Insurers are hiring lawyers, with an eye on privilege

By Joe Cahill
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Take heart, legal job seeker. You may have a future as a claims adjuster, if you don’t mind taking center stage in the occasional discovery dispute.

Once considered a humble plan B for low-ranking graduates, jobs in the claims departments of insurance companies look more like a safe haven amid the tight legal job market.

“More and more insurance companies are using persons with law degrees to serve as adjusters,” says Don Sampen, a partner at Clausen Miller in Chicago who also teaches insurance law at the Loyola University Chicago School of Law.

Data on the number of lawyers working as claims adjusters isn’t available, but Sampen estimates that “a quarter to a third” of the adjusters he encounters in his insurance coverage practice have law degrees.

“It’s a significant portion of our workforce,” says David Perry, senior vice president of specialty claims at CNA Insurance Cos., who oversees more than 300 adjusters in the Chicago-based insurer’s professional liability unit. Perry, himself a lawyer, estimates that 95 to 100 percent of the adjusters in some of his departments are attorneys.

Law firms are cashing in, too, as more insurers engage outside counsel to perform functions traditionally done by in-house claims staff, says Richard Shore, a partner at Gilbert in Washington, D.C., who represents policyholders in coverage disputes.

“What I’m seeing is that insurers are increasingly hiring lawyers to handle claims processing,” he says.

In doing so, many insurers sometimes try to turn their attorney-adjusters into a tactical advantage when policyholders sue over rejected claims, by asserting the attorney-client privilege for work done by adjusters with law degrees. “Insurance companies may decide to hire an attorney for the role based on the view that it is more likely to give rise to a privilege,” says Sampen, who has represented both insurers and policyholders in coverage disputes.

Plaintiffs seeking to overturn denials of coverage often request the insurer’s claims files in discovery. Those files shed light on the decision-making process underpinning the rejection, information a plaintiff needs to support a claim that the insurer acted in bad faith in denying coverage. Insurers, not surprisingly, do not relish revealing their internal decision-making processes in open court. But they’re hard-pressed to resist requests to produce claims files prepared by nonlawyers.
It’s a different story when the adjuster has a law degree. Insurers argue that the conversations and documents of such an adjuster are shielded from discovery by the attorney-client privilege or the work product doctrine.

Lawyers for policyholders take a dim view of this argument. Shore says claiming attorney-client privilege for the work of attorneys acting as claims adjusters is like an engineering firm hiring attorneys to build a bridge “and then trying to shield their work when the bridge collapses.” Shore also contends that hiring a law firm to process claims violates an insurance company’s contractual obligation to evaluate claims objectively. Lawyers, he points out, are obliged to represent their client zealously. “Invariably the law firm will deny or severely cut back the claim.”

Shore says he recently persuaded a magistrate to order an insurance company to hand over a claim file prepared by an outside law firm. The insurer, Shore says, had engaged the law firm to handle the matter as soon as his client filed a notice of claim. He says an attorney at the law firm handled all the traditional claims functions, including investigating the claim and making the recommendation to deny coverage.

“There was no one at the insurance company that was doing any of this,” he says. “It was all done by the lawyers.”

Battles over discovery of claims files prepared by attorneys often wind up in court.

“It’s litigated constantly,” says Jeffrey Goldwater, a partner in Chicago with Lewis Brisbois Bisgaard & Smith who represents insurers in coverage disputes.

Cases generally turn on the question of whether the attorney is performing a legal function or a business function. This requires a judge to assess the nature of the lawyer’s role in the claims process.

“It’s a fact-intensive inquiry,” says Caroline Hurtado, a shareholder at Anderson Kill & Olick in Ventura, Calif., who represents policyholders in coverage litigation.

State law governs questions of privilege, so rulings vary around the country. But courts generally decline to extend attorney-client or work product privileges to matters that don’t require a law degree. This would include such routine claims department chores as logging of claims, preparation of summaries for internal use, factual investigations and initial coverage recommendations.

“The attorney acting as a claims adjuster is just performing a business function, not a legal function, and there’s no privilege for business decisions,” Hurtado says. “I’m not going to accept a privilege claim just because there’s an ‘Esq.’ after the claims adjuster’s name.”
TIMING AND PRIVILEGE CLAIMS

On the other hand, courts are likely to accord the privilege to traditional legal functions, such as performing legal research and giving advice on the law related to coverage decisions.

Timing also matters. As the parties move toward litigation, the files of attorneys involved in the claims process are more likely to be considered privileged as documents prepared in anticipation of litigation. Sampen says courts will look to determine whether an adverse relationship had developed between the insurer and insured at the time of the communication or document in question.

Under this analysis, documents prepared and conversations that took place before a coverage decision was made are unlikely to be privileged. Those that come after a decision to deny coverage might be privileged; those following a denial probably will be privileged; and those that follow the filing of a lawsuit almost certainly would be privileged.

Insurers can keep the lines clear and preserve possible privilege claims by separating legal and claims functions within the claims department. Goldwater says some companies give attorneys the title “claims counsel” and assign them traditional legal tasks, while other members of the department handle work customarily performed by claims adjusters. Attorney-adjusters are more likely to be found in more complex commercial corners of the insurance business, handling claims under professional liability policies such as directors’ and officers’ insurance or professional malpractice coverage. Fewer work in personal lines like auto or homeowners, where knowledge of electrical wiring or plumbing is more valuable than the ability to recite the rule against perpetuities.

Many of the abilities useful in the law are readily transferable to claims work. Attorneys often have well-developed analytical skills and experience applying general principles to unusual fact scenarios. And, of course, there’s the familiarity with litigation because they tend to work in areas that involve lawsuits against policyholders by third parties.

“The background and training is very relevant,” Perry says. “A lot of our clients are being sued.”