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Are An Insurance Company's Claims Documents Attorney Client Privileged?

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Can an insurance company refuse to produce relevant documents, simply because they were authored or received by an attorney? In a word, no.

These days, it seems that virtually everyone who works for or with an insurance company is an attorney or went to law school. Why is that? Years ago, many claims people did not even have a college degree, much less a J.D. after their names. Now, however, it seems that insurance companies have their former-lawyers-turned-claims-handlers refer out claims investigation, analyses, and handling to outside counsel. Could it be that the main goal for such an approach is to withhold claims documents from insureds in a coverage litigation? Cynical readers will say yes. Simply having outside counsel create or receive documents created in the ordinary course of an insurance company's claims handling operations does not make those documents privileged or subject to work product.

New York, a state whose courts have addressed this question repeatedly, continues to recognize that an insurance company cannot make a blanket decision to withhold claims investigation and claims handling documents,

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simply because they were written by an attorney. In *National Union Fire Insurance Company of Pittsburgh, PA v. TransCanada Energy USA, Inc.* , 981 N.Y.S.2d 68 (N.Y. App. Div. 2014), the New York Supreme Court, Appellate Division, First Department affirmed this long standing principle. The court explained "that the insurance companies retained counsel to provide a coverage opinion, i.e., an opinion as to whether the insurance companies should pay or deny the claims."

Id. The court rejected that position. It reiterated that "*[d]ocuments prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so 'merely because [the] investigation was conducted by an attorney.*'" *Id*. (emphasis added) (quoting *Brooklyn Union Gas Co. v Am. Home Assur. Co.*, 803 N.Y.S.2d 532 (N.Y. App. Div. 2005).)

The court upheld the trial court's decision "that the majority of the documents sought to be withheld are not protected by the attorney-client privilege or the work product doctrine as materials prepared in anticipation of litigation." *Id.* That decision is consistent with the principle that the attorney client privilege does not apply to claims documents that an insurance company creates in the ordinary course of business. In order for the privilege to apply, "the party invoking it must demonstrate that the information at issue was a communication between client and counsel or his employee, that it was intended to be and was in fact kept confidential, and that it was made in order to assist in obtaining or providing legal advice or services to the client." *SR Int'l Bus. Ins. Co. Ltd. v. World Trade Ctr. Properties LLC,* No. 01 CIV. 9291 (JSM), 2002 WL 1334821, at *1 (S.D.N.Y. June 19, 2002). New York is not the only state that follows this well-reasoned set of rules. Other courts across the country have done the same.

The takeaway for insureds in the middle of coverage litigation is to understand that it is becoming a more common tactic for insurance companies to claim virtually every document that they have is privileged or work product or both. That position almost certainly is wrong for documents created during the ordinary course of an insurance company's claims handling. Insureds should push to have these documents produced. Courts that examine the principles at issue closely recognize that the documents should be produced.