

Client Alert

Insurance Coverage & Recovery Practice Group

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Safeguard Your Litigation Privileges When Working With Insurance Brokers On Complex Insurance Claims

Businesses facing catastrophic losses, whether as a result of an accident or a natural disaster, or due to mass tort claims, frequently will engage both their insurance broker and legal counsel to identify and pursue potentially responsible insurers. The insurance broker can be a valuable resource during the claims process and, among other things, can help:

- develop loss allocation models to support insurance recoveries;
- collect, organize, and analyze the client's documentation of losses;
- supplement counsel's knowledge of the insurance market to help develop negotiation strategy; and
- leverage long-standing business relationships to facilitate settlement of claims disputes.

Clients must keep in mind, however, that disputed claims often proceed to litigation or arbitration. Once adversarial proceedings commence, insurers will argue that the broker is not the client's attorney, but rather a "third-party" to the attorney-client relationship. Insurers often pursue discovery of broker-client communications as well as attorney-client communications that are shared with the broker. These efforts by insurers can be overcome by establishing that the broker was engaged to assist counsel in gathering factual information, preparing for litigation, or otherwise formulating confidential legal advice, rather than performing the typical "day-to-day" functions of an insurance brokerage. The burden is on the policyholder to make this showing.

It is critical to document the reasons for the insurance broker's participation as part of the legal team at the outset of the claims process. In order to protect the confidentiality of communications to the greatest extent possible, and guard against inadvertent waiver of privileges, the client and/or counsel should secure an agreement with the broker before the broker is engaged to assist with a disputed claim. The agreement should:

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- Specify that the broker is being retained to assist counsel in formulating confidential legal advice;
- Outline the discrete functions the insurance broker will perform; and
- Specify that communications, files, and records will be maintained as privileged materials and labeled as such.

A court or arbitral tribunal will still have to analyze and decide whether a particular communication, in fact, was related to assisting with counsel's rendition of legal services. By taking the steps outlined above, however, clients can position themselves to have a strong factual record when adversarial proceedings commence.



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