Protecting Expert Records

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One of the industry's most powerful weapons against bad faith litigation is the "genuine dispute" defense. Under this doctrine, even if the insurer made an incorrect decision regarding coverage or the value of a claim, the insurer cannot be liable for bad faith if it can show that a legitimate dispute existed regarding its obligations. One method of establishing a genuine dispute is to show that the insurer reasonably relied on the opinion of an expert. *Guebara v. Allstate Ins. Co*., 237 F.3d 987, 993 (9th Cir. 2001). Plaintiffs regularly attempt to overcome this powerful defense by trying to show that the insurer's expert is biased. *Id*. at 996. To do this, plaintiffs often try to subpoena the expert's records, seeking documents relating to other insurance claims. Such records, however, may be protected from disclosure.

In California, custodians of private information relating to third-parties have a duty to protect that information. *Craig v. Municipal Court*, 100 Cal. App. 3d 69, 77 (1979). This rule has special application to insurance companies, which are obligated to keep insurance information private. Cal. Ins. Code § 791.13. As custodians of private information, insurance companies "may not waive the privacy rights of persons who are constitutionally guaranteed their protection." *Board of Trustees v. Superior Court*, 119 Cal. App. 3d 516, 526 (1981). Insurance companies, therefore, may oppose the production of an expert's records on the following grounds:

First, information relating to insurance claims is "personal" and "privileged." *Griffith v. State Farm Mut. Auto. Ins. Co*., 230 Cal. App. 3d 59, 65-66 (1991). California Insurance Code section 791.13 restricts insurers from disclosing such information. In fact, insurers cannot disclose information relating to other insureds without prior written consent. *Mead Reinsurance Co. v. Superior Court*, 188 Cal. App. 3d 313, 321-22 (1986). At a minimum, third-parties must be given notice and an opportunity to object when their private records are sought by subpoena. Code Civ. Pro. § 1985.3.

Second, medical records are protected by the right to privacy. *Johnson v. Superior Court*, 80 Cal. App. 4th 1050, 1068 (2000).

And third, the requesting party must demonstrate a compelling need for the private information that outweighs privacy rights. *Board of Trustees v. Superior Court*, 119 Cal. App. 3d 516, 525 (1981). The fact that "discovery of private information is found directly relevant to the issues of ongoing litigation" is not enough of a compelling need to require disclosure. Id. Indeed, "the public interest in preserving confidential information outweighs in importance the interest of a private litigant. . . ." *City & County of San Francisco v. Superior Court*, 38 Cal. 2d 156, 163 (1951).

But even if a compelling need does outweigh the right to privacy, the requesting party still may be blocked from obtaining the documents if there is an alternative means of acquiring the information. In *Allen v. Superior Court*, 151 Cal. App. 3d 447, 449 (1984), a personal injury plaintiff subpoenaed the records from a medical expert

relating to “his practice for the defense and for insurance companies over the past five years.” The plaintiff maintained that she needed these records to show that the doctor was biased. *Id*. at 450. The California Court of Appeal held that records “concerning other patients and examinees” were not discoverable because the plaintiff had “made no showing that the information sought or substantially equivalent information could not be obtained through other means, such as by conducting a deposition without production of the records.” *Id*. at 453.

Insurers should not simply concede to the disclosure of their expert’s records. Rather, they should object on the grounds that (i) information relating to insurance claims is personal and privileged, (ii) the records are protected by the right to privacy, and (iii) there is no compelling need that outweighs the right to privacy. And even if the court denies these objections, insurers may argue against production if there is an alternative means of acquiring the information. By so doing, insurers will not only fulfill their obligation to keep insurance information private, they will limit the scope of the records produced, if not defeat production all together.

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