

Insurer Claims-Adjustment Documents Are Often Discoverable

By **Christopher Sheehan and Jan Larson** (September 18, 2019, 5:42 PM EDT)

Policyholders looking to advance claims or defenses related to the adjustment of their insurance claim all too frequently find themselves unable to obtain crucial communications and documents from their insurer because the insurer utilized an attorney during the claim-adjustment process. Insurers routinely claim that such communications and documents are protected by the attorney-client privilege, the work product doctrine or both.

However, as the U.S. District Court for the District of Colorado recently reminded us in *Olsen v. Owners Insurance Co.*, even though insurers often use attorneys to assist in the claim-adjustment process, and even though those attorneys might be called upon to provide legal guidance or defend a future lawsuit, investigating the validity of a policyholder's claim is normally a factual endeavor that occurs well before any litigation is anticipated. As a result, communications and documents generated by the insurer in response to its investigation of an insurance claim often fall well outside the ambit of traditional privilege protections, even when an attorney is involved.

In *Olsen v. Owners Insurance Co.*,^[1] the plaintiff, Kenneth Olsen, sustained injuries as a result of a traffic collision and required medical treatment to recover. Olsen also claimed the injuries prohibited him from returning to work. After it appeared that the at-fault individual's insurance coverage would be insufficient to cover his medical expenses, Olsen filed a claim for benefits under his employer-provided insurance issued by Owners Insurance Company.

After Owners failed to provide benefits, Olsen filed suit, and, as part of his discovery requests, sought documents related to the handling and adjustment of his claim. Owners withheld from its production approximately 48 documents containing correspondence between Owners' claims adjuster, Nicholas Zeman, and its in-house counsel, Andrew Torrey, on the grounds they were protected from disclosure under the attorney-client privilege and the work product doctrine. Olsen's motion to compel the production of those documents soon followed.

According to Olsen, Zeman consulted Torrey in the ordinary course of Owners' claim-handling process and Owners was therefore required to produce all communications and documents that did not reflect legal advice but simply addressed the adjustment of his insurance claim. Olsen argued that where the



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challenged documents did not reflect clearly protected information, Torrey's role was akin to a routine claims adjuster whose communications and documents are fully discoverable.

In response, Owners claimed that the challenged documents were privileged because Zeman was generally told to seek legal counsel from Torrey if he had suspicions or concerns that his denial of a claim could lead to a bad faith action against Owners, and, thus, it was immaterial whether the communications occurred or the documents were generated as part of Owners' claim-adjustment process.

Even more broadly, Owners argued that communications by an attorney acting in a claim-handling role are always privileged because they "are actually shrouded by [an] ever-present threat of liability for bad faith claims handling." Owners also argued that the documents were entitled to work product protection because the threat of litigation arose "immediately" given Olsen's counsel's reputation for bringing bad faith claims against insurers.

With the parties' respective arguments as a backdrop, the court conducted an in camera review of 16 different groups of documents, generally summarized as follows:

- Emails alerting Torrey and Zeman to Olsen's lawsuit and assigning Owners' defense in the matter to another attorney, Kristi Lush;
- An email from Zeman to Lush transmitting a copy of Olsen's complaint;
- An email from another attorney, Andrew Lavin, alerting Torrey to Olsen's lawsuit;
- Emails between Zeman and Lush discussing Olsen's lawsuit, the fact that Lush's defense of Owners did not pose a conflict of interest, and Lush's need for underlying information;
- Two emails from Zeman to Torrey stating that Lush would be performing a conflicts check and that Zeman did not have information regarding the amount of an unspecified workers' compensation lien;
- A presuit email from Zeman to Torrey expressing skepticism as to a certain number of Olsen's medical bills;
- A presuit email in which Torrey both agrees with Zeman's request for prior medical records and seeks factual information from Zeman regarding Olsen's claim for benefits;
- An email from Torrey requesting a status update on Olsen's claim given Olsen's recent uninsured motorist demand and inquiring whether Zeman has sufficient information to evaluate that demand;
- A duplicate copy of Lavin's email to Torrey (noted above), later forwarded by Torrey;
- An email from Torrey reflecting his understanding of the nature of Olsen's demand, asking Zeman for his evaluation, and discussing the information needed to fully evaluate the demand;
- A presuit email from Torrey authorizing Zeman to proceed with obtaining an independent medical examination — which Zeman later testified was required before such an examination

could proceed — and instructing Zeman to limit his consultation with local defense counsel in order to facilitate the examination;

- An email from Torrey to Zeman seeking a status update as to Olsen’s claims;
- Copies of a memorandum from Zeman to Torrey providing details regarding Olsen’s claim, the accident and Olsen’s medical bills and seeking authority to give Olsen permission to settle with both the at-fault individual’s insurer and with Owners, but in which Zeman made no mention of any particular legal question;
- An email from Torrey to Zeman requesting factual information as to the circumstances of Olsen’s claim for benefits and providing Zeman direction as to the information needed to evaluate Olsen’s underinsured motorist demand;
- An email from Zeman to Torrey expressing uncertainty about Olsen’s medical records and diagnosis and suggesting that Zeman seek prior medical records to aid his evaluation; and
- Zeman’s claim notes, many of which, the court explained, reflected routine claim-adjustment procedures.

With the exception of two entries in Zeman’s claim notes, the court concluded that none of the above-referenced documents were entitled to protection under the attorney-client privilege or work product doctrine. Applying Colorado federal and state law, the court reminded the parties that “in the context of insurance claims and investigations, not every document drafted by counsel or every communication with counsel is protected by the attorney-client privilege.” That is because when an “attorney functions as a claims handler, the attorney-client privilege does not protect his communications with his client.”

Specifically, the court noted that “the attorney-client privilege does not protect the results of a factual investigation conducted by counsel relating to the origination of an insurance policy and the validity of a claim.” Nor, in that context, will the work product doctrine protect communications from a lawyer to an insurer.

The court further noted that claim investigations arising in the first-party context are normally “made in the ordinary course of business and are discoverable.” For instance, the court observed that memoranda of the type Zeman generated relating to Olsen’s claim are akin to an investigative file, which is ordinarily subject to discovery. The court explained that to the extent communications or documents might be protected by the attorney-client privilege in an insurance context, Colorado courts consider whether:

- (1) the information was provided by agents of the corporate client “to counsel acting as counsel” at the direction of supervisors;
- (2) the information was necessary for the provision of legal advice;
- (3) the agents were aware that their communications were made for the purpose of counsel rendering legal advice to the corporate client; and
- (4) the communications were treated as confidential.

As applied to Owners’ specific privilege claims, the court summarized by stating that “the nature of the services rendered by Owners’ attorneys to Owners at any given time drives whether the work product doctrine or attorney-client privilege attaches, not a particular chronology of events.” Against these principles and standards, the court observed that nearly all of Owners’ challenged communications and documents were administrative in substance, occurred or were generated as part of Owners’ claim-

adjustment process, and/or otherwise failed to reflect a request for, or the exchange of, legal advice; the fact that several post-dated Olsen's lawsuit was immaterial to the question of their discoverability.

The court further held that because the majority of the challenged materials were not "documents or tangible things prepared in anticipation of litigation," and did not otherwise contain Owners' strategy in defending against Olsen's lawsuit, the work product doctrine did not save them from disclosure. In so ruling, the court expressly rejected Owners' argument that the challenged documents were "immediately" entitled to work product protection due to Olsen's counsel's purported reputation for suing insurers. Instead, the court found that Owners' documents did not reflect the possibility of litigation until Owners actually received a copy of Olsen's complaint.

In sum, Olsen provides a helpful reminder that not all communications and documents involving an insurer's counsel are entitled to protection. Policyholders should closely scrutinize their insurer's privilege log and, when appropriate, request judicial review of withheld communications and documents to ensure a more complete production.

If generated in the normal course of a claim-adjustment process, and provided they do not otherwise contain clearly protected information or advice, these often critical communications and documents might be discoverable despite an attorney's involvement in their creation.

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[1] Olsen v. Owners Ins. Co., Civil Action No. 18-cv-1665-RM-NYW, 2019 WL 2502201 (D. Colo. June 17, 2019)