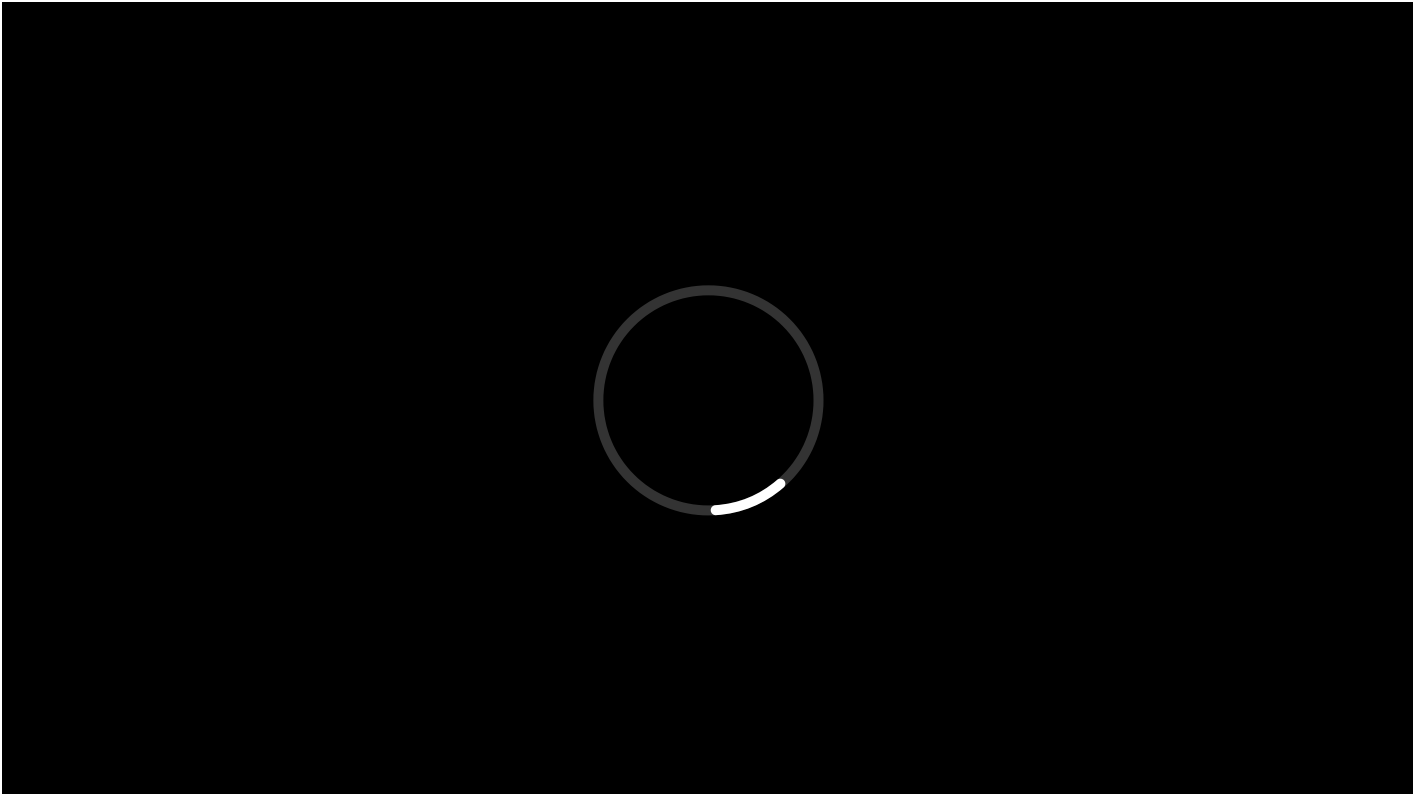


Policyholder Playbook Episode 8: When Litigating With Multiple Insurers, Consider Seeking Inter-Insurer Communications

September 19, 2023

PRACTICES Insurance Recovery, Litigation



To see past episodes of Policyholder Playbook, [click here](#).

To receive future posts by email, please [subscribe here](#).

Show notes:

When litigating with multiple insurers, consider seeking to discover the communications between those insurers, through a targeted request for production. Seeking Liberty's emails to London; what AIG is saying to Beazley; Zurich's letter to Hartford. You get the point.

We've had success discovering communications between insurers, even when those insurers had executed a joint defense agreement. How? Because the interests of those insurers diverged, at least with respect to some key issues.

Interests among insurers may diverge if one is primary, and one is excess. The primary insurer wants to exhaust fast to hand the baton to the excess insurer, and the excess insurer wants the opposite.

Interests may diverge among insurers who insure consecutive policy periods. The first insurer wants the second to cover the loss, and the second wants the opposite.

If you can identify a divergence of interests among insurers, you should be able to discover those insurers' communications with each other, at least with regard to the issues upon which their interests diverge. Why? Because, at least with respect to those issues, there is no "common interest," and a "common interest" is often a critical element of any successful joint defense or common interest defense to discovery.

Although there are great cases that support this proposition in many jurisdictions, here's a great one: *Selby v. O'Dea*, an Illinois state appellate court decision, which provides that parties to a joint defense agreement may withhold only those communications that are "germane to," or that are "in furtherance of," the parties' common interest. Meaning, parties to a joint defense agreement cannot withhold, *carte blanche*, all communications between them. Instead, under *Selby*, "a communication-by-communication analysis" is necessary "to ensure that only protected communications are withheld." Leveraging *Selby* can lead to an *in-camera* review of withheld inter-insurer communications. And who knows what's in there – it could make your case.

So, the punchline of this play—do not assume that communications between insurers are not discoverable, they very well may be.