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Attorney–Client Privilege in Insurance Disputes

Protecting Confidentiality in Claims Handling and Litigation

WEDNESDAY, FEBRUARY 1, 2012

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TOPICS

- Attorney-Client Privilege and Work Product Protection: The Basics
- Privilege in the Insurance Context
- The Common Interest Doctrine
- When Does Claims Handling End and Legal Work/Anticipation of Litigation Begin?
- Disclosures Among Policyholders, Defense Counsel, Insurers, and Reinsurers
- Waiver: Scope of Waiver
- Waiver: Express and Implied

REFERENCE MATERIALS

- **“Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine,”** JENNER & BLOCK LLP (2011)
- **TESTIMONIAL PRIVILEGES,** David M. Greenwald, Robert R. Stauffer, Erin R. Schrantz (ThomsonReuters 2012)
- **Attorney-Client Privilege Resource Center,** Jenner & Block website <http://www.jenner.com/attorneyclientprivilege>
- **Spotlight Litigation Monitor Newsletter,** Jenner & Block (available upon request)

WHAT LAW APPLIES IN FEDERAL COURT?

- **Attorney-Client Privilege** – Choice of Law Governed by FRE 501 and FRE 502.
 - State law in diversity cases
 - Federal law in federal question cases, including pendent state claims
 - **Note:** FRE 502 applies federal law even in diversity cases, as set forth in rule.
- **Work-Product Doctrine** – Governed by FRCP 26(b)(3) and Federal Common Law.
 - State court proceedings governed by state analogue to FRCP 26(b)(3).

BASICS OF ATTORNEY-CLIENT PRIVILEGE

1. Client
2. Lawyer, Acting as a Lawyer
3. Communication
4. Legal Purpose
5. Confidentiality

WORK PRODUCT PROTECTION

- **FRCP 26(b)(3)** provides protection for:
 - Documents and tangible things
 - Prepared in anticipation of litigation or for trial
 - By or for a party or a party’s representative
 - **Note:** Intangible Work Product Doctrine is Broader than Rule 26.
- Qualified protection for “*Ordinary*” Work-Product
 - Showing of “*Substantial Need*” and “*Undue Hardship*” required
- More protection for “*Opinion*” Work-Product
 - Showing of “*Extraordinary Need*”
 - Some federal courts provide absolute protection for opinion work-product (e.g., 4th Cir.; W.D. Md.; W.D. Mich.).
- **Anticipation of Litigation:** Standards
 - **Majority:** “Because Of” Test
 - **Minority:** “Primary Motivation” Test
 - **1st Circuit:** “For Use In Litigation” Test

SCOPE AND DURATION

- Attorney-Client Privilege is absolute unless waived.
- Federal rule is that privilege survives death of individual client. *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998).
- Privilege for organizations ends when the organization ceases to have a legal existence. *See e.g.*, Restatement (Third) of the Law Governing Lawyers 73 cmt k.
- The Work Product protection is a *qualified* protection.
- Attorneys have an independent interest in protecting work product. *See, e.g., Hobbey v. Burge*, 433 F.3d 946 (7th Cir. 2006).

PRIVILEGE IN INSURANCE CONTEXT

QUESTIONS:

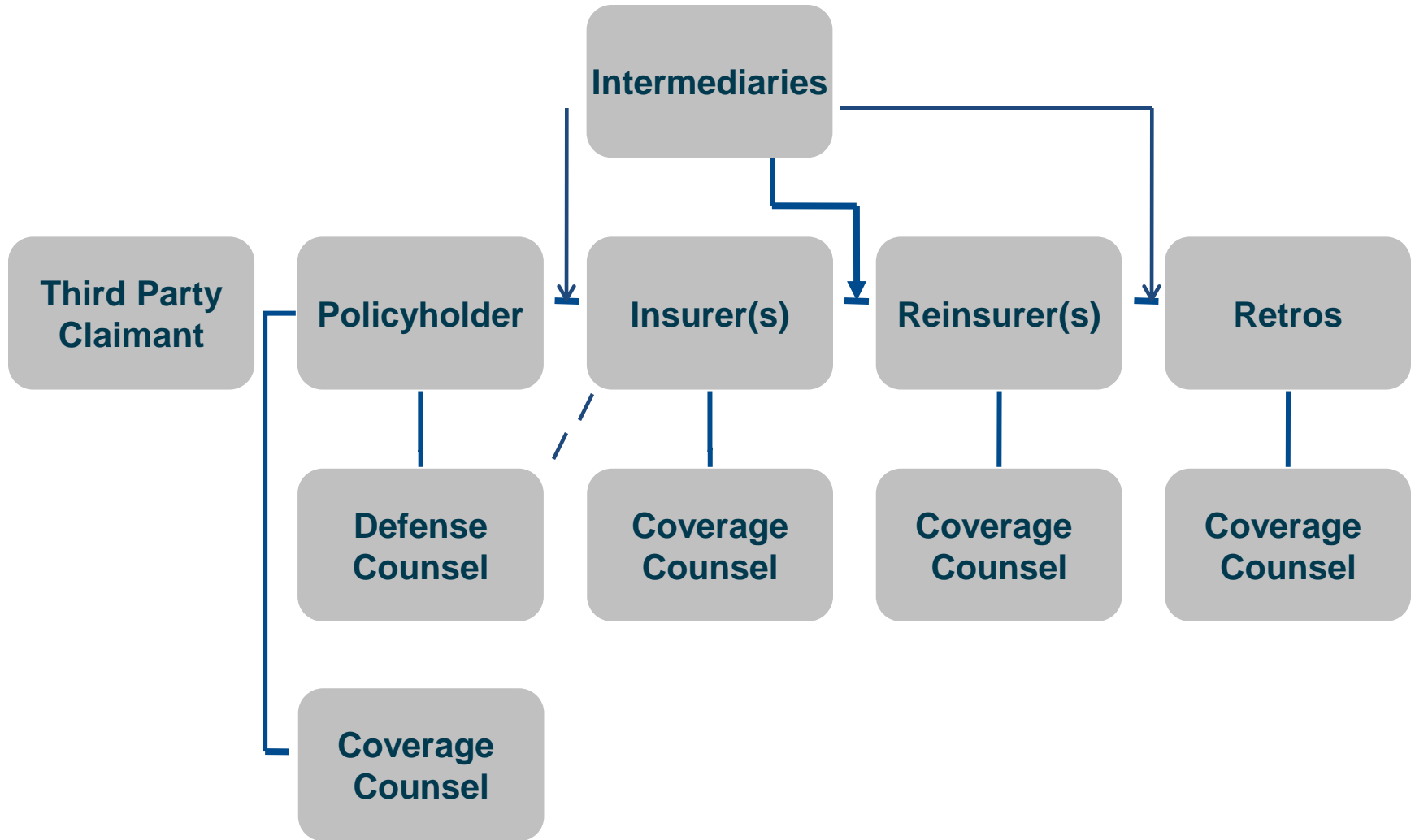
Attorney-Client Privilege:

- When does work of attorney constitute Legal Work vs. Claims Handling?
- When is a communication between Insured and Insurer for a legal purpose?
- When is a communication in pursuit of a common legal purpose or common legal strategy?

Work Product Protection:

- When does Claims Handling give way to Anticipation of Litigation?

(RE)INSURANCE AND PRIVILEGE



WHEN IS INSURER'S ATTORNEY ACTING IN A LEGAL CAPACITY?

- In order for Attorney-Client Privilege to apply, communication must be made for legal purpose.
- When attorney is acting in “business” capacity, privilege does not attach.

Argo Sys. FZE v. Liberty Ins. PTE Ltd., 2005 WL 1355060 (S.D. Ala. 2005) (no privilege where attorney acted as claims-investigator rather than as attorney).

Brooklyn Union Gas Co. v. Amer. Home Assur. Co., 23 A.D.3d 190, 803 N.Y.S.2d 532 (1st Dep't 2005) (“Documents prepared in the ordinary course of an insurance company’s investigation to determine whether to accept or reject coverage” are not privileged and do not become privileged “merely because an investigation was conducted by an attorney”).

Dunn v. State Farm Fire & Cas. Co., 122 F.R.D. 507 (N.D. Miss. 1988), *aff'd* 927 F.2d 869 (5th Cir. 1991) (merely assigning attorney investigative tasks does not destroy ability to make privileged communications).

In re Subpoena of Curran, 2004 WL 2099870 (N.D. Tex. 2004) (outside attorney working on claims investigation acted in legal capacity; cites *Upjohn* regarding need for attorneys to investigate facts to enable informed advice).

WHEN IS INSURER'S ATTORNEY ACTING IN A LEGAL CAPACITY? (*cont'd*)

- **Attorney acting as claims adjuster will not be within the privilege.**

Chicago Meat Processors, Inc. v. Mid-Century Ins. Co., 1996 WL 172148 (N.D. Ill. 1996) (where attorney performs role of claims adjuster/investigator and does not render legal assistance, communications are not privileged).

Irving Materials, Inc. v. Zurich Am. Ins. Co., 2007 WL 4616917, at *4 (S.D. Ind. 2007) (no privilege if attorney acts solely as claims adjuster).

Flagstar Bank v. Fed. Ins. Co., 2006 WL 6651780, at *4 (E.D. Mich. 2006) (same).

But See: Aetna Cas. & Sur. Co. v. Superior Court, 153 Cal. App. 3d 467, 475-76 (Cal. Ct. App. 1984) (attorney retained to investigate claim and make coverage determination is “a classic example of a client seeking legal advice”).

WHEN DOES AN INSURER “ANTICIPATE LITIGATION?”

- **“Claims Files” present difficult issues** regarding where line should be drawn between documents prepared in “ordinary course of insurer’s business” and those prepared “in anticipation of litigation.”

See, e.g., AIU Ins. Co. v. TIG Ins. Co., 2008 WL 4067437 (S.D.N.Y. 2008) (discussing various approaches); *Evanston Ins. Co. v. OEA, Inc.*, 2006 WL 1192737 (S.D.N.Y. 2006) (“When an investigation conducted by counsel crosses the line from business-centered (and unprotected) to litigation-centered is a question of fact that must be determined on a case-by-case basis.”); *Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, 2002 WL 31729693 (S.D.N.Y. 2002).

- **Fact Specific Analysis may include:**
 - Has coverage litigation been initiated?
 - Has insurer declined or decided to decline coverage?
 - Has insurer referred the matter to (outside) counsel?
 - Are there other indicia that distinguish the case from routine claims handling?

THE COMMON INTEREST DOCTRINE: INSURANCE

QUESTIONS:

May Policyholder disclose privileged information to Insurer without waiving privilege?

- Federal common law does not recognize an insured-insurer privilege.

See, e.g., Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508 (D.C. Cir. 1993).

- State law varies.

See, e.g., Urban Outfitters, Inc. v. DPIC Cos., 203 F.R.D. 376 (N.D. Ill. 2001) (confronting conflict between Michigan and Illinois).

Must Policyholder disclose privileged information to Insurer?

THE COMMON INTEREST DOCTRINE

- An Expansion of the Joint Defense Doctrine
- The Common Interest Doctrine does not create a new privilege, but expands persons with whom otherwise privileged information may be shared without waiver.
- Must show communications furthered a joint defense or joint legal interest – at the time of the communications.
- Common Business Interest not sufficient.
- Some courts require an “identity of legal interest”; others apply broader standard and allow “some adversity.”

Compare Bank of America, N.A. v. Terra Nova Ins. Co. Ltd., 211 F. Supp. 2d 493 (S.D.N.Y. 2002) (requiring identity of legal interest); **With:** *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985) (some adversity allowed).

THE COMMON INTEREST DOCTRINE

- The Common Interest Doctrine is not limited to matters relating to threatened or pending litigation.
- Courts apply varying requirements regarding involvement of counsel in communications.
- Outside of the insurance context, the Common Interest Doctrine is permissive and does not require disclosure of privileged information.
- **Waiver:**
 - As to third parties: Common Interest participants may waive only their own privilege.
 - Subsequent litigation waives privilege among Common Interest participants.

COMMON INTEREST DOCTRINE: DEFENSIVE USE

Courts Applying Doctrine to Prevent Third Party Discovery

Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc., 212 F.R.D. 567 (E.D. Cal. 2002) (common interest doctrine applied even where reservation of rights; permitted disclosure by insured to insurer without waiver of attorney-client privilege or work product protection).

Am. Special Risk Ins. Co. v. Greyhound Dial Corp., 1995 WL 442151 (S.D.N.Y. 1995) (statement made by insured to insurer privileged because done in “pursuit of legal representation”).

Kingsway Fin. Servs. v. PricewaterhouseCoopers LLP, 2008 WL 4452134 (S.D.N.Y. Oct. 2, 2008) (common interest doctrine applies between Ds & Os and insurer where insurer had only indemnity obligation and no duty to defend).

COMMON INTEREST DOCTRINE: DEFENSIVE USE

Courts Rejecting Doctrine to Prevent Discovery By Third Parties

First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co., 163 F.R.D. 574 (N.D. Cal. 1995) (communications between “Cumis” counsel and insurer not privileged).

In re Imperial Corp. of America, 167 F.R.D. 447 (S.D. Cal. 1995) (even where insured Ds & Os and insurer entered into JDA, neither attorney-client privilege nor work product protection applied because (1) insurer had no duty to defend; and (2) possibility of future coverage action created adversity).

RECOMMENDATIONS

- **Enter into Common Interest/Defense Agreement.**
- **Policyholders:**
 - Negotiate to disclose factual information rather than privileged information
 - Draft communications carefully
- **Insurers:**
 - Consider what information is needed to evaluate claim.
 - Work with insured to minimize risk of waiver.

COMMON INTEREST DOCTRINE: OFFENSIVE USE

Waste Management, Inc. v. Int'l Surplus Lines Ins. Co., 144 Ill.2d 178, 579 N.E.2d 322 (Ill. 1991)

- **Holding:** Even where Insurer denies coverage, Common Interest Doctrine applies and, pursuant to Cooperation Clause, Policyholder must disclose information to Insurer.
- “Common Interest” tested at time of contracting rather than at time of communication.

Courts Rejecting Offensive Use of Doctrine

N. River Ins. Co. v. Columbia Cas. Co., 1995 WL 5792 (S.D.N.Y. 1995) (common “desire” for successful outcome not an identical legal interest).

First Pac. Networks, Inc. v. Atl. Mut. Ins. Co., 163 F.R.D. 574 (N.D. Cal. 1995) (reservation of rights injected tension in relationship; insured may withhold privileged information).

COMMON INTEREST DOCTRINE: OFFENSIVE USE

Courts Rejecting Offensive Use of Doctrine

Rockwell Int'l Corp. v. Superior Court, 26 Cal. App. 4th 1255 (Cal. Ct. App. 1994) (rejecting *Waste Management* approach).

Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408 (D. Del. 1992) (rejecting *Waste Management* approach).

Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51 (Ct. 1999) (duty of cooperation does not waive privilege).

Practice Tips:

- Consider Express Common Interest Agreement
- Negotiate Scope of Disclosures to Minimize Risk of Waiver

REINSURANCE AND PRIVILEGE - KEY QUESTIONS -

- Is Reinsurance Information Relevant?
- Are Communications And Materials Exchanged Between Insurer And Reinsurer Protected?
 - Common Interest Doctrine
 - Work Product Doctrine
- Does Use Of Intermediaries Waive The Privilege?
- What Happens When The Insurer And Reinsurer End Up In A Dispute?

COMMON INTEREST DOCTRINE

Common Interest Applied

- *Employers Reins. Corp. v. Laurier Indemn. Co.*, 2006 WL 532113 (M.D. Fla. 2006)
- *Minn. Sch. Bds. Assoc. Ins. Trust v. Employers Ins. Co.*, 183 F.R.D. 627 (N.D. Ill. 1991)
- *Great Am. Surplus Lines, Inc. Co. v. Ace Oil Co.*, 120 F.R.D. 533 (E.D. Cal. 1988)
- *Durham Indus., Inc. v. North River Ins. Co.*, 1980 WL 112701 (S.D.N.Y. 1980)
- *Hartford Steam Boiler Inspection & Ins. Co. v. Stauffer Chem. Co.*, 1991 WL 230742 (Conn. Super. Ct. 1991)

COMMON INTEREST DOCTRINE: REINSURANCE

Common Interest Rejected

- *Reliance Ins. Co. v. Am. Lintex Corp.*, 2001 WL 604080 (S.D.N.Y. 2001)
- *Front Royal Ins. Co. v. Gold Players, Inc.*, 187 F.R.D. 252 (W.D. Va. 1999)
- *McLean v. Cont'l Cas. Co.*, 1996 WL 684209 (S.D.N.Y. 1996)
- *N. River Ins. Co. v. Columbia Cas. Co.*, 1995 U.S. LEXIS 53 (S.D.N.Y. 1995)
- *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132 (N.D. Ill. 1993)
- *N. River Ins. Co. v. Phil. Reins. Corp.*, 797 F. Supp. 363 (D. N.J. 1992)

Offensive Use Of Common Interest Doctrine

- *Amer. Reins. Co. v. U.S. Fidelity & Guaranty Co.*, 40 A.D.3d 486, 494, 837 N.Y.S.2d 616, 624 (N.Y. App. 2007) (McGuire, J. dissenting)

Access To Records Clause

- *Gulf Ins. Co. v. Transatlantic Reins. Co.*, 788 N.Y.S.2d 44 (1st Dep't 2004) (“access to records” provision in reinsurance agreement did not waive privilege).

Actual Adversity Between Insurer and Reinsurer

- *The Regence Group v. TIG Specialty Ins. Co.*, No. 07-1337-HA, 2010 WL 476646, at *2-3 (D. Or. Feb. 4, 2010) (unpublished) (denying insurer’s motion for protective order to withhold, in litigation with insured, privileged documents exchanged with reinsurers, where insurer subsequently engaged in two contested arbitrations with reinsurers).

DISCLOSURES BY INSURER TO REINSURERS

- **Consider Express Common Interest Agreement.**
- **Consider Non-Waiver Terms In Confidentiality Agreement.**

See, e.g., AIU Ins. Co. v. TIG Ins. Co., No. 07 Civ. 7052 (SHB)(HBP), 2008 WL 5062030 (S.D.N.Y. Nov. 25, 2008).

- **Consider Risk Of Communicating Through Intermediaries.**

Compare Minn. Sch. Bds. Assoc. Ins. Trust v. Employers Ins. Co., 183 F.R.D. 627 (N.D. Ill. 1999); *Certain Underwriters at Lloyd's v. Fidelity Cas. Co. of N.Y.*, 1997 WL 769467 (N.D. Ill. 1997); *U.S. Fire Ins. Co. v. Gen. Reins. Corp.*, 1989 WL 82415 (S.D.N.Y. 1989); *With United States v. Pepper's Steel & Alloys, Inc.*, 1991 WL 1302864 (S.D. Fla. 1991).

- **Analyze Risks On Case-by-Case Basis.**

See Mitchell A. Orpett, 3 LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION 41:45 (2008).

- **Discuss Waiver Issues Candidly.**

POTENTIAL WAIVER

- Express Waiver: Disclosure to Third Parties
- Implied Waiver: “At Issue” Waiver

BASIC STANDARDS FOR WAIVER

- **Attorney-Client Privilege**
 - Privilege generally waived when communication disclosed outside the attorney-client relationship.
- **Work Product Protection**
 - Protection waived if disclosed to adversary, or to someone who substantially increases opportunity for potential adversaries to obtain the information (conduit).

FRE 502: SCOPE OF WAIVER

- **PRE-RULE 502:**
 - **AC Privilege:** Subject Matter Waiver
 - **WP Protection:** Waiver of WP disclosed and perhaps underlying documents; generally no subject matter waiver
- **RULE 502:** Subject Matter Waiver only with respect to Intentional “Disclosure” and only in “Unusual Situations,” but applies to both AC Privilege and WP Protection.

RULE 502(a)

(a) Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver. – When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the **waiver extends to an undisclosed communication or information** in a federal or state proceeding only if:

- (1)** the waiver is intentional;
- (2)** the disclosed and undisclosed communications or information concern the same subject matter; and
- (3)** they ought in fairness to be considered together.

RULE 502(a)

Explanatory Note: Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a **subject matter waiver** (of either privilege or work product) **is reserved for those unusual situations** in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. **It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver.**

FRE 502 LIMITATIONS: “USE” vs. “DISCLOSURE”

Substantive law regarding “strategic use” unchanged.

See, e.g., 154 Cong. Rec. H7818-9 (Explanatory Note Addendum) (“This subdivision does not alter the substantive law regarding when a party’s strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter[.]”)

- Direct use of protected information – *e.g.*, producing party’s use as exhibit
- Implied waiver/“at issue” waiver
 - Asserting affirmative defense of “reasonable investigation”
 - Asserting reliance on advice of counsel
 - Asserting ineffective assistance of counsel
 - Asserting attorney malpractice

RULE 502(d), (e), (f)

(d) Controlling effect of a court order. – A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling effect of a party agreement. – An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling effect of this rule. – Notwithstanding Rules 101 and 1101, this rule applies to state proceedings in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

RECOMMENDATIONS

Where coverage litigation is proceeding in parallel with underlying litigation:

- Negotiate scope of discovery in the coverage litigation to minimize risk of waiver.
- Ask Court to enter appropriate FRE 502(d) order.

EXPRESS WAIVER

Attorney-Client Privilege

- **Intentional disregard of confidentiality**
 - Disclosure to Third Parties outside the attorney-client relationship
 - Disclosure to those in an organization without a “need to know”
- **Potential “third parties”: Brokers, Insurers, Reinsurers, Government Agencies, Auditors**

See e.g., Sony Computer Entertainment America, Inc. v. Great American Ins. Co., 229 F.R.D. 632 (N.D. Cal. 2005) (presence of broker waived privilege).

- “Agency” Doctrine and Joint Defense/Common Interest Doctrines may expand parties to whom disclosures can be made.

Work-Product Protection

- More robust protection: waiver occurs when disclose to litigation adversary or to one who makes it substantially likely will be discovered by adversary.

IMPLIED WAIVER – AT ISSUE WAIVER

- **“At Issue” Waiver** occurs where a party raises an issue the effective rebuttal of which requires inquiry into privileged communications.
- **Requires affirmative act;** just denying allegations typically does not waive privilege.

See, e.g., Parker v. Prudential Ins. Co. of America, 900 F.2d 772, 776 (4th Cir. 1990) (no waiver where opponent attempted to put advice of counsel at issue).

- **Merely filing coverage action seeking indemnification for attorneys fees does not create “at issue” waiver.**

See, e.g., Bovis Land Lease, LMB, Inc. v. Seasons Contracting Corp., 2002 WL 31729693 (S.D.N.Y. 2002).

- **Examples of “at issue” waiver:**
 - Asserting affirmative defense of “reasonable investigation”
 - Asserting reliance on advice of counsel

“AT ISSUE” WAIVER GENERALLY

Different Approaches To “At Issue” Waiver:

- **Broad Approach**: *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash 1975)
 - (1) Party asserting privilege has taken an affirmative act that
 - (2) Makes protected information relevant to the case, and
 - (3) Application of privilege would deny opposing party access to information vital to the defense.
- **Narrower Approach**: *In re Erie County*, 546 F.3d 222 (2d Cir. 2008)

Some showing that opposing party is relying on privileged communications as a claim or defense or as an element of a claim or defense (*e.g.*, where state of mind or good faith are put at issue).

IMPLIED WAIVER – ADVICE OF COUNSEL

- **Elements of Advice of Counsel Defense:**
 - Client made complete disclosure to counsel;
 - Client sought advice as to legality of contemplated action;
 - Counsel advised client action was legal; and
 - Client relied on that advice.
- **Asserting advice of counsel precludes use of the privilege to shield that advice from scrutiny.**

See, e.g., Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992); Restatement (Third) of the Law Governing Lawyers 79.
- **Scope of waiver:** the subject matter of the advice.

Roehrs v. Minnesota Life Ins. Co., 228 F.R.D. 642 (D. Ariz. 2005) (testimony of adjusters that they consulted with counsel, coupled with affirmative defense of reasonable evaluation of claim, waived privilege).

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Attorney-Client Privilege In Jeopardy In Insurance Litigation



Tripartite Relationship: Considerations and Strategies for Preserving Confidential Communications Shared By Policyholders With Insurers

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Jeopardizing the Attorney-Client Privilege

Potential waiver of the attorney-client privilege arises with disclosure of information and documents to any third party. This segment will focus on disclosures to the insurer by the policyholder and its defense counsel, and the effect of such disclosures on the privilege.

Realistically, for the insurer-policyholder relationship to work, it is necessary for the policyholder and its defense counsel to provide substantial information to the insurer about any matter for which insurance coverage is sought.

This information-sharing is necessary to permit the insurer to fulfill its obligations under the terms of the insurance agreement. The insurer needs information to defend the policyholder and/or meaningfully participate in its defense, to assess the value of a claim for purposes of potential settlement, and to determine reasonable and necessary attorneys fees incurred in defense of a suit.

Providing information and documents, including materials subject to the attorney-client privilege, enables the insurer to perform under the insurance policy and thus benefits the policyholder.



Jeopardizing the Attorney-Client Privilege

This segment of our presentation will focus on the benefits and risks of purposeful sharing of attorney-client materials between the policyholder and its insurer, as well as ways to minimize the risk of waiving privileges as to third parties by such disclosures.

Of course, insurance practice includes many other potential attorney-client privilege waiver settings. These include situations 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: Waiver of Attorney-Client Privilege In Insurance Disputes

Cellco P'ship v. Certain Underwriters at Lloyd's London, No. 05-3158, 2006 WL 1320067, at *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).

SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop. LLC, No. 01 Civ. 9291, 2002 WL 1334821 (S.D.N.Y. June 19, 2002) (third-party insurance broker is not within the scope of the attorney-client privilege).

J.E. Dunn Constr. Co. v. Underwriters at Lloyd's London, No. 05-0092-CV, 2006 WL 1128777, at *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. Servs. 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

The law concerning information-sharing and waiver of privilege in the insurance relationship largely has been established in adversarial coverage cases between policyholders and insurers.

In other words, the applicable law frequently has developed from situations where the policyholder has refused to share privileged defense information and the insurer is seeking to obtain access to defense materials through discovery motion practice in coverage litigation.



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

A far more common setting, however, is where the insurance relationship is not broken and, even if the insurer has reserved its rights with respect to coverage, the policyholder understands the insurer's need for defense-related information to properly defend or indemnify it.

In that situation, both the policyholder and insurer share an interest in determining a way to share the information between themselves without making it discoverable by third parties, such as claimants or potential claimants.

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



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

Resolution of the privilege issues will depend on:

the applicable state law and

the interpretation of theories such as the joint client exception, common interest doctrine, and at issue doctrine,

as well as the effect of the insurance policy's cooperation clause.



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

The law governing the insurer-policyholder relationship, and the privileges of defense counsel's efforts, differs from state to state.

Although the applicable standards largely have evolved through case law, some jurisdictions have set requirements or expectations about what defense information will be shared by the policyholder with its insurer by statute.

For instance, California's well-known Cumis statute (governing when independent counsel is required to defend the policyholder) provides that such counsel and the policyholder must disclose to the insurer all information concerning the defense of the underlying action (but not privileged materials relevant to coverage) and that such information-sharing shall not waive applicable privileges as to any other third party.



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

To the extent information-sharing requirements are not imposed by statute, they are imposed by virtue of the cooperation clause in insurance policies. Under these clauses, the policyholder has a duty to cooperate with the insurer, an obligation that extends to the conduct of the defense of the underlying suit.

Recognizing the insurer's need for information to meaningfully participate in the defense and to assess settlement opportunities, some courts have held the duty to cooperate explicitly includes an obligation to share privileged defense materials, even where the insurer is defending under a reservation of rights. Other courts do not compel disclosure of privileged materials when the policyholder and insurer are in an adversarial relationship.

The case law leaves some uncertainty about whether the voluntary disclosure of privileged defense information by the policyholder to cooperate with its insurer could result in a waiver of privilege as to third parties. In contrast, for instance, the Cumis statute explicitly states that information disclosed by the policyholder and defense counsel to the insurer as required by statute is not a waiver of the privilege as to any other party.



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

Application of Cooperation Clause

***Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 329, 331 (Ill. 1991)** (cooperation clause and common-interest doctrine apply to documents prepared by defense counsel not retained by the insurer).

***Allianz Ins. Co. v. Guidant Corp.*, 373 Ill. App. 3d 652, 869 N.E.2d 1042 (2d Dist. 2007)** (applying Illinois privilege law, an insured could not assert the attorney-client privilege or the work product protection against its insurers to avoid producing defense-related documents in a coverage action with the insurers).

But see

***Remington Arms Co. v. Liberty Mut. 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).

***Eastern Air Lines, Inc. v U.S. Aviation Underwriters, Inc.*, 716 So. 2d 340 (Fla. Dist. Ct. App. 1998)** (where parties are in adversarial relationship cooperation clause does not compel production of privileged materials to insurer).



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

Another possible justification for continued protection of privileged information shared between the policyholder and its insurer is the joint client exception.

In some jurisdictions, the insured and insurer are both considered clients of counsel retained to defend the underlying action against the policyholder. In such instances, disclosure of confidential attorney-client or work product materials to the insurer will not waive the privilege as to third-parties.

However, in many instances, case law explicitly requires that the policyholder have independent counsel whose undivided loyalty belongs to the policyholder where the insurer has reserved its rights.



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. Essentially, these courts recognize that defense counsel acts for the mutual benefit of the policyholder and insurer, even if he or she is not retained to represent the insurer as well as the policyholder.

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 of underlying defense documents without waiver of privilege where the insurer disclaimed coverage or reserved its rights to deny coverage to the policyholder.



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

Application of Common Interest Doctrine

***Allstate Ins. Co. v. Barnett*, No. C-10-0077, 2010 WL 3619778 (N.D. Cal. Sept. 9, 2010)** (insured's statement made prior to the insurer making a coverage decision was not privileged where insured failed to prove that the purpose of the statement was primarily to provide information to defense counsel, rather than to determine whether Allstate was required to defend the suit).

***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. Cont'l 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).



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

Application of Common Interest Doctrine, continued

***Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 329, 331 (Ill. 1991)** (cooperation clause and common-interest doctrine apply to documents prepared by defense counsel not retained by the insurer).

***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. Super. 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

At Issue Doctrine:

Some courts have held that, by tendering a claim or suit to its insurer and seeking coverage for the underlying matter, a policyholder puts “at issue” communications from defense counsel in the matter for which coverage is sought, requiring their production to the insurer.

This doctrine may be limited to specific documents or issues, as opposed to being broadly applied to all defense materials in the underlying suit. It is essentially an implied waiver of the privilege by the actions of the policyholder in making an issue of matters contained in otherwise privileged communications with its defense counsel.

Because it is a waiver of privilege that would otherwise be applicable, the “at issue” doctrine does not provide a strong justification for limiting disclosure of the privileged underlying defense materials to the insurer, and precluding discovery of them by other third parties.



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

Application of the At Issue Doctrine

Potomac Elec. Power Co. v. Cal. Union Ins. Co., 136 F.R.D. 1 (D.D.C 1990) (claim over whether conditions of coverage met and over reasonableness of defense costs put defense materials at issue).

HM Holdings Inc. v. Lumberman's Mut. Cas. Co. 612 A.2d 1138 (N.J. 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

Reinsurance Disputes Can Present Additional Concerns:

Concerns about waiver of protections applicable to defense materials shared with insurers have been underscored by a case involving production of communications between the insurer and its reinsurers. In this instance, the policyholder sought information shared by the insurer with its reinsurers. If such information is discoverable, however, then concerns extend to whether any information an insurer may share with its reinsurer (such as privileged assessments of the policyholder's liability and exposure) may become discoverable by any third-party (e.g., claimants).

See *Regence Group v. TIG Specialty Ins. Co.*, No. 07-1337, 2010 WL 476646 (D. Or. Feb 4, 2010), mandamus denied, No. 10-70530 (9th Cir. May 21, 2010), petition for cert. denied, No. 10-450 (U.S. Dec. 6, 2010).



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

Although arbitration of insurer-reinsurer matters is more common, disputes, including privilege issues, sometimes are litigated between insurers and reinsurers.

***Am. Re-Insurance Co. v. U.S. Fid. & Guar. Co.*, 40 A.D.3d 486, 837 N.Y.S.2d 616 (1st Dept. 2001)** (common interest doctrine did not permit reinsurer to discover privileged documents from insurer where the parties' interests were adverse, and the fact that the parties shared an interest in the outcome of the underlying coverage litigation did not create a common interest that would defeat the insurer's claimed privileges as to underlying settlement-related documents).

***Nat'l Union Fire Ins. Co. v. Clearwater Ins. Co.*, No. 04-cv-5032, 2007 WL 2106098 (S.D.N.Y. July 21, 2007)** (reinsurer not entitled to production of an unredacted version of a letter from an insurer's counsel that rendered legal advice on the consequences of settlement and was protected by the attorney-client privilege).



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

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 need to find a way to share such information while minimizing the risk of disclosure to others, particularly claimants.

Common approaches to this problem include:

- 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).



Questions?

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