional malpractice, business liability, construction, automobile liability, uninsured/underinsured motorists, homeowners, environmental, and toxic tort as well as general commercial litigation.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation.
For more information on the IDC, visit us on the web at ***www.iadtc.org***.

Illinois Association of Defense Trial Counsel, PO Box 3144, Springfield, IL 62708-3144, 217-585-0991, idc@iadtc.org