

COMMUNICATIONS WITH YOUR INSURER: ARE THEY PRIVILEGED AND PROTECTED FROM DISCLOSURE TO THIRD PARTIES?

Your company is a defendant in a lawsuit seeking damages for injuries caused by one of its products. No problem—that's what insurance is for, right? What's this? The plaintiffs have issued a subpoena seeking the production of your communications with the insurer? Aren't these documents protected from disclosure?

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attorney-client privilege, the work product doctrine, or the “common interest” extension of the foregoing protections.²

ATTORNEY-CLIENT PRIVILEGE

The general rule is that the insured-insurer relationship does not give rise to an attorney-client relationship for privilege purposes.³ In determining whether the privilege applies to a particular communication, courts typically adopt one of two analyses. Under the majority⁴ or broad⁵ view, communications *pertaining to the insured's potential liability covered by the policy*—an important qualification—are protected by the privilege because they are deemed to be made in connection with the legal defense of a claim that the insurer is required to provide under the terms of the policy.⁶ Under the minority and narrow view, “there is no per se attorney-client

privilege in insured-insurer communications,”⁷ but instead, the privilege applies only if the communication has been made for the purpose of seeking legal advice *with respect to the insured's defense*—again an important qualification—“and under circumstances in which the insured has a reasonable expectation of confidentiality.”⁸

The qualification is significant in both rules because, when the purpose of the communication is obtaining, verifying, or disputing denials of coverage, many courts refuse to apply the attorney-client privilege.⁹ The reason for the distinction between the willingness to entertain a privilege in cases in which the insured is seeking a legal defense and the denial of the privilege in cases in which there is a coverage dispute is that, in cases in which coverage is contested, the insured and insurer are adverse.

Thus, the clearest case for the attorney-client privilege is in the context of a

Maybe so, maybe not. To begin answering this question, let's first dispel the notion that there is a general insured-insurer independent privilege¹ that protects the confidentiality of all communications between them. The modern rule is that, in order to be protected from compelled disclosure, the communications must clearly fall within the ambit of one of the traditional privileges: the

John K. Villa, “Communications with Your Insurer: Are They Privileged and Protected from Disclosure to Third Parties?” *ACC Docket* 22, no. 3 (March 2004): 119-123. Copyright © 2004 John K. Villa and the Association of Corporate Counsel. All rights reserved.

liability insurance policy in which the insurer has agreed to defend and indemnify the insured, *without a reservation of rights*,¹⁰ and has engaged an attorney to represent the interests of both the insured and the insurer.¹¹ In cases in which there is no duty to defend under the policy and both the insurer and the insured have retained separate counsel, such as in the case of many casualty insurance policies¹² or directors and officers (“D&O”) liability policies,¹³ it is more difficult to sustain the privileges. One court has expressly rejected the claim that the D&O policy is sufficiently analogous to a general liability policy so as to warrant application of the privilege.¹⁴

WORK PRODUCT DOCTRINE

Generally stated, the work product doctrine protects from disclosure any document or other tangible evidence prepared by the party or the party’s

THE DECISIVE ISSUE IS NOT WHETHER A DOCUMENT WOULD BE WORK PRODUCT IN THE INSURED’S HANDS BUT WHETHER TRANSMISSION OF THE INSURED’S ADMITTEDLY PROTECTED WORK PRODUCT TO THE INSURER CONSTITUTES A WAIVER OF THE PROTECTION.

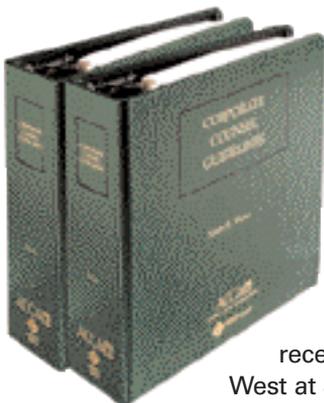
attorney in anticipation of litigation¹⁵ or for use at trial, unless there is a showing of substantial need and undue hardship.¹⁶ Opinion work product, such as insured counsel’s analysis of the facts and the legal issues arising in the claim against the insured,¹⁷ may be subject to a higher standard.¹⁸

The decisive issue is not whether a document would be work product in the *insured’s* hands but whether transmission of the insured’s admittedly protected work product to the insurer constitutes a waiver of the protection. As distinguished from the attorney-client privilege, the general rule is that a party does *not* waive the protections afforded by the work product doctrine by transmission or disclosure of the work product to a third party unless doing so substantially increases the opportunity for adversaries or potential adversaries to obtain the documents.¹⁹ Whether a waiver occurs under this standard depends on a number of factors, including whether the insurer is deemed an adversary or a potential adversary. Most courts find that the intended adversary is the opposing party in the underlying action, and thus, there is no waiver by providing the document to the insurer.²⁰ In cases, however, in which the insurer has refused to indemnify the insured at the time of the disclosure, some courts will find the insurer as the adversary, and thus the disclosure can constitute a waiver.²¹

“COMMON INTEREST” EXTENSION OF THE ATTORNEY-CLIENT/WORK PRODUCT PRIVILEGES

The answer to these “waiver” problems can be in the common interest/joint defense doctrine.²² Under this rule, clearly applicable to the work product doctrine and probably applicable to the attorney-client privilege,²³ confidential communications disclosed to a third party represented by separate counsel are protected from discovery *when the parties engage in a common legal enterprise and the communications are part of an ongoing and joint effort to set up a common defense strategy.*²⁴

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Communications between an insured and its insurer may fall within this rule.²⁵ For example, in *Sawyer v. Southwest Airlines*,²⁶ the common interest doctrine was held to protect communications between a defendant and its liability insurer who was obligated to defend the insured in the underlying action.²⁷ The court in *Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc.*,²⁸ similarly applied the doctrine to communications relating to the claims and defenses in the underlying lawsuit, because as to these claims and defenses the insured and the insurer shared a “commonality of interest” despite a reservation of rights.²⁹

Other courts have declined to apply the common interest doctrine to insured-insurer communications, basing their decisions on a variety of factors individual to those cases: the absence of evidence of the existence of a joint defense effort,³⁰ the fact that the insurer has no duty to defend the insured, thereby precluding them from being considered coparties to the underlying litigation,³¹ or the fact that the insured and its insurer are engaged in actual or potential litigation with respect to coverage issues.³²

With little consistency or predictability in the application of these privileges and protections, insureds and insurers should take steps to protect themselves:

- If warranted by the circumstances, enter into a common interest or joint defense agreement between the insured and insurer as to the defense of the underlying claims.
- If there has been a reservation of rights or denial of coverage by the insurer, be very cautious in the disclosure of privileged communications.
- If there are coverage issues, hire separate counsel to handle coverage discussions with the carrier so that coverage communications (on which there may be adversity) will not be

confused with liability issues (on which there are common interests).

- Keep informed on the status of the law on this issue in the applicable jurisdiction.
- Draft all insured-insurer communications with utmost care. ■

NOTES

1. See *LindeThomson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d 1508, *1514 (D.C. Cir. 1993) (“Federal courts have never recognized an insured-insurer privilege as such); accord. *Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567, *571 (E.D. Cal. 2002); see generally John P. Ludington, *Annotation, Insured-Insurer Communications as Privileged*, 55 A.L.R.4th 336 (1987) (“There is no insured-insurer privilege protecting communications between an insured and its liability or indemnity insurer”).
2. See *Aiena v. Olsen*, 194 F.R.D. 134, *136 (S.D.N.Y. 2000).
3. See *LindeThomson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d at *1515 (D.C. Cir. 1993) (rejecting “any sweeping general notion that there is an attorney-client privilege in insured-insurer communications . . . [because] [a]n insured may communicate with its insurer for a variety of reasons, many of which have little to do with the pursuit of legal representation or the procurement of legal advice.”); see generally PAUL R. RICE, 1 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES 2d § 4:29 (Mar. 2003).
4. Lee R. Russ in consultation with Thomas F. Segalla, 17 COUCH ON INSURANCE 3d § 250:19 (database updated through Dec. 2003).
5. Ludington, *supra* note 1, at §§ 2, 4 (1987); Russ, *supra* note 4.
6. See, Ludington, *supra* note 1; see, e.g., *American Special Risk Ins. Co. v. The Greyhound Dial Corp.*, No. 90 Civ. 2066, 1995 WL 442151 at *2 (S.D.N.Y. July 26, 1995) (postclaim disclosures of facts necessary to establish potential liability constitute disclosures in pursuit of legal representation and are privileged, even if there may appear to be a conflict of interest between the insured and the insurer).
7. Ludington, *supra* note 1, at § 2.
8. Russ, *supra* note 4, at § 250:20; see also Ludington, *supra* note 1, at §§ 2, 11.
9. See *Aiena v. Olsen*, 194 F.R.D. at *136 (finding that the privilege did not apply in action by former corporate directors against the principal owners for breach of fiduciary duty and securities fraud because “the individual defendants have failed to establish that their advocacy of their position to the carrier was intended either to obtain legal advice or to convey information regarding the claim for the use of potential future counsel”); *In re Pfizer Inc. Securities Litig.*, No. 90 Civ. 1260 (SS), 1993 WL 561125 at *8 (S.D.N.Y. Dec. 23, 1993) (privilege was not applicable to communications between corporate insured being sued for securities fraud in class action lawsuit and its carrier, in case in which the purpose of the communications was the seeking of insurance coverage from the carrier and not the provision of legal advice).
10. A “reservation of rights” or “nonwaiver agreement” is defined as “[a] contract (supplementing a liability-insurance policy) in which the insured acknowledges that the insurer’s investigation or defense of a claim against the insured does not waive the insurer’s right to contest coverage later.” BLACK’S LAW DICTIONARY (7th ed. 1999). As explained by one authority, a reservation of rights can be unilateral in nature, in which case the insurer provides notice to its insured that it will defend but reserves its right to disclaim coverage under the policy, or it can be in the nature of a bilateral nonwaiver agreement between insured and insurer, which “disclaims liability under the policy, reserves to each party his or her respective rights, and provides that the insurer will defend, at its own expense, and that nothing which is done under the agreement will be deemed to constitute a waiver of the respective rights.” Russ, *supra* note 4, at § 202:38. Thus, in cases in which “the insurer defends under a reservation of rights, denying the duty to indemnify on some or all claims, the attorney [selected by the insured but paid for by the insurer] represents only the insured on the denied claims[,]” and no attorney client relationship exists between the insurer and the insured’s counsel. *Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc.*, 212

- F.R.D. at *571; *accord* First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co., 163 F.R.D. 574, *578 (N.D. Cal. 1995) (construing California law); Michigan Millers Mut. Ins. Co. v. Bronson Plating, 197 Mich. App. 482, 496 N.W.2d 373, **378 (1992), *aff'd*, 445 Mich. 558, 519 N.W.2d 864 (1994).
11. "Where an insurer has agreed that it has a duty to defend and to indemnify its insured, they are both clients of the lawyer . . . and the attorney-client privilege applies to protect communications between the lawyer and the insurer." Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc., 212 F.R.D. at *571; *accord* First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co., 163 F.R.D. 574, *578 (N.D. Cal. 1995) (construing California law).
 12. *See* Brantley v. Sears Roebuck & Co., 959 S.W.2d 927, *928 (Mo. Ct. App. 1998).
 13. *See* Imperial Corp. of America v. Shields, 167 F.R.D. 447, *453 (S.D. Cal. 1995).
 14. *Id.* at *451.
 15. In the situation in which the insurer does not undertake the defense of its insured but has reserved its rights under the policy, paying for the insured's representation by counsel selected by the insured, certain information provided by insured's counsel to the insurer pursuant to the terms of the policy and/or to a statute governing this particular type of relationship may not be protected by the work product privilege because it is regarded as having been prepared for some other purpose independent of the litigation. *See* First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co., 163 F.R.D. at *582.
 16. *See* FED. R. CIV. P. 26(b) (3); Hickman v. Taylor, 329 U.S. 495 (1947).
 17. Imperial Corp. of America, 167 F.R.D. at *454; *see* American Special Risk Ins. Co., 1995 WL 442151 at *3 (communications between insured's counsel and insurer regarding a dispute as to the amount that the insurer should contribute to proposed settlement constituted protected work product because it necessarily involved counsel's assessment of the validity of the claims asserted against the insured).
 18. FED. R. CIV. P. 26(b)(3) instructs courts to protect against disclosure those materials that reflect "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." The U.S. Supreme Court has construed this admonition as requiring more of a showing than simply substantial need and an inability to obtain the materials by other means without undue hardship. *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981); *see* *United States v. Adlman*, 134 F.3d 1194, 1204 (2d Cir. 1998) (the rule requires a "highly persuasive" showing before disclosure of opinion work product may be compelled); *see also* Imperial Corp. of America, 167 F.R.D. at *453 (opinion work product is discoverable only in "rare and extraordinary circumstances).
 19. *See* Go Medical Indus. PTY, LTD, CAN v. C.R. Bard, Inc., No. 3:95 MC 522 (DJS), 1998 WL 1632525 at *7 (D. Conn. Aug. 14, 1998); *see generally* JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES § 2.12 (ACC and West 2000 and annual supplements).
 20. *See* Go Medical Indus. PTY, LTD, CAN v. C.R. Bard, Inc., 1998 WL 1632525 at *7 ("Go Medical submitted its work product to CIC for the purpose of obtaining insurance coverage to pursue its claims against C.R. Bard. This disclosure did not substantially increase the opportunity for C.R. Bard to obtain its work product . . . [accordingly, Go Medical did not waive the work product protection]"); *see also* *In re Pfizer Inc. Securities Litig.*, 1993 WL 561125 at *6, *8 (an insurer, like an outside auditor, "is not reasonably viewed as a conduit to a potential adversary; therefore, disclosure of protected work product to the insurer did not waive the protection).
 21. Imperial Corp. of America v. Durkin, 167 F.R.D. at *454-455; First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co., 163 F.R.D. *582-*585.
 22. *See* Sawyer v. Southwest Airlines, Nos. Civ.A.01-2385-KHV, Civ.A.01-2386-KHV, 2002 WL 31928442 at *3 (D. Kan. Dec. 23, 2002) (characterizing the common interest doctrine as a safe harbor that allows parties to share otherwise protected information without risking a waiver of the protections).
 23. Imperial Corp. of America v. Durkin, 167 F.R.D. at *455.
 24. *United States v. Schwimmer*, 892 F.2d 257, 245 (2d Cir. 1989). *See* *Matter of Bevill, Bresler, & Schulman*, 805 F.2d 120, 125 (3d Cir. 1986) (in order to establish the applicability of the doctrine, the party seeking its protection must show that (1) the communications were made during the course of a joint defense effort, (2) they were designed to further that effort, and (3) the privilege has not been waived).
 25. *See* Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc., 212 F.R.D. at *572; *Sawyer v. Southwest Airlines*, 2002 WL 31928442 at *3.
 26. Nos. Civ.A.01-2385-KHV, Civ.A.01-2386-KHV, 2002 WL 31928442 at *3 (D. Kan. Dec. 23, 2002)
 27. *Id.*; *see also* NL Indus., Inc. v. Commercial Union Ins. Co., 144 F.R.D. 225, 231 (D. NJ. 1992) (noting that, between an insured and an insurer, a common interest exists especially where the insurer is obligated to defend the underlying action brought against the insured).
 28. 212 F.R.D. 567 (E.D. Cal. 2002).
 29. *Id.* at *572.
 30. *See* Imperial Corp. of America v. Durkin, 167 F.R.D. at *455; *In re Pfizer Inc. Securities Litig.*, 1993 WL 561125 at *8.
 31. *See* Imperial Corp. of America v. Durkin, 167 F.R.D. at *456.
 32. *See id.*; *Go Medical Indus. PTY, LTD, CAN v. C.R. Bard, Inc.*, 1998 WL 1632525 at *3.