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The Prudential Need for Insurer Access to Information

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The disclosure of documents and information to a professional liability insurer is fundamental to a policyholder's obligation to cooperate with its insurer in the defense and settlement of a claim. In most policies, an insured is contractually obligated to provide its professional liability insurer with all information, assistance, and cooperation that the insurer may reasonably request. This provision ensures that the carrier will receive sufficient information about the claim so that it can fully evaluate the potential liability to the insured and, significantly, assess a reasonable settlement value for the case.

This straightforward concept can become more complicated, however, where the insured may access information in the course of the claim to which it would not otherwise have access, as when confidential information is produced in the course of discovery. Information obtained from the claimant and other noninsureds may be critical to an insurer's ability to evaluate the claim and proceed on equal footing with its insured in assessing the matter. Those other parties, however, may have an interest in protecting such information, and thus discovery in the underlying litigation may be subject to a protective order. In such instances, claimants and policyholders typically request that courts enter stipulated protective orders governing the production and safeguarding of confidential documents with explicit provisions as to whom the parties may disclose confidential information, including interested participants such as experts, witnesses and mediators. Insurers are likewise routinely added to the approved list of recipients, precisely in light of the cooperation requirement and the role they often play in resolution of the dispute.

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This sharing of confidential information with insurers provides benefits to claimants and insureds. First, the insured benefits by fulfilling its obligation to cooperate with its insurer and providing all information that the insurer reasonable requires. Second, the claimant and policyholder benefit because the insurer can fully evaluate its insured's exposure in the claim and participate meaningfully in the resolution of the matter. Courts generally have proved receptive to this approach, likely in recognition of the role a carrier often plays in resolution of the dispute and of the policyholder's contractual obligations in that regard. However, in a recent ruling, a judge in the United States District Court for the Southern District of New York refused to allow confidential documents to be shared with the defendants' insurers. *See In re American Realty Capital Properties, Inc.* Litigation, No. 1:15-mc-40-AKH, Doc. No. 313 (S.D.N.Y. Oct. 26, 2016). The ruling demonstrates that insurers should educate their insureds about the need to seek exceptions to confidentiality orders to allow information to be shared with them and work proactively with the insureds to convince courts that the disclosure of confidential information to insurers is critical to the efficient evaluation and potential settlement of cases.

In the action, a purported class of shareholders of American Realty Capital Properties Inc. (ARCP), a commercial real estate investment trust, filed a consolidated securities class action alleging violations of federal securities laws. The securities class action named as defendants ARCP, its subsidiaries and certain directors and officers of ARCP and its subsidiaries as well as the company's auditors and various underwriters of the ARCP's securities offerings. The securities class action is consolidated with several opt-out actions and a separate derivative action for purposes of pre-trial discovery.

As part of discovery in the consolidated actions, the parties submitted a proposed stipulated protective order to the court to govern the production, handling, and disclosure of confidential information. The parties could not agree whether confidential information produced in discovery could be shared with defendants' insurers and submitted the issue for the court's consideration. In its Oct. 26, 2016 Order in the ARCP litigation, the court held that confidential information could not be shared with insurers. In explaining the basis for its ruling, the court stated that the party seeking that permission:

... failed to show that there is a justifiable need to include its insurer among the persons entitled to receive, view or otherwise be told of the contents of 'confidential' documents. Insurance coverage generally is determined according to the allegations of the complaint, not the documents produced in discovery. The protective order is supposed to encourage production and discourage disputes about relevance. [The insured's] position poses the danger of reversing that position.

See Order Determining Discovery Issues, *In re American Realty Capital Properties Inc.* Litigation, No. 1:15-mc-40-AKH, Doc. No. 313 at 2 (S.D.N.Y. Oct. 26, 2016). Accordingly, the resulting protective order allowed parties receiving materials designated as confidential to share those materials, at least for purposes of the litigation, with counsel, experts, witnesses and mediators — but not a party's insurers. The rationale appears twofold. First, the court suggests, that sharing the information may be unnecessary under the view that the allegations of the complaint are presumably sufficient to resolve any questions concerning the availability of coverage for the securities and derivative actions. Second, the inclusion of insurers purportedly could discourage production and lead to unspecified disputes over relevance and be detrimental to the orderly

disposition of the case.

The court's suggestion—that sharing information with insurers is unnecessary as the allegations in complaints determine the scope of coverage—ignores the more pressing need to provide confidential information to the parties' insurers: to evaluate the insured's exposure in the action and meaningfully participate in the defense and settlement. As discovery progresses in any case, an insurer necessarily must evaluate the insured's exposure based on information and documents produced in litigation rather than potentially stale and inaccurate allegations in the complaint made without the aid of discovery. Although the allegations in the consolidated complaints may partially govern the availability of coverage, the court's rationale neglects that an insurer likely needs confidential information to meaningfully participate in settlement negotiations. For example, in this action, the reports of plaintiffs' damages expert would be designated as a confidential document, and plaintiffs' view of potential damages would be vital for insurers to evaluate and understand in advance of settlement discussions and mediation. But, under the court's order, defendants would be prohibited from sharing any confidential information concerning plaintiffs' alleged damages or any evaluation of the analysis of plaintiffs' damages expert if the information were deemed confidential. Thus, the insurers—the entities that often fund settlements in the typical securities class actions—would be completely shut out from the sources of information necessary for settlement.

Similarly, the court's second concern misses the mark and could lead to the inefficiencies it seeks to avoid. Artificially limiting relevant information is more likely to prolong a dispute rather than facilitate its resolution, particularly where the key facilitators may be denied relevant information. Thus, the court's efficiency concern—that sharing information with insurers would create disincentives to produce documents and engender disputes over relevancy—is completely swallowed by the fact that insurers cannot provide informed consent to a settlement for which they have no basis to evaluate the reasonableness. Further, sharing confidential information solely during the protective confines of a mediation is likely too late to allow insurers to assess liability and damages meaningfully.

Finally, the suggestion that the party seeking to facilitate, rather than limit, potential disclosure has failed to meet some unspecified burden is misplaced. Typically, the party seeking to prevent the disclosure of documents in a public proceeding bears the burden to show that limitations on disclosure outweigh the need to make public all documents submitted to the court. See, e.g., *The Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); (necessity to show good cause to support imposition of protective order). Creating a burden to share information with insurers, whose interests likely equal or exceed any of the other persons or entities to whom disclosure is approved — is at odds with the general principal that protective orders must be narrowly tailored.

Production of documents, especially confidential documents, to insurers serves the vital purpose of allowing insurers to be meaningfully involved in the defense and settlement of claims. When courts prevent such disclosure, the ability of insurers to evaluate and provide consent to settlements is significantly hampered, threatening the ability of complex cases to be settled. On the other hand, appropriately defined protective orders provide the basis for confidential information to be shared with the relevant parties, including insurers, and allow relevant decision makers to be fully informed in advance of mediation and settlement discussions.