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Discovery of Ordinary Claims-Handling Business Documents in Insurance Coverage Disputes

By John G. Nevius, Esq., P.E.

Insurance companies are in the business of underwriting risks and deciding whether a claim is covered. Often they will use attorneys for these ordinary business activities, particularly the claim-related activities. Policyholders are entitled to know what factors an insurance company considered in deciding whether to pay a loss under an insurance policy. Particularly when the policyholder and insurance company are embroiled in coverage litigation, these claims-handling and claims-related documents can take on added importance.

Claims-Handling Documents Generated Prior to Denial of Coverage Are Not Privileged

Because documents that a company generates in the ordinary course of business are not privileged, courts in New York, Pennsylvania and elsewhere have held that an insurance company cannot refuse to produce in litigation documents generated while deciding whether to pay a claim. "[T]he payment or rejection of claims is a part of the regular business of an insurance company." *Blanco v. Prada USA Corp.*, Index No. 101644/07, 2008 N.Y. Misc. LEXIS 10080, at *2 (Sup. Ct. Apr. 30, 2008) (internal citation omitted). Even so, many insurance companies continue to refuse to produce claim-related documents that those companies generated in the ordinary course of business, while deciding whether to pay a claim. Even if insurance companies engage outside attorneys to perform the ordinary claims functions to give those ordinary claims-related documents the appearance of "privilege" or "attorney work-product," the documents are still business records and discoverable.

Examples of routine business activities that are part of the claims process and so subject to discovery include:

- investigating the circumstances of the loss;
- examining the insurance policy terms and conditions in question;
- examining the damages incurred and whether and how those damages are covered by the insurance policy;
- taking a position as to the payment, if any, to be made for the claimed damages; and
- otherwise investigating and analyzing the claim and the insurance policy.

John G. Nevius is a senior shareholder in Anderson Kill's New York office. He is a member of the firm's Insurance Recovery Group and Chair of the firm's Environmental Law Group. Mr. Nevius is a Registered Professional Engineer and Adjunct Professor of Law at Pace University Law School where he teaches a class on Climate Change and Insurance. Mr. Nevius would like to thank his Anderson Kill colleagues Pamela D. Hans, John M. O'Connor and Kerry A. Sheehan for their assistance in preparing this article.
(212) 278-1508 | jnevius@andersonkill.com

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The business documents relating to these routine functions of handling a claim are all subject to production in discovery. These claims-related documents are not in general privileged work product or materials like other documents prepared in anticipation of litigation, regardless of the involvement of in-house or outside counsel.

In *Westhampton Adult Home, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 105 A.D.2d 627, 628, 481 N.Y.S.2d 358, 360 (1st Dep't 1984), for example, the 1st Department reversed the trial court and specifically required production of documents reflecting communications between an insurance company and its outside coverage counsel generated prior to denial. *Id*. at 627. The 1st Department rejected the assertion that a privilege applied simply because the insurance company engaged outside counsel. *Id*. at 627. The court, instead, ordered production of documents generated before and up until the date that the insurance company denied coverage.

The Appellate Division, 2d Department, also has held that the "payment or rejection of claims is a part of the regular business of an insurance company" and that "[m]erely because such an investigation was undertaken by attorneys will not cloak the reports and communications with privilege." *Bertalo's Restaurant*, 240 A.D.2d at 454-55, 658 N.Y.S.2d at 659 (citations omitted). Accordingly, communications that occurred before the date that the insurance company had reasonable grounds to deny the claim "are not immune from discovery" and must be produced regardless of any claims of "attorney-client" privilege, "work-product" privilege, or privilege for materials prepared in anticipation of litigation.

Documents Cannot be Withheld on the Basis of "Relevance"

Insurance companies often also withhold documents that merely indicate "relevance" on a privilege log. Of course, there is no "privilege" based on relevance and any such assertion is improper. CPLR 3101(a) provides for "full disclosure of all evidence material and necessary in the prosecution or defense of an action" and this provision has been "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issues for trial." *Roman Catholic Church of the Good Shepherd v. Tempco Sys.*, 202 A.D. 2d 257, 258, 608 N.Y.S.2d 647, 648 (1st Dep't 1994) ("Good Shepherd"). Disclosure is not limited to "evidence directly related to issues raised by the pleadings"; any facts "bearing on the controversy" are discoverable, and "[t]he test is one of usefulness and reason." *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y. 2d 403, 406, 408, 235 N.E.2d 430, 432-33, 288 N.Y.S.2d 449, 452-53. Moreover, the burden of showing that disclosure is improper is on the party resisting disclosure. Good Shepherd, 202 A.D. 2d at 258, 608 N.Y.S.2d at 648.

Documents Involving Third Parties Are Generally Discoverable

When an insurance company hires an outside adjuster to assist in a claim, whether to investigate, quantify the loss or make a recommendation as to whether the loss is covered by the policy, documents authored by or delivered to the adjuster presumptively are part of the insurance companies' business of claims handling and may be discoverable solely on this basis. Further, a party may rely on the attorney-client privilege only where the information claimed to be privileged has not been divulged to a person or entity that is not in the alleged attorney-client relationship or other third party. *See, e.g., People v. Harris*, 57 N.Y.2d 335, 343, 442 N.E.2d 1205, 1208, 456 N.Y.S.2d 694, 697 (1982). Policyholders should pay close attention to situations in which the insurance company has engaged an outside adjuster to participate in the claims investigation and determination — but is refusing to turn over those documents.

Where more than one insurance company insures the same loss, those insurance companies may not be able to assert the attorney-client privilege if they share documents among themselves. As is the case with outside adjusters, insurance companies who do not share a common interest may be found to have waived the attorney-client privilege — especially where separate counsel are employed — as they are not in an attorney-client relationship with each other and by definition have divergent interests. At a minimum, the insurance

companies asserting privilege over shared documents would likely have to demonstrate that they have a "common interest" such that they did not waive privilege by sharing documents with other insurance companies.

Discover, Discover, Discover

Policyholders in a dispute with their insurance companies should not hesitate to challenge improper claims of attorney-client privilege or work product. By paying close attention to the documents that insurance companies seek to withhold, the justification for withholding those documents, and the circumstances in which those documents were created, policyholders may shed light on an improper assertion of privilege. This is not to suggest that an insurance company may not assert privilege or work product protections as to any document that it drafts before communicating its coverage position to the policyholder. But documents generated by an insurance company before the company makes a decision to deny a claim are not necessarily privileged or attorney work product. Policyholders would be wise to pay close attention to documents created before a coverage decision is received and to consider challenging assertions of privilege.

By calling the court's attention to improper assertions of privilege, policyholders may be able to obtain discovery of documents that reveal the true reasons for denying a claim, identify inconsistent interpretations of policy language, and thus meaningfully advance their case.

About Anderson Kill

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