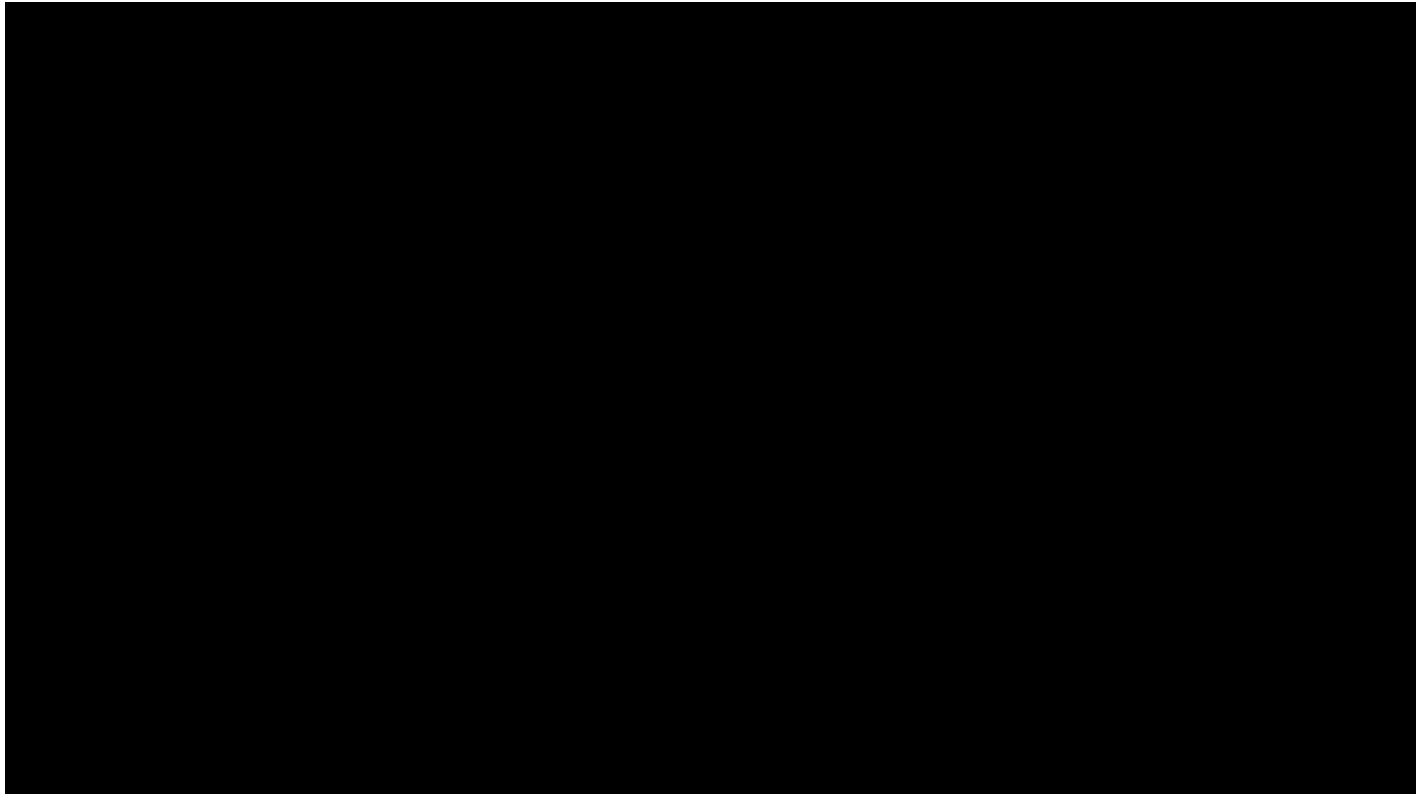


Policyholder Playbook Episode 15: Don't Let Your Insurer Withhold Parts of its Claim File Because of Attorney Involvement

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PRACTICES Insurance Recovery, Litigation



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Show notes:

Episode 15 is a play that is becoming more and more important – don't let your insurer withhold parts of its claim file because of attorney involvement.

Let's start with the basics. Insurance companies set up electronic claim files soon after they receive notice of a claim. From that point forward, most claim-related activity is documented in that file. The insurer's investigation, coverage determination, and the basis for that determination—it should all be in the claim file. In an insurance coverage dispute, that claim file would contain relevant information, and should therefore be discoverable.

Some insurers say, "not so fast." They'll withhold documents from the claim file on the basis that attorneys were involved and so they're privileged or work product. And here's where we often push back. Here's a great quote from a federal district court – "[C]ourts have routinely applied a

rebuttable presumption that neither attorney work product nor attorney-client privilege protects an insurer's investigatory file on an insured's claim from discovery before a final decision is made as to that claim." The concept is that investigating claims, creating a claim file, determining if there is coverage—those are routine insurance company business functions. Insurers cannot shield documents created in the ordinary course of their business merely by employing lawyers to do routine tasks.

A recent decision out of a federal district in Colorado highlights this concept in action. There, an insurer faced with a bad faith suit refused to produce certain communications involving lawyers that it claimed were privileged. The court conducted an in-camera review of the withheld documents and it ordered the insurer to produce many of them, reasoning that many of the withheld documents appeared to have regarded claim handling and the adjustment of the claim, but were merely "farmed out to attorneys." The court held that the insurer could not shield the documents from discovery by doing so. And that's a critically important holding, as those documents an insurer withholds are privileged or protected could make or break a case.

And that's today's play – do not allow your insurer to shield its claim file from discovery merely because it farmed out claim-handling activities to attorneys.

Quote No. 1 - Montoya v. Loya Ins. Co., No. CV 18-0590 SCY/KBM, 2019 WL 430881, at *2 (D.N.M. Feb. 4, 2019).

Quote No. 2 - Franklin D. Azar and Assocs. v. Executive Risk Indemnity, No. 22-cv-1381 (Nov. 7, 2023).