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**ANTICIPATION OF LITIGATION:
THE ROLE OF LITIGATION PRIVILEGE
IN SUBROGATED CLAIMS**

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INTRODUCTION

When an insurer steps into the shoes of its insured and commences a subrogated action against the parties who caused an insured loss, it is often desirable for the insurer to withhold the production of certain documents that have been generated during the process of investigating the insured's claim. This may be permitted where the materials have been prepared with a view to litigation, pursuant to what is called "litigation privilege." This privilege does have its limits and exceptions though, and its protection may even be forfeited in some circumstances. Claims representatives, adjusters and other subrogation professionals should be alert to the nature and scope of this very useful form of privilege.

WHAT IS LITIGATION PRIVILEGE?

Our legal system is an adversarial system. That is, our legal system is based on the assumption that a court will be best able to discern the truth of a case by having each party put forward its case in the strongest possible light. In order to prepare their cases, lawyers must be free to investigate, research and prepare for a trial without having to disclose their work to

the opposing lawyer. The concern is that, if lawyers were required to disclose their trial preparation work to the other side, some lawyers might delay in preparing their own cases in the hopes of first obtaining disclosure of the other side's work. This would lead to inefficient litigation, unfairness and sharp practice in preparing cases for trial, all to the detriment of the clients.

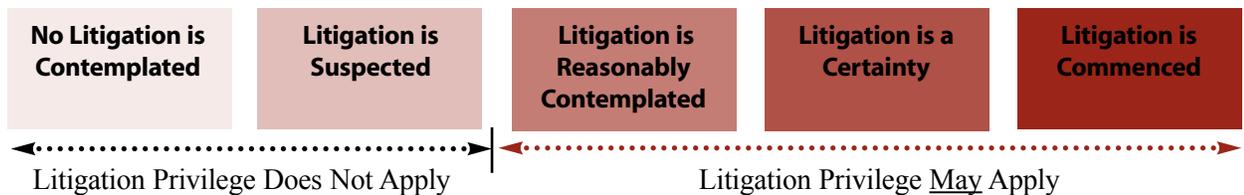
Litigation privilege exists to prevent these problems. At common law, litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation. Its purpose is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. Litigation privilege prevents counsel from being compelled to produce these documents to an opposing party or its counsel.

CONDITIONS FOR PRIVILEGE TO APPLY

In order for litigation privilege to exist, two conditions must be met:

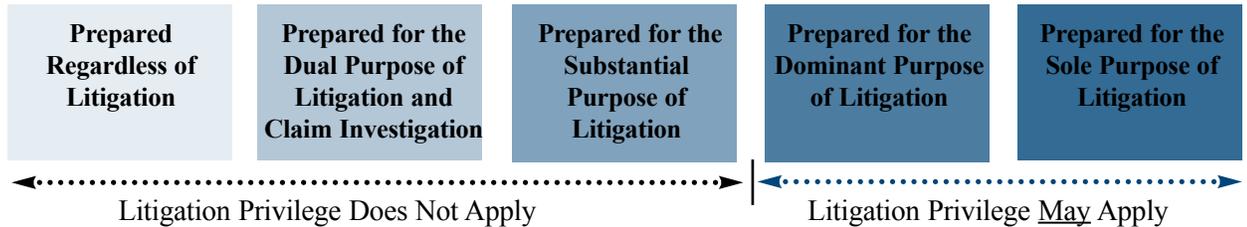
(i). *Litigation must be "Reasonably Contemplated":*

Although litigation does not have to be *commenced* in order for litigation privilege to apply, the documents or communications must have been made with litigation in mind, rather than just in the context of general legal advice. It is usually sufficient that, objectively speaking,¹ there is a "**reasonable prospect**" of litigation, or that litigation is "**reasonably contemplated**". Conversely, there must be more than a mere "suspicion" that there will be litigation in future.²



(ii). *The Document is Prepared for the "Dominant Purpose" of Litigation*

Litigation privilege does not automatically apply to every document or communication that is produced after litigation is reasonably contemplated. For instance, there is no assumption that privilege attaches to an adjuster's documents simply because a lawyer has been retained to pursue a subrogated action. Any documents over which privilege is being claimed must have been prepared for the **dominant purpose** or the **sole purpose** of that litigation. Importantly, this means that litigation privilege will not apply if a document is created for a dual purpose, such as claims assessment and anticipated litigation. An adjuster's or claims handler's notes, conversations, emails, interviews and reports will not necessarily be privileged, *even if portions of the documents deal expressly with the issue of subrogation*. Rather, the dominant purpose of the document must be to assist in the anticipated or actual litigation.³



PROVING LITIGATION PRIVILEGE

The onus is on the party claiming litigation privilege to establish that there is a basis for that privilege.⁴ A subrogating insurer might establish a claim of litigation privilege, for example, by submitting an affidavit from the claims handler which sets out: (1) when the claims handler reasonably anticipated that litigation was likely, and the reasons why, and (2) that each document for which privilege is claimed was created for the dominant purpose of advancing the subrogated claim. Each document must be individually assessed for privilege.

Where a subrogating insurer's claim of litigation privilege is challenged by a defendant, a court may also look to the circumstances and chronology of events leading up to the subrogated claim in order to determine when documents were created, and for what purpose. The court may also inspect the documents in order to determine the validity of a claim for privilege.

CONCLUSION

At all stages of the claims process, claims representatives, adjusters and other subrogation professionals should be alert to the nature and scope of litigation privilege. The earlier that subrogation counsel is retained on a file, the better. Many insurance companies now retain subrogation counsel as a matter of course on all large losses, as soon as the insurer receives a notification of loss. By so doing, the lawyer and the adjuster are able to work together to develop viable theories of recovery for the claims, while also working together to ensure that litigation privilege is not unintentionally waived during the course of the claim investigation and assessment.

Cozen O'Connor's experience in litigating all forms of insurance-related matters, and our expertise in the area of subrogation and recovery actions, is available to be deployed for the benefit of your company to assist in the recovery of subrogated claims.

For additional information concerning Cozen O'Connor's Subrogation and Recovery Program, please contact:

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ENDNOTES

1. *Winston v. Roy and Sunalliance Insurance Co. of Canada*, [2006] O.J. No. 5286 (S.C.J.) at para.6.
2. *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*, [2007] O.J. No. 1190 (S.C.J.) at para. 13.
3. *Ibid* at para. 14.
4. *Ibid* at para. 15.

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