Shhh! Why the Attorney-Client Privilege and Work Product Doctrine May Not Protect Communications with Coverage Counsel

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I. INTRODUCTION

Insurance companies often retain outside counsel in connection with the claim adjustment process. Some insurers retain outside counsel to offer coverage opinions. Some insurers choose to engage outside counsel to assist in the claim investigation itself. Others hire outside counsel to investigate the claim and provide a coverage opinion. But all of a company’s communications with its lawyer during this process are protected by the attorney-client privilege, right? Not necessarily. Nor is it a done deal that documents prepared during the claim investigation will be protected by the work product doctrine simply because an insurer hired outside counsel in connection with the investigation. Understanding when and how communications and documents receive protection is critical for both insurers and policyholders because discovery of these communications can not only affect the outcome of coverage disputes but also affect potential extra-contractual exposure.

Predicting whether a communication or document is protected under the attorney-client privilege or work product doctrine can be challenging generally, but it is especially dicey in the insurance context due to the unique relationships between an insurance company, the policyholder, and counsel—some of which can change even as coverage determinations are made and lawsuits are filed. Though baseline standards of attorney-client protection are generally consistent, jurisdictions differ on what actions constitute a waiver of the privilege and when exceptions to the privilege apply.\(^1\) The inconsistency among jurisdictions addressing

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\(^1\) Because most insurance disputes alleging breach of contract and bad faith arise under state law, in federal diversity cases the scope of the attorney-client privilege typically is governed by state law. See Fed. R. Evid. 501 (“But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”). On the other hand, the scope of the work product doctrine is always governed by federal law when the litigation is in federal court. See, e.g., United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1988) (holding that “[u]nlike the attorney client privilege, the work product [doctrine] is governed, even in diversity cases, by a uniform federal standard embodied in Fed. R. Civ. P. 26(b)(3)). With respect to state court proceedings, many state legislatures have enacted a work product doctrine that mirrors the federal rules. Compare Fed. R. Civ. P.
exceptions to the attorney-client privilege pales in comparison, however, to the various interpretations of whether documents or tangible things are “prepared in anticipation of litigation” under the work product doctrine.\(^2\) Even when a court finds that documents and tangible things are prepared in anticipation of litigation, the materials may nonetheless be discoverable if the requesting party can satisfy the “substantial need” and “without undue hardship” standard of the work product doctrine.\(^3\) This varying body of case law on attorney-client communications and discoverability of documents in a claims file can create significant unpredictability on both sides of the policy. It remains paramount, then, that insurers and policyholders alike understand the laws of the state in which they operate: communications and materials that receive protection in one jurisdiction may be subject to discovery under similar circumstances in another.

II. BRUSHING UP ON THE BASICS

A. THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the “oldest of the privileges for confidential communications known to the common law.”\(^4\) The privilege is intended to encourage complete and candid communication between clients and their attorneys and “recognizes that sound legal advice . . . depends upon the lawyer’s being fully informed by the client.”\(^5\) Thus, the attorney-client privilege protects “not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”\(^6\)

\(^2\) See FED. R. CIV. P. 26(b)(3).
\(^3\) See id.
\(^5\) Id.
\(^6\) Id. at 390.
Condensed to its core, the attorney-client privilege applies to (1) a communication (2) made in confidence (3) between privileged persons (4) for the purpose of securing or providing legal advice.\(^7\) Within the umbrella of “privileged persons” are the client, the attorney acting in his or her legal capacity, and “any of their agents that assist in facilitating the attorney-client communications or the legal representation.”\(^8\) The privilege only protects the disclosure of an actual communication; it does not apply to underlying facts within the knowledge of those who are communicating.\(^9\) In other words, while a fact known to a client is not protected, an attorney-client communication concerning that fact is protected. The burden of establishing the attorney-client privilege rests with the party who claims it,\(^10\) but jurisdictions differ with respect to which party has the burden of establishing an exception to the privilege or showing that the privilege has been waived.\(^11\)

**B. \hspace{1em} THE WORK PRODUCT DOCTRINE**

In addition to the attorney-client privilege, litigants in insurance disputes often use the work product doctrine to protect certain materials from discovery. “While the attorney-client privilege shields communications between attorney and client (and in some circumstances third parties), the work product doctrine protects an attorney’s written materials and ‘mental

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\(^7\) *In re* Teleglobe Commc’ns Corp., 493 F.3d 345, 359 (3d Cir. 2007).

\(^8\) *Id*.

\(^9\) *Upjohn*, 449 U.S. at 395.


\(^11\) *Compare* John Blair Commc’ns, Inc. v. Reliance Capital Grp., L.P., 582 N.Y.S.2d 720, 721 (N.Y. App. Div. 1992) (burden of proving non-waiver rests with proponent of the privilege), *with* Lipton v. Superior Court, 56 Cal. Rptr. 2d 341, 353 (Cal. 1996) (once the proponent establishes that attorney client privilege is applicable, burden shifts to opponent to show that an “exception exists or that there has been an expressed or implied waiver”).
impressions.’’\textsuperscript{12} Work product immunity was intended to protect “the integrity of the adversarial process by creating a zone of privacy and protection for the attorney’s preparatory work on a case.”\textsuperscript{13} Information protected by the work product doctrine is generally categorized into “fact” and “opinion” work product. An attorney or other representative’s mental impressions, conclusions, opinions, or legal theories are afforded greater protection than “fact” work product, which includes “everything else that is eligible for protection as work product.”\textsuperscript{14} A party claiming work product immunity must show that the material was prepared or obtained because of the prospect of litigation\textsuperscript{15}—a task that is particularly complex in the insurance context.\textsuperscript{16} The point at which an insurer “anticipates litigation” is an issue that has divided jurisdictions and caused significant confusion for insurers and policyholders alike.


\textsuperscript{14} In re Grand Jury Subpoena, 220 F.R.D. 130, 145 (D. Mass. 2004); see also United States v. Nobles, 422 U.S. 225, 238 (1975) (although its protection extends to all documents prepared in anticipation of litigation, “[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case”); In re Int’l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982) (noting that some courts have provided almost absolute protection to the mental impressions, conclusions, opinions, or legal theories of an attorney); Parkdale Am., LLC v. Travelers Cas. & Sur. Co. of Am., Inc., No. 3:06CV78, 2007 WL 4165247 (W.D.N.C. Nov. 19, 2007). But cf. Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995) (finding the doctrine does not protect facts concerning the creation of work product or facts contained within the work product); Craig v. O’Charley’s Rest. Props. LLC, No. 3:09-CV-187, 2010 WL 725574 (W.D. Ky. Feb. 25, 2010) (“The work-product doctrine does not protect facts contained within the work product.”).

\textsuperscript{15} See Cummins, Inc. v. Ace Am. Ins. Co., No. 1:09-CV-00738-JMS, 2011 WL 1832813, at *6 n.6 (S.D. Ind. May 2, 2011) (rejecting the notion “that the work product doctrine protects from disclosure every document that contains or reflects an attorney’s impressions no matter whether the document was generated in anticipation of litigation”)

III. Navigating the Unsettled Waters of the Attorney-Client Privilege and Work Product Doctrine in Insurance Coverage Litigation

While the basic “rules” for the attorney-client privilege and work product doctrine are relatively straightforward, their application in the insurance coverage litigation context is anything but clear cut. Courts routinely apply various exceptions and waiver doctrines to assertions of attorney-client privilege and recognize disparate trigger points for when an insurer “anticipates litigation.” Given all the possible exceptions, there are few, if any, certainties in this realm, but litigants should count on one thing: a party cannot create an impenetrable shield to discovery simply by incanting the phrase “attorney-client privilege” or “work product doctrine.” Insurers and policyholders alike should carefully analyze which exceptions may be in play if there has been a claim of privilege and be intimately familiar with the relevant precedent in the jurisdiction.

A. When the Attorney-Client Privilege Is Susceptible to Challenge

Courts have identified four broad categories where an insurer’s communications with counsel are not protected by the attorney-client privilege. Perhaps the most common situation is when the insurer expressly or impliedly waives the privilege. Attorney-client communications may also be subject to discovery when the attorney is acting as a “claims adjuster” at the time of the communication—as opposed to acting in his or her legal capacity. Finally, courts have permitted discovery of attorney-client communications under the “joint client” and “crime-fraud” exceptions to the attorney-client privilege.

1. “They Waived It.”

The fact that the attorney-client privilege can be waived is nothing new, but both insurers and policyholders should always be on the lookout for waiver because it can be entirely
unintentional. Waiver takes two forms: it may be either express or implied.\textsuperscript{17} Most courts hold that when waiver is present, the scope of the waiver reaches “all other [privileged] communications relating to the same subject matter.”\textsuperscript{18} Applying the “need to know” standard, courts have found that the attorney-client privilege was expressly waived when communications are relayed to employees who do not need to know the content of the privileged communication in order to effectively perform their duties or make decisions on behalf of the company.\textsuperscript{19} Similarly, courts have generally required that disclosure outside of the organization be “necessary, or at least highly useful, for the effective consultation between the client and the lawyer” in order to maintain the privilege.\textsuperscript{20} Thus, as a general rule, insurers should avoid disclosing privileged communications to third parties unless that party’s participation is necessary to obtain informed legal advice from counsel or even to employees who do not require the information to perform their job effectively.

In addition to express waiver, courts generally agree that a party may impliedly waive the attorney-client privilege by placing the party’s privileged communications “at issue” in the litigation.\textsuperscript{21} In the insurance litigation context, the implied waiver doctrine arises most frequently when an insurer employs an advice of counsel defense.\textsuperscript{22} Most courts agree that when

\textsuperscript{18} Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1349 (Fed. Cir. 2005).
\textsuperscript{20} United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).
\textsuperscript{21} See e.g. Chick-fil-A v. ExxonMobile Corp., No. 08-61422-CIV, 2009 WL 3763032, at *11 (S.D. Fla. Nov. 10, 2009) (“Fairness may compel a finding of an implied waiver when a party asserts a claim or defense that requires examination of protected communications.” (internal quotation marks and citations omitted)).
\textsuperscript{22} See, e.g., Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., 545 N.E.2d 1156, 1160 (Mass. 1989) (reasoning that insurer’s decision not to defend lawsuit against policyholder was not unreasonable where “the insurer asked for, received, and relied upon an opinion from outside counsel regarding its liability under the policy.”).
a litigant interjects advice of counsel as part of a claim, counterclaim, or affirmative defense, the asserting party has placed the privileged communications “at issue” in the litigation.23

The fact that an insurer waives the privilege by affirmatively asserting an advice of counsel defense is fairly intuitive. And some courts have essentially held that advice of counsel must be raised as an affirmative defense in order for waiver to occur. The Supreme Court of Montana, for instance, decided that an insurance company had not waived the attorney-client privilege despite a claim supervisor’s admission at trial that advice of counsel influenced the company’s decision to deny coverage.24 In other jurisdictions, however, implied waiver, may occur even when advice of counsel is not raised as an affirmative defense. Courts have held that “advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing the attorney client communication.”25 Other courts have found attorney-client communications to be at issue simply when employees testify that legal advice influenced the decision to deny the claim.26 A court reasoned that although an employee’s affidavit did not disclose privileged communications per se, the affidavit had “alleged particularized facts that implicitly relied upon communications with counsel contained in the [policyholders’] file.”27

26 See Roehrs v. Minn. Life Ins. Co., 228 F.R.D. 642, 646 (D. Ariz. 2005) (deciding that the attorney-client privilege was impliedly waived when claims adjusters testified in their depositions that they “considered and relied upon, among other things, the legal opinions or legal investigation” in denying coverage for the policyholder’s claims.)
No doubt, the insurers in the foregoing cases had not made a strategic decision to waive the privilege by raising the advice of counsel defense when a claim handler simply mentioned that counsel had provided an opinion on the claim. This fact underscores the importance of vigilance for waiver of the attorney-client privilege for insurers and policyholders alike.

2. “The Attorney Was Adjusting a Claim, Not Acting as Lawyer.”

Another situation that places attorney-client communications at risk occurs when an insurer hires a licensed attorney to perform the investigation and handling of a policyholder’s claim. As mentioned above, the attorney-client privilege only attaches to communications that are made for the purpose of securing or providing legal advice. This poses a unique problem for insurance companies because claims adjusters perform tasks similar to those done by lawyers. Both lawyers and claims adjusters may investigate claims, analyze contracts, and determine whether those claims fall within the scope of the contractual provisions. Thus, outside counsel’s involvement may regularly go beyond providing coverage advice.

Yet a growing majority of courts have taken the position that the investigation and adjustment of a claim is a regular business function in the insurance industry, and that these duties “ordinarily [can] be done by an individual not licensed to practice law.” Accordingly, when an insurance company engages outside counsel to perform “non-legal” tasks such as the investigation and adjustment of a claim—taking an EUO, for example—the company risks a later judicial determination that the communications with outside counsel on such matters were not for the purpose of securing or providing legal advice.

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28 In re Teleglobe Commc’ns Corp., 493 F.3d 345, 359 (3d Cir. 2007).
As a general rule, an insurer may not assign its ordinary business functions to an attorney in an attempt to “cloak with privilege matters that would otherwise be discoverable.”\(^{30}\) For instance, an insurer may not engage an attorney to conduct oral examinations during the claim investigation and attempt to shield from discovery portions of the attorney’s memorandum summarizing the testimony, appraising the interviewee’s credibility, or proposing inferences based off of the testimony.\(^{31}\) One court has reasoned that such duties are not conducted for the purpose of securing or providing legal advice, as these are “all tasks we entrust daily to lay jurors.”\(^{32}\) Other courts reason that in fairness, insurers should not be allowed to create a “blanket obstruction to discovery of its claims investigation” merely by hiring outside counsel to conduct that investigation.\(^{33}\)

By the same token, however, courts recognize that hiring outside counsel to investigate a policyholder’s claim “does not mean ipso facto” that all communications between the insurer and outside counsel lose protection of the attorney-client privilege.\(^{34}\) Many insurers hire outside counsel to investigate the policyholder’s claim and provide a coverage opinion. This reality inevitably leads to discovery disputes over whether the documents exchanged between outside counsel and the insurer in this context are protected by the attorney-client privilege.

A majority of courts addressing the issue conduct an in camera review of the communications in dispute—redacting portions related to legal advice and ordering production


\(^{31}\) Id.

\(^{32}\) Id.


\(^{34}\) Aetna Cas. & Sur. Co. v. Superior Court, 200 Cal. Rptr. 471, 476 (Cal. Ct. App. 1984); see also In re Subpoena of Curran, No. 3:04-MC-039-M, 2004 WL 2099870 (N.D. Tex. Sept. 20, 2004) (holding that “if the attorney performs tasks of an investigator or adjustor in the process of providing legal services, she is still functioning as an attorney”).
of purely investigatory reports. At another place on the spectrum, however, some courts look to the insurer’s “dominant purpose” for engaging outside counsel in order to determine whether the attorney-client privilege extends to documents containing both investigatory reports and legal opinions. Courts applying the dominant purpose approach concede that “the privilege does not require the communication to contain purely legal analysis or advice to be privileged.” Rather, if the purpose for retaining counsel was to provide coverage advice to the insurer—and counsel conducted investigatory functions in order to render that advice—then documents containing a combination of investigative reports and legal opinions are protected from discovery. Indeed, at least one court has expressed that outside counsel’s dual role in the coverage context is a “classic example” of a client seeking advice from counsel:

This is a classic example of a client seeking legal advice from an attorney. The attorney was given a legal document (the insurance policy) and was asked to interpret the policy and to investigate the events that resulted in damage to determine whether [the insurer] was legally bound to provide coverage for such damage.

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35 See, e.g., Merrin, 49 F.R.D. at 57 (in camera inspection revealed that “with the exception of the last two paragraphs on the four page report—which are in the nature of legal advice—the report [by outside counsel] is found to be outside the scope of the attorney-client privilege”); Nat’l Farmers Union Prop. & Cas. Co. v. Dist. Court, 718 P.2d 1044, 1049 (Colo. 1986) (“We conclude the attorney client privilege does not protect the first twenty-seven and one-third pages of the memorandum because the information contained therein was not legal advice but the results of a factual investigation relating to the issuance of the policy.”); accord Genovese v. Provident Life & Acc. Ins. Co., 74 So. 3d 1064, 1068 (Fla. 2011) (“Where a claim of privilege is asserted, the trial court should conduct an in-camera inspection to determine whether the sought-after materials are truly protected by the attorney-client privilege. If the trial court determines that the investigation performed by the attorney resulted in the preparation of materials that . . . did not involve the rendering of legal advice, then that material is discoverable.”).

36 See, e.g., Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 875 (5th Cir. 1991) (holding that attorney-client privilege protected documents prepared by outside counsel while investigating the claim because outside counsel was retained “for the purpose of ascertaining [the insurer’s] legal obligations to the [policyholder]”); Aetna Cas. & Sur. Co., 200 Cal. Rptr. at 476 (inquiring into the insurer’s “dominant purpose” for retaining outside counsel).

37 Dunn, 927 F.2d at 875.

38 See generally id. (holding that attorney-client privilege protected documents prepared by outside counsel while investigating the claim because outside counsel was retained “for the purpose of ascertaining [the insurer’s] legal obligations to the [policyholder]”); In re Subpoena of Curran, No. 3:04-MC-039-M, 2004 WL 2099870 (N.D. Tex. Sept. 20, 2004) (finding that outside counsel hired to investigate claim and provide legal analysis was acting in legal capacity and “[a]ny investigative work that she may have done was for the purposes of providing legal services”).

39 Aetna Cas. & Sur. Co., 200 Cal. Rptr. at 476. To be clear, the appellate court seemed to make this statement in dicta. The court held that the trial court committed reversible error by granting the policyholder “carte blanche access” to the files and testimony of outside counsel without first conducting an in camera inspection. Id. Whether
Whether through in camera inspection or blanket protection, courts addressing the claims adjuster exception generally will protect an attorney’s truly legal analysis from discovery. But the more counsel looks like they were acting in the capacity of a claims adjuster, the more likely it is that communications sent to or from the client may be subject to discovery.

3. The Joint Client Exception and Common Interest Doctrine.

Otherwise privileged communications also may be subject to discovery under the “common interest doctrine” or “joint client exception” to the attorney-client privilege. When an attorney represents two or more clients having a common interest in the representation, the clients’ communications with the attorney are privileged as to third parties but not with respect to each other.\(^\text{40}\) Thus, if “former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable.”\(^\text{41}\) This is an important exception to the attorney-client privilege here because insurers often act on behalf of policyholders when investigating claims of loss or accepting a duty to defend under a liability policy. Thus, the joint client exception and common interest doctrine may apply in both the first-party and third-party context.

a. First-Party Coverage

At first blush the insurer and policyholder might seem like adversaries in the first-party context. However, some policyholders have argued that the joint client privilege applies to communications between the carrier and the attorney retained by the carrier to investigate the policyholder’s claim because the attorney—in light of the insurer’s implied duty of good faith

\(^\text{40}\) F.D.I.C. v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000).

\(^\text{41}\) In re Telelobe Commc’ns Corp., 493 F.3d 345, 366 (3d Cir. 2007).
and obligation to conduct a neutral investigation—necessarily is “consulted on a matter of common interest.” 42

b. Liability Coverage

The joint client exception and common interest doctrine have greater significance in the context of liability insurance. Courts hold that when a liability insurer appoints counsel to defend a policyholder against third-party claims, “certain interests of the insured and insurer essentially merge,” 43 creating a “tripartite attorney-client relationship” between the insurer, defense counsel, and the policyholder. 44 As a result of this tripartite relationship, courts have applied the joint client exception and common interest doctrine to permit discovery in subsequent litigation of certain attorney-client communications made during the course of the underlying lawsuit.

The predominant justification for permitting access to otherwise privileged communications within the tripartite relationship is that the insurer and policyholder have a mutual interest in defeating the underlying liability claim against the policyholder. 45 In this scenario, many courts apply the general rule that “when two or more parties consult an attorney for their mutual benefit . . . the communications between the parties or the attorney as to that transaction are not privileged in a later action between such parties or their representatives.” 46

45 See, e.g., Baker v. CNA Ins. Co., 123 F.R.D. 322, 326 (D. Mont. 1988) (noting the “well-established principle regarding discovery in bad faith actions prosecuted by an insured against the insurer . . . that communications between the insurer and an attorney who also represented the insured in the original tort action against the insured are not privileged with respect to the insured”); Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920, 923 (Iowa 1958).
46 Id.
This approach inevitably creates disputes as to whether the insurer and policyholder had common interests in the underlying litigation.\(^{47}\)

Despite this room for argument about whether the insurer and policyholder have a common interest in the third-party context, some courts have broadly applied this exception to the tripartite relationship. For instance, a Pennsylvania federal district court stated:

> It thus seems clear that, in relation to counsel retained to defend the claim, the insurance company and the policy-holder are in privity. Counsel represents both, and, at least in the situation where the policy-holder does not have separate representation, there can be no privilege on the part of the company to require the lawyer to withhold information from his other client, the policy-holder. In short, I am satisfied that, \textit{with respect to all matters from the beginning of the litigation until the termination of the attorney-client relationship} between the assured and the attorney, \textit{there can be no attorney-client privilege which would prevent disclosure to the policy-holder}.\(^{48}\)

Illinois law takes the foregoing analysis one step further. In \textit{Waste Management, Inc. v. International Surplus Lines Insurance Co.},\(^ {49}\) the Supreme Court of Illinois found that two insurance carriers and their policyholder had a common interest even though the policyholder retained independent counsel in the underlying litigation.\(^ {50}\) In a “limited sense” the parties had a common interest in the representation because the carriers had a duty to indemnify the

\(^{47}\) Victor Corp. v. Vigilant Ins. Co., 674 F.3d 1, 19 (1st Cir. 2012) (deciding that despite the insurer’s acceptance of its defense obligation under a reservation of rights, the fact that the insurer funded the defense and paid a portion of the underlying settlement was sufficient to establish a common interest with the policyholder); Liberty Mut. Fire Ins. Co. v. Kaufman, 885 So. 2d 905, 909 (Fla. Dist. Ct. App. 2004) (rejecting argument that the parties’ common interests vanish once the insurer expressly denies coverage for certain claims it is defending on behalf of the policyholder).


\(^{49}\) 579 N.E. 2d 322 (Ill. 1991).

\(^{50}\) \textit{Id.} at 329. The insurers agreed not to contest the reasonableness of a settlement in the event the policyholder settled the underlying litigation. \textit{Id.} at 334. However, the insurers expressly reserved their rights to deny coverage under the policies. \textit{Id.} After the policyholder settled the underlying suit, the parties filed declaratory judgment actions against each other seeking a determination of their respective rights and liabilities under the policies. \textit{Id.}
policyholder for defense costs potentially covered under the policy.\(^{51}\) After determining that the
common interest doctrine “may properly be applied where the attorney, though neither retained
by nor in direct communication with the insurer, acts for the mutual benefit” of the parties,\(^{52}\) the
court ordered production of privileged communications the policyholder had with its counsel in
the underlying lawsuit.\(^{53}\)

Not all courts apply a blanket common-interest or joint-client exception to the attorney-
client privilege in this context but instead look to the nature of the communication in the
underlying litigation. These courts find that “the attorney-client privilege still attaches to those
communications \textit{unrelated to the defense of the underlying action}, as well as those
communications regarding issues adverse between the insurer and the insured.”\(^{54}\) In particular,
“\textit{[c]ommunications that relate to the issue of coverage . . . are not discoverable . . . because the}
interests of the insurer and its insured with respect to the issue of coverage are always
adverse.}”\(^{55}\) This distinction may provide little comfort for insurers, however,\(^{56}\) as it is unlikely

\(^{51}\) \textit{Id}. at 329.
\(^{52}\) \textit{Waste Mgmt.}, 579 N.E. 2d at 324.
\(^{53}\) \textit{Id}. at 336. Although the court’s ruling benefited the insurance carriers, the court’s analysis has been applied
against insurers by other courts following Illinois law. \textit{See} W. States Ins. Co. v. O’Hara, 828 N.E.2d 842, 848-49
(Ill. App. Ct. 2005) (permitting discovery of insurer’s otherwise privileged documents related to insurer’s settlement
of different claim under the policy because under the holding of \textit{Waste Management} “both the insured and the
insurer do not have to be privy to . . . communications with counsel for counsel to be acting in the interests of
both”).
distinction as to nature of the communication in the context of first-party bad faith claims); \textit{see also} Camacho v.
nature of the communication in the context of third-party bad faith claims).
\(^{55}\) \textit{Id}. (alteration in original quoted text).
\(^{56}\) In fact, some policyholders have used this distinction to their own advantage. \textit{See}, \textit{e.g.}, \textit{Bourlon}, 617 S.E.2d at 47
(joint client exception did not apply to deposition question posed by carrier asking policyholder whether defense
counsel advised policyholder if punitive damages were covered under the policy because the question dealt with an
issue of coverage under the policy).
that an attorney retained to defend the policyholder would discuss coverage issues with an
insurer and breach the “undeviating and single allegiance” owed to the policyholder.57

The joint client exception and common interest doctrine can have important implications
in subsequent litigation between an insurer and policyholder.58 Otherwise privileged attorney-
client communications may be subject to discovery when those communications were made
during the course of the tripartite relationship between an insurer, defense counsel, and the
policyholder. Therefore, insurers and policyholders should understand the applicable law
regarding the joint client exception and common interest doctrine in the context of both first-
party and third-party claims.

4. “Bad Faith” and the Crime-Fraud Exception.

A final, widely recognized exception to the attorney-client privilege is the crime-fraud
exception. The crime-fraud exception is grounded on the principle that promoting ongoing or
contemplated criminal activity is not within the proper scope of the attorney-client relationship.
Thus, courts hold that attorney-client communications in pursuit of an ongoing or future “crime
or evil enterprise” are not protected by the attorney-client privilege.59 In the first-party insurance
context, policyholders may argue that an insurer’s bad-faith handling of a claim amounts to
“fraud,” and that the crime-fraud exception thus permits discovery of the insurer’s attorney-client
communications relating to coverage issues.60 Against this backdrop, rules differ across

insurance company, undertakes to represent the policyholder, he owed to his client, the insured, an undeviating and
single allegiance. If there is a conflict of interest, he cannot continue to represent the insurer and the insured.”).
58 In addition to the areas discussed above, courts have also extended this exception to situations involving a third-
party assignee and excess liability insurance. Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850, 855 (7th Cir. 1974)
insurer).
60 See id. at 30 (policyholder alleged insurance company breached its duty of good faith in denying coverage and
thus sought discovery of all materials relating to policyholder’s claim, including correspondence “sent or exchanged
jurisdictions regarding the policyholder’s burden of establishing whether the crime-fraud exception applies to a carrier’s otherwise privileged communications.61

For example, one court decided that a policyholder met the requirements for the crime fraud exception by establishing that an insurers’ defenses to a legitimate claim of coverage were asserted in bad faith.62 After the policyholder made a “prima facie showing”63 that each affirmative defense asserted by the carrier was brought in bad faith,64 the court held that the assertion of these defenses, which were speculative and had no factual basis, 65 amounted to “civil fraud.”66 Thus, attorney-client communications related to that fraud were subject to discovery.67 Similarly, the Supreme Court of Washington recently allowed a policyholder to invoke the civil fraud exception by showing “that a reasonable person would have a reasonable belief that an act of bad faith has occurred.”68 There the court held that if the court reviews the attorney-client communications in camera and finds that “there is a foundation to permit a claim of bad faith to proceed, the attorney-client privilege shall be deemed to be waived.”69

between and among [the insurer] and any of its agents or legal counsel’"). Other jurisdictions employ a general rule in bad faith actions that, once the issue of coverage is decided, attorney client privilege documents in an insurer’s claim file and litigation file must be produced up to the date of the resolution of the underlying lawsuit. See Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005); accord Adega v. State Farm Fire & Cas. Ins. Co., No. 07-20696-CIV, 2008 WL 1009719 (S.D. Fla. Apr. 9, 2008) (ordering the insurer to produce all materials in its underlying claim file and litigation file up to the date of resolution of the claim).

61 Jurisdictions also differ with respect to what actually constitutes “fraud” when applying this exception to the attorney client privilege. State ex rel. Med. Assurance of W. Va., Inc. v. Recht, 583 S.E.2d 80, 97 (W.Va. 2003) (Davis, J., concurring) (“Indeed, in the context of the exception, there are as many definitions of ‘fraud’ as there are courts tackling the issue.”).

62 Werley, 526 P.2d at 33.

63 The court defined a prima facie case as “requiring that the evidence in favor of a proposition be sufficient to support a finding in its favor, if all the evidence to the contrary be disregarded.” Id. at 32 n.15.

64 Id. at 33 (reasoning that “[i]f one of the defense to [policyholder’s] claim against [insurer] is not shown by prima facie evidence to have been a bad faith legal defense, then [insurer’s] refusal to pay [the] claim would not have been in bad faith” and the policyholder should not be compelled to produce its otherwise privileged attorney-client communications).

65 See id. at 34-35.

66 Id.

67 Id.


69 Id.
As evidenced by these two examples, a policyholder’s burden of establishing the crime fraud exception in the first-party context varies by jurisdiction. Indeed, some jurisdictions expressly reject the proposition that evidence of an insurer’s bad faith is tantamount to fraud, finding the crime fraud exception inapplicable in first-party claims against an insurer.\(^{70}\) However, insurers and policyholders should be aware that an additional exposure present in bad faith cases could be loss of the protection afforded by the attorney-client privilege.

The foregoing decisions demonstrate that the attorney-client privilege is far from inviolate. The very nature of adjusting insurance claims and defending an insured creates a rich environment for the application of long-standing exceptions to the attorney-client privilege. Accordingly, insurers and policyholders alike should be prepared to actively challenge or defend a claim of privilege on a detailed privilege log prepared with these pitfalls in mind.

**B. IS THAT DOCUMENT TRULY WORK PRODUCT?**

Work-product immunity is triggered when a party acts “in anticipation of litigation.” Because the role of an insurance company is to evaluate, investigate, and adjust claims from the moment claims are reported, the debate as to the exact point in the claims process a party begins to “anticipate litigation” is central.\(^{71}\) Accordingly, an insurance company’s general business

\(^{70}\) See, e.g., Freedom Trust v. Chubb Group of Ins. Cos., 38 F. Supp. 2d 1170, 1174 (C.D. Cal. 1999) (refusing to extend the crime-fraud exception to cover first-party claims of bad faith, even where policyholder can establish prima facie showing of bad faith); Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 173 F.R.D. 7, 12-13 (D. Mass. 1997) (insurer’s bad faith and unfair settlement conduct did not establish a “crime” or “fraud” sufficient to justify application of crime-fraud exception); State ex rel. U.S. Fid. & Guar. Co. v. Second Judicial Dist. Court, 783 P.2d 911, 916 (Mont. 1989) (“We reject the reasoning of those cases, which would extend the civil fraud exception to bad faith allegations.”); see also Ring v. Commercial Union Ins. Co., 159 F.R.D. 653, 659 (M.D.N.C. 1995) (addressing crime-fraud exception in the context of opinion work product and holding that mere allegations of bad faith, coupled with insurer’s decision to wait over five months to deny policyholder’s claim, did not establish prima facie case of the insurer’s crime or fraud).

\(^{71}\) See, e.g., AIU Ins. Co. v. TIG Ins. Co., No. 07–7052, 2008 WL 4067437, at *12 (S.D.N.Y. Aug. 28, 2008) (noting that “it is the routine business of insurance companies to investigate and evaluate claims” (citations omitted)).
practices can, and often do overlap with its conduct in anticipation of litigation, presenting significant difficulties in assigning proper application of the work product immunity.72

In an effort to create uniformity, some courts have focused on specific dates/events in the claim handling process as benchmarks for the applicability of the work-product protection.73 As a result, dates on a calendar may have special significance in the discoverability of insurer claim files and ensuing success in coverage and bad faith litigation. These “date certains,” which are utilized to balance the protection with the business of handling insurance claims, vary across jurisdictions. Equally unsettled are courts’ standards for assessing a policyholder’s “substantial need” for documents that would otherwise receive work product protection. This adds just one more complicating layer when this doctrine is applied to insurance coverage litigation.

1. When Does an Insurer Reasonably Anticipate Litigation?

   a. The Date the Insured Reports the Claim to the Insurer.

Most courts recognize that a carriers’ investigation of a claim is generally performed in the ordinary course of business.74 However, insurers have successfully argued in some

72 See City of Glendale v. Nat’l Union Fire Ins. Co. of Pittsburgh, 2013 WL 1797308 at *12 (D. Ariz. Apr. 29, 2013) (“Materials prepared as part of insurance claims investigations are generally not considered work product due to the industry's need to investigate claims.”); Coltec Indus., Inc. v. Am. Motorists Ins. Co., 197 F.R.D. 368, 374 (N.D. Ill. 2000) (finding insurer failed to establish work product protection over documents memorializing “the types of tasks insurance companies perform in the ordinary course of business, whether or not litigation was imminent”); St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp., 197 F.R.D. 620, 636 (N.D. Iowa 2000) (in analyzing a work product question, the court concluded that “an insurer's investigation of whether coverage exists is required and the conduct of that much of its investigation is assuredly in the ordinary course of its business”).

73 While these “default” times may serve as a general threshold for the application of the work-product doctrine, an insured or insurer can otherwise offer evidence that supports an earlier or later application of the doctrine.

jurisdictions that litigation is anticipated from the time a claim is first reported.\(^{75}\) This approach generally is taken in those instances where liability of an insured is certain, so insurers assert that work-product protection begins at the time a loss occurs, even before a claim is brought against an insured.\(^{76}\) While this approach has the benefit of providing a clear threshold for the applicability of the doctrine, it is by no means a default rule and generally only applies to cases where there are substantial losses and clear liability on behalf of the insured.

**b. The Date the Insurer Issues a Reservation of Rights and/or Claim Denial.**

Insurers routinely send a reservation of rights letter to their insured while continuing to investigate the claim, and courts have found that the issuance of a reservation of rights letter is sufficient to trigger a reasonable anticipation of litigation.\(^{77}\) To decide whether the reservation of rights starts work product protection for an insurer’s files, courts typically focus on the substance of the reservation of rights as opposed to its mere existence, with a keen eye to whether the insurer takes a coverage position in the letter. For example, in a case where the insurer took a clear coverage position by objecting to the claims while at the same time reserving its rights, the court held that the insurer was acting in anticipation of litigation at the time the

\(^{75}\) See Fireman’s Fund Ins. Co. v. McAlpine, 391 A.2d 84, 89-90 (R.I. 1978) (“In our litigious society, when an insured reports to his insurer that he has been involved in an accident involving another person, the insurer can reasonably anticipate that some action will be taken by the other party.”).

\(^{76}\) See Kansas City S. Ry. Co. v. Nichols Constr. Co., LLC, No. 05-1182, 2007 WL 2461014, at *5 (E.D. La. Aug. 27, 2007) (collecting cases, and noting that “[i]nvestigative files will be protected, however, when prepared in response to an accident so serious that a lawsuit will inevitably be filed”); Raso v. CMC Equip. Rental, Inc., 154 F.R.D. 126, 129 (E.D. Pa. 1994) (documents prepared by investigator hired by insurer concerning his investigation of a crane accident were protected by work product where, although claim had not been filed against the insured when investigation was conducted, there was reason to foresee litigation in the future, since insured was in control of and operating boom crane at time of accident which caused plaintiff’s alleged catastrophic and permanent injuries). The court in Raso found that although the investigative material were covered by the work product doctrine, the insured showed “substantial need” and was therefore entitled to discover the documents. Id.; see also infra Section III.B.2.

letter was issued. Conversely, where a reservation of rights letter merely requests more information from the insured, courts have decided that the letter does not indicate that the insurer was going to deny coverage and did not demonstrate that the insurer anticipated litigation.

As illustrated, the date of issuance of a reservation of rights has become a benchmark for application of the work product doctrine because it is often the first time an insurance company takes a coverage position. Federal courts in Florida, for example, have adopted a rebuttable presumption that documents prepared before the final decision on an insured’s claim do not constitute work product, but documents created after a claim denial will be entitled to protection. The rationale for this presumption is founded in the notion that insurance companies investigate claims “with an eye toward litigation” in the ordinary course of their business. An insurer may rebut this presumption by articulating “specific evidentiary proof of objective facts” that it reasonably anticipated litigation at the time of the document’s creation. To do so, insurers must demonstrate “the connection to possible litigation concretely enough to

78 Id.
79 F.D.I.C. v. Fid. & Deposit Co. of Md., No. 3:11-CV-19-RLY-WGH, 2013 WL 3989140, at *3 (S.D. Ind. Aug. 2, 2013); see also City of Ocala v. Safety Nat’l Cas. Corp., No. 5:12-CV-48-OC-10PRL, 2013 WL 1760184 (M.D. Fla. Apr. 24, 2013) (emphasizing that insurer only put insured on notice of its intent to deny coverage but did not actually do so); St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp., 197 F.R.D. 620, 638 (N.D. Iowa 2000) (“[U]ntil the investigating party determines on a course of action, no work product protection attaches, and that, even after the parties ‘stake out’ their positions, they do not necessarily ‘anticipate litigation’ if they continue to explore amicable resolution and/or the documents in question were still collected in the ordinary course of business.”).
80 See Ring v. Commercial Union Ins. Co., 159 F.R.D. 653, 656 (M.D.N.C. 1995) (“[I]n general, only documents accumulated after the claim denial will be done in anticipation of litigation.”); Moe v. Sys. Transp., Inc., 270 F.R.D. 613, 625 (D. Mont. 2010) (suggesting that an insurer's formal denial of a claim is a factor that supports a finding that the insurer's actions were in anticipation of litigation).
82 Commercial Long, 2012 WL 6850675, at *2.
assure a court that it is not simply trying to immunize from discovery its routine claims processing material.”

Additionally, work product protection may exist both before or after a claim is denied. Should the insured be able to prove that documents prepared after a claim denial were created in the ordinary course of business those documents may still be discoverable. And when an insurance company can establish that certain materials were created with “litigation in mind,” documents prepared prior to a claim denial may still be protected. To guard against overbroad work product claims, however, courts generally require verifiable evidence that litigation is anticipated, not just that it is a possibility.

If a reservation of rights letter does not clearly deny coverage, policyholders should challenge the assertion that work product immunity attaches at the date of its issuance. Moreover, counsel for policyholders should scrutinize the actual language of the reservation of


86 See Resort of World, N.V. v. Clarendon Am. Ins. Co., No. 96 CIV. 1752, 1997 WL 739586, at *1 (S.D.N.Y. Nov. 25, 1997) (stating that “there is no rule that bars application of work product protection to documents created prior to the event giving rise to litigation” (quoting United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995))).

87 See U.S. Fire Ins. Co. v. Bunge N. Am., Inc., 68 Fed. R. Serv. 3d 134 (D. Kan. 2007) aff’d, 244 F.R.D. 638 (D. Kan. 2007) (finding a “blanket” claim of privilege insufficient to invoke the work-product doctrine and that insurer must provide specific information as to why a document was created to invoke the privilege); Nationwide Agribusiness Ins. Co. v. Meller Poultry Equip., Inc., No. 12-C-1227, 2013 WL 4647983, at *2 (E.D. Wis. Aug. 29, 2013) (“[B]ecause it is ‘reasonable to assume that a reasonable insurer would make a claims decision only after it possessed the minimum amount of information it required to make that decision,’ courts will ‘presume that documents which were produced by an insurer for concurrent purposes before making a claims decision would have been produced regardless of litigation purposes and therefore do not constitute work product.’ The presumption can be overcome by ‘specific evidentiary proof of objective facts to the contrary.’” (internal citations omitted)); accord Kaufman & Broad Monterey Bay v. Travelers Prop. Cas. Co. of Am., No. C10-02856, 2011 WL 2181692, at *6 (N.D. Cal. June 2, 2011).

88 See Royal Bahamian, 268 F.R.D. at 698–99 (compelling production of documents over a work-product immunity objection despite the insurer’s argument that it anticipated litigation before denying the claim because a board member of the plaintiff threatened to sue); accord Milinazzo v. State Farm Ins. Co., 247 F.R.D. 691, 701-02 (S.D. Fla. 2007) (holding express threat to sue by insured’s attorney insufficient due to six-month lapse of time between letter and denial of coverage during which no lawsuit was brought); 1550 Brickell Assocs. v. Q.B.E. Ins. Co., 253 F.R.D. 697, 699 (S.D. Fla. 2008) (finding an affidavit, which stated that the insurer believed litigation to be possible because the claim was “excessive” to be “not enough”).

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rights to see if a clear coverage position is established. If not, the work product doctrine may not apply. On the other hand, insurers and adjusters acting in anticipation of litigation should keep detailed logs as to why certain documents are generated, and be prepared for a showing to the court, supported with a cogent objective basis for anticipating litigation when defending a claim of work product protection.

c. **The Date the Insurer Engages Coverage Counsel in Connection with the Insured’s Claim.**

Insurers routinely argue that the hiring of outside counsel to assist with a claim automatically signifies that the insurer is acting in anticipation of litigation. Courts, however, often reject this argument, and find that engaging coverage counsel, without an additional showing that litigation is imminent, does not trigger work-product protection.89

A recent decision from a federal district court in Maryland illustrates the risk that an insurer takes by simply assuming work product protection.90 There, the court recognized that information concerning the date an insurer alleges it “anticipates litigation” is generally within the insurer’s sole possession. Policyholders and the court must therefore rely upon the insurer’s representations about whether the assertion is merited. The court then found that the insurance company had initially mislead the court into believing the insurer anticipated litigation earlier than it actually did, and emphasized the need for courts to scrutinize insurer’s self-proclaimed “anticipation of litigation” date.

89 *See generally* St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp., 197 F.R.D. 620, 638 (N.D. Iowa 2000) (deciding that “because the hiring of outside counsel does not, by itself, indicate a determination to litigate, and the record presented thus far indicates that coverage evaluation—i.e., claims investigation in the ordinary course of business” continued after counsel was hired, the work-product privilege did not attach from the date coverage counsel was engaged).

The court further recognized that investigative reports created before the insurer’s coverage decisions are not protected because these reports are prepared in the ordinary course of business. Therefore, engaging coverage counsel “does not automatically convert the analysis from an ordinary business activity to a litigation-geared activity.” Like other courts, the court refused to adopt a blanket rule that counsel’s involvement necessarily allows insurers to assert the doctrine. Instead, the court recognized the general rule that where counsel performs claims handling tasks, no protection applies. The same reasoning applies even when documents are created with the assistance of, or under the direction of, counsel.

Just as in the analysis for the attorney-client privilege, to the extent an insurer’s attorney acts in dual roles, both as coverage counsel and investigator, courts “must separate protected communications and work product created in the coverage counsel role from the documents created in the investigative role.” As recently explained in an opinion out of the Southern District of New York:

The relevant question is whether the document reflects a lawyer’s-or one working at the direction of a lawyer-mental impressions in relation to actual or potential litigation. Certainly there may even be questions as to those questions—for instance, regarding how likely the litigation really was. Not all insurance declinations result in litigation; experienced counsel will be able to make judgments as to which are more likely than others to result in litigation. In short,

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91 See Mehta v. Ace Am. Ins. Co., No. 3:10CV1617, 2013 WL 3105215, at *2 (D. Conn. June 18, 2013) (refusing to grant blanket protection to emails to and from the insurer’s claims specialist even though she was an attorney, explaining an “insurance company may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigations” (quoting First Aviation Servs., Inc. v. Gulf Ins. Co., 205 F.R.D. 65, 69 (D. Conn. 2001))).
92 See Westchester Surplus Lines Ins. Co. v. Clancy & Theys Constr. Co., No. 5:12-CV-636-BO, 2013 WL 6058203, at *5 (E.D.N.C. Nov. 15, 2013) (“The fact that [] counsel assisted with preparation of the January 2012 letter does not dictate the conclusion that the prospect of litigation was then substantial and imminent.”); Conn. Indem. Co. v. Carrier Haulers, Inc., 197 F.R.D. 564, 571 (W.D.N.C. 2000) (denying work product protection to documents created by insurance company prior to denial of claim and finding that “neither retaining legal counsel nor failing to do so is conclusive proof of whether a party has ‘resolved to litigate’”).
the Court does not believe that work done by the SLCU provides presumptive protection as work product.94

Insureds should closely examine privilege logs to determine the nature of the protections being asserted; on the other hand, insurers must articulate descriptions that—if accurate—clearly indicate that an attorney was not merely acting in the role of a claim adjuster and performing tasks otherwise conducted during the ordinary course of business.

d. Case-by-Case/Primary Purpose Approach.

Certain jurisdictions recognize that a bright line or uniform rule is not the most appropriate or effective avenue to properly address issues of work-product immunity in the insurance coverage context. Courts in these jurisdictions instead choose to undertake a more labor intensive case-by-case analysis, scrutinizing the facts underlying each claim of work-product protection to determine if the document was in fact created in anticipation of litigation.95

In these instances, courts will often seek to ascertain the “primary purpose” behind the creation of the document at issue.96 In assessing the twin purpose of materials created to assist in


95 See generally Travelers Indem. Co. v. Northrop Grumman Corp., No. 12 CIV. 3040 KBF, 2013 WL 1087234, *2 (S.D.N.Y. Mar. 12, 2013) (“The Court does not believe that all [insurers’] documents are presumptively protected by the work product doctrine before or after a coverage declination. Whether a document is protected as work product must be determined on a case by case (or, under certain circumstances, group by group) basis.”); Schwarz & Schwarz of Va., LLC v. Certain Underwriters at Lloyd’s London Who Subscribed to Policy No. NC959, No. CIV.A. 6:07CV00042, 2009 WL 1043929, at *2 (W.D. Va. Apr. 17, 2009) (“[T]here is no bright-line test for when work product protection applies for insurance companies, and instead courts must undertake a case-by-case analysis.”); Dion v. Nationwide Mut. Ins. Co., 185 F.R.D. 288, 292 n.1 (D. Mont. 1998) (reasoning that in applying the work-product doctrine, a court must determine “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”); Airheart v. Chicago & N. W. Transp. Co., 128 F.R.D. 669, 671 (D.S.D. 1989) (adopting a case-by-case analysis in the insurance coverage context and stating “[i]n this approach the Court considers the factual content of the problem faced in each separate case”); Spaulding v. Denton, 68 F.R.D. 342, 345-46 (D. Del. 1975) (rej ecting a “rule-of-thumb approach” to avoid “insurers mechanically forming their practices so as to make all documents appear to be prepared in ‘anticipation of litigation’”).

96 Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 984 (4th Cir. 1992) (noting that documents were not prepared because of the prospect of litigation nor was litigation the “driving force behind preparation of each requested document”); Cummins, Inc. v. Ace Am. Ins. Co., 1:09-CV-00738, 2011 WL 1832813,
the claim handling process, courts have clarified that “a document prepared for dual litigation
and ordinary business purposes does not necessarily mean that the document is not work product.
. . . [A] document created with a dual purpose is not work product if the litigation purpose was
not primary, but would be work product if it was primary.” Courts exercising the “primary
purpose” analysis generally maintain that the “focus must always be on the specific facts of a
particular case,” but use the presumption of the reason for a document’s creation as an aid in
applying the work product doctrine on a document specific basis. Thus, if a policyholder can
prove that, although helpful to litigation, a document was initially created in the ordinary course
of business, work product protection may not attach.

The “primary purpose” test is, again, but one method courts use to draw protection lines.
It is important to keep in mind that, in some jurisdictions, litigation must be the sole reason for
the creation of a document for the doctrine to apply and the subtle differences between
jurisdictions as to the purpose in creating a document can drastically affect whether the doctrine
applies.

at *5 (S.D. Ind. 2011) (finding the court should analyze whether the “primary motivating purpose behind the
creation of a document or investigative report [is] to aid in possible litigation.” (citations omitted)); Guidry v. Jen
privilege cannot make a factual showing that the primary purpose of the insurance investigation was in anticipation
of litigation, the court may conclude that the investigation was conducted in the ordinary course of investigating a
potential insurance claim.”).

98 See id.
(S.D. Fla. July 16, 2013) (“Documents created for a concurrent purpose, i.e., not made ‘because of’ the anticipation
of litigation but rather for other purposes in addition to the preparation for litigation, are not protected by work-
Va. June 15, 2011) (finding the privilege applied to documents created solely to settle impending litigation); Bogan
was created and holding that if the document at issue was not prepared “solely in anticipation of litigation” they are
not protected (emphasis added)). Some courts simply ask whether the document at issue “would have been prepared
in essentially similar form irrespective of the prospect of litigation.” Wells Dairy, Inc. v. Am. Indus. Refrigeration,
Inc., 690 N.W.2d 38, 48 (Iowa 2004). If the answer is “yes,” work product immunity will not attach.
2. Establishing a Substantial Need for Protected Documents.

The work product doctrine, even if applied, does not provide absolute protection for an insurer’s files. Even when an insurer can demonstrate a threshold showing for application of the doctrine, “[t]he protection can be overcome if the party seeking discovery demonstrates ‘substantial need of the materials’ and cannot obtain the ‘substantial equivalent’ by other means without undue hardship.”\(^{100}\) In assessing whether a party may obtain information that is the “substantial equivalent” of documents being sought, courts may consider whether a deposition will serve the same purpose.\(^{101}\)

The “substantial need” argument frequently surfaces during bad faith litigation where the focus is on the reasonable conduct of the insurer.\(^{102}\) In these instances, the claim files and otherwise privileged materials of the insurance company are, by and large, considered relevant.\(^{103}\) The question becomes whether the allegations of bad faith are enough to meet the test for “substantial need.” As one court put it, work product protections that normally shield production of an insurer’s claim file are abrogated by substantial need in a bad faith action.


\(^{102}\) Something akin to the substantial need rationale in the work-product doctrine has also been extended to the attorney-client privilege. See, e.g., In re Bergeson, 112 F.R.D. 692, 697 (D. Mont. 1986). Other courts reject this view, holding that “[i]t would be inconsistent with the nature and purpose of the attorney-client privilege to make an exception to the privilege based only on the unavailability of information from other sources.” Hutchinson v. Farm Family Ca. Ins. Co., 867 A.2d 1, 6 (Conn. 2005); see also State ex rel. Med. Assurance of W. Virginia., Inc. v. Recht, 583 S.E.2d 80, 92 (W.Va. 2003) (holding that when the attorney-client privilege is applicable, it is “absolute”).

\(^{103}\) See generally Brown v. Superior Court, 670 P.2d 725, 734 (Ariz. 1983) (“The portions of the claims file which explained how the company processed and considered [the policyholder’s] claim and why it rejected the claim are certainly relevant to these issues.”).
because “the trial is the file.”  

In some cases, the need for discovery even extends to the insurance company’s subjective beliefs, which further expands the potential scope of discovery.

While discovery of the insurer’s claim file may be the only way to determine whether the insurer acted in good faith, some courts are still hesitant to require production of work product materials in an insurer’s claims files. Accordingly, some jurisdictions require an actual showing of need, over and above the baseline assertion of bad faith. This means that a simple allegation of bad faith in these jurisdictions will not automatically trigger the “substantial need” exception. As one court stated, “if a plaintiff attempting to prove the validity of a claim

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104 See Tackett v. State Farm Fire & Cas., 558 A.2d 1098, 1103 (Del. Super. 1988) aff'd sub nom. Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254 (Del. 1995) (adopting plaintiff’s argument that “the trial is in the file”); accord Underwriters Ins. Co. v. Atlanta Gas Light Co., 248 F.R.D. 663, 668-70 (N.D. Ga. 2008) (acknowledging other courts’ recognition that “[a] claim file is so integral to proving bad faith that an insured can meet the substantial need burden”); Camacho v. Nationwide Mut. Ins. Co., 287 F.R.D. 688, 695-96 (N.D. Ga. 2012) (“A plaintiff’s need for the information in the insurance company’s claim file in a third party bad faith claim such as this one is substantial because the documents in the file are often the only reliable indication of whether the insurance company acted in bad faith.”); 17A Couch on Insurance § 251:27 (3d ed. 2007) (“[I]t has been said that the nature of the issues in a bad faith insurance action automatically establishes the substantial need element for discovery of certain materials in the insurer's claims file, which is one of the factors to be considered in determining whether the claims file is exempt from discovery under the work product rule.”)


107 See Ring v. Commercial Union Ins. Co., 159 F.R.D. 653, 657 (M.D.N.C. 1995) (“While arguably it may be more difficult to prove a claim of bad faith failure to settle without examining an insurance company’s claims file, that does not mean it is impossible.”); accord Bartlett, 206 F.R.D. at 630 (holding the insured has alternative means of obtaining information through depositions and subpoena of third parties).


109 See Bozeman v. State Farm Fire & Cas. Co., 420 So. 2d 89 (Ala. 1982) (requiring showing of substantial need despite the assertion of a bad faith claim).
against an insurer could obtain the insurer’s investigative files merely by alleging the insurer
acted in bad faith, all insurance claims would contain such allegations.” \(^\text{110}\)

Even when a court decides that discovery of work product materials is warranted, the
mental impression(s) and opinion work product may still be redacted from a claim file. \(^\text{111}\)
Indeed, “opinion work product can not be discovered [even] upon a showing of substantial need
and an inability to secure the substantial equivalent of the materials by alternate means without
undue hardship.” \(^\text{112}\) This well-established law follows the principle articulated by the Supreme
Court in the seminal case of Hickman v. Taylor that “[n]ot even the most liberal of discovery
theories can justify unwarranted inquiries into the files and the mental impressions of an
attorney.” \(^\text{113}\)

All parties in bad faith litigation must be familiar with specific guidelines of their
jurisdiction in order to make a good faith effort to comply with discovery and minimize the need
for contentious motion practice. Policyholders should clearly convey to opposing counsel, and
eventually the court, how certain materials will assist them in the litigation of a bad-faith matter
instead of relying solely on the allegations. Insurers should undertake the same analysis and be
specific and thorough in their work-product objections, explaining why an insured may not need
or be entitled to the requested information and/or alternative means by which requested
information can be obtained without invading the insurer’s work product.

\(^{111}\) See Phila. Indem. Ins. Co. v. Olympia Early Learning Ctr., No. C12-5759 RBL, 2013 WL 3338503, at *4-
\(^{112}\) Cox v. Adm’r. U.S. Steel & Carnegie, 17 F.3d 1386, 1422 (11th Cir. 1994); Carver v. Allstate Ins. Co., 94 F.R.D.
131, 133 (S.D. Ga. 1982) (finding mental impressions absolutely immune from discovery, despite substantial
need/lack of substantial equivalent).
\(^{113}\) Hickman, 329 U.S. at 510.
IV. GUIDING PRINCIPLES FOR POLICYHOLDERS AND INSURERS

In *Upjohn*, the Supreme Court declared that “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”\(^{114}\) Despite the Court’s professed desire for certainty in the contours of the attorney-client privilege, it conceded that application of the privilege must be determined on a “case-by-case” basis.\(^{115}\) Thus, insurers and their counsel are best served by taking as many steps as possible to ensure that the attorney-client privilege and work product doctrine protect privileged communications and trial materials from discovery. Likewise, policyholders seeking access to an insurer’s attorney-client communications and work product materials should be cognizant of when an insurer has placed advice of counsel “at issue” in the litigation; the distinction between a legal advisor and claims adjuster; the common interest doctrine; and the basis for an insurer’s claim of work product protection. Of course, it is always vitally important to know the case law of the relevant jurisdiction because courts’ approaches to these questions are far from uniform. Litigators should however, pay close attention to the following key areas which will likely form the battleground on a disputed claim of attorney-client privilege or work-product protection:

*When and for what purpose did the insurer retain outside counsel?*

- Where possible, insurers should be clear that they are seeking specific, confidential legal advice and should consider limiting outside counsel’s role to purely legal functions. If coverage counsel is both investigating a policyholder’s claim and providing a coverage opinion, this may give rise to a viable challenge to a claim of privilege.


\(^{115}\) *See id.* at 396-97.
Insurers should consider establishing two distinct lines of correspondence with an outside counsel wearing “two hats.” For instance, have outside counsel provide separate reports for the insurer—(1) reports concerning the factual investigation and (2) reports concerning legal advice.

In situations where counsel provides reports incorporating a combination of factual investigations and legal advice, counsel should be sure to cite case law in order to help establish that the report is being prepared by counsel in a legal capacity.

Policyholders should carefully examine communications, claim notes, and redactions to determine the extent of outside counsel’s involvement. Courts may be inclined to grant in camera review where the roles of outside counsel are unclear.

Policyholders should inquire about all personnel involved in the handling of a certain claim, from the date it was made through the date of the initiation of the action, whether by written discovery or corporate representative deposition. This should provide a clearer picture of whether an insurer or its outside counsel actually “adjusted” the claim and whether or to what extent a waiver may have occurred.

Should discovery on the bad faith claim be stayed?

An insurer may seek to stay discovery on the bad faith claims until the contract action is resolved or try to bifurcate declaratory judgment actions and bad faith claims.

A lengthy stay of discovery or abatement of a bad faith claim can often be prejudicial to a policyholder’s case, as time and litigation costs escalate even without addressing issues of bad faith and ultimately would require re-ploughing some of the
same ground. Policyholders should examine if the discovery for an underlying coverage action is truly interrelated with the bad faith claim.\(^{116}\)

**Who received confidential communications?**

- Has the insurer implemented internal procedures which limit disclosure of confidential communications to employees on a “need to know” basis? What outside parties received confidential communications?
- Policyholders should request, and if necessary move to compel, detailed privilege logs, containing the identity of the author of any document and all recipients, the date the document/communications were created, and a description of each withheld document/communication.\(^{117}\) The privilege log is the first step in analyzing the propriety of an insurer’s claim of protection, and may often reveal that purportedly privileged communications were disclosed to third parties, or made at a time when litigation was not anticipated. The privilege log should account for all communications, and all redaction portions of an insurer’s production.

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The vagueness of these entries prevents a reasonable evaluation of whether these documents are legitimately being withheld from production. [The insurer] must not only describe the emails and attachments that are being withheld with more detail, including dates, authors, and recipients, but must also specify which privilege or grounds apply, and why, to the withholding of each. For documents being withheld on the basis of work-product privilege, [the insurer] must indicate that those particular emails were created primarily in anticipation of litigation. Even where a document can be characterized as being helpful or important to the instant litigation, if the document has actually been prepared for non-litigation purposes, it must be produced.

*Id.* at *3.
Did the insurer discuss coverage issues with counsel retained to defend a policyholder in the underlying action?

- Communications made with defense counsel during the tripartite relationship could be subject to discovery in a later bad faith action.

- Policyholders also must be cognizant that communications with its counsel in an underlying lawsuit may be discoverable by the insurer if an adverse relationship develops—either because claims were placed “at issue” or under the joint client and/or common interest doctrine. Policyholders should assume that all communications with counsel that is paid for by an insurer may later be discovered; but, in an abundance of caution, policyholders should clearly label any communications/documents that pertain only to coverage issues, and not to defense of the underlying lawsuit, as such.

Does the insurer maintain multiple files?

- Has the insurer established multiple files when defending a policyholder under a reservation of rights—one for the defense of the policyholder and one for coverage purposes? Were these separate files handled by different claim representatives who report to different supervisors, or is there an argument that a conflict of interest exists?

Is there a defined “anticipation of litigation” date?

- Policyholders should be wary of an insurer’s claims that the entire claim file is protected in a coverage action. Ask the insurer via interrogatory or otherwise to provide specific evidentiary proof that it anticipated litigation from the date the insurer begins to

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claim the work product privilege. Conversely, insurers should clearly and objectively document the basis for their anticipation of litigation.

Does the policyholder have a substantial need for the information?

- While doctrinally reserved to the work-product context, insurers and policyholders should be aware of courts’ sensitivity to the policyholder’s “substantial need” for information in the insurer’s file in order to prove a bad faith case. This need-based analysis may motivate a court’s ruling, even on a question of attorney-client privilege.120

V. CONCLUSION

Given the frequent retention of outside counsel to assist with the claim adjustment process, there is a high probability insurers will assert attorney-client or work protection over at least part of the claim file in later coverage litigation. Insurance coverage litigators, therefore, must be intimately familiar with the ins and outs of the attorney-client privilege and work product doctrine, especially when discovery of the claim file may have a direct impact on the outcome of coverage litigation and potential extracontractual exposure. The various jurisdiction-dependent and fact-specific rules and outcomes make this task difficult, but no less vital. As demonstrated, an understanding of the fundamentals of the attorney-client privilege or work product doctrine is no substitute for a close examination of the governing law when litigating a disputed claim of privilege.

120 See supra note 102.