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District Court, City and County of Denver Case No. 2023CV31492 Jill D. Dorancy, District Court Judge	
In re: HILL HOTEL OWNER, LLC, a Colorado limited liability company, Respondent, v. HANOVER INSURANCE COMPANY, a New Hampshire corporation, Petitioner.	**▲ COURT USE ONLY ▲**
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BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 21 and C.A.R. 32, including all the word count, page limit, and formatting requirements set forth in these rules. I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 21 and C.A.R. 32.

/s/ Marshall Gilinsky

CORPORATE DISCLOSURE STATEMENT

United Policyholders ("UP") is a nonprofit, 501(c)(3) corporation and has no public ownership.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

For over 30 years, the non-profit (501)(c)(3) United Policyholders ("UP") has been an information resource insurance products, coverage and claim matters and an advocate for the interests of individual and commercial insurance consumers throughout the entire United States. UP assists purchasers of insurance and those pursuing claims for loss indemnification. UP is routinely called upon to help policyholders secure paid-for benefits in the wake of large-scale national disasters such as floods, windstorms, and hurricanes and recently, pandemics. UP provides extensive assistance to Colorado policyholders on adequately insuring assets and navigating fair and prompt claim settlements after every day losses and natural disasters. UP has staff members who reside in Colorado and the organization has been providing disaster preparedness and recovery support throughout the state since 2010. UP works closely with the Colorado Division of Insurance and state legislators to promote important legislation, regulation, and guidance that benefits policyholders on a range of issues including consumer protection rules as well as accessibility and affordability of insurance.

United Policyholders engages in ongoing data collection on claim adjusting matters and receives frequent reports from policyholders and professional policyholder advocates on how insurance company representatives, including

attorneys, are adjusting claims. In the interest of preventing disputes and unfair and adversarial claim adjusting actions by insurance company personnel, (be they adjusters or attorneys acting as adjusters) United Policyholders has helped passed laws in several states that give property owners the right to access claim file documents, including damage inspections, reports, evaluations and related documentation. Transparency promotes better claim handling. Allowing opacity in the name of a privilege has the reverse effect.[1]

In furtherance of its mission, UP cautiously chooses cases and regularly appears as an *amicus curiae* in courts across the country in order to provide policyholders' perspectives on insurance cases likely to have widespread impact. UP has been doing this for decades. Since 1991, it has filed hundreds of *amicus curiae* briefs in state and federal courts across the country. A list of those submissions can be found here: https://uphelp.org/advocacy/amicus-library. UP's briefs have been cited in the opinions of state high courts and by the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell*

[1] https://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/ClaimRelatedDocumentsNotice.pdf

Int'l, Inc., 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

By submitting a brief in this matter, UP seeks to fulfill the classic role of *amicus curiae* in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration. This is an appropriate role for *amicus curiae*. As commentators have often stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

I. STATEMENT OF THE CASE

This matter concerns whether attorney-client privilege attaches to ordinary business activities of an insurance company, conducted for business rather than legal purposes. As set forth in greater length in the Statement of the Case of Hill Hotel Owner LLC (the "Policyholder), which is incorporated herein, in the District Court, the Policyholder seeks insurance coverage for damages alleged in an underlying lawsuit as to which Hanover Insurance Company ("Hanover") denied coverage. Following the Policyholder's efforts to seek discovery from Hanover and Hanover's refusal to disclose all requested documents relating to its claim handling and investigation, the District Court ordered Hanover to turn over the claims handling and investigation communications in dispute. Specifically, the disputed communications are those between an outside lawyer hired by the insurance company and a pair of engineers that the insurance company also hired to conduct its insurance claim investigation.

In March 2024, the District Court held a hearing on the discovery dispute. The District Court ordered the insurance company to hand over the email communications between Hanover's outside counsel and the engineers Hanover hired for the claims investigation. The Court found that “those documents are not

protected by either work-product or attorney-client privilege. . . since they were not prepared in anticipation of litigation." (April 12, 2024 Court Order).

Hanover then petitioned for review of the Order under C.A.R. 21, arguing that the April 12 Order creates "a harsh rule restricting the attorney-client privilege in a manner not previously done in Colorado or any other state." (April 22, 2024 Show Cause Petition). On April 30, 2024, this Court ordered a Rule to Show Cause to issue directing the Policyholder and District Court to answer in writing why the District Court's Order should not be vacated and remanded as Hanover requests in its Petition. The District Court filed a response to the Rule to Show Cause conceding that the language of its April 12, 2024 Order used an imprecise standard, but explaining that the correct conclusion was reached that attorney-client or work-product privileges do not extend to lawyers participating in regular claims handling activities of insurance companies.

II. INTRODUCTION

Amicus Curiae UP files this brief to give this Court further context in relation to the overwhelming national consensus that neither the attorney-client privilege nor the work-product doctrine apply to the ordinary "business of insurance" activities of claims handling and claim investigation. The attorney-client privilege applies to communications made for a legal purpose and cannot shield claims handling or

investigations concerning insurance claims, even when these actions are conducted by or involve an insurance company's in-house counsel or outside attorneys. As discussed below, the effect of the District Court's briefly stated decision is consistent with long-established jurisprudence governing the discovery of insurance industry business activities such as claims handling and claims investigations, which are not cloaked in privilege when an attorney is used in the role of a claims handler.

III. THE TRIAL COURT'S DISCOVERY ORDER ALIGNS WITH THE NATIONAL CONSENSUS RECOGNIZING NO PRIVILEGE FOR ORDINARY INSURANCE CLAIMS HANDLING AND INVESTIGATION ACTIVITIES.

A. The Overwhelming Weight of Published Authority Holds That Insurance Claims Handling and Investigation Activities Are Not Privileged, Even If Conducted By Outside or In-House Counsel.

The District Court’s conclusion that the documents sought by the plaintiffs are discoverable is correct and supported by both Colorado precedents and most jurisdictions. An insurance company's ordinary business activities of claims handling and claim investigation are not privileged, even if an attorney is retained to lead, guide, or provide advice about these activities.

The District Court’s decision is guided by established caselaw, not just in Colorado but nationwide. Under Colorado law, claims adjustment activities are not entitled to the protections of the attorney-client privilege, even where an attorney participates in claim adjusting activities to further their ability to offer legal advice

(e.g., by investigating the factual basis for the claim). *Menapace v. Alaska Nat'l Ins. Co.*, No. 20-cv-00053-REB-STV, 2020 U.S. Dist. LEXIS 191695 (D. Colo. Oct. 15, 2020). Communications with attorneys relating to the insurance company's efforts to review, investigate, and respond to a claim are simply not privileged. *Id*. Colorado courts have emphasized that "claims investigation is an ordinary activity in the business of insurance" and the mere fact that litigation is always a possibility with an insurance claim "is insufficient to justify interfering with the normal and intended function of the discovery rules." *Compton v. Safeway, Inc.*, 169 P.3d 135, 137-38 (Colo. 2007). As numerous other Colorado courts have recognized, an attorney involved in these ordinary business activities is not engaged in the provision of legal advice.[2] Therefore, the District Court's discovery order was well within the bounds of Colorado law.

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[2] *See, e.g.*, *Nat'l Farmers Union Prop. & Cas. Co. v. District Court for Denver*, 718 P.2d 1044 (Colo. 1986) (ruling information from an attorney related to a factual investigation is not legal advice and is not protected by attorney-client privilege, and an insurance company may not avail itself of work product doctrine simply because it hired attorneys to perform factual investigation into whether a claim should be paid); *Western Nat'l Bank v. Emp. Ins. of Wausau*, 109 F.R.D. 55 (D. Colo. 1985) (holding file of law firm retained by insurance company and assigned to investigate policyholder's claim was not work product, but investigative file of insurance company prepared in ordinary course of business, not entitled to privilege); *Munoz v. State Farm Mut. Auto. Ins. Co.*, 968 P.2d 126 (Colo. App. 1998) (finding if a lawyer acts in an investigative capacity, not as legal counselor, with reference to whether a claim should be paid, neither attorney-client privilege nor work product privilege protects communications from lawyer to insurance carrier); *Fiechtner v.*

Furthermore, under Colorado law, it is commonplace for policyholders to depose the people who act as a claims handler or investigator--even when these roles are done by retained or in-house attorneys. An insurance company may not shield information gathered in a claim investigation from subsequent discovery by having outside counsel participate in the claims investigation process. *National Farmers Union*, 718 P.2d 1044 (Colo. 1986). "The great weight of Colorado authority demonstrates that information an attorney learns when serving as a claims adjuster is not protected by the attorney-client privilege or the work product doctrine." *Curtis Park Group, LLC v. Allied World Specialty Ins. Co*., No. 20-cv-00552-CMA-NRN, 2021 U.S. Dist. LEXIS 185179, at *21 (D. Colo. Sept. 28, 2021). Colorado courts have also held that an insurer's *outside counsel* may be deposed when they act as a

Am. Family Mut. Ins. Co., No. No. 09-cv-02681-WJM-MEH, 2011 U.S. Dist. LEXIS 102947 (D. Colo. Sept. 13, 2011) (holding attorney's actions in capacity as a claims adjuster were not protected by any attorney privilege or work-product doctrine); *Colo. Mills, LLC v. Phila. Indem. Ins. Co.*, No. 12-cv-01830-CMA-MEH, 2013 U.S. Dist. LEXIS 47601 (D. Colo. Apr. 2, 2013); *Plaza Ins. Co. v. Lester*, No. 14-cv-01162-LTB-CBS, 2015 U.S. Dist. LEXIS 72438 (D. Colo. June 4, 2015) (holding insurance company's counsel's communications related to non-legal, investigative activities not entitled to protections of attorney-client privilege); *Ivan v. AIG Prop. Cas. Co.*, No. 17-cv-01906-PAB-MEH, 2018 U.S. Dist. LEXIS 240352 (D. Colo. Feb. 13, 2018) (holding attorneys acting in role as claims investigators when gathering factual information, including when presenting significant detail regarding findings to insurance company, are not protected by attorney-client privilege); *Olsen v. Owners Ins. Co.*, No. 18-cv-1665-RM-NYW, 2019 U.S. Dist. LEXIS 101048 (D. Colo. June 17, 2019) (holding privilege does not apply where an attorney is acting in capacity of a claims handler).

"keyperson in the claims investigation process." *Id*. Under these precedents, the District Court was in line with Colorado law when ordering discovery relating to the communications of in-house, outside counsel, and their third-party investigators retained to aid in non-legal business activities of insurance companies.

These are not anomalous results reached by the District Court or previous Colorado trial courts when considering the interests involved. Indeed, many other states follow the same rules of privilege as applied to insurance company efforts to hide their business activities behind a legal veil. For example, under California law, neither the attorney-client privilege nor the work-product rule provide blanket protection for communications by attorneys employed predominantly as insurance adjusters or claims examiners, because such work normally does not involve legal services. *See 2,022 Ranch, L.L.C. v. Sup. Ct. (Chicago Title Ins. Co.)*, 113 Cal. App. 4th 1377, 1397 (2003). An attorney's communications are only privileged when the *dominant relationship* between the insurance company and its in-house attorneys is one of *attorney-client*, rather than *adjustor-insurer*. *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725 (Cal. 2009). Attorneys hired to perform insurance adjustment cannot cloak claim investigations in privilege merely because they are lawyers. *See Watt Indus., Inc. v. Superior Court*, 115 Cal.App.3d 802, 805 (1981).

Similarly, under New York law, the courts first examine the primary or predominant character of a communication to determine whether privilege applies. In a dispute between an insurance company and a policyholder pertaining to an underlying claim, the insurance company's "claims file" is not privileged material, and the insurer cannot claim confidentiality against the policyholder who seeks to discover its contents. *Melworm v. Encompass Indem. Co.*, 37 Misc. 3d 389, 390 (N.Y. Sup. Ct. 2012). For this reason, reports prepared by an insurance company's attorneys prior to the decision to pay or reject a claim are not privileged and are discoverable. This result holds even when those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation with the policyholder and in part by the insurance company's business obligation to investigate a claim and reach a coverage decision in good faith. *Id*; *see also Landmark Ins. Co. v. Beau Rivage Rest., Inc.*, 121 A.D.2d 98, 101 (N.Y. App. Div. 2nd Dept. 1986).

Likewise, the Supreme Court of Mississippi recognizes no attorney-client privilege where an insurance company claims handler relies substantially, if not wholly, on in-house counsel to prepare a coverage denial letter. *Travelers Property Casualty Company of America v. 100 Renaissance, LLC,* 308 So. 3d 847 (Miss. 2020). In those circumstances, an insurance company impliedly waives its attorney-

client privilege with its in-house counsel and the reasoning of the in-house counsel is discoverable. *See id.*

Washington courts simply presume that there is no attorney-client privilege relevant between the insurance company and the policyholder in the insurance company's claims adjusting process, and that work-product protection is generally irrelevant. *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 241 (Wash. 2013). This presumption can be overcome by the insurance company showing that its attorneys were not engaged in the tasks of investigating, evaluating or processing the claim. *Id*. Notably, however, an attorney assisting an insurance company's adjustor in writing a denial letter or investigating the amount of covered damages, are not privileged tasks. *See Canyon Estates Condo. Ass'n v. Atain Specialty Ins. Co.*, No. 2:18-cv-1761-RAJ, 2020 WL 363379, at *1 (W.D. Wash. Jan. 22, 2020).

Oklahoma has codified its legal rules regarding attorney-client privilege, which protects "confidential communications made for the purpose of facilitating the rendition of legal services to the client." Okla. Stat. tit. 12 § 2502(B). The mere fact that an attorney was involved in a communication between the lawyer and client does not render the communication privileged; rather, the communication must relate to *legal advice or strategy* sought by the client. *In re Grand Jury Proceedings*, 616 F.3d 1172, 1182 (10th Cir. 2010). Documents and communications generated

during the investigation and processing of an insurance claim, including those by attorneys, are not protected by the attorney-client privilege if they concern routine insurance business matters rather than the rendition of professional legal services. *Wichert v. Ohio Sec. Ins. Co.*, No. CIV-21-976-D, 2023 U.S. Dist. LEXIS 121100, at *3 (W.D. Okla. May 31, 2023).

Florida has also codified its attorney-client privilege rules, protecting communications made when a client consults with a lawyer with the purpose of obtaining legal services or with a lawyer who is rending legal services. Fla. Stat. §90.502. In the insurance context, however, this privilege applies only when an attorney acts for an insurance company in their legal capacity and in anticipation of litigation. *1550 Brickell Assocs. v. Q.B.E. Ins. Co.*, 253 F.R.D. 697, 699 (S.D. Fla. 2008). Florida courts have emphatically held that attorney-client privilege and the work-product doctrine simply do not apply to communications with an insurance company's attorneys or third-party investigators functioning as a mere "conduit" for an insurance company's claims investigations. *Bankers Ins. Co. v. Fla. Dep't of Ins. & Treasurer*, 755 So. 2d 729 (Fla. App. 2000).

In the same way, Illinois courts have declined to apply attorney-client privilege when an attorney acts as a claims adjustor, claims process supervisor, or claims investigation monitor, and not as a legal advisor. *Slaven v. Great Am. Ins.*

Co., 83 F. Supp. 3d 789, 794 (N.D. Ill. 2015). Illinois has also limited the application of work-product privileges in the insurance context: as a general rule, an insurance company's claims investigation is not undertaken in anticipation of litigation, rather, such documents and communications reflect the routine business of the insurance industry. *Id*. at 795-96.

Simply put, an insurance company is required by its good faith obligations under the insurance policies that it sells to conduct an investigation in response to a policyholder's claim, to reach a coverage decision, to determine the amounts that should be paid under the policy, and to communicate these decisions to the policyholder. *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462 (Colo. 2003); *Farmers Grp., Inc. v. Trimble,* 691 P.2d 1138 (Colo. 1984). These processes and decisions must be done openly and subject to review by the policyholder in subsequent coverage litigation. If an attorney's mere involvement in a claim investigation or an attorney's hiring of third-party investigators as "experts" can render this process opaque to policyholders, then bad faith conduct by insurance companies would be shielded and policyholders in Colorado would be left without recourse.

B. The Nature of the Insurance Business Should Prevent Attorneys from Shielding Discovery of Claims Handling and Investigation Activities.

This Court should recognize, like courts nationwide, that the very nature of the insurance business must prevent insurance companies from using the attorney-client privilege to shield documents and communications that otherwise would be discoverable as part of the insurance company's claim handling and investigation in response to an insurance claim. The public policy interests served by the attorney-client and work-product privileges do not apply to insurance claims handling and investigation done by attorneys because claims handling and claims investigation are actions that must be taken in the regular course of the ordinary business of insurance.

The purposes of neither privilege are furthered when privilege is extended to attorneys acting as mere claims adjusters/investigators. This Court has expressly held that neither the attorney-client nor work-product doctrine shields the discovery of materials prepared in the ordinary course of business. *Hawkins v. Dist. Court of Fourth Judicial Dist.*, 638 P.2d 1372, 1375-1378 (Colo. 1982). Because a substantial part of an insurance company's business is to investigate claims, an adjuster's investigations should be presumed to be a part of the insurance company's ordinary business activity.

This position is consistent with U.S. Supreme Court precedent and numerous state courts across the nation. The U.S. Supreme Court has explained that the attorney-client privilege exists to encourage full and frank communications between attorneys and their clients and thereby promotes broader public interest in the observance of law and administration of justice. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Specifically, the attorney-client privilege only protects communications made to obtain legal assistance from the attorney in his capacity as a legal advisor. *Fisher v. United States*, 425 U.S. 391 (1976). Similarly, the work-product privilege protects society's interest in the adversary system by allowing litigants to craft legal arguments and strategies in anticipation of litigation without fear of discovery by the opposing side. *Hickman v. Taylor*, 329 U.S. 495 (1947). This is a common and appropriate view. *See e.g., Slaven,* 83 F. Supp. 3d at 796 (documents created before the insured is notified of a denial of a claim "simply reflect the business that insurance companies do"); *Beau Rivage Rest., Inc.*, 121 A.D.2d at 101 (documents and communications that aid in the process of payment or rejection of claims are part of the regular business of an insurance company); *Melworm*, 37 Misc. 3d at 390 (the evaluation of potential liability of an insured is within the ordinary course of business of an insurance company, even when conducted by an attorney).

Any alternative rule would permit insurance companies like Hanover to abuse the attorney-client and work-product privileges to hide bad faith claims handling activities. Permitting insurance companies to hide communications with third party investigators and attorneys during a claims investigation would create an open season for undiscoverable bad faith conduct -- a public policy concern that has been repeatedly raised by the courts. *See e.g.*, *Slaven*, 83 F. Supp. 3d at 793 (public policy dictates that insurance companies should not be permitted to insulate routine claims activities from discovery by delegating them to outside counsel); *Watt Indus., Inc.*115 Cal.App.3d at 805 ("…to apply the privilege [here] would have the effect of placing a premium upon use of attorneys as business agents, nonattorneys or clients acting for themselves having no such right to protect their notes.").

With inappropriate privilege protection for business tasks that are imbued with good faith, insurance companies would foreseeably engage in bad faith conduct. For example, extending privilege to attorneys conducting routine claims investigations or to experts hired by these attorneys as their "experts" would permit insurance companies to begin retaining multiple investigators and developing alternative reports and theories. This ordinary insurance company work could all be hidden from outside investigation by policyholders who are attempting to understand why their claim was not handled in good faith. Insurance companies would

foreseeably "shop" for attorney experts and investigators until finding one willing to write a report or provide an opinion or valuation that supports their bad faith positions, safe with the knowledge that any improper claims-handling methods will never be accessible to the policyholder.

Within the insurance context, the arguments against privilege are amplified by the relationship between insurance companies and policyholders. A bad faith case necessarily depends on showing how the insurance company managed the claim, so that the policyholder may then show that some aspect of that handling was improper. Across jurisdictions, the need for the policyholder to have access to the insurance company's claims handling procedures is not only substantial, but overwhelming. *See generally Farmers Grp., Inc. v. Trimble*, 691 P.2d 1138 (Colo. 1984); *Brown v. Superior Court*, 670 P.2d 725, 734 (Ariz. 1983); *Riggs v. Schroering*, 822 S.W.2d 414 (Ky. 1991); *Hodges v. S. Farm Bureau Cas. Ins. Co.*, 433 So. 2d 125, 130-31 (La. 1983). If attorney-client privilege is made available to attorneys acting as claims adjusters, it would hamper the ability of any policyholder to determine the adequacy of investigation or even what evidence an insurance company had or what it considered when it denied or valued a claim. It would not be fair to allow insurance companies to create a blanket obstruction to discovery of any investigation into their conduct in handling their policyholders' claims. Doing so would eviscerate the

possibility of deterring bad faith insurance company conduct. *See Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 412 (Colo. 2004) (when an insurance company acts in bad faith, compensatory damages are available to make the policyholder whole and, where appropriate, punitive damages are available to punish and deter wrongful insurance company conduct), *see also Cary*, 68 P.3d at 466 (bad faith causes of action are available as a separate cause of action due to the special nature of insurance contracts and the relationship between the policyholder and insurance company). To the extent that attorneys function as claims adjusters, their work-product, communications to the client, and impressions about the facts of an insurance claim should be treated as the ordinary business of the insurer, outside the scope of privilege. *See e.g.*, *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 771 N.W.2d 623, 638-39 (S.D. 2009).

C. The Insurance Company's Argument That the Trial Court's Ruling Would Upset Established Privilege Precedent is Unfounded.

Hanover attempts to frame the District Court's order as completely upsetting privilege law in Colorado. As shown above, this is an overexaggerated and unsupported argument because the opposite is true: shielding claims handling activities from discovery merely because the handler is a licensed attorney would fly in the face of established privilege jurisprudence. Although the District Court's decision could have more clearly spelled out the basis for applicable privilege under

the Work Product Doctrine versus Attorney-Client communications, it was correct in concluding that the discovery at issue – prepared in the course of ordinary claims handling activities – is not protected from discovery under Colorado law. As emphasized in many jurisdictions, communications and documents regarding claims handling are not cloaked with privilege merely because they are carried out by an attorney; when a lawyer is hired to do the business or work of a non-lawyer, discovery of such material does not destroy immunity. *Drennen v. Certain Underwriters at Lloyd's of London (In re Residential Capital, LLC)*, 575 B.R. 29, 33 (Bankr. S.D.N.Y. 2017); *see also 2,022 Ranch,* 113 Cal.App.4th at 1401 (insurance companies may not assert privileges to thwart discovery of claims investigations while simultaneously relying upon such materials to defend against bad faith claims).

Additionally, Hanover's claims that the District Court's rule conditioning the attorney-client privilege on the anticipation of litigation would "eviscerate privilege protection for the vast majority of attorney-client privileged communications in society" ignores the legal nuances discussed above. While claims handling materials generated prior to a claim determination or litigation are frequently presumed to be discoverable, an insurance company may still shield discovery where they can demonstrate that the communications with an attorney were legal in nature. *See e.g.,*

Cedell, 295 P.3d at 241 (presumption of discoverability can be overcome if insurance company demonstrates that an attorney was not engaged in the task of investigating and evaluating or processing the claim); *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725 (2009) (claims handling communications are privileged where the insurance company can demonstrate the predominant relationship between parties is one of attorney-client).

The District Court's finding that there is no attorney-client privilege prior to a claim determination does not upend established privilege law. Colorado law makes clear that claims investigation activities are not protected by attorney-client privilege. *Menapace v. Alaska Nat'l Ins. Co.*, No. 20-cv-00053-REB-STV, 2020 U.S. Dist. LEXIS 191695 (D. Colo. Oct. 15, 2020). As noted, the majority of courts give policyholders access to claims handling materials by holding that most or all claim investigation and pre-denial analysis occurs in the ordinary course of business; UP respectfully submits that it would be "wrong" to apply a blanket privilege, rather than a presumption of discoverability.

IV. CONCLUSION

The District Court's Order is supported by both Colorado law and the overwhelming national consensus in favor of the discoverability of claims handling practices. Neither the attorney-client nor work-product privileges should shield

regular insurance company business records imbued with good faith from routine discovery. Claims handling, investigation, and adjustment are a part of the ordinary course of business in the insurance industry and should be discoverable even when these tasks are conducted by an attorney. Hanover's attempt to frame the District Court's decision compelling production as an unprecedented error is nothing but an attempt to circumvent longstanding and established privilege jurisprudence, and so the District Court's Order should be affirmed.

Respectfully submitted,

Dated: June 11, 2024

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CERTIFICATION OF SERVICE

I hereby certify that on the 11th day of June, 2024, a true and correct copy of the foregoing Brief of *Amicus Curiae* United Policyholders in Support of Respondent was filed using the Honorable Court's electronic filing system, which provides notice to all Counsel of record:

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AMICUS CURIAE
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