

Come Out, Come Out, Wherever You Are: Insurance Companies Cannot Hide Claims-Handling Evidence Behind the Attorney-Client Privilege



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Many insurance companies hire attorneys to act as claims handlers, apparently seeking to shield their claims-handling conduct from discovery by asserting the attorney-client privilege and the qualified attorney work-product immunity. The attorney-client privilege and work-product immunity do not shield insurance company claims-handling information from discovery just because the insurance company hired attorneys to do the work of an adjuster or claims handler. Policyholders should not accept this abuse, and their efforts to seek in discovery what the insurance companies are trying to hide behind improper claims of privilege will often be rewarded.

The Federal District Court in Connecticut ordered an insurance company to produce all claims documents held by the attorneys it had hired as its claims handlers, despite the fact that those same attorneys represented the insurance company in the coverage litigation. In *First Aviation Services, Inc. v. Gulf Insurance Co.*, Judge Peter C. Dorsey ruled that the insurance industry's practice of using attorneys to perform the tasks of claims handlers "cannot become a mechanism for avoiding disclosure of documents through an assertion of privilege."

At the outset, the insurance company in *First Aviation* hired outside counsel to perform basic claims-handling functions. After tendering its claim, the policyholder heard only from the outside law firm, which wrote the insurance company's reservation of rights, investigated the

claim, monitored the underlying action and delivered the insurance company's eventual denial of coverage.

These typically are the tasks of an insurance company's claims handler. An insurance treatise used to train insurance professionals explains that investigating and claims determination are the task of a claims handler: "Claims representatives must investigate the facts of specific claims to determine coverage, legal liability, damages, and reserves." Further, the manual explains how claims-handlers must investigate and assess how the insurance policy responds to the facts:

First, claim representatives verify coverage, which may require investigation. Once coverage has been determined, the claim representative continues to gather facts about the claim through careful investigation.... As the facts are collected, the claim representative determines liability to assess how the insurance coverage will respond. The claims representative must also gather and evaluate facts about the damages to determine the value of the claim. Throughout this entire process, loss reserves are set and revised to reflect the probable cost to the company of the claim.

Markham, Quigley, & Thompson, *The Claims Environment*, Insurance Institute of America, Malvern, Pennsylvania: 1993 at pp. vii, and 29 respectively.

Accordingly, after receiving a sparse document production from the insurance company, the *First Aviation* plaintiffs demanded that the insurance company also produce the claims investigation documents held by the insurance company's out-

side counsel. The insurance company refused, asserting that these attorneys continued to represent the insurance company in the coverage litigation and that their documents were privileged and immune from discovery.

The *First Aviation* court soundly rejected the insurance company's claim of attorney-client privilege and work-product protection. The court relied in part on admissions by the insurance company's own expert witness that its outside attorneys functioned as claims handlers, and that their decisions were primarily business decisions:

Whoever is handling the claim on behalf of the insurance company has the same duties and obligations, whether it's a lawyer or not a lawyer. And the duties and obligations are to, of that person, are to figure out what the insurance company's duties or obligations are. In terms of is there coverage, do the right thing with the insured in terms of timely communications and other things that should be done with regard to the insured.

The court also noted that the insurance company's lack of internal guidelines supported the conclusion that the insurance company outsourced its claims handling:

Moreover, that [the insurance company] has no claims manuals or underwriting manuals for D&O Liability Insurance Policies suggests that [the insurance company] might outsource all claims arising thereunder.

The court warned that the use of attorneys as claims-handlers must not become a method of avoiding discovery of documents: "such a practice cannot become a mechanism for avoiding disclosure of documents through an assertion of privilege." In holding for the policyholder, the court stated further that an insurance company "may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigations."

First Aviation is not alone. In rejecting the insurance industry's abuse of the attorney client privilege, courts nationwide are applying longstanding and sound principles. Not all communications with attorneys are privileged. There must be a showing of confidence for the purpose of seeking or giving legal advice. The attorney cannot merely

be providing a routine service that otherwise would have to be provided by insurance company employees. Just as a manufacturer could not shield its manufacturing activity from discovery by hiring attorneys to staff and supervise its factories, an insurance company can not shield its claims handling activity by hiring attorneys to conduct it. This is their business, and conducting it through outside counsel is a business decision that should not provide an unfair litigation advantage against policyholders.

As the Court determined in *First Aviation*, simply because an attorney is conducting the investigation does not create a shield from the disclosure of otherwise discoverable documents: "to the extent an attorney acts as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply." In short, policyholders should not be fooled by an insurance company's game of "hide and seek." Claims handling documents generated by outside attorneys are discoverable. Policyholders who submit a claim should be wary of investigation and claim-handling conducted solely by the insurance company's outside law firm. If litigation ensues, policyholders should vigorously dispute the inevitable, illegitimate assertion of privilege by the insurance company. ■

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