INSURANCE COVERAGE
SECTION OF LITIGATION
Winter 2018, Vol. 28 No. 1

The Insurance Brokers for the London Market: Whose Agents Are They, Anyway?

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The London insurance market is replete with history, personality, and peculiarity. One peculiarity that often affects insurance coverage disputes for policyholders in the United States arises from the role of insurance brokers in London.

These brokers act as gatekeepers: Policyholders must use them to obtain policies from the London Market. Often, they have been viewed as agents of the policyholders that are seeking to purchase insurance coverage, rather than as agents of the insurance companies. [2] That position typically is proffered by the insurance companies that participate in the London market, along with syndicates of Lloyd's of London. [3]

Yet recently, the London insurance companies and syndicates have reversed course—even within the same case—and contended that they themselves are the ones whom the London brokers represent. They have argued in favor of dual agency—i.e., that it is necessary to examine the particular action the London broker is taking in order to decide whom the broker represents at that time.

The outcome of a coverage dispute can rest on the resolution of this question. It has implications for discovery, attorney-client privilege, notice, and other potentially case-dispositive concerns.

Aggravating the complexity is the role of "U.S. counsel"—meaning, U.S.-based law firms hired by London Market insurers to receive claims notices and updates from policyholders and keep the London participants in the applicable policies fully informed.

When U.S. counsel have been called upon to inform policy participants about notices and updates from policyholders, they often have sent their communications to the applicable London brokers. The brokers then distributed or forwarded those communications to the respective insurance companies and syndicates. This structure supposedly developed because it can be complicated to keep track of the various insurance companies and syndicates that participate in any particular policy—and even more so with a multilayered, multiyear insurance program.

Because the London insurers contend that the London brokers represent policyholders, their U.S. counsel necessarily waive any chance of attorney-client

privilege when they send their communications to the London brokers. Because the waiver is plain, there is no need to evaluate whether such communications would have been privileged in the first place.

Recently, the Eastern District of New York ruled along these lines. It decided that there was no attorney-client privilege for communications of U.S. counsel that were forwarded to London brokers for distribution to London market insurance companies and syndicates.[4] Other recent decisions highlight the role of London brokers and U.S. counsel as well.

This article examines the inherent inconsistencies in the argument that London brokers can be the agents of the policyholders but that the insurance companies nevertheless can assert attorney-client privilege over communications from their U.S. counsel that they receive from London brokers.

The London Market: Background

The London Market is complicated, even for insurance companies. In many respects, its operations are fundamentally different from insurance in the United States. Among other things, the London Market is a subscription market, which means that any number of insurers may subscribe to a percentage of the limits for a given insurance policy.[5] The subscribers may be insurance companies based in London or insurance companies based anywhere in the world or syndicates of Lloyd's of London.[6] Syndicates typically consist of groups of unidentified individuals (known simply as "Names") or entities that have been accepted as underwriters of Lloyd's, or both.[7] A syndicate subscribes to a percentage of an insurance policy as a single unit, even though it may be made up of multiple individuals or entities.[8]

Acting through managing agents, subscribing insurers—whether insurance companies or syndicates—each sign a "slip" that indicates the percentage of their participation in the policy. Signatures are collected until the percentages add up to 100 percent of the risk.[9]

The London broker plays a critical role in the process of ushering the policy into existence. It has been said that

> [t]raditionally, the glue that holds this Market together is, indeed, the London broker, who circulates the slip to multiple insurers until the risk is fully subscribed, assembles the physical policy on behalf of the insurers, and thereafter may act as a middleman to convey notices to the insurers and communications between and among the insurers and their agents, including counsel.[10]

The London brokers are, relatively speaking, a small group of insurance brokers that have had many names over the decades, including Sedgwick Forbes, Price Forbes, C.E. Heath, Heath Lambert, Marine Aviation & General, and others.

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During both the underwriting and claims process, the London broker's role goes far beyond a typical U.S. broker's involvement. U.S. policyholders, and even their U.S.-based insurance brokers, may not purchase a London Market policy without going through a London broker. In most cases, U.S. policyholders have limited or no contact with London insurance companies and syndicates, even when claims are submitted. Instead, a common practice is for notices, updates, and other communications to go to the U.S. brokers and then to London brokers, who then send copies to the insurance companies and syndicates or their managing agents.

Underwriters might claim that they do not retain copies of claim correspondence or even of policies, particularly if they were not the first to sign the slip. That entity is called the "lead," a status traditionally treated as carrying certain organizational obligations. Thus, if an insurance coverage dispute arises and the policyholder cannot locate its policies, the London insurers may assert the position that they do not have, and never were supposed to have, copies of the policies themselves and that the files of the London broker are the policyholder's only recourse. They may attempt to assert the same position with regard to correspondence, including notice letters, regarding claims.[11]

So Whom *Do* the London Brokers Represent?

For many years, London insurers took the position that, at all times, the London brokers were agents solely of the policyholder and never of the insurance companies.[12] They have been successful in convincing a number of U.S. courts of its accuracy.[13]

Recently, certain London insurers switched to the argument that the London brokers are dual agents that represent policyholders at the time of underwriting but represent the London insurers when the policyholders present claims. They did so in an effort to preserve attorney-client privilege for communications from their U.S. counsel that they had received from London brokers.[14]

The basis for the claim of dual agency was not entirely clear as, at both points, the London broker is the gatekeeper between the policyholder, its U.S. broker, and the London insurers. During the underwriting process, the London broker walks a new policy from underwriter to underwriter to obtain 100 percent participation.[15] During the claims process, similarly, the London broker "walks" or otherwise provides the claim notices, updates, and other correspondence to the underwriters in order to keep the insurers informed.[16]

In any event, the claim of dual agency failed to preserve the London insurers' claim of attorney-client privilege over those communications. In rejecting that claim, the Eastern District of New York noted that the London insurers failed to identify any facts that could establish privilege.[17] The London insurers responded with a motion for reconsideration, which led to a complete re-briefing of the issue. That motion ultimately was denied as well.[18]

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Interestingly, the London insurers' assertion of dual agency has favorable implications for policyholders in other respects. Among other things, it puts an end to the defense—often asserted by insurance companies in coverage disputes—that policyholders fail to honor their duties to insurance companies by sending notice letters and updates to brokers. That defense is refuted by the assertion that London brokers are agents of the London insurers for purposes of claims.

Disclosure by U.S. Counsel to London Brokers Waives the Privilege

All insurance companies—not just London insurers—sometimes attempt to insulate their claims files from disclosure in discovery by putting claims responsibilities in the hands of counsel. London insurers added structure to this approach by using U.S. counsel and even requiring it sometimes in the terms of the policies, some of which name the U.S. firm to handle the claim. Thus, from the outset of a claim, a U.S. law firm would then be the policyholder's point of contact.

London insurers use this structure to argue that the U.S. counsel files, including copies of correspondence sent to the London brokers, are entirely privileged.[19] They are wrong.

The U.S. counsel for the London insurers can end up performing claims-related tasks for years, even when there is no coverage litigation at all—neither actual nor threatened. Not surprisingly, London Market insurance companies claim that the performance of, and communications about, those tasks are protected by the attorney-client privilege. Some commentators go so far as to state that as long as the correspondence was addressed to underwriters, then even correspondence providing mere updates, and even if from an adjuster, should be treated as privileged.[20]

But the mere fact that a law firm is performing and communicating about such tasks does not automatically make them privileged. Even insurance companies have acknowledged this fact.[21]

It is beyond dispute that claims handling is an ordinary part of an insurance company's business.[22]The handling, monitoring, updating, and reviewing of claims, especially pre-litigation, is the essence of what insurance companies do.[23] These ordinary claims activities do not become the confidential rendering of legal advice solely because the people who perform them possess law degrees. For this reason, it is recognized in many jurisdictions[24] that the practice of assigning claims to law firms should not serve as a basis for avoiding disclosure of claims files.[25]

Even if the documents were not shared with a London broker, there may be an issue as to the underlying nature of the communications to determine whether they are entitled to protection. Substantial discovery may be needed to determine which documents, if any, are privileged, particularly if portions of the relevant privilege log are inadequate or incomplete.[26] Courts may need to conduct document-by-document reviews to determine whether or not the communications are privileged. In

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some cases, courts that have conducted such reviews determined that much of the correspondence that was asserted as privileged or protected was not.[27]

One clue to whether the function is legal or nonlegal lies in whether there is any procedure for handling claims or keeping claims files *except* through counsel. "It is telling that virtually no [insurance company] documents were produced to demonstrate claims analysis or investigation being conducted by anyone other than [the outside lawyers]."[28] This position is particularly relevant in cases involving the London Market because many London Market insurers take the position that they have no claims department or claim files.

But the recent case law establishes that the dispute is moot. Even if the U.S. counsel's communications could have been deemed privileged as a matter of law, the privilege would have been waived when they sent the communications to the London brokers, who, the London insurers claim, are agents of the insureds.

Even counsel for the London Market find this outcome beyond dispute. One such attorney, who denies ever distributing his own communications through London brokers, decried the practice as follows: "In essence the insurers put the fox in charge of protecting their hen house."[29]

In reacting to this outcome, insurers' counsel have suggested that—going forward—all that the London Market needs is a slight change of tactics in order to continue preserving the privilege. The solution, according to some commentators, would be to use technology to eliminate the broker from the chain of communication. One commentary suggests the following:

> On a going-forward basis, the simplest thing to do is to limit the distribution of attorney-client privileged communications to the actual participants on the involved slip who have retained the involved attorneys, and to make sure those participants understand the attorney-client communications must remain confidential.[30]

But the solution is not as simple as it sounds. In many cases, decades of communications have taken place already. Thus, the privilege has been waived for every letter that was distributed through the London brokers. Once waived, it cannot be resurrected by resort to alternative forms of communications.

Conclusion

All policyholders that deal with the London Market should take note. If U.S. counsel distributed communications to London insurers through London brokers, those communications are not protected and should be disclosed. And if London insurers claim that notice or claim updates went only to brokers, they should be precluded from denying knowledge or receipt by their own claims of dual agency.

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[2] *See, e.g.*, Edinburgh Assurance Co. v. R.L. Burns Corp., 479 F. Supp. 138, 144–46 (C.D. Cal. 1979), *affirmed except as to interest*, 669 F.2d 1259 (9th Cir. 1982) (offering an explanation relating to certain aspects of the London market).
[3] *See, e.g.*, Ostrowiecki v. Aggressor Fleet, Ltd., No. 07-cv-6598, 2008 U.S. Dist. LEXIS 122422, at *23 (E.D. La. May 20, 2008).
[4] Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp. [National Railroad], 162 F. Supp. 3d 145, 2016 U.S. Dist. LEXIS 27041 (E.D.N.Y. 2016).
[5] David Klein, "It Was Only a Slip! London Insurers' Communication with Counsel via Brokers Constituted Waiver of Privilege," *Policyholder Pulse*, Apr. 25, 2016.
[6] Lloyd's itself describes the market as being made up of members that can be corporate entities, names, and limited partnerships. *See* Lloyd's.com, Membership Overview. *See also* Fredrik Furugren & Max Matthiessen, "Insurance Brokers Role at the London Market," *NFT*, Apr. 1997.
[7] Lloyd's further explains that its members also may join together to form a syndicate and subscribe to policies as a syndicate. *See* Lloyd's.com, The Lloyd's Market. The Insurance Risk Management Institute (IRMI) defines a Lloyd's syndicate as "[a] group of individuals at Lloyd's of London who have entrusted their assets to a team of underwriters who underwrite on behalf of the group." *See* IRMI.com, Lloyd's Syndicate.
[8] *See* Lloyd's.com, The Lloyd's Market, *supra*.
[9] *See* S.P. Manson, S. Turpin & C. Fischette, "10 Things You Need to Know about London Market Practice," at 5–6 (Mar. 2, 2013) (available at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2013_insurance_coveragelitigationcommittee/b_11_10_things_you_need.authcheckdam.pdf). Commentators with experience representing the London market offer historical detail about the role of the London broker to walk around to underwriters to obtain subscribers to a policy. *See* Barry Zalma, "London Market System of Communication Waives Attorney Client Privilege," *Zalma on Insurance*, May 11,

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2016. *See also* Edinburgh Assurance Co. v. R.L. Burns Corp., 479 F. Supp. 138, 144–46 (C.D. Cal. 1979) (offering an explanation about aspects of the London market).
[10] Klein, "It Was Only a Slip!," *supra*.
[11] Denis P. Theobald, "Aviation Insurance and Lloyd's of London," 47 *J. Air L. & Com.* 787, 791 (1982) (discussing London market practices and expressing a London market participant's view of issues); William Green, AmWINS Grp. Inc., "Insurance Claims at Lloyd's—How Does It Work?," *Amwins.com*, Feb. 18, 2014.
[12] Theobald, "Aviation Insurance and Lloyd's of London," *supra*, at 792.
[13] *See, e.g.*, *Occidental Chem. Corp. v. Hartford Accident & Indem. Co.*, Index No. 41009/80 (N.Y. Sup. Ct. Niagara Cty. Mar. 22, 1995); In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig., MDL No. 764, 1990 U.S. Dist. LEXIS 12532, at *7 (E.D. Pa. Sept. 19, 1990).
[14] *See* National Railroad, 162 F. Supp. 3d at 149.
[15] *See* Zalma, "London Market System of Communication Waives Attorney Client Privilege," supra("The London broker would take [the policyholder's] insurance order and walk around to the various syndicates and companies in the London insurance market to 'fill up' the policy.").
[16] Green, "Insurance Claims at Lloyd's—How Does It Work?," *supra*.
[17] *See* National Railroad, 162 F. Supp. 3d at 153.
[18] *Certain Underwriters at Lloyd's London v. Nat'l R.R. Passenger Corp.*, No. 14-cv-4717 (FB) (RLM) (E.D.N.Y. Apr. 25, 2016) ("the fact that the reports were to be made available to insurers who were clients and who had a right to review them does not establish that the distribution was in fact so limited" and, thus, the insurers "failed to establish the necessary elements of privilege, including whether those communications were between attorneys and clients")
[19] *See* National Railroad, 162 F. Supp. 3d at 150.
[20] Theobald, "Aviation Insurance and Lloyd's of London," *supra*, at 792.
[21] Certain Underwriters at Lloyd's v. Fid. & Cas. Co., No. 89-cv-0876, 1997 U.S. Dist. LEXIS 19670, at *3 (N.D. Ill. Dec. 9, 1997) (addressing claims by the defendant insurance company that the plaintiff London insurance companies' privilege claims were unsupported).
[22] Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160, 163 (D. Minn. 1986).
[23] W. Nat'l Bank of Denver v. Emp'rs Ins. of Wausau, 109 F.R.D. 55, 57 (D. Colo. 1985).
[24] Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, No. 90-cv-7811, 1994 U.S. Dist. LEXIS 17768, at *5 (S.D.N.Y. Dec. 13, 1994); Mission National Insurance Co., 112 F.R.D. at 163(claim documents would be created whether or not attorneys were hired or litigation ultimately ensued because insurance companies have a duty to investigate claims).
[25] First Aviation Servs. v. Gulf Ins. Co., 205 F.R.D. 65, 69 (D. Conn. 2001) (holding that the fact that counsel handled the claim was not a valid basis for withholding the documents and, thus, production was required).
[26] AIU Ins. Co. v. TIG Ins. Co., 2008 U.S. Dist. LEXIS 66370, at *34 (S.D.N.Y. Aug. 28, 2008) ("Application of the work-product doctrine to an insurance company's claims files has been particularly troublesome because it is the routine

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business of insurance companies to investigate and evaluate claims."); Tudor Ins. Co. v. McKenna Assocs., No. 01- cv-0115 (DAB) (JCF), 2003 U.S. Dist. LEXIS 10853, at *7 (S.D.N.Y. June 25, 2003); Am. Nat'l Fire Ins. Co. v. Mirasco, Inc., Nos. 99-cv-12405 (RWS), 00-cv-5098 (RWS), 2001 U.S. Dist. LEXIS 10623, at *3 (S.D.N.Y. Aug. 2, 2001), *vacated on other grounds*, 144 F. App'x 171 (2d Cir. Aug. 15, 2005). Thus, courts have held that documents in a claims file created by or for an insurance company as part of its ordinary course of business are not afforded work-product protection. *E.g.*, OneBeacon Ins. Co. v. Forman Int'l, Ltd., No. 04-cv-2271 (RWS), 2006 U.S. Dist. LEXIS 90970, at *12 (S.D.N.Y. Dec. 15, 2006) (citing cases).

[27] Certain Underwriters at Lloyd's v. Fid. & Cas. Co., 1997 U.S. Dist. LEXIS 19670, at *3 (N.D. Ill. Dec. 9, 1997) (finding that correspondence from counsel, and some to counsel, that contained a "status report," "review of the case," or "non-legal advice," was "primarily factual" or was an "update," or simply did not contain advice or impressions of counsel).

[28] Drennen v. Certain Underwriters at Lloyd's of London (In re Residential Capital, LLC), No. 12-12020, 2017 Bankr. LEXIS 1951, at *12 (Bankr. S.D.N.Y. July 14, 2017).

[29] *See* Zalma, "London Market System of Communication Waives Attorney Client Privilege," *supra*.

[30] Michael L. Foran & Gavin Coull, "Attorney-Client Privilege Derailed by Custom and Practice," *Law360*, Apr. 13, 2016.

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