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NEWSLETTER

District Court Holds Policyholder May Depose Insurer's In-House Counsel

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The United States District Court for the District of Kansas denied an insurer's motion for a protective order to prevent the deposition of its in-house lawyer or to restrict the deposition and the accompanying *subpoena duces tecum* to items that are non-privileged and relevant. *Continental Cas. Co. v. Multiservice Corp.*, 2008 WL 73345 (D. Kan. Jan. 7, 2008).

In a declaratory judgment action in which an insurer sought a determination as to coverage under a professional liability policy, the insurer filed a motion for a protective order to prevent the deposition of its in-house counsel, or, at a minimum, to restrict the deposition to items that were non-privileged and relevant. Denying the motion, the court rejected the insurer's argument that good cause existed for the entry of a protective order because the attorney's communications were protected by the attorney-client privilege and/or work product privilege, and therefore, the deposition would only serve to "annoy, harass, or cause unnecessary expense." The court recognized that a party may object to discovery on the basis of privilege or relevance, but "such objections are not a basis upon which the court may enter a protective order."

The court also rejected the insurer's argument that the deposition notice failed to satisfy the test for deposing opposing counsel. The insurer's motion contained only unsworn general statements regarding the attorney's position with the insurer and her role in the underlying lawsuit, and therefore, the court could not determine whether the attorney qualified as opposing counsel in the matter. Lastly, the court noted that even if the attorney did qualify as opposing counsel, the insurer's motion did "not provide the court sufficient information to determine whether all, or even most or some, of the communications [the policyholder] seeks are privileged."