

The Defendant's Insurance Company As The Plaintiff's Investigator, Exhibit Maker, and Witness

By Stephen C. Kaufman, Civil Procedure & Evidence Editor

Recently, I was selected to serve as editor of the Civil Procedure and Evidence section of this magazine. Each month, if all goes well, there will appear in this space an article authored either by a member of the legal community or by me. Those wishing to submit articles for publication in this section should send them to Stephen C. Kaufman, Kidneigh, Hughes, Pelz, Leach & Clikeman, P.C., 500 Colorado Club Building, 4155 East Jewell Avenue, Denver, Colorado 80222. While the scope of articles may cover rule changes, or recent decisions and trends in the areas of civil procedure and evidence, they need not be limited to Colorado law or to actual rules. Articles may also address topics of practical significance and everyday relevance. I look forward to seeing your contributions in future issues.

DISCOVERY OF THE INSURER'S FILE

Thanks to two recent decisions handed down by the Colorado Supreme Court, *Hawkins v. District Court*, 638 P.2d, 1372 (1982) (en banc), and its corollary, *Kay Laboratories v. District Court*, 635 P.2d 721 (1982) (en banc), insurance company files are now subject to discovery. No longer will insurance companies be able to protect the fruits of their investigations on grounds of work product or attorney-client privilege. The opportunity is now open to plaintiffs' attorneys to obtain the results of insurance company investigations, use documents acquired from their files as exhibits, and call their adjusters as witnesses.

The Colorado Supreme Court held in *Hawkins* that documents contained in an insurance adjuster's file pertaining to his investigation of a claim or incident are discoverable, provided that the investigation was conducted in the normal course of business, as opposed to instances where there was a "substantial probability of imminent litigation" or where a lawsuit

had already been filed. In so deciding, the supreme court ruled that documents prepared or obtained by an insurance company in the normal course of business are ordinary business records, not trial preparation materials, and, therefore, are not work product. The supreme court further recognized that a substantial part of an insurance company's business revolves around the investigation of claims and incidents and announced that an insurance company's investigation would be presumed to have been conducted in the normal course of business. To rebut this presumption the insurance company must show a "substantial probability of imminent litigation," which in all likelihood would require, in the words of the court, "a showing by the insurance company that reports and statements were compiled by or under the direction of the insured's legal counsel for use in specific litigation about to be filed or for use in an upcoming trial." *Id.* at 1379.

The conclusion to be drawn from *Hawkins* is that the plaintiff's attorney is entitled to all documents contained in the insurance adjuster's file pertaining to the adjuster's investigation, which came into existence prior to the filing of suit or notification by an attorney that he is representing a claimant and contemplates filing suit. For this reason, a plaintiff's attorney may want to refrain from sending the insurance company early notice of his representation. In any event, the only docu-

ments obtainable would be investigative and would not include documents containing an adjuster's opinions, evaluation, or, unfortunately, the company's reserve. Where the insurer's file or a document within the file contains both investigative information and evaluation or opinion, it would be appropriate for the court, rather than defense counsel, to review the file or document *in camera* and excise those portions not pertaining to investigation.

In *Hawkins* the insured under a fire insurance policy brought suit against his insurer for refusal to pay on his claim related to a fire which destroyed his house. The insured requested that the defendant insurer provide him with notes and investigative reports regarding interviews the adjuster made while investigating the claim together with statements taken from those persons interviewed. Because *Hawkins* involved a suit brought by an insured against his own insurance company, it has been argued that *Hawkins* did not apply when a third party attempted to obtain investigative documents from the defendant's insurance company. *Hawkins* made no such distinction, there is no rational basis for such a distinction, and the Colorado Supreme Court in *Kay*, at 72, expressly held that such a distinction was "without merit."

Kay has also closed a second loophole left by *Hawkins*. Insurance companies have contended that the attorney-client privilege protects them from having to disclose investigative documents prepared by the insurance adjuster based upon conversations with the insured. In support they cite *Bellmann v. District Court*, 187 Colo. 350, 531 P.2d 632 (1975) (en banc). In *Bellmann* the insured gave a statement to his insurer explaining the circumstances surrounding his involvement in a motor vehicle accident. Subsequently, criminal charges, including manslaughter and vehicular homicide, were filed against the insured and the district attorney served a subpoena on the insurer which the insured moved to quash. The court

Stephen C. Kaufman is an associate of the law firm of Kidneigh, Hughes, Pelz, Leach & Clikeman, P.C. Special thanks to William Babich and those at the law firm of Kidneigh, Hughes, Pelz, Leach & Clikeman, P.C. for their comments, suggestions and typing.

held that the statement was exempt from subpoena as being within the attorney-client privilege.

On the one hand, there is no contradiction between *Bellmann* and *Hawkins*. *Bellmann* involved a very serious accident (with death) so that one can say there was a "substantial probability of imminent litigation" at the time of the accident. This would mean that the adjuster was not only standing in the place of the insured's attorney at the time he took the statement insofar as the work product doctrine is concerned, but also for purposes of the attorney-client privilege. On the other hand, *Bellmann* made no determination as to whether there was a "substantial probability of imminent litigation." Therefore, *Bellmann* can be construed as being inconsistent with *Hawkins* if read to hold that the insurance company always stands in the place of the insured's attorney. When this issue was squarely presented in *Kay*, the supreme court ruled: "[T]he relationship between the insurance company and its lawyer must exist at the time the documents are created for the privilege to apply. To the extent that *Bellmann* brought preexisting documents within the scope of the attorney-client privilege, we hold that that case is no longer good law." *Kay* at 723 n.3.

As a practical matter, *Hawkins* and *Kay* place plaintiffs in as good a position as defendant insureds in regard to knowing the facts of what happened and how it happened. Formerly, insurance companies, being businesses, would as part of their everyday activities immediately investigate an incident, discover the names and locations of witnesses, take statements, and otherwise apprise themselves as to what had happened and why. The injured party, however, being an individual, would not attempt or be competent to investigate an incident, and he would consequently be on an unequal footing when he brought suit in that people forget, witnesses are lost, and facts are covered up. Now, due to *Hawkins* and *Kay*, the plaintiff can acquire the results of a contemporaneous investigation without a showing of substantial need or undue hardship and without having to bear the cost.

INSURANCE DOCUMENTS AS EXHIBITS — INSURANCE ADJUSTERS AS WITNESSES

Once the insurer's investigative documents are obtained, the next step

is to use the favorable ones as evidence in the form of exhibits. The groundwork for this has been laid by Rule 26(b)(1) of the *Rules of Civil Procedure* which limits the scope of discovery to that which is "reasonably calculated to lead to the discovery of admissible evidence." Since *Hawkins* and *Kay* have eliminated these documents from the work product and attorney-client exceptions, such insurance documents would be admissible pursuant to Rules 401 and 402 of the *Rules of Evidence* which require only that evidence be relevant to be admissible. Arguably, these documents are hearsay; however, they would likely be admissible under one or more of the following exceptions to the hearsay rule: Records of Regularly Conducted Activity, *C.R.E.* 803(6); Recorded Recollection, *C.R.E.* 803(5); Spontaneous Present Sense Impression 803(1); Excited Utterances, *C.R.E.* 803(2). Also, the documents would be admissible as a nonhearsay admission by a party-opponent. *C.R.E.* 801(d)(2).

Should the insurance adjuster's investigation prove favorable from the plaintiff's view, there is no reason why the plaintiff cannot call the adjuster as a witness in addition to using the documents he prepared as exhibits. Since the investigative documents are not work product or attorney-client privileged, neither is the

investigation. Accordingly, the plaintiff may call the insurance adjuster as a witness to testify to how he conducted his investigation and to the results obtained. There is no statute exempting insurance personnel from being witnesses, nor is such an exemption allowed by the *Rules of Evidence*. The fact that the insurance adjuster has an interest in the outcome of the case makes no difference. These principles are embodied in §13-90-101, *C.R.S.* (1973), as follows: "*Who may testify-interest*. All persons without exception, other than those specified in Sections 13-90-102 to 13-90-108 may be witnesses. Neither parties nor other persons who have an interest in the event of an action or proceeding shall be excluded. . . ."

CONCLUSION

By way of *Hawkins* and *Kay*, the Colorado Supreme Court has provided plaintiffs with a measure of equality. These cases demonstrate that insurance companies enjoy no special rights beyond those accorded any other person or entity involved in a lawsuit or having knowledge of relevant information. There are many obstacles which a plaintiff must overcome to achieve a fair settlement or prevail at trial. *Hawkins* and *Kay* have made it somewhat easier for plaintiffs to meet the challenge.

CALENDAR

OTLA ANNUAL CONVENTION

Snowmass, August 18-20

OTLA CURRENT PROBLEMS LUNCHEON

Thursday, July 24, 1981

Wooten Wong, 21 Land, 214

1451 East Virginia Avenue, Denver

Thursday, August 13, at Noon

OTLA ANNUAL MEETINGS

1981 - St. Louis, July 30-31

1982 - San Francisco, July 26-August 2

OTLA MID-WINTER MEETINGS

1981 - New Orleans, December 22, March 1

1982 - Atlanta, Georgia, 1982