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## **California Court of Appeal upholds insurer's attorney-client privilege**

By Samuel H. Ruby

By writ of mandate, the California Court of Appeal has directed a trial court to vacate an order that would have required an insurer to turn over hundreds of pages of potentially privileged documents.

In an action for breach of the duty to defend and bad faith, an insurer withheld from production numerous documents in its claim file concerning its litigation strategy, reserves, and communications with reinsurers. A discovery referee determined that the insurer could claim a privilege only with respect to direct communications between the insurer and its attorneys. The referee determined that *internal* correspondence and memoranda involving only the insurer's employees (or reinsurers) was not privileged, even if it discussed or relayed the attorney's advice. The trial court adopted the referee's findings.

Riding to the insurer's rescue, the Court of Appeal ruled, "the challenged orders employed an overly restrictive definition of the attorney-client privilege." "If legal advice is discussed or contained in the communication between [the insurer's] employees," the Court held, "then to that extent, it is presumptively privileged." A court cannot compel production of a presumptively privileged communication unless it finds that the insurer "waived the privilege by distributing the advice within the corporation" to employees who had no business being in the loop. On remand, the trial court will have to review each document, determine whether it "contains a discussion of legal advice or strategy of counsel," and if it does, whether the "employees with whom the advice of legal counsel was shared come within these principles."

The Court of Appeal's opinion, which has been certified for publication, is in the case of Zurich American Insurance Company v. Watts, Los Angeles County Superior Court No. BC 245144 & BC 251718.