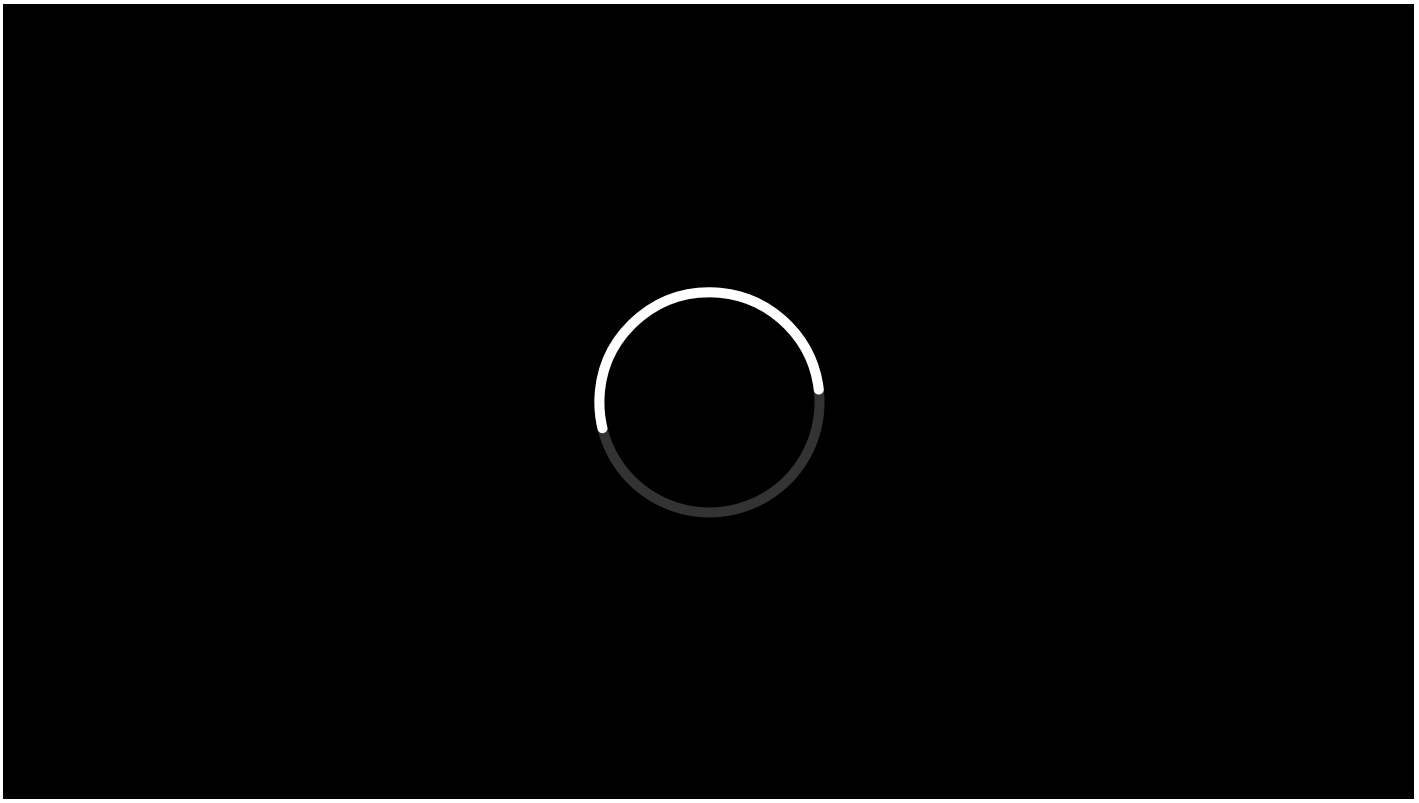
Policyholder Playbook Episode 10: Insurer-to-Reinsurer Communications Could be Pivotal in Your Coverage Dispute

October 17, 2023 Greg Van Houten

PRACTICES Insurance Recovery, Litigation



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The communications an insurer has with its reinsurer regarding a claim—what I call "reinsurance communications"—are often the most candid and telling communications that an insurer has regarding a disputed claim. That leads us to this week's play: in any insurance coverage case, consider seeking to discover reinsurance communications.

Claims files—the bread-and-butter of discovery in an insurance coverage case—are often unhelpful. They often include communications that are cryptic, incomplete, or carefully crafted by in-house or outside counsel. That's if you can even get a complete claim file—more and more insurers are attempting to shield large swaths of their claims files from production by asserting they contain privileged communications or work product. This is where reinsurance communications come in.

Insurers, perhaps knowing how helpful reinsurance communications can be, will often dispute the

discoverability of reinsurance communications. One oft-used tactic by insurers is to argue, quite generally, that reinsurance is not discoverable. Case law used by insurers often supports shielding reinsurance agreements from discovery, but not reinsurance communications. Insurers may then cite a bunch of cases that purportedly say that. I have found that, if you read those cases, more often than not they will regard the discoverability of reinsurance agreements—the actual reinsurance contracts executed by the insurer and its reinsurer. But that's not what we're talking about here—we're talking about reinsurance communications, a completely different category of document.

Insurers may also argue that reinsurance communications are propriety—a fancy word that makes sense in a case about the recipe for Coca-Cola, not insurance coverage. Insurers may also argue that reinsurance communications are confidential, which is not a basis for withholding documents . . . if confidentiality is a concern, execute a protective order.

And there are scores of cases that stand for the proposition that reinsurance communications are discoverable. I'll give you one now: *National Union v. Continental Illinois*, where the court said, and I quote: "Insurers may well have discussed their positions . . . with some or all of their reinsurers. Any such discussions would obviously be relevant."

We cited that case in a successful motion to compel a few years ago; and, sure enough, the insurer's reinsurance communications were among the best evidence we received.

So, this play, in short: consider seeking reinsurance communications in every insurance coverage case.