

New York Law Journal: Pre-Denial Work Product Limitation Applies to Insurers and Not Policyholders

New York law unequivocally empowers policyholders to demand discovery of nearly all documents and communications authored by insurers or their consultants before a denial of coverage by prohibiting insurers from claiming work-product protection over such material.

While Insurers routinely contend that this prohibition applies equally to policyholders in discovery disputes, a recent decision by Judge Jesse Furman in the Southern District of New York clarifies that this limitation on the scope of work product “applies to insurers ... and not to insureds.” *Tower 570 v. Affiliated FM Insurance*, No. 20-CV-0799 (JMF), 2021 WL 1222438, at *4 (S.D.N.Y. Apr. 1, 2021) (emphasis original). This means that policyholders can seek discovery into insurers’ pre-denial claims adjustment without opening the door to disclosure of their own sensitive and privileged coverage analysis.

In *Tower 570*, a first-party property coverage action, the policyholder engaged an electrical engineer and public adjuster within days of an electrical incident that resulted in significant property damage, to evaluate its cause and origin. The electrical engineer prepared a report expressing his opinion on the cause of loss, the final version of which was eventually provided to the insurer. However, draft copies of the report were also shared with the public adjuster and policyholder’s legal counsel. The insurer sought to compel these draft reports as well as communications among the electrical engineer, policyholder employees, the public adjuster, and counsel—all of which were authored within days of the loss but months prior to the insurer’s eventual denial of coverage. Citing to cases restricting insurers’ work-

product claims, the insurer argued that “[i]n the insurance context, it is generally recognized that an ‘anticipation of litigation’ privilege is deemed triggered when a determination has been made to reject coverage,” (citing *Bombard v. Amica Mutual Insurance*, 11 A.D.3d 647, 648, 783 N.Y.S.2d 85, 86 (2nd Dep’t 2004)). The Southern District, however, rejected the insurer’s argument, making express that “[t]he payment or rejection of claims is a part of the regular business of an insurance company” only, (emphasis original) (quoting *Bombard*, 11 A.D.3d at 648). Thus, although insurers may not assert work-product protection prior to the denial of coverage, a New York policyholder most certainly can.

From a practical standpoint, this means that policyholders are free to seek discovery of all pre-denial claims adjustment activity, including any communications with, or reports authored by, consultants, independent adjusters, or “experts” engaged by insurers to investigate the loss or evaluate coverage. Absent a decision to deny coverage (which Insurers all too often delay under the guise of “investigation”), an insurer may not assert “work-product” protection over such material. Even more significant is that for policyholders, this means they can pursue pre-denial discovery without fear of weakening their own work-product claims respecting material generated prior to receiving a formal denial of coverage from their carrier.

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