

# Legal Dimensions

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## Insurance Company Claims File Protected From Disclosure, Superior Court Rules

In *Applegarth v. General Cinema*, 2002 Mass. Super. LEXIS 255 (2002) (Houston, J.), a Massachusetts Superior Court judge considered whether portions of an insurance company's claims file were protected from disclosure in a civil suit based upon the work product privilege in the rules of civil procedure.

Finding that the insurer sustained its burden of proving that the file materials were prepared in anticipation of litigation and that the plaintiff did not have a "substantial need" for the materials, the Court issued a protective order precluding discovery of the materials. The favorable finding reverses a recent trend of trial court decisions limiting the application of the work product doctrine in the con-

text of an insurer's claims file.

The work product doctrine, Mass. R. Civ. P. 26, provides:

[A] party may obtain discovery of documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Neither the Massachusetts Appeals Court nor the Supreme Judicial Court has squarely addressed the applicability of the doctrine in the context of insurance claims files in a published opinion. Because the state rule mirrors the federal rule, state courts may look to decisions of the federal courts in construing the privilege. The First Circuit Court of Appeals employs a case-by-case approach to determine whether documents prepared by an insurance company comprise documents prepared in anticipation of litigation. See *Sham v. Hyannis Heritage House Hotel, Inc.*, 118 F.R.D. 24 (D. Mass. 1987). In light of the absence of Massachusetts appellate authority on the subject, most state court judges have adopted the First Circuit's approach.

In determining whether file materials are protected by the work product doctrine, the controlling test is whether the document can fairly be said to have been prepared or obtained because of the prospect of litigation. However, the mere possibility that a certain event might lead to future litigation does not cloak the document in the work product privilege. Moreover, the fact that documents prepared in the ordinary course of business may ultimately prove useful to a party in a case in future litigation does not trigger the protection of the rule.

In *Applegarth*, the plaintiff sustained a head injury as a result of a slip and fall at the insured's movie theatre. After the lawsuit was filed, the plaintiff sought discovery of portions of the insurance company's investigation file. Specifically, the plaintiff moved to compel: (1) letters between the defendant's corporate risk manager and the insurer; (2) investigator's reports; and



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(3) the claims handler's computer notes regarding conversations with the insured. The defendant resisted the production of the materials based upon the work product privilege.

The Court summarily concluded that the requested materials qualified on their face as protected work product. Citing a 1989 Superior Court decision, the Court reasoned that "once a tort claim of this type is reported by an insured to its insurer for a defense ... the file materials accumulated by the insurance company are largely in anticipation of litigation," *Applegarth*, supra, quoting *Belcher v. Pawtucket Mutual Ins. Co.*, Civil No. 89-J672 (Suffolk Superior Court 1989).

The Court further held that the plaintiff could not satisfy the heavy burden of showing that she had a "substantial need" for obtaining the insurer's work product. To satisfy this burden, the plaintiff would have to convince the Court that the documents played an "exceptionally important" role in the case and that the materials sought were "wholly unique and unduplicatable." The plaintiff argued that she had a "substantial need" for the materials to determine whether a deposed witness had given inconsistent statements to the insurance company's investigator. The Court disagreed and found that the plaintiff demonstrated only a "pleasant desirability" for the insurer's work product. The availability of the key witnesses for depositions weighed heavily against the plaintiff in attempting to satisfy the "substantial need" requirement.

The *Applegarth* Court's analysis in applying a de facto presumption of privilege is a departure from recent trial court decisions emphasizing the insurer's burden of demonstrating that its file materials were not prepared in the ordinary course of its business. Indeed, the recent trend has been to deny the insurer's motion for a protective order in the absence of an affidavit or other evidence affirmatively proving that the documents were not prepared in the insurance company's ordinary course of business. See e.g., *Vasquez v. Elco*, 2001 WL 1631535 (Mass. Super. 2001); *Poteau v. Normandy Farms Family*

*Camp Ground*, 2000 WL 1765424 (Mass. Super. 2000); *American Auto Insurance Co. v. J.P. Noonan Transportation, Inc.*, 2000 WL 33171004 (Mass. Super. 2000); *Meszar v. Horan*, 1999 WL 1260280 (Mass. Super. 1999); *Pasteris v. Robillard*, 121 F.R.D. 18, 21 (D. Mass. 1988); *Sham v. Hyannis Heritage House Hotel*, 118 F.R.D. 24 (D. Mass. 1987).

In many of these cases, the defendant failed to file an affidavit or

otherwise prove the existence of the privilege. In some cases, the defendants relied upon a "privilege log" by merely identifying the general nature of the subject documents without explicit testimony to meet the defendant's burden of proof in obtaining the privilege. On the other hand, trial courts are more likely to accept the insurer's claim of privilege when a properly drafted affidavit accompanies the defendant's motion for a protective

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order. See **Harris v. Steinberg**, 1997 WL 89164 (affidavit of claims supervisor established that portions of claims file were not prepared in "ordinary course").

No decision addressing the applicability of the work product doctrine is likely to be forthcoming from the Massachusetts Appeal Court because it involves an interlocutory order of the trial court that is not subject to appeal absent "exceptional circumstances."

Accordingly, Massachusetts trial courts are likely to continue to address the work product doctrine on a case-by-case basis with disparate results. Therefore, insurance carriers should be vigilant in protecting the privilege. Trial courts have suggested that insurance companies may segregate their files into trial preparation materials and non-trial preparation materials. Furthermore, investigative documents that have been created at the behest of counsel have uniformly enjoyed the protection of the privilege. When applicable, this factor should be emphasized to the motion judge. Finally, defense counsel must support motions for protective orders with carefully drafted affidavits in order to sustain the defendant's burden of obtaining the privileges of the work product doctrine. □

## Written UM Rejection Not Needed for Additional Insured, R.I. Court Rules

PROVIDENCE — An auto insurer is not required to obtain a written rejection of uninsured motorist coverage from an insured beyond the initiation of the insurance policy, according to the Rhode Island Supreme Court.

Under Rhode Island law, insurers are required to offer uninsured motorist coverage, but any named insured who buys the minimum coverage for bodily injury liability may decline the uninsured motorist coverage. The insured must sign an advisory notice indicating that he or she understands the "hazard of uninsured and underinsured motorists" and still waives the right to coverage.

In the case of **Leno Ferreira et al. v. Integon National Insurance Company**, the Court agreed that Rhode Island state law only requires the insurer to get a rejection of coverage from the insured at the outset of a policy, not when another insured is added to the policy.

### Rejected Coverage

In 1996, Ferreira was added to the Integon automobile insurance policy of Natalia Lopes, whom he later mar-

ried. Lopes had bought the policy in 1995, at which time she declined uninsured motorist coverage and signed the warning form, in accordance with the law. At the time that Ferreira was added as an insured, Integon sent notices to both Lopes and Ferreira, advising them of the availability of UM coverage. The insureds were both notified annually at renewal time and did not seek to obtain UM coverage.

In 1999, Ferreira was injured in an accident with an uninsured motorist. Following the accident, he and Lopes filed a complaint looking to have the insurance policy reformed to include UM insurance, on the grounds that Integon never received a written notice from Ferreira rejecting the coverage.

Integon argued that the law requiring insurers to procure a signed refusal only applies to the original policyholder at the time of purchase. The lower court agreed with the insurer and denied Ferreira and Lopes's motion for partial summary judgment.

### Clear Statute

The guiding statute, the Court noted, is clear in requiring a written rejection of coverage only at the time of original issuance of the policy.

Lopes did not appeal, but Ferreira did, asserting that the statute is ambiguous and the trial court erred in granting summary judgment for Integon, when ambiguity should be construed in favor of the insured.

The Supreme Court only considered whether the hearing justice erred in granting summary judgment to Integon, not the denial of Ferreira's motion. The Court agreed with the lower court, stating that the Rhode Island law clearly requires a written rejection only at the outset of a policy, citing a paragraph that deals with changes after initial selection of limits.

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