

## Coverage Counsel Authors Insurer's Letters – Leads To Waiver of Attorney-Client Privilege

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The other thing more unexciting than a discovery dispute is reading about someone else's discovery dispute.

But Wednesday's decision from the Washington federal court in *Canyon Estates Condominium Association v. Atain Specialty Insurance Company*, No. 18-1761 (W.D. Wash. Jan. 22, 2020), is no snoozer.

The decision is brief, but has a lot to say.

A condominium association was seeking unredacted copies of its insurer's claims file documents and invoices for activities performed by its outside coverage counsel, Michael Hooks.

The insurer maintained that the documents were precluded from discovery on account of attorney-client privilege.

The court set out the rules concerning attorney-client privilege in the context of a coverage dispute. As a starting point, "there is a presumption of no attorney-client privilege relevant between the insured and the insurer in the claims adjusting process."

However, the court noted that the presumption can be overcome "by showing its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim, but instead in providing the insurer with counsel as to its own potential liability; for example, whether or not coverage exists under the law."

So the question was this: Was Mr. Hooks, as outside coverage counsel, engaged in evaluating or processing the claim OR was he providing the insurer with counsel as to whether or not coverage exists under the law?

The insurer, seemingly prepared for this issue, maintained that it "consciously chose to keep [Michael] Hooks, its outside counsel, separate from the claim investigation, and he did not participate in the investigation or otherwise perform claim handling functions."

But the court concluded that such declarations, about Mr. Hooks's role, were "pure amphygory."

As the court saw it, Hooks "clearly—and arguably, knowingly—engaged in at least some quasi-fiduciary activities."

A significant aspect of the court's decision was that Mr. Hooks authored draft letters signed by the insurer and sent to the insured related to coverage and claims processing. As the court put it: "Assisting an adjustor in writing a denial letter is not a privileged task."

What about if the outside counsel engages in what the court believes is claim investigation and also provides advice on whether or not coverage exists under the law? Here, "waiver of the attorney-client privilege is likely since 'counsel's legal analysis and recommendations to the insurer regarding liability generally or coverage in particular will very likely implicate the work performed and information obtained in his or her quasi-fiduciary capacity.'" (citation omitted).

The court concluded that very few of the documents at issue are covered by attorney-client privilege. In addition, following an in-camera review, the court noted that counsel has discoverable information related to the drafting of the letters that is relevant to the claims.

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