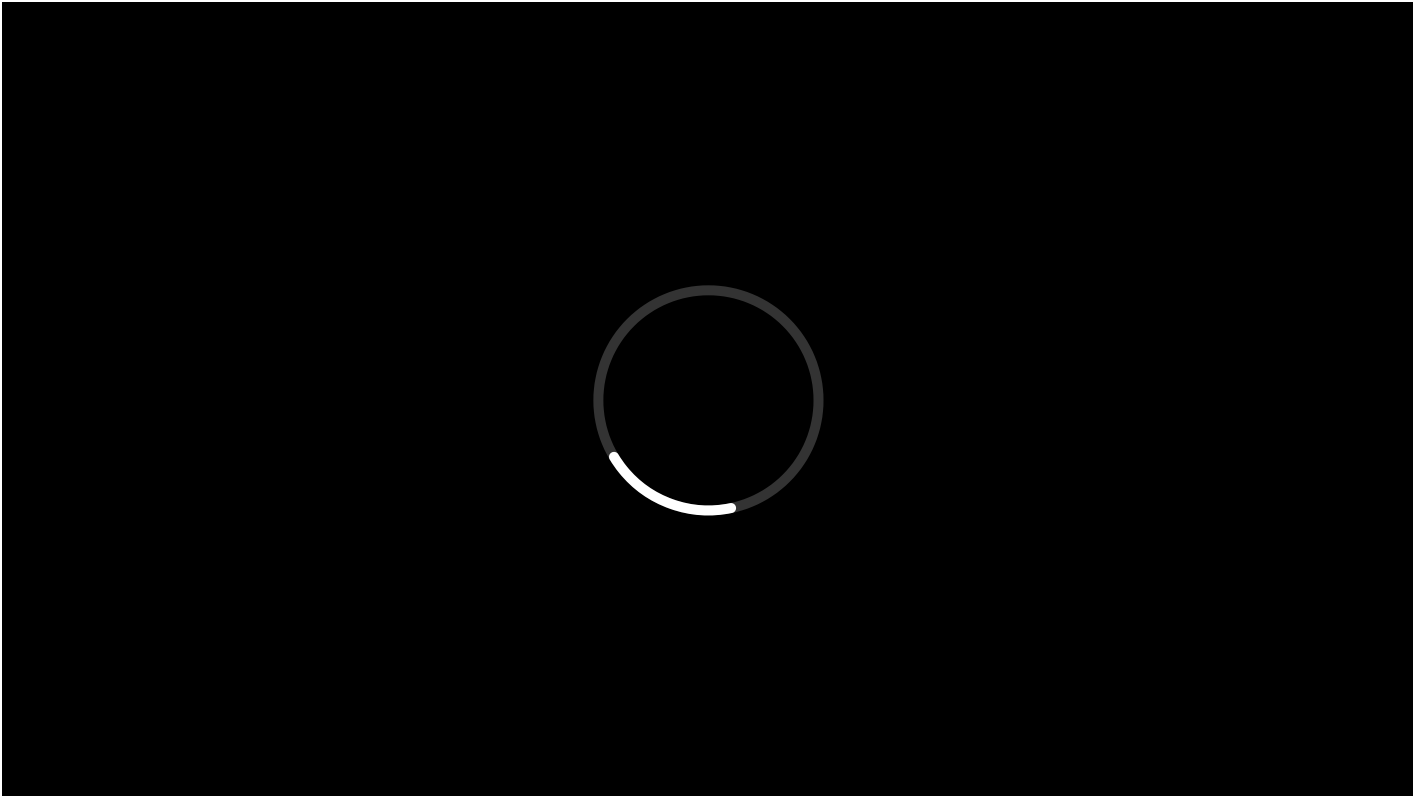


Policyholder Playbook Episode 12: Protect Communications With Your Broker

November 14, 2023 Greg Van Houten

PRACTICES Insurance Recovery, Litigation



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Show notes:

One of the first steps in an insurance coverage dispute is to assemble a team. Often, the folks our clients turn to first is their insurance broker. We love that, and we encourage it. Brokers are often tremendously helpful with managing claims, advancing claims, liaising with your insurer, and even resolving claims. If we, insurance coverage counsel, are engaged, and our client's broker is not, we'll often recommend folding the broker in. The broker knows the insurance program, how it should work, how it was negotiated, who the key players are. We love that. And we also want to protect that. Meaning, we often do what we can to ensure communications with and including brokers, made during the claims process, are and remain confidential. And there's some law supporting that proposition.

We recently litigated this issue in the case captioned *Homeland Insurance Company of New York v. Clinical Pathology Laboratories*, in the Western District of Texas. Homeland served our client with very broad document requests, including a request for most if not all of our client's communications involving their broker. We withheld a few hundred documents involving that broker on the basis that

the documents were privileged or contained work product, and that there was no waiver of those protections because the broker was acting as our client's "client representative," a key question under Texas law but also elsewhere. Our client submitted an affidavit stating that the company involved its broker in confidential and protected communications to assist the company with securing insurance coverage. Homeland ultimately filed a motion to compel. The Court denied the motion and the communications remained confidential. Email me if you'd like a copy of the Order.

In the order, the Court cited cases from across the country holding that communications involving a broker and attorneys may be privileged, and that an insurance broker can act as a "client representative" of an insured when its communications are made for the purpose of facilitating the rendition of legal services to the client. The Court held, upon the affidavit we submitted and our privilege log, that that was what was happening here. It was a great result.

So, this play, as a first step with an insurance coverage dispute, consider adding your broker to your team. As a part of that process, you might want to analyze the applicable legal landscape to assess whether and to what extent you can protect communications with your broker from production and disclosure. There is law out there that might be able to help.