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Broker Communications and Claims Against Insurers

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Mobile home parks typically carry liability insurance. Most policies are placed through a trusted insurance broker. When a claim or a lawsuit arises, the natural reaction is to contact the broker about tendering the matter to the insurer for coverage. After all, the broker has easy access to the policy information, and can quickly ascertain how to tender the claim. Assisting a client with claims is typically part of an insurance broker's services and is usually included within the fees paid for placing insurance. But is using your broker to tender a claim a good idea? Not always.

It makes sense to have a broker tender a matter where the coverage concern is straight-forward and not likely to be in dispute. For instance, in clear cases of property damage (*i.e.,* a tree falls on a mobile home), bodily injury (a slip-and-fall in a clubhouse), it is unlikely that the insurer will dispute coverage. In more complex cases that affect mobile home park owners, such as disputes arising out of the condition of a park property or where the residents claim that they have been constructively evicted, coverage is far from clear. In more complex cases, the safer bet is not to communicate with the broker, but rather tender the matter directly to the insurance company or to have the tender handled through counsel.

Denial of coverage can lead to a "bad faith" claim. To state a claim for bad faith, it must be shown that the insurer acted unreasonably in denying policy benefits, whether by denying a defense, refusing to settle or refusing to indemnify the park owner against the third party's claims.

How can communications between a park owner and its broker affect a park owner claim for bad faith? Here's how. If there is a legitimate dispute as to whether coverage existed, or if a denial of coverage was based upon a reasonable mistake as to coverage, there is usually no liability for bad faith. *Century Surety Co. v. Polisso* (2006) 139 Cal. App. 4th 922, 949 ("There must be proof the insurer failed or refused to discharge its contractual duties not because of an honest mistake, bad judgment, or negligence, 'but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.'"). If a park owner sends a claim to its broker to tender to the insurer, and if that broker, who is not an expert in complex coverage analysis, offers an informal opinion that: (1) he or she does not see coverage; (2) coverage is unlikely; or (3) even worse, "I think you can reasonably expect that coverage for the claim will be denied," such comments can directly affect a finding of bad faith. Should the insurer learn of these opinions and/or statements, or should the broker express such opinions directly to a claims investigator, the insurer will argue that its conduct was not unreasonable as evidenced by the park owner's broker's opinion. Thus, while the broker's opinion is almost always irrelevant to the determination by the Court as to whether coverage is available under a policy based upon the interpretation of policy terms, such an opinion can be extremely damaging to a bad faith case where liability turns upon whether the insurer denied a claim "unreasonably" or "without proper cause." As such, it is important for a park owner to be very careful about communications with the park's insurance brokers with respect to pending claims.

This is not to say that there should never be any communications between a park owner, its counsel and the park's insurance brokers concerning a pending claim. A broker may have valuable insight on a coverage question or dispute. However, the park owner and its counsel must always be aware that just because there is a pending dispute, and even if the attorney is dealing directly with the broker, the communications in and of themselves are not automatically privileged for the simple reason that brokers are almost always seen as "third parties" with respect to the attorney-client relationship with the park owner. As a result, depending upon the Court and the jurisdiction, these communications may not always be protected from disclosure to the insurance company.

For example, opposite results were reached in two Federal court cases from the Northern District of California. In one case, *Atmel Corp. v. St. Paul Fire & Marine Ins. Co.* (ND Cal. 2005) 409 F. Supp. 1180, the Court found that the attorney-client privilege was not automatically waived when the insured disclosed an attorney-client communication to its broker. The Court reasoned that communications between the insured and its broker were protected because the broker was deemed to be a necessary advisor as to coverage and the disclosure to the broker was reasonably necessary to further the client's interests.

Sony Computer Entertainment America, Inc. v. Great American Ins. Co. (ND Cal. 2005) 229 F. R. D. 632, reached the opposite conclusion. There, the Court found that the attorney-client privilege was waived because the insured failed to present admissible evidence that the presence of the broker during a deposition preparation conference was reasonably necessary to accomplish the purpose for which the lawyer was consulted. As recognized by the *Sony* Court, "[w]here a third party is present, no presumption of confidentiality obtains, and the usual allocation of burden of proof, resting with the proponent of the privilege, applies in determining whether confidentiality was preserved . . ."

The take-away here is that there is no guarantee that communications between a park owner, its counsel and the park owner's insurance broker will necessarily be privileged. Because the park owner does not, and cannot know in advance whether its broker will give an "off the cuff" coverage opinion in an e-mail or other writing, which opinion could be discovered by the insurer and used against the park owner in subsequent coverage litigation, it is best to avoid this type of communication altogether. When a more complex claim presents itself, a park owner is better served to either tender the matter directly to the insurer, or promptly send the claim to its coverage/litigation counsel to tender on the park's behalf.

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