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The Evolution of Litigation Immunity in the Context of Insurance Coverage and Bad Faith Litigation

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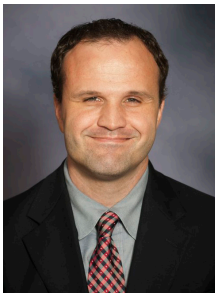

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March 2020 struck and courts, like the rest of the world, came to a screeching halt due to the pandemic. Over two years later, it seems as though history will be told in terms of what the world was like before and after the pandemic. Economic inflation, social inflation, nuclear verdicts, and the changing makeup of jury pools and their impact on litigation have become top concerns for insurance companies and their insureds as courts resume operations and jury trials return at a more consistent pace. One legal principle receiving attention across the country over the last two and a half years, despite the operational restrictions of courts, is the concept of litigation privilege or litigation immunity in the context of insurance coverage and bad faith litigation against insurers.

What is Litigation Privilege

Litigation immunity, sometimes referred to as litigation privilege, is a concept protecting parties from civil liability for conduct and communications made by the parties in the course of judicial proceedings. The terms "litigation privilege" and "litigation immunity" are frequently used interchangeably in case law but, technically speaking, litigation immunity applies in the context of judicially-created immunity and litigation privilege applies in the context of statutorily-created immunity. *See* T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers,* 31 PEPP. L. REV. 915, 916 n.2 (2004). As of 2018, only six states codified the privilege by statute, while forty-two states recognized immunity in case law. *See* Marc I. Steinberg & Logan J. Weissler, *The Litigation Privilege as a Shelter for Miscreant Legal Counsel,* 97 OR. L. REV. 1, 18 (2018). Courts around the country, however, are increasingly refusing to allow insurers the protections of litigation privilege or immunity to apply as an absolute privilege and, instead, courts seem to find ways to limit the protections even when recognized under state law.

The Evolution of Litigation Privilege Post-Pandemic

Historically, the "majority approach" seemed to bar evidence of post-suit conduct of an insurer or its counsel in any action against the insurer for bad faith except in cases involving "extraordinary facts." *See Sinclair v. Zurich Am. Ins.*

Co., 129 F. Supp. 3d 1252, 1258 (D. N.M. 2015). Decisions from courts in the last few years, however, have limited application of the privilege even when historically recognized in that state.

For example, a Missouri appellate court in *Qureshi v. Am. Family Mut. Ins. Co.,* 604 S.W.3d 721, 727 (Mo. App. E.D. 2020), rejected the notion that that a court should consider only an insurer's pre-suit conduct in a vexatious refusal to pay claim against the carrier. The insurer in that case argued that it was entitled to a directed verdict because the insured failed to proffer sufficient evidence that the insurer refused to pay or otherwise acted vexatiously before the insured instituted suit on his uninsured motorist claim. *Id.* at 726. The insurer further argued that evidence of its conduct after suit was filed was irrelevant to the cause of action and should not have been considered. *Id.* The court rejected the insurer's arguments, finding the distinction between pre-suit and post-suit conduct "arbitrary." *Id.* Relying on Missouri precent, the appellate court held that direct and specific evidence of vexatious refusal is not required, and the jury may consider all available testimony and facts and circumstances that developed prior to trial. *Id.* at 727, *citing DeWitt v. American Family Mut. Ins. Co.,* 667 S.W.2d 700, 710 (Mo. 1984); *Hopkins v. American Economy Ins. Co.,* 896 S.W.2d 933 (Mo. App. W.D. 1995). Specifically, the appellate court held that it was appropriate for the jury to consider the amount of the settlement offer made by the insurer after suit was filed, as well as the insurer's refusal to answer questions about the offer during a deposition as evidence of the carrier's vexatious conduct. *See id.*, 604 S.W.3d at 728-28.

Courts around the country, however, are increasingly refusing to allow insurers the protections of litigation privilege or immunity to apply as an absolute privilege and, instead, courts seem to find ways to limit the protections even when recognized under state law.

Later that year in August 2020, the Supreme Court of Pennsylvania issued a divided decision in *Berg v. Nationwide Mut. Ins. Co.,* 235 A.3d 1223 (Pa. 2020), in which two justices supported affirming the Superior Court's ruling that a bad faith refusal to pay claim was not established. The Justices advocated for the adoption of a general rule that evidence of post-litigation conduct is generally inadmissible in insurance bad faith litigation. Those Justices contended that evidence of post-litigation conduct should be limited "to proof of a bad-faith refusal to settle the underlying insurance claim on reasonable terms during the litigation." *Id.* However, the decision in support of affirmance noted that even evidence of bad faith refusal to settle should be limited to circumstances in which "there is a colorable proffer to demonstrate that a bad-faith refusal to settle an underlying claim continued into the litigation." *Id.* at 1223 n.18.

Relying on precedent from other jurisdictions, the Justices reasoned that public policy supports a general prohibition on several grounds, such as: "'the irrelevance, or tangential relevance, of the broader range of post litigation conduct,' *see, e.g., Palmer by Diacon v. Farmers Ins. Exchange,* 261 Mont. 91, 861 P.2d 895, 915 (Mont. 1993); 'the central role of counsel, particularly outside counsel, in making strategic and tactical decisions,' *see, e.g., Knotts v. Zurich Ins. Co.,* 197 S.W.3d 512, 521-22 ('The insurer relies heavily on its attorneys using common litigation strategies and tactics to defend[]'); 'the chilling effect on zealous advocacy fostered by penalizing a defendant for litigation decisions,' *see, e.g., Timberlake Const. Co. v. U.S. Fidelity and Guar. Co.,* 71 F.3d 335, 341 (10th Cir. 1995) ('Insurer's counsel would be placed in an untenable position if legitimate litigation conduct could be used as evidence of bad faith.'); and 'the availability of other measures, such as attorney sanctions, to address inappropriate litigation conduct,' *see Knotts,* 197 S.W.3d at 522 ('The Rules of Civil Procedure control the litigation process and, in most instances, provide adequate remedies for improper conduct during the litigation process.')." *Berg,* 235 A.3d at 1267.

In contrast, the Justices in support of reversal adopted the opposite approach noting that two Pennsylvania Superior Court decisions left open the potential for evidence of bad faith to be premised on litigation tactics. In the first decision—*O'Donnell v. Allstate Ins. Co.,* 1999 PA Super 161, 734 A.2d 901, 906—the Superior Court held that Pennsylvania's statutory bad faith law did not preclude an insurer's litigation conduct as evidence of bad faith. However, the *O'Donnell* Court was skeptical that an insurer's discovery practices could support a claim for bad faith when the state's rules of civil procedure otherwise allowed a party relief from the carrier's discovery misconduct. *Id.,* at 909. In the second decision—*Hollock v. Erie Ins. Exch.,* 2004 PA Super 13, 842 A.2d 409, 415— the Superior Court permitted evidence of an insurer's litigation conduct to support a claim for bad faith where the offending conduct arguably demonstrated an intentional cover-up and an intent to conceal evidence. The *Hollock* decision, in contrast, was based on the reasoning that there was no rule of civil procedure or other remedy to protect the other party from the insurer's attempt to undermine the truth-determining process. *Id.* The *Berg* Justices supporting reversal reasoned that the insurer's litigation strategy in that case to spend nineteen years fighting a claim worth $25,000 rather than settle to "send a message" that the insurer was willing to spare no expense to litigate small claims, combined with evidence of the carrier's concealment of evidence during discovery, was a "substantial and continuing harm upon the civil justice system." *Berg*, 235 A.3d at 1254-56.

Subsequently, in 2022, the Supreme Court of Connecticut addressed the doctrine of litigation immunity in *Dorfman v. Smith,* 342 Conn. 582, 593, 271 A.3d 53 (2022), in which it carefully balanced competing public policies to determine whether an insurer is entitled to common-law immunity. *Dorfman* provided an explanation for the general purpose of "absolute immunity" under Connecticut law:

> Recently, in *Scholz v. Epstein,* 341 Conn. 1, 10, 266 A.3d 127 (2021), we recognized the policy rationales underlying this privilege. Although we articulated these rationales in relation to a claim brought against an attorney for communications made during a judicial proceeding, we also have relied on these rationales to apply immunity to claims brought against party opponents and witnesses: '[T]he purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . [T]he possibility of incurring the costs and inconvenience associated with defending a [retaliatory] suit might well deter a citizen with a legitimate grievance from filing a complaint… Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine [of absolute immunity] was intended to protect nevertheless faced the threat of suit. . .
>
> We since have recognized that absolute immunity extends to an array of retaliatory civil actions beyond claims of defamation, including intentional interference with contractual or beneficial relations arising from statements made during a civil action, intentional infliction of emotional distress arising from statements made during judicial proceedings, and fraud against attorneys or party opponents for their actions during litigation. *See id.,* 628; *Tyler v. Tatoian,* 164 Conn. App. 82, 92, 137 A.3d 801, cert. denied, 321 Conn. 908, 135 A.3d 710 (2016). This expansion is premised on the rationale that, 'because the privilege protects the communication, the nature of the theory [on which the challenge is based] is irrelevant.' (Emphasis omitted; internal quotation marks omitted.) *MacDermid, Inc. v. Leonetti,* supra, 310 Conn. 628.

Given the increasing tendency by some courts to limit or altogether remove the litigation privilege or litigation immunity protection in claims against insurance companies, carriers would be wise to consider the potential impact of their litigation conduct in a claim against them for coverage or bad faith.

Id. at 590-92. Despite the underlying purpose and expansion of the doctrine, litigation privilege is not without limit under Connecticut law. *Id.* at 592 (recognizing that the privilege does not bar claims for abuse of process, vexatious litigation and malicious prosecution). *Dorfman* further explained that the extent to which the privilege applies requires balancing several public policy concerns, such as "(1) whether the alleged conduct subverts the underlying purpose of a judicial

proceeding in a similar way to how conduct constituting abuse of process and vexatious litigation subverts that underlying purpose; (2) whether the alleged conduct is similar in essential respects to defamatory statements, inasmuch as the privilege bars a defamation action; and (3) whether the alleged conduct may be adequately addressed by other available remedies. . . [and] whether federal courts have protected the alleged conduct pursuant to the litigation privilege.")

Dorfman involved allegations of common law bad faith in the context of an underlying underinsured motorist claim. *Id.* at 582. The plaintiff insured based its bad faith cause of action on the defendant's conduct during litigation, which allegedly included falsely responding to the complaint; asserting a special defense the defendant knew had no basis in fact; and falsely responding to interrogatories and discovery requests. *Id.* at 595. The plaintiff alleged that the defendant "used intentional misstatements, intentional misrepresentations, intentionally deceptive answers, and violated established rules of conduct in litigation," and "knowingly and intentionally engaged in dishonest and sinister litigation practices by taking legal positions that were without factual support in order to further frustrate [the plaintiff's] ability to receive benefits due [to her] under her contract."[1] *Id.*

The *Dorfman* Court analyzed Connecticut case law and publicly policy and, ultimately, concluded that the plaintiff's claims were more akin to claims of fraud and defamation for which Connecticut has afforded absolute immunity. *Id.* at 595-96. The Court rejected the plaintiff's argument that the bad faith cause of action demonstrated the defendant's systemic abuse of the judicial process thereby subverting application of absolute immunity, instead, holding that "unless the plaintiff's cause of action challenges

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[1] In its recitation of the facts, the Court noted the following:

> The defendant hired attorneys to represent it in connection with the plaintiff's action but deliberately withheld from them its file notes, which included the recorded statement and identity of a witness to the collision, even though the defendant knew that information was necessary for its attorneys to prepare accurate responses to the plaintiff's complaint and discovery requests. The defendant pleaded in its answer to the plaintiff's complaint that it denied or did not have sufficient information to admit the plaintiff's allegations regarding the cause of the collision and her injuries, and asserted a special defense of contributory negligence, even though it knew that it was without a basis in fact. The defendant also provided false responses to the plaintiff's discovery requests, including that it did not know of the existence of the witness to the collision or whether any recorded statements of witnesses existed. In the plaintiff's deposition of the defendant, the defendant's designee admitted that the defendant had been aware of the witness to the collision and his recorded statement but failed to disclose that information in its interrogatory responses. The designee also indicated that the defendant did not single out the plaintiff for special or unique treatment when it conditioned her receipt of underinsured motorist benefits on the provision of an affidavit of no excess insurance and when it provided false responses to her discovery requests. The defendant admitted liability with respect to the plaintiff's breach of contract claim, and the plaintiff was awarded damages in connection therewith.

Dorfman, 342 Conn. at 582-83.

the purpose of the litigation or litigation procedure, these allegations do not suffice to establish an improper use of the judicial system." *Id.* at 598-99. The Court held that the cause of action must itself challenge the purpose of the underlying litigation or litigation procedure to avoid application of the privilege. *Id.* at 599. Unlike the Pennsylvania Justices in support of reversal in *Berg*, the Supreme Court of Connecticut noted that "[a]s with claims of fraud, although we do not condone such conduct, such unfairness does not bar absolute immunity but, instead, makes clear the importance of the availability of other remedies." *Dorfman*, 342 Conn. at 599; *cf. Berg,* 235 A.3d at 1254-56 (finding that concealing evidence in discovery undermining the truth-determining process admissible to support a claim of bad faith). Consistent with the approach adopted by the Justices in support of affirmance in *Berg*, *Dorfman* found that other procedural safeguards adequately protected litigants from any harm resulting from the insurer's alleged conduct. *Dorfman,* 342 Conn. at 611-12.

The *Dorfman* Court also held that litigation privilege applied to bar the plaintiff's claims of negligent infliction of emotional distress and violations of the Connecticut Unfair Trade Practices Act, finding that each cause of action was premised on false communications, did not challenge the purpose underlying a judicial proceeding, was more akin to a defamation or fraud claim than an abuse of process or vexatious litigation claim. *Id.* at 612-20. It also noted that other adequate remedies existed to address the alleged wrongful conduct. *Id.* Notably, the court expressly held that *Dorfman* does provide insurers with immunity from all Unfair Trade Practices Act claims under litigation privilege. *Id.* at 620. Rather, the court left open the possibility that other allegations of violations of the statute may not be absolutely immune under the litigation privilege. *Id.*

Looking Forward

Given the increasing tendency by some courts to limit or altogether remove the litigation privilege or litigation immunity protection in claims against insurance companies, carriers would be wise to consider the potential impact of their litigation conduct in a claim against them for coverage or bad faith.

For example, carriers that file actions for declaratory judgment in a proactive effort to have the court determine the rights and obligations of the parties when insurance coverage for a claim or suit is in dispute, or insurers that file actions for interpleader to allow the court to distribute insurance proceeds equitably when faced with multiple claimants and insufficient policy limits, may consider whether opposing counsel will attempt to convince courts to construe that conduct as evidence of bad faith. It should be anticipated that plaintiffs and insureds are likely to argue that rather than make a claims decision to afford coverage or settle claims, the filing of these actions constitutes an abdication of or subcontracting of the insurer's policy obligations to the court. Those insurers should consider whether the jurisdiction in which these actions are filed is susceptible to those arguments given recent trends in those courts. If the insurer cannot maintain privilege or immunity from such filings, it may later have to answer why its decision to file such a lawsuit was a reasonable one under the circumstances.

Once suit is filed, insurers also should take great care in the pleadings, motions and briefs they submit to the court. Claims or defenses pleaded or maintained without sufficient evidentiary basis arguably could support a claim for bad faith. *See e.g. Homer v. Nationwide Mut. Ins. Co.*, No. 15-1184, 2016 U.S. Dist. LEXIS 114548, at *13 (W.D. Pa. Aug. 26, 2016)*; Krisa v. Equitable Life Assurance Soc'y,* 109 F. Supp. 2d 316, 321 (M.D. Pa. 2000). Pleadings or briefs that mispresent facts or policy terms likewise may plaintiffs and insureds to maintain such a claim. In addition, the failure of an insurance company to perform an adequate investigation before filing a motion or pleading may be relevant to the bad faith inquiry. *See Gooch v. State Farm Mut. Auto. Ins. Co.*, 712 N.E.2d 38 (Ind. Ct. App. 1999). While some outside counsel may prefer a "kitchen sink" approach and plead every imaginable claim or defense to avoid waiver, insurers should ensure that those claims and defenses have sufficient basis in fact and law. If they do not, the pleading may prove a difficult exhibit for the insurer's adjuster or corporate representative to address at deposition.

The insurance company's discovery practice is also a prime target for developing a record of purported bad faith against the insurer. *See e.g. Barefield v. DPIC Cos.*, 215 W. Va. 544, 600 S.E.2d 256 (W. Va. 2004). The failure to produce all relevant requested documents in a timely manner without a motion to compel may give rise to an argument that the insurer was hiding relevant materials. *See Southerland v. Argonaut Ins. Co.*, 794 P.2d 1102 (Colo. Ct. App. 1990). The overly aggressive assertion of privilege or work product in discovery can fall into the same bucket. The deposition testimony of an insurance company's claims professional or corporate representative may be subject to this same scrutiny. An evasive or argumentative witness can arguably show the failure of the insurer to handle the claim or suit in a good faith manner. Of course, the conduct of an insurer's outside counsel in the litigation—whether in discovery or otherwise—may further support the argument that the company has handled the claim in bad faith. In particular, counsel's behavior at deposition often comes under this kind of scrutiny. In addition, overly burdensome discovery requests served by the insurer upon the insured can give rise to the argument that the carrier has chosen to abuse the discovery process to punish or harass the insured for making a claim. *See Givens v. Mullikin*, 75 S.W.3d 383, 391-92 (Tenn. 2002).

Indeed, even the decision of an insurer to appeal an adverse trial court ruling could support a finding of bad faith or vexatious conduct in some jurisdictions. *See e.g. Peerless Enter. v. Kruse*, 317 Ill. App. 3d 133, 738 N.E.2d 988 (Ill. App. Ct. 2000) ("Under section 155 of the Code, attorney fees and sanctions for vexatious and unreasonable delay may include the delay incurred by an insurer's appeal of a judgment.")

As set forth in the discussion regarding *Qureshi*, some jurisdictions may consider an insurer's post-suit settlement offers relevant to the bad faith inquiry. *See e.g.*, *Qureshi*, 604 S.W.3d at 727-28; *Kirtos v. Nationwide Ins. Co.,* 2008-Ohio-870, ¶ 36 ("In a case of bad faith regarding whether an insurer negotiated with its insured in bad faith, evidence as to the settlement negotiations is highly relevant."); *Leiserv, LLC v. Summit Entm't Ctrs., LLC*, No. 15-cv-01289-PAB-KLM, at *18 (D. Colo. Feb. 6, 2017) ("evidence of settlement discussions is admissible to show that a party acted in bad faith in carrying out its obligations under a contract so long as it is not used to prove or disprove liability on the claim being settled or the amount of that claim."); *In re State Farm Mut. Auto. Ins*. Co., 629 S.W.3d 866, 877 (Tex. 2021) ("[I]n the trial of bad-faith claims, the settlement offer is generally admissible as evidence of the insurer's good-faith (or bad-faith) efforts to resolve the claim.").

The key takeaway here is that insurers should examine whether their conduct in litigation—from filing through trial—supports their argument that they are handling and responding to the claim in good faith.

The key takeaway here is that insurers should examine whether their conduct in litigation—from filing through trial—supports their argument that they are handling and responding to the claim in good faith. While some may place an emphasis on zealous and aggressive prosecution or defense of an insurance company's position in litigation, an insurer's litigation tactics and strategy, or those employed by outside counsel on its behalf, may prove counterproductive in a jurisdiction in which the insurer cannot avail itself of the protection afforded by litigation privilege or immunity. What remains to be seen is the extent to which the limitation of litigation privilege or immunity in these contexts leaves an insurer at a disadvantage against their litigation counterparts in the absence of an equally applicable restriction on plaintiff and insured litigation tactics and strategy.

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