2019 Annual Conference
March 13 -15 2019
Orlando, FL

"You Said What?"
How to Maintain a Claims File
That Will Survive the Scrutiny of Extra-Contractual Litigation

Whether an insurance professional specializes in construction, auto, property, first-party, third-party, or is a Jack-of-All-Trades, he or she almost certainly must maintain a claims file on each claim. There comes a time in the life of many claims' professionals when his or her claims file, or that of the claims professional they manage, becomes the subject of discovery in an extra-contractual claim. Because of that, it is helpful to understand how to maintain a claims file that can withstand the scrutiny of such litigation and to understand the protections and privileges that may be afforded to insurers and claims adjusters before and during litigation. As more and more states are finding that an insurance adjuster may be held personally liable for bad faith, proper maintenance of a claims file, coupled with an understanding of work product and attorney client privilege, becomes more and more important to all adjusters.

I. Protections and Privileges Generally

Two basic kinds of protections and privileges apply to a claims file during the pendency of extra-contractual litigation; work product and attorney-client.

A. Work Product

1. Anticipation of Litigation

Work product is a protection applied to documents that are either prepared in anticipation of litigation or are proffering a legal opinion. *Hickman v. Taylor*, 329 U.S. 495 (1947). If a party receiving a request for these documents shows that the documents were prepared in anticipation of litigation, then the requesting party cannot get the items unless the requesting party proves that a) he has a substantial need; and b) that he is unable, without undue hardship, to obtain the substantially equivalent material by other means. F.R.C.P. 26(b).

2. Opinion

Even if a court determines that material from a certain date is discoverable, as litigation was not anticipated on that date, the court must still protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney, or other representative of a party, concerning the litigation. *In re Cendant Corp*., 343 F.3d at 663 ("Rule 26(b)(3) establishes two tiers of protection: first, work prepared in anticipation of litigation by an attorney or his agent is discoverable only upon a showing of need and hardship; second, 'core' or 'opinion' work product that encompasses the 'mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation' is "generally afforded near absolute protection from discovery.").

B. Attorney-Client Privilege

Attorney-client privilege attaches to communications between lawyers and clients made in the process of seeking legal advice. Federal Rules of Evidence 502.

1. Different types of Attorney-Client Relationships

Attorney-client privilege can be found between an insured and defense counsel, between an adjuster/claims professional and in-house counsel (claims counsel), and between a claims professional and outside coverage counsel. The privilege attaches to communications in all of these relationships. The attorney-client privilege is very strong. It is helpful to note that typically, as long as an attorney is hired by an insurer to defend an insured, communications between that attorney and both the insured and the insurer are protected. Thus, reports, emails, messages, etc. from that attorney updating an adjuster on the liability claim should not be discoverable by the liability plaintiff. However, they may be discoverable in a later bad faith action by the insured (who already has access to the report) against the insurer. *See e.g.*, *Camacho v. Nationwide Mut. Ins. Co*., 287 F.R.D. 688 (2012)

II. Discoverability of a Claims File

A. Scope of Discovery

Federal Rule 26 sets forth the general scope of discovery. Note that this may differ from state to state for matters litigated at a state level although many states have adopted the Federal Rules as their own as well. Unless otherwise limited by court order Rule 26 indicates that the scope of discovery is any matter that is not privileged, any matter that is relevant to the subject, and anything, even if ultimately inadmissible evidence, that appears reasonably calculated to lead to the discovery of admissible evidence. Thus, objections such as hearsay are not applicable to discovery questions as even if the hearsay is not admissible, it may lead to the discovery of admissible evidence, i.e., the hearsay statement will lead to discovery of the speaker of the original statement which, when garnered in a deposition, will no longer be hearsay.

B. Description of Contents

A claims file is a very general and amorphous term often used to describe notes, correspondence, investigative reports (police reports, incident reports, expert reports, etc.), internal reports, and photographs related to a particular claim. It is typically maintained by a claim's adjuster, monitored by a manager, and often audited by different people and entities.

In terms of discoverability, the claims file "straddles the line" of work product because insurers typically investigate all claims with an eye towards litigation, or at the very least, and understanding that many claims turn into litigated matters. Typically, even if a claims adjuster thinks a file "may end up in suit" the early investigative documents in a claims file are typically not considered work product. This can include documents gathered in determining whether a claim should be accepted or rejected. However, there comes a time when litigation becomes "imminent" and everything after that date becomes protected work product. It is important to note that any communications with an attorney, whether staff or panel, is protected by privilege, even if the work product protection does not apply to other claims material gathered around that same time. *See e.g.*, *Camacho v. Nationwide Mut. Ins. Co*., 287 F.R.D. 688 (2012).

C. Things to Keep in Mind with an Eye Towards Litigation

It is always a good idea for a claims professional to ask themselves certain questions early on in a claim with an eye towards these later protections or potential protections:

1. Should a statement be recorded?

2. Should the statements be taken in a particular order?

3. Should counsel be hired to manage the investigation, to hire experts, to talk to witnesses?

III. The Nuts and Bolts of Producing a Claims File

A. First Steps

This is typically done with the assistance of counsel. You (or your attorney will need to determine a "cut off" date for work product—i.e., determine when litigation was anticipated. All matters after that date should be protected from production. Counsel will need to review the file to determine all items that are mental impressions, conclusions, opinions, or legal theories. All items that fall into these categories should be protected from production, even if they fall before the date of anticipation of litigation. All communications with attorneys should be redacted, this includes notes about what the attorneys said and the actual emails, letters, texts, and voicemails.

B. Dos and Don'ts in Documenting Your File and Making Notes

1. **DO:** If you are entering a note about a conversation or meeting and counsel was present, make sure you identify counsel as being present as such will protect the content of the meeting.
2. **DO** use words that make it clear that you anticipate litigation. For example, "the insured refutes our position and indicated he is going to talk to an attorney", "I anticipate we will hear from a lawyer on this one soon".
3. **DO** make your notes clear regarding your thoughts (keep them professional) so that counsel understands your thought process. For example, "the claimant wanted $100,000, but he only had $100 in medical bills and a strained finger, thus I did not evaluate the claim at $100,000.)
4. **DO** note a mistake if you see one. Mistakes happen. If you notice today that on February 20, 2019, you made a note entry indicating that you spoke to claimant's engineer, but you really spoke to claimant's attorney, note that in today's entry, i.e., "Today I realized that I

inadvertently referenced a conversation with John Doe on February 20, 2019. I actually spoke with Jane Smith on that date."

5. **DON'T** make disparaging comments about insured, claimant, or counsel (even if they are true). For example, instead of "Plaintiff is unbelievable. He wants the moon and then some. He is belligerent every time I call. We are offering him $50 to go away and not a penny more and he doesn't even deserve that!", try "Plaintiff has been irate what I have called. He has demanded $1,000,000 for his sprained ankle. We are evaluating the case at $1,000."
6. **DON'T** make typos, particularly significant ones. Even small typos make a jury in a bad faith action think you are too busy to fully evaluate a claim. It is even worse if you make a significant typo like adding an extra "zero" on an offer or referencing a full release when you meant to reference a limited liability release.

IV. Personal Liability of Adjusters

Typically, if an employee makes an error in the course and scope of his or her employment, the employee is not personally liable for that error. However, there have been some cases where insurance adjusters, agents or other professionals are being held personally liable for some of their actions. It does seem patently unfair for an adjuster, who does not have any authority to resolve a claim beyond that which is given to them by their employer, to be held liable for failing to resolve a claim. However, Courts are still willing to impose that liability.

A. Texas

1. *Liberty Mutual Ins. Co., v. Garrison Contractors, Inc.*

In *Liberty Mutual Ins. Co., v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 486 (Tex.1998) the Texas Supreme Court held that the Deceptive Trade Practices Act applied not only to insurance companies, but to *some* individual employees. Interestingly, four years earlier the Texas Supreme Court held in *Natividad v. Alexsis, Inc.*, 876 S.W.2d 694 (1994) that neither an adjusting firm nor an adjuster employed by the firm owed a duty of good faith to an injured worker seeking worker's compensation coverage, absent a contractually created "special relationship." While *Natividad* has not been explicitly overruled, the *Garrison* case, *supra*, has been cited most recently (in 2016) for the proposition that adjusters can be held personally liable for violation of the Deceptive Trade Practices Act. See, *Gayatan v. State Farm Lloyds*, 2016 WL 8488351 (USDC W.D. Texas).

B. California

1. *Bock v. Hansen*

In *Bock v. Hansen*, 225 Cal.App.4th 215 (2014) the Court of Appeals for the First District in California found that an insurance adjuster could be held liable for negligent misrepresentation for the adjuster's conduct related to adjusting a loss. The court found a "special" relationship between an insurer and insured that, while not a true fiduciary relationship, is something more than a business relationship. This special relationship led the Court to find that the adjuster, as an employee of a party with a special relationship, has a personal duty to the insured and thus the general law of negligent misrepresentation applied to the adjuster.

C. Washington

1. Keodalah v. Allstate Insurance Company

Most recently, in *Keodalah v. Allstate Insurance Company*, 3 Wash.App.2d 31 (2018) the Washington State Court of Appeals found that an adjuster can be personally liable for bad faith and violation of the Consumer Protection Act. In *Keodalah*, *supra*, the Court found that the duty of good faith involved in insurance applies equally to individuals and corporations.

D. Florida

1. Stallworth v. Hartford Insurance Company

In contrast, in *Stallworth v. Hartford Insurance Co.,* 2006 WL 2711597, 20 Fla. L. Weekly Fed. D 169 (2006) the U.S. District Court for the Northern District of Florida found an adjuster is not in privity of contract with the insured and thus cannot be induvial liable to an insured for bad faith.

The bad news is that there are more than a handful of cases across the United States that hold that there is some liability for insurance adjusters or agents for their handling of claims. The good news is that not all courts are willing to go this route. I certainly would not call it a trend. Further, it appears that the adjusters' conduct does need to be something more egregious than a simple error before personal liability is imposed.

V. Conclusion

Bear in mind your claims file is one of the only "contemporaneous histories" of a claim, and thus is invaluable in extra-contractual litigation. Further, with the possibility of individual liability being found against adjusters, it is more and more important to always appear

professional and thorough, and to understand what may become public record in a future extra contractual suit.