Attorney–Client Privilege in Insurance Disputes
Protecting Confidentiality in Claims Handling and Litigation

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:
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Thursday, August 13, 2009
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Attorney-Client Privilege Issues in Insurance Litigation

Overview of the Attorney-Client Privilege in Insurance Litigation

John Heintz

August 13, 2009
Attorney-Client Privilege: The Basics

- Ensures that the attorney has sufficient information to give informed professional advice

Elements:
- A confidential communication
- By a privileged person
- For the purpose of seeking legal advice

Communication to lawyer does not necessarily make it privileged – must meet elements

In practice, privilege extends to communications back to client
Work Product Doctrine: The Basics

- Provides qualified protection to materials prepared in anticipation of or during litigation

- Elements:
  - A document, tangible item, or an attorney’s opinions and thoughts
  - Prepared in anticipation of litigation
  - By or for a party or a party’s representative
Work Product Doctrine: The Basics (cont’d)

- Qualified protection for “ordinary” work product
  - Disclosure requires showing of “substantial need” and “undue hardship”

- More protection for “opinion” work product
  - Disclosure requires showing of “extraordinary need”
Asserting the Privilege

- Privilege belongs to the client

- Client must make timely objection to disclosure

- Party asserting privilege bears burden of establishing privilege
  - But party seeking disclosure bears burden of establishing exception to privilege
Asserting the Privilege (cont’d)

- Privilege logs – FRCP 26(b)(5)
  - Blanket refusals or boilerplate objections insufficient

- Privilege objections at deposition
Timing/Duration of Privilege

- Attorney-Client Privilege is absolute unless waived
  - *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998) (Attorney-Client Privilege continued after death of client even where privileged communications were relevant to criminal proceeding)
Timing/Duration of Privilege (cont’d)

- Privilege for organization ends when organization ceases to legally exist
  - *Gilliand v. Geramita*, No. 05-01059, 2006 WL 2642525, at *3-4* (W.D. Pa. Sept. 14, 2006) (“there should be a presumption that the attorney-client privilege is no longer viable after the corporate entity ceases to function”)
Express Waiver

- Voluntary disclosure of privileged communication to third party outside the attorney-client relationship
  - Includes consent to have lawyer or someone else disclose the protected communication
  - May include disclosure to those within an organization who do not “need to know”
  - Third parties may include plaintiffs/co-defendants in underlying litigation, insurers, reinsurers, brokers, government agencies, and auditors
Express Waiver (cont’d)

- Acting with intentional disregard of confidentiality
  - *E.g.*, privileged discussion in a public place

- Potential protection against express waiver
  - Joint defense/common interest agreement
  - Confidentiality Agreement (Government)
  - Protective Order
Implied Waiver

- **Broad Waiver Rule**
  - Assertion of a claim, counterclaim, or affirmative defense that raises as an issue a matter to which otherwise privileged material is relevant may automatically waive the privilege.

- **Intermediate Test Approach**
  - Need for discovery of privileged materials is balanced against the need to protect the confidentiality of the materials.
Implied Waiver (cont’d)

- **Restrictive Test**
  - A litigant waives the privilege *only* when the litigant directly puts the attorney’s advice at issue in the litigation

Effect of Producing Privileged Materials to Governmental Entity

- Old: Incentives to disclosing privileged material to certain governmental entities
  - Thompson Memo
- New: Cooperation credit based on disclosure of relevant facts whether or not contained in privileged communication
  - U.S. Attorney’s Manual, § 9-28.720(a)
  - SEC Enforcement Manual, § 4.3
Effect of Producing Privileged Materials to Governmental Entity (cont’d)

- “Selective Waiver”: Some courts have held that waiver as to the government is not waiver as to all
  - Seminal case: *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977)
  - Most circuits have rejected the selective waiver doctrine

- Waiver analysis may vary depending on jurisdiction of dispute and existence of confidentiality agreement
Effect of Producing Privileged Materials to Governmental Entity (cont’d)


- *In re Natural Gas Commodity Litig.*, No. 03-Civ-6186, 2005 WL 1457666, at *9 (S.D.N.Y. June 21, 2005) (not waived by disclosure to government pursuant to confidentiality agreement)

- *In re Qwest Commc’n Int’l, Inc.*, 450 F.3d 1179, 1192 (10th Cir. 2006) (waived by production to SEC and DOJ despite confidentiality agreement)
Scope of Waiver

- In cases involving disclosure to third parties, courts generally question the nature of any relationship between the attorney, the privileged person and the third party – the more remote the connection, the more likely a waiver will be found.

- Courts look to whether client has revealed so much that it has no further reasonable expectation of privacy.
Scope of Waiver (cont’d)

- **Partial waiver:** Only disclosed communication is subject to discovery
  - Includes inadvertent disclosure and where only factually isolated portion of communication was revealed
- **Subject-matter waiver:** Extends to all communications concerning the subject-matter of the disclosed communication
  - Limited to situations in which party intentionally puts protected information into litigation in selective, misleading and unfair manner (FRE 502)
Special Issues in the Tripartite Relationship

- Three Scenarios
  - Insurer accepts defense of claim
    - Privileged communications shared between insured and insurer but protected from plaintiffs in underlying negligence action
    - See Lectrolarm Custom Sys., Inc. v. Pelco Sales, Inc., 212 F.R.D. 567 (E.D. Cal. 2002) ("Where an insurer has agreed that it has a duty to defend and to indemnify its insured, they are both clients of the lawyer . . . [a]nd the attorney client privilege applies to protect communications between the lawyer and the insurer.")
Special Issues in the Tripartite Relationship (cont’d)

- Insurer agrees to defend but reserves rights
  - Privileged communications between insured and insurer may be protected as to plaintiffs in underlying action but may be discoverable in coverage litigation
Special Issues in the Tripartite Relationship (cont’d)

- Insurer denies coverage, insured hires own lawyer
  - Privileged communications between insured and its lawyer protected from plaintiffs in underlying action and from insurer in coverage litigation
  - See *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, (D. Del. 1992) (denying insurer motion to compel production of privileged documents from underlying litigation, holding that “either the policy provides coverage, in which case the denial of coverage breaches the insurance contract and relieves [insured] of the duty to cooperate, or there is no duty to cooperate because the damage is not the type” covered by the policy)
Special Issues in the Tripartite Relationship (cont’d)

- Critical Issue: May a plaintiff in an underlying action obtain a privileged document produced in coverage litigation?
Special Issues in the Tripartite Relationship (cont’d)

- Broker/Adjuster Issues
  - Involvement of insurance broker in communication may destroy privilege
    - Compare *Miller v. Haulmark Trans. Sys.*, 104 F.R.D. 442, 445 (E.D. Pa. 1984) (presence of broker did not waive privilege where broker aided in securing coverage and broker’s purpose at meeting was to aid in preparing answer) with *Sony Computer Entm’t Am., Inc. v. Great Am. Ins. Co.*, 229 F.R.D. 632, 634 (N.D. Cal. 2005) (privilege waived where broker’s presence was not necessary to further purpose for which lawyer was consulted)
Testimony from adjusters that a basis for denial of coverage was advice of counsel even if advice of counsel not “formally” asserted as a defense impliedly waives privilege

Special Issues in the Tripartite Relationship (cont’d)

- Insurers cannot shield claims files from disclosure by having lawyers handle claims
  - For work product doctrine to apply, investigation must be outside of standard claims handling process
  - For attorney-client privilege to apply, attorney must provide legal advice, not conduct factual investigation
  - Could lead to bad faith claim
Special Issues in the Tripartite Relationship (cont’d)

- See *Geneva Mortgage Corp. v. Certain Underwriters at Lloyd’s, London*, 14 Misc.3d 1233(A), 836 N.Y.S.2d 499 (N.Y. Sup. Ct. 2006) (ordering disclosure of claims file where defendants’ counsel acted as primary investigator and adjuster)

- See also *Mission Nat’l Ins. Co. v. Lilly*, 112 F.R.D. 160 (D. Minn. 1986) (ordering production of claim file documents prepared by attorneys because attorneys had created them in their role as insurance claims adjusters, not legal counsel)
Special Issues in the Tripartite Relationship (cont’d)

- Insured’s claim of bad faith may be basis for disclosure of privileged insurer communications
  - Insurer’s intentional denial, failure to process, or failure to pay a claim without a reasonable basis can lead to bad faith suits
  - Bad faith actions against an insurer can only be proven by showing how insurer processed claim, how claim was considered, and why insurer took action it did
Special Issues in the Tripartite Relationship (cont’d)

Special Issues in the Tripartite Relationship (cont’d)

- Waiver and the advice of counsel defense: Insurer waives privileges when it asserts its good faith due to its reliance on its counsel's advice
  - Defense to bad faith or malicious claim handling allegations by providing evidence insurer relied on the advice of competent counsel
Special Issues in the Tripartite Relationship (cont’d)

- Successful only if insurer had reasonable belief that claims could be denied within bounds of law
  - See State Farm Mut. Auto Ins. Co. v. Lee, 13 P.3d 1169, 1175 (Ariz. 2000) (en banc) (insurer “is liable for bad faith if the evidence shows its employees could not or did not reasonably believe that the first-party stacking claims could be rejected within the bounds of the law.”).
Special Issues in the Tripartite Relationship (cont’d)

- Privilege impliedly waived because insurer voluntarily puts its state of mind and attorney advice at issue
  - *State Farm*, 13 P.3d at 1177 (“A litigant cannot assert a defense based on the contention that it acted reasonably because of what it did to educate itself about the law, when its investigation of and knowledge about the law included information it obtained from its lawyer, and then use the privilege to preclude the other party from ascertaining what it actually learned and knew.”).
Special Issues in the Tripartite Relationship (cont’d)

- **Scope:** Insured entitled to discover communications between lawyer and insurer relating to advice on denial of coverage
  - **Purpose:** permit insured to test the reasonableness of attorney opinion and insurer’s reliance thereon
  - *State Farm*, 13 P.3d at 1178 (“Where, however, an insurer makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny an opposing party ‘an opportunity to uncover the foundation for those assertions in order to contradict them.’”
Questions?

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Attorney-Client Privilege in Insurance Disputes

Protecting Confidentiality in Claims Handling and Litigation

Jerold Oshinsky

A Live Interactive 90-Minute Teleconference Program
Thursday, August 13, 2009 — 1:00 p.m. Eastern Time

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Exceptions to the Privilege

- Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. Fed. R. Evid. 501.
Application of the Rule

• Under the Klaxon doctrine, each federal trial court applies the choice of law rules that prevail in the state in which it sits. In diversity cases, federal courts have concluded that issues of attorney-client privilege are substantive and thus controlled by the forum state’s laws, while issues of work product are procedural and so controlled by federal law.

• *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Question whether federal court in diversity suit should apply Delaware or New York law on pre-verdict interest should be resolved by applying Delaware choice of law rule; otherwise accident of diversity would “constantly disturb” equal administration of justice in state and federal courts and “do violence to the principle of uniformity within a state.”
Common Interest

• Insurance companies may argue that they are entitled to obtain their policyholder’s privileged communications because of a “common interest” with the policyholder in minimizing liability in the underlying litigation.

• However, where an insurer has denied coverage, or reserved rights, not indicating an intent to do anything other than to deny coverage, policyholders may argue there is no “common interest” sufficient to warrant production. *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 417(D.Del. 1992).
Common Interest (cont.)

- *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381, 386 (D. Minn. 1992). “The rationale which supports the ‘common interest’ exception to the attorney-client privilege simply doesn’t apply if the attorney never represented the party seeking the allegedly privileged materials.”

- The party asserting the privilege must show:
  1. The communications were made in the course of a joint defense effort.
  2. The statements were designed to further the effort.
  3. The privilege has not been waived.
At Issue

• The “at issue” exception to the attorney-client privilege applies when:
  (1) by some affirmative act,
  (2) a party makes the protected information relevant to the case, and,
  (3) the opposing party is denied vital information.

At Issue (cont.)

• *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 749 N.Y.S.2d 488, 496 (App.Div. 2002), A report was not “at issue,” where similar information about the policyholder’s knowledge of the claim was available from non-privileged sources.

• Similarly, in *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36 (1999), the Connecticut Supreme Court found the exception is invoked only when the content of the legal advice “is integral to the outcome of the legal claims of the action.”
Cooperation Clause

• Under the express terms of the insurance contract, policyholders have a duty to fully cooperate with the insurer in the defense of underlying actions. In some cases, insurance companies have argued this leads to a waiver of the privilege to withhold documents related to the underlying litigation.

• Insurers rely on the Waste Management decision to support this argument. In that case, the Illinois Supreme Court held that the policyholder’s defense counsel’s files from the underlying litigation were not privileged, in part because of the “cooperation clause.” Waste Management, Inc. v. International Surplus Lines Ins. Co., 579 N.E.2d 322, 327 (Ill. 1991).
Cooperation Clause (cont.)

- However, many courts have held that the inclusion of the cooperation clause in an insurance policy does not require that the policyholder give up all attorney-client privilege protections.

- *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 417 (D.Del. 1992), the Delaware District Court expressly rejected the argument that a cooperation clause vitiates the attorney-client privilege stating, “the insurer does not seek these documents in order to cooperate on underlying litigation, but to succeed in the insured’s coverage dispute against the insurer.”
Common Interest – At Issue – Cooperation Clause

• In a recent decision the New York Supreme Court, Appellate Division, rejected a reinsurer’s “common interest”, “at issue” and cooperation clause arguments in the context of a dispute between an insurance company and its reinsurer. *American Re-Insurance Co. v. United States Fidelity & Guarantee Co., et al.*, No. 604517/02, N.Y. Sup., App. Div., 1st Dept., 2007 N.Y.App.Div. LEXIS 6514 (May 27, 2007),
Bad Faith Exception

• Courts have found the attorney-client privilege inapplicable to prevent disclosure of claims files upon the policyholder’s showing of bad faith.

• To demonstrate a claim for bad faith, a policyholder must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.
Bad Faith (cont.)

• The Arizona Supreme Court articulated the “bad faith exception” in *Brown v. Superior Court*, 670 P.2d 725, 734 (Ariz. 1983), noting that the claims file is a unique, contemporaneously prepared history of the company’s handling of the claim, and the policyholder’s need for this information is not only “substantial,” but “overwhelming.”
Bad Faith (cont.)

- *National Farmers Union Property & Casualty Co. v. District Court*, 718 P.2d 1044, 1048 (Colo. 1984). Production ordered of a report letter, holding the attorney was acting as a “claims adjuster.”

Crime-Fraud Exception

- An exception to the attorney-client privilege also has been recognized for communications that are intended to advance a criminal or fraudulent enterprise.

- The privilege cannot be asserted to “protect a client in the perpetuation of a crime or other evil enterprise in concert with the attorney.” In Re Grand Jury Proceedings, 417 F.3d 18, 23 (1st Cir. 1999); United Servs. Auto Assn v. Werley, 526 P.2d 28, 31 (Alaska 1974).
Crime Fraud Exception (cont.)

• Critical to raising the exception is the ability to draft a time line showing the contemporaneous relationship between the information sought and the fraud.

• To prevail, a policyholder, must present sufficient facts to establish probable cause to believe that a crime or fraud was committed and that the documents were prepared and used as part of an ongoing scheme of crime or fraud. *Craig v. A.H. Robbins Co.*, 790 F.2d 1, 4 (1st Cir. 1986); *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982).
Crime Fraud Exception (cont.)


• *In re Grand Jury Investigation*, 445 F.3d 266 (3d Cir.), *cert. denied*, 127 S.Ct. 538 (2006). A client’s misuse of communications with her attorney in furtherance of an improper purpose was sufficient to meet the crime/fraud exception.
Legal Capacity Doctrine

• In-house and outside counsel often perform ordinary business functions of the insurer. To the extent an attorney acts as a claims adjuster, claims process supervisor, or claims investigation monitor, the work product privilege does not apply.

• The burden of establishing that communications are subject to the work product privilege rests with the party asserting the privilege. The party must demonstrate that the material was prepared because of litigation or anticipated litigation and not created in the ordinary course of business.
Legal Capacity Doctrine (cont.)


Tripartite Relationship

• In certain circumstances, the basis for the reservation of rights creates a conflict of interest between the policyholder and the insurer.

• Under California law, such a conflict triggers the insurer’s duty to provide independent counsel to protect the policyholder at the insurer’s expense. Accordingly, knowing how and when you are entitled to independent counsel is important.
Cumis Counsel

- In *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal.App.3d 358 (1984), the court held that “where there are divergent interests of the insured and the insurer brought about by the insurer’s reservation of rights based on possible non-coverage under the insurance policy, the insurer must pay the reasonable cost for hiring independent counsel by the insured.”
Cumis Counsel (cont.)

- The *Cumis* decision was codified in 1987 by California Civil Code Section 2860(b).

- For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.
Cumis Counsel (cont.)

• When the divergent interests of the insurer and the policyholder are brought about by the insurer’s reservation of rights based upon asserted non-coverage under the policy, the insurer must pay the reasonable cost of retaining independent counsel by the insured. *Long v. Century Indemnity Co.*, 163 Cal.App.4th 1460 (2008).

• Independent counsel must be provided for the insured when resolution of a third party claim will bear directly on the outcome of the coverage dispute between the insurer and the insured. *Cumis* at 364; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* 20 Cal.App.4th 1372, 1396 (Ct. App. 1993).
Cumis Counsel (cont.)

- *Cumis* counsel is required “when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for defense of the claim;”
- To trigger *Cumis* counsel, the conflict must be actual and significant, not merely potential or theoretical;
- Not every conflict of interest triggers an obligation on the part of an insurer to pay for independent counsel;
- The mere fact that an insurer disputes coverage does not entitle the insured to *Cumis* counsel; and
- *Cumis* counsel is not required simply because an insurer denies coverage for certain facts or allegations or because the underlying action includes a claim for punitive damages.
Conflict of Interest

• Some other circumstances that may create a conflict of interest requiring the insurer to provide independent counsel include:
  • where the insurer insures both the plaintiff and the defendant,
  • where the insurer has filed suit against the insured, whether or not the suit is related to the lawsuit the insurer is obligated to defend,
  • where the insurer pursues settlement in excess of policy limits without the insured's consent and leaving the insured exposed to claims by third parties; and
  • any other situation where an attorney who represents the interests of both the insurer and the insured finds that his or her representation of the one is rendered less effective by reason of his or her representation of the other.
Potential Privilege Issues

• Using *Cumis* counsel does not fully clarify what evidentiary treatment ought to apply to independent counsel’s work product and attorney-client communications produced in the course of the underlying defense.

• For example, joint counsel may become aware of a policyholder’s assessment of the likelihood of coverage. In such a position, joint counsel is “forced to walk an ethical tightrope” by not communicating such relevant information to the insurer, which is also one of his clients. *Cumis* at 49.

• The *Cumis* court did not address specifically, however, whether such communications would be discoverable by the insurer in a future coverage action if the insurer were paying for the policyholder’s independent counsel.
Section 2860(d)

- California Civil Code § 2860 addresses some of the discovery-related issues arising from insurer-provided independent counsel.

- Section 2860(d) states that “it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely inform and consult with the insurer on all matters relating to the action.” (Emphasis added).

- At least one court has read this provision to allow the policyholder considerable leeway regarding the information it discloses to its insurer. See First Pac. Networks, Inc. v. Atl. Mut. Ins. Co., 163 F.R.D. 574, 584 (N.D. Cal. 1995).
Waiver Issues

- Section 2860(f) states that “[c]ounsel shall cooperate fully in the exchange of information that is consistent with each counsel’s ethical and legal obligations to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract.”

- Does this mean that the cooperation clause in insurance policies amounts to a contractual waiver of the attorney-client privilege?
Waiver of Privilege (cont.)

- *Rockwell International Corporation v. Superior Court*, 32 Cal.Rptr.2d 153 (Cal. Ct. App. 1994). The court held that “the standard cooperation clause included in every third party liability insurance policy” does not contractually waive the attorney-client privilege. The parties did not intend for the cooperation clause to function as a waiver of privilege, and allowing the cooperation clause to trump the attorney-client privilege would be contrary to California public policy as expressed in § 2860.
Attorney-Client Privilege In Jeopardy In Insurance Litigation

Strategies for Preserving Confidential Communications

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Jeopardizing the Attorney-Client Privilege

Potential waiver of the attorney-client privilege arise with disclosure to any third party. Here, we will focus on disclosures to the insurer by the policyholder and its defense counsel. However, other potential waiver settings including where attorney-client communications are shared with a broker, auditor, government agency or even a reinsurer.

There is also a risk of potential waiver of work-product protection, but generally such waiver is found only where disclosure is made to a litigation adversary or a conduit to a litigation adversary.
Examples of Waiver of Attorney-Client Privilege In Insurance Litigation

*Cellco P’ship v. Certain Underwriters at Lloyd’s London*, No. 05-3158, 2006 WL 1320067, *3-5* (D. N.J. May 12, 2006) (communications to third-party insurance broker are not privileged even where contact person at broker is an attorney in the absence of a specialized necessity for involvement or facilitation of the attorney-client relationship).


*J.E. Dunn Constr. Co. v. Underwriters at Lloyd’s London*, No. 05-0092-CV, 2006 WL 1128777, *2* (W.D. Mo. April 25, 2006) (communications to third-party broker are not privileged despite joint-defense agreement between policyholder and broker because broker’s interest was to minimize its own liability to policyholder and so policyholder and broker did not share a common interest).

*See also See Constr. Indus. Services Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43, 47-48 (E.D.N.Y. 2001) (disclosure of privileged materials to third-party accountant constituted waiver of attorney-client privilege, even where accountant was involved in the litigation but not in a way “crucial to the lawyer’s assessment of the case”)


Insurer Access to Attorney-Client Communications and Work Product Created in Defense of Its Policyholder

If defense documents are shared with the insurer, is there a waiver of the policyholder’s attorney-client and work product protections?

– Joint Client Exception
– Common Interest Doctrine/At Issue Doctrine
– Cooperation Clause
– Practical Issues and Solutions
Insurer Access to Attorney-Client Communications and Work Product Created in Defense of Its Policyholder

Joint Client Exception
In some jurisdictions, the insured and insurer are both considered clients of counsel retained to defend the underlying action.

In such instances, disclosure of confidential attorney-client or work product materials to the insurer will not waive the privilege.
Insurer Access to Attorney-Client Communications and Work Product Created in Defense of Its Policyholder

Common Interest Doctrine

Even if the insurer is not considered a joint client of defense counsel, many courts recognize a common interest in defense materials between an insurer and its insured.

For instance, some courts hold that the parties’ common interest permits access to privileged materials where there is an “interlocking relationship” between the parties or where a “limited common purpose” requires disclosure. *Gus Consulting GMBH v. Chadbourne & Parke LLP*, 858 N.Y.S.2d 591, 593 (N.Y. Sup. Ct. 2008) (rejecting the identity of legal interest standard and holding that “a total identity of interest among the participants is not required under New York law”).

Other courts disagree, finding no common interest supporting disclosure where the insurer disclaimed coverage or reserved its rights.
Common Interest Doctrine, continued

*Allianz Ins. Co. v. Guidant Corp.*, 869 N.E.2d 1042 (Ill. App. Ct. 2007) (common-interest doctrine applies to materials prepared by defense counsel not retained by the insurer; insurer and its insured are aligned with respect to underlying litigation and defense counsel acted for the mutual benefit of both parties; moreover, the requested materials were not prepared in anticipation of the declaratory judgment suit).

*Metro Wastewater Reclamation Dist. v. Continental Cas. Co.*, 142 F.R.D. 471, 476 (D.Colo. 1992) (finding common interest between insurer and policyholder despite coverage dispute, noting “[t]here has been no showing by [the policyholder] that, at the time the documents in question were generated, it had any intent or expectation that they would be concealed from its insurance carriers”).

*Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp*, No. 00-9212, 2002 WL 31729693 at *15 (S.D.N.Y. Dec. 5, 2002)(defense documents generated prior to the insurer’s disclaimer of coverage must be produced within a shared privilege because the insurer’s interest was not adverse to the insured at the time the documents were created).
Common Interest Doctrine, continued


*EDO Corp. v. Newark Ins. Co.*, 145 F.R.D. 18 (D. Conn. 1992) (insurer was entitled to discovery of insured’s underlying defense documents, even where a coverage dispute subsequently arose between the parties; the documents in question were not created in anticipation of a lawsuit with the insurer and the insured had no reasonable belief as to the confidentiality of its communications as against insurers).

*See also Rockwell Int’l Corp. v. Superior Court*, 32 Cal. Rptr. 2d 153, 158 (Cal. Ct. App. 1994) (defense counsel must disclose to the insurer all information from the underlying suit except privileged material relevant to a coverage dispute).
Insurer Access to Attorney-Client Communications and Work Product Created in Defense of Its Policyholder

Cooperation Clause

The policyholder has a duty to cooperate with the insurer, an obligation that extends to conduct of the defense of the underlying suit. Some courts have held this includes sharing privileged defense materials.


But see Remington Arms Co. v. Liberty Mutual Ins. Co., 142 F.R.D. 408 (D. Del 1992)(no duty to cooperate where insurer denied coverage because either there is no coverage or the insurer breached the agreement).

Insurer Access to Attorney-Client Communications and Work Product Created in Defense of Its Policyholder

At Issue Doctrine

Some courts have held that, by bringing a declaratory judgment action, the policyholder has put communications from defense counsel at issue, requiring their production to insurer counsel. This doctrine may be limited to specific documents or issues, as opposed to being broadly applied to all defense materials in the underlying suit.


*HM Holdings Inc v. Lumberman’s Mutual Cas. Co.* 612 A.2d 1138 (NJ App Div 1992) (requiring production of documents involving a material issue in dispute in the coverage suit if the information is not available from a less intrusive source).
Insurer Access to Attorney-Client Communications and Work Product Created in Defense of Its Policyholder

Practical pointers
Realistically, to evaluate a claim and authorize settlement, an insurer usually will need to have access to privileged information about the underlying litigation. Accordingly, to make the insurance relationship work, the policyholder and insurer may need to find a way to share such information while minimizing the risk of disclosure to others.

Examples:
Periodic oral reports from defense counsel to insurer
Disclosure of work-product but not attorney client communications
Joint defense/confidentiality agreements, including a prohibition on further disclosure and notice of any third party attempt to obtain documents, as well as provisions for maintaining confidentiality into the future (or return/destroy provisions)
Role of Attorney for Insurer in Claims and Coverage Matters

Was the lawyer acting as a lawyer, i.e., providing confidential legal advice to the client?

Is the document protected work product, i.e., was it prepared in anticipation of litigation as opposed to in a routine claims handling function?
Role of Attorney for Insurer in Claims and Coverage Matters

*Bovis Lend Lease LMB, Inc. v. Seasons Contracting Corp.*, No. 00 Civ. 2002 WL 31729693 (S.D.N.Y. Dec. 5, 2002) (acknowledging that insurance claims files documents may consist of both documents prepared in the ordinary course of business and documents shielded from discovery).


*Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869 (5th Cir. 1991) (the attorney-client privilege is not waived where the insurer’s attorney undertakes investigative tasks as long as they “are related to the rendition of legal services”; litigation was anticipated where attorney was retained within a week after claims adjuster learned that claimant’s husband confessed to setting fire giving rise to claim).

*Mission Nat’l Ins. Co. v. Lilly*, 112 F.R.D. 160 (D. Minn 1986) (adopting “case-by-case analysis” of work product and attorney client privilege raised when insurer’s counsel acts both as claims investigator and legal advisor; ordering redaction of portions of documents reflecting “mental processes and opinions of counsel which truly bear on the anticipated, choate litigation”).
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Practical Solutions:
Take steps to demonstrate elements of attorney-client privilege in the communication providing advice
 • Identify author of document as attorney and state the purpose of a communication is to provide legal advice
 • Label the document as privileged
 • Send the communication only to necessary recipients

In-House Counsel:
 • Separate legal advice as much as possible from general business advice

Outside Counsel:
 • Make clear how any investigative activities are related to and necessary for the provision of legal advice; identify legal opinion and mental impressions as such in written analysis
Questions?

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