Chicago Daily Law Bulletin®

Serving the profession since 1854

July 8, 2020

An insured does not control its insurer

By Donald P. Eckler and Patrick Cloud
Donald "Pat" Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. Patrick Cloud is a shareholder in Heyl, Royster, Voelker, & Allen, P.C.'s Edwardsville office. Cloud concentrates his practice on insurance coverage litigation, toxic tort matters, complex civil litigation, and products liability defense. He is also chair of both the firm's Insurance Services Practice and Class Actions/Mass Torts Practice. Their views are their own and not those of their firms or their clients.

Johnny is sued, and his father hires a lawyer for him. In the course of the case, certain information and documents are sought by the plaintiff that are in the possession of Johnny's father. Johnny's father refuses to produce the requested information and documents. Could Johnny or his counsel be sanctioned or held in contempt for what Johnny's father refuses to do?

Depending on how a recent decision is applied, they just might be.

Extending the decisions in *Szczeblewski v. Gossett*, 342 Ill.App.3d 344 (2003), and *Oelze v. Score Sports Venture, LLC*, 401 Ill.App.3d 110 (2010), the 2nd District Appellate Court in *Grant v. Rancour*, 2020 IL App (2d) 190802, Para. 26, 30, recently held that the insured has "reasonable control over the documents possessed by her insurer" and that a defendant has a "good-faith obligation to make a reasonable effort to secure that production." However, an insured and outside defense counsel do not have control over the insurer and that good-faith effort can only consist of a request to the insurer for the documents and information sought.

In *Grant*, the plaintiff sought information and documents reflecting payments to the defendant's disclosed controlled expert witnesses by the insurer and the insurer's in-house counsel in other cases. Defense counsel objected to the production and directed the plaintiff to issue a subpoena to the insurer and its in-house counsel. The defendant ultimately only produced documents that did not satisfy plaintiff's counsel and the court, and defense counsel was held in friendly contempt.

Szczeblewski and *Oelze*, which concerned requests to admit, require defense counsel to consult an insurer's database to respond regarding the reasonableness of medical bills. Quoted by the *Grant* court, the *Oelze* court went so far as to hold that "[s]o defendant knew what [plaintiff's] injuries were and, with its access to its insurance company and the insurer's databases of claims and necessary treatments and expenses, could make a pretty good guess at the reasonableness of the expenses and treatments claimed and contest those, if necessary." *Oelze*, 401 Ill.App.3d at 126. The *Grant* court extended this reasoning to the good-faith effort for production of documents in the possession of the defendant's insurer.

Before getting to the limitations of the ability for defense counsel to undertake good-faith effort to produce information and documents from a defendant's insurer, a further examination of the Supreme Court rules is necessary. Rule 213(e) allows the production of documents in lieu of a response and states that such response shall be in conformity with Rule 214. In turn, Rule 214 provides that a party can respond that the documents sought are not in the party's possession or control, and then identify who is in possession of the documents. It does not appear from the oral argument or the opinion in *Grant* that this argument was advanced. It is clear that despite knowing the identity of the insurer and its in-house counsel, the plaintiff did not issue subpoenas to them for the information requested, and the trial court did not require that such be issued, instead requiring defense counsel to obtain the documents and information.

The *Grant* decision and the *Szczeblewski* and *Oelze* decisions before it, do not properly appreciate the relationship between the insured, the insurer, and defense counsel and therefore what would constitute a "good-faith effort" by the insured and defense counsel is absent from the decision. Beyond asking, there is nothing an insured or defense counsel can do to obtain production of any requested documents or information from an insurer. In any other situation under the rules, the identification of the entity or individual holding the documents and information requested would discharge a party's and its attorney's obligation under the discovery rules. Nothing in the relationship between an insurer and its insured should change the application of the Rules.

Under Illinois law, an insurance defense lawyer has two clients: the insured and the insurer. However, ultimate duties are owed to the insured. Understanding that the *Grant* court rejected the argument that the insurer was not subject to personal jurisdiction of the court because no subpoena had been issued to it and could not be compelled to produce documents, a lawyer cannot compel a client, especially one that is not party to the litigation, to do anything. The insured should not be sanctioned for something the insurer refuses to do, especially when plaintiff's counsel has the means readily available to obtain the documents and information requested.

Broad application of the *Grant* decision may routinely place defense counsel in an untenable position that could lead to a conflict between the insured and the insurer and frequently cause significant delays in litigation as defense counsel works to protect the insured and themselves from sanction or contempt. Just as Johnny and his lawyer cannot make Johnny's father produce requested documents and information, so too are an insured and retained insurance defense counsel unable to require an insurer to produce information and documents.

©2020 by Law Bulletin Media. Content on this site is protected by the copyright laws of the United States. The copyright laws prohibit any copying, redistributing, or retransmitting of any copyright-protected material. The content is NOT WARRANTED as to quality, accuracy or completeness, but is believed to be accurate at the time of compilation. Websites for other organizations are referenced at this site; however, the Law Bulletin Media does not endorse or imply endorsement as to the content of these websites. By using this site you agree to the Terms, Conditions and Disclaimer. Law Bulletin Media values its customers and has a Privacy Policy for users of this website.