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Discovery Warnings From In Re Hurricane Sandy Cases

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PPBloginsurancepolicyimageA recent federal court decision provided evidence yet again that policyholders likely will have to fight hard against insurance companies that have denied coverage and often engage in unacceptable litigation practices. On November 7, 2014, the United States District Court for the Eastern District of New York issued a Memorandum & Order in the *In Re Hurricane Sandy Cases*, Case No. 14 – MC – 41. United States Magistrate Judge Gary K. Brown's Order provides discovery warnings to insurance companies involved in discovery disputes. One crucial lesson is that draft expert reports, which were prepared in the ordinary course of business and not in anticipation of litigation, may not be withheld as protected work-product. This Order shines a light on discovery violations that often occur in the context of insurance disputes. It is not uncommon for insurance companies to refuse to produce a variety of categories of documents that were created in the ordinary course of business. Often times, policyholders are faced with the objection by the insurance company that certain claims-handling documents were prepared in anticipation of litigation and therefore are not discoverable. However, this Order serves as a good reminder that such an objection can be overcome and that it is worth the effort and expense to move to compel production of those documents. The decision confirms that documents created in the ordinary course of claims investigations are not work-product. In fact, the Order cites to another case for support, *Safeco Insurance Co. of America v. M.E.S., Inc.*, which provides a similar caution that "courts must be careful in cases involving insurance and surety disputes not to hold that documents are protected from discovery simply because of a party's ritualistic incantation that all documents created by insurers are made in preparation for litigation." 2013 WL 1680684 at *5 (E.D.N.Y. Apr. 17, 2013). Therefore, this Order provides policyholders with additional support to overcome such an objection, especially in the expert context. In sum, this Order is a reminder to policyholders of an unfortunate truism when it comes to insurance coverage litigation: it may be expensive and time consuming to move to compel production, in the face of numerous insurance company objections, but it frequently is worth doing so.

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