A COMMON INTEREST IN COOPERATION: HOW TO PROTECT PRIVILEGED INFORMATION AND POLICY BENEFITS WHEN REPORTING TO LIABILITY INSURERS

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Defense of claims against policyholders often gives rise to a complex insurer-insured relationship. Insurers require adequate information to participate in the defense, evaluate the matter for potential resolution, and determine the extent to which coverage may be available. On the other hand, policyholders have a vital interest in ensuring that privileged information and attorney work product created in the course of the defense does not lose that status and become discoverable by underlying plaintiffs by virtue of it having been shared with an insurer. At the same time, the policy usually imposes a contractual obligation upon the insured to cooperate with the carrier. Thus, the insured and insurer will usually have aligned interests in cooperating with each other in establishing the existence of a common interest privilege that will facilitate the sharing of privileged and work-product information without risk, or minimizing the risk, of waiver.

Such cooperation requires consideration of many issues, however, some of which we explore below. First, we examine the contractual underpinnings and scope of an insured's duty to cooperate. Second, we explore the contours of the attorney-client and work product privileges and how courts have defined "common interest." Insureds and insurers can maximize the likelihood that such common interest will be recognized and enforced through a common interest agreement, and we discuss some best practices for such agreements. Finally, where the establishment of a common interest or entry into a common interest agreement may not be possible, insureds and insurers may advance their mutual interest in the provision and receipt of necessary information by sharing it within the confines of the mediation privilege. As the scope of the mediation privilege varies from state to state, thought should be given to the applicable law.

THE COOPERATION CLAUSE: WHAT DOES THE POLICY REQUIRE?

Most liability insurance policies include a cooperation clause obligating the insured to "cooperate" with the insurer in connection with claims against the insured. The contractual duty to cooperate encompasses a range of discrete obligations regarding the provision of information, assistance in the defense of a claim, and the enforcement of the insured's rights against third parties. The precise contours of the insured's duty can vary depending on the policy language, the nature of the coverage provided, or the insurer's position, *e.g.*, primary versus excess:

- Standardized general liability provisions, such as the ISO CGL form, generally provide that the insured must "cooperate with [the insurer] in the investigation or settlement of the claim or defense against the suit" and "assist [the insurer], upon [its] request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply." ISO CG 00 01 04 13, Section IV.2.c.

- Some insurers' policy forms underscore the carrier's right to make any investigation it deems necessary and obligate the insured to cooperate with all such investigations, including investigations with respect to both the underlying liability and the availability of coverage.

- Policy provisions commonly define the scope of the insured's cooperation and duty to provide information as that which the insurer "may reasonably request" or "may reasonably require."

- In the duty-to-defend context, policy provisions may specify that the insured must attend hearings, give evidence, help obtain the attendance of witnesses, and participate in similar activities necessary to the conduct of the defense provided by the insurer.

- In policies under which the insured controls the defense and the insurer's defense-related obligation consists of the duty to advance defense costs, the insurer will usually have a contractual right to associate in the defense in its discretion. In such cases, cooperation extends to the provision of information and access that permits the insurer to associate "fully" or "effectively" in the defense. The policy may also explicitly require the insured to keep the insurer fully and contemporaneously informed as to the conduct of the defense.

- Related contractual provisions require the insured's assistance in enforcing rights of contribution or the insurer's subrogation rights. Some liability policies may also expressly stipulate that the insured may not take any action that prejudices the insurer or increases the insurer's potential exposure.

In construing the scope of insureds' obligations under cooperation clauses, courts have often defined the insureds' duty in terms of providing the insurer with "material" information. For example, under Washington law, an insurer's requests for information must be "material to the circumstances giving rise to liability on [the insurer's] part." *Staples v. Allstate Ins. Co.*, 295 P.3d 201, 206 (Wash. 2013) (citation omitted) (insurer demanded examination under oath regarding first-party loss); *see Granite State Ins. Co. v. Integrity Structures, LLC,* No. C14-5085BHS, 2015 WL 136006, at *8 (W.D. Wash. Jan. 9, 2015) (applying materiality standard to third-party liability claim scenario). Information is considered material when it "concerns a subject relevant to and germane to the insurer's investigation as it was then proceeding." *Tran v. State Farm Fire & Cas. Co.*, 961 P.2d 358, 363 (Wash. 1998). Courts have confirmed that the duty to provide such material information extends to issues of both liability and coverage.[1]

[1] *See, e.g.*, *Direct Auto. Ins. Co. v. Reed*, 76 N.E.3d 85, 91-92 (Ill. App. Ct. 2017) ("While the insured has no obligation to assist the insurer in any effort to defeat recovery of a proper claim, the cooperation clause does obligate the insured to disclose all facts within his knowledge and otherwise help the insurer determine coverage under the Policy.") (internal citation and quotation marks omitted); *Abdelhamid v. Fire Ins. Exch.*, 106 Cal. Rptr. 3d 26, 33-34 (Cal. Ct. App. 2010) (observing in first-party context that an insured's failure to provide documents requested by the insurer or answer questions that are material to the existence of coverage constituted material breach of policy.); *cf. ro*

Conversely, many jurisdictions have adopted a "substantial compliance" standard, concluding that an insured may be held to have breached its duty of cooperation where the breach is a material one.[2] Thus, while not every asserted failure by an insured to provide requested information will necessarily vitiate coverage, a pattern of non-compliance with an insurer's reasonable requests can.[3]

Developers Surety & Indem. Co, , v. Towne & Country Dev. No. 2:15-cv-01738-MJP (W.D.Wash., Nov. 4, 2015) (slip. op) (holding that GL policy cooperation clause did not extend to cooperation with coverage investigation designed to bolster coverage defenses including demand that individual insured submit to interview by insurer's coverage counsel).

[2] *See, e.g., N.Y. Cent. Mut. Fire Ins. Co. v. Rafailov*, 840 N.Y.S.2d 358 (N.Y. App. Div. 2007) ("An insured's duty to cooperate is satisfied by substantial compliance, and where a delay in compliance is neither lengthy nor willful, and is accompanied by a satisfactory explanation, preclusion of a claim is inappropriate."); *HSB Grp., Inc. v. SVB Underwriting, Ltd.*, 664 F. Supp. 2d 158, 195 (D. Conn. 2009) ("Connecticut courts have uniformly required that an insured's lack of cooperation must be 'substantial or material' in order to relieve an insurer of its obligations under the policy."; insured had not breached its duty to cooperate when it failed to comply with a discovery request, concluding that "any breach of the duty to cooperate, if in fact there was a breach, was immaterial and insubstantial and provides no grounds for relieving the insurer of its obligations under the policy."); *State Farm Mut. Auto. Ins. Co. v. Holcomb*, 458 N.E.2d 441, 445 (Ohio Ct. App. 1983) (noting that to constitute a breach of the cooperation clause, "the failure of cooperation must also be material and substantial."); *Gaston v. Allstate Ins. Co.*, No. 4:08-cv-749, 2008 WL 5716525 (N.D. Ohio July 31, 2008) (finding that insured's failure to cooperate with insurer's investigation was a "material and substantial" breach of its obligations under the policy where it refused to provide income tax returns, bank records, and cellphone records to the insurer); *See Zurich Am. Ins. Co. v. Diamond Title of Sarasota, Inc.*, No. 8:10-cv-383, 2011 WL 1878151, at *4 (M.D. Fla. May 17, 2011) (explaining that under Florida law, an insured's failure to cooperate will vitiate its right to coverage only when the failure is material, when the failure causes substantial prejudice to the insurer, and when the insurer exercised good faith and due diligence in attempting to secure the insured's cooperation).

[3] *See, e.g., Avarello v. State Farm Fire & Cas. Co.*, 616 N.Y.S.2d 796 (N.Y. App. Div. 1994) (explaining that insured will be held in breach of the cooperation clause if the insurer can show that the insured "engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents"); *Levy v. Chubb Ins.*, 659 N.Y.S.2d 266, 268 (N.Y. App. Div. 1997) ("While in the proper circumstances the insured may be given another chance to comply, insurance companies are entitled to obtain, promptly and while the information is still fresh . . . relevant information to enable them to decide upon their obligations and protect against false claims.") (citation and internal quotation marks omitted); *Hsu v. Safeco Insurance Co.*, 654 F. App'x 979, 981 (11th Cir. 2016) (applying Georgia law) (holding that insureds breached cooperation by not responding to either of the insurer's requests for tax returns and by not offering any explanation or excuse for such failure and insurer "diligently" sought insured's cooperation through regular communication with the insured or the insured's representative); *Gabor v. State Farm Mut. Auto. Ins. Co.*, 583 N.E.2d 1041 (Ohio Ct. App. 1990) (concluding that the insured's refusal to produce his income tax returns "constitute[d] a substantial and material breach of his contractual duty to cooperate which clearly prejudiced the insurer's investigation into possible motives for arson"); *Double G.G. Leasing, LLC v. Underwriters at Lloyd's*, 978 A.2d 83 (Conn. App. Ct. 2009) (determining that insured, despite its argument of substantial compliance, breached its duty to cooperate by not providing the insured with requested tax returns, which were considered "material inquiries" in the course of the insurer's investigation).

The question remains, does a contractual duty to cooperate require the insured to provide the insurer with information subject to the attorney-client or attorney work product privileges? In the seminal case of *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 579 N.E.2d 322 (Ill. 1991), the Illinois Supreme Court held that the cooperation clauses contained in the liability insurance policies at issue precluded the insureds from withholding privileged information from their insurers. The court reasoned that the cooperation clause "represents the contractual obligations imposed upon and accepted by insureds at the time they entered into the agreement with insurers. In light of the plain language of the cooperation clause in particular, and language in the policy as a whole, it cannot seriously be contended that insureds would not be required to disclose contents of any communications they had with defense counsel representing them on a claim for which insurers had the ultimate duty to satisfy." *Id*. at 328.[4]

A number of courts outside Illinois, however, have declined to follow *Waste Management*'s rationale and obligate an insured to share otherwise privileged information based on the policy's contractual requirements.[5] Thus, in many jurisdictions, a policy's cooperation

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[4] *See also Travelers Indem. Co. of Conn. v. Att'ys Title Ins. Fund, Inc.*, 194 F. Supp. 3d 1224, 1234-36 (M.D. Fla. 2016) (finding that an insured who refused to disclose settlement discussions to insurer violated cooperation clause notwithstanding assertion of mediation privilege), *appeal docketed*, No. 16-cv-15387 (11th Cir. Aug. 10, 2016); *MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 613 (S.D. Fla. 2013) (observing, in holding that insured could not withhold documents relating to defense of underlying action on basis of privilege, that insureds "voluntarily purchased an insurance policy which included a cooperation clause and other provisions which made it obvious, particularly to a corporate customer such as the MapleWood entities-with their apparent sophistication, that the insurer and insured would share the same legal agenda if faced with any claims made against the insured"); *cf. Bogatin v. Federal Ins. Co.*, No. 99-4441, 2000 WL 804433, at *29 (E.D. Pa. June 21, 2000) (holding that cooperation clause in a directors and officers liability insurance policy required insured to disclose all relevant information to the insurer, even if that information is protected by the Fifth Amendment privilege against self-incrimination; determining that "a Fifth Amendment privilege against self-incrimination does not trump an insurance policy's duty to cooperate requirement.").

[5] *See, e.g.*, *Dedham-Westwood Water Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. CIV.A. 96-00044, 2000 WL 33593142, at *5 (Mass. Super. Ct. Feb 4, 2000) ("[A] broadly worded cooperation clause is insufficient to override the attorney-client privilege or work product immunity since such a clause does not provide a clear intent to override these privileges."); *Eastern Air Lines, Inc. v. U.S. Aviation Underwriters, Inc.*, 716 So. 2d 340, 342-43 (Fla. Dist. Ct. App. 1998) ("Under Florida law, the cooperation clause does not eviscerate the attorney-client privilege."); *Rockwell Int'l Corp. v. Sup. Ct. of Los Angeles Co.*, 26 Cal. App. 4th 1255, 1260-61 (Cal. Ct. App. 1994) ("We consider the theory fanciful, and refuse to adopt the rules announced by the Illinois Supreme Court in [*Waste Management*]."); *North River Ins. Co. v. Philadelphia Reinsurance*, 797 F. Supp. 363, 369 (D.N.J. 1992) ("Absent a showing that the parties intended the language of the cooperation clauses of the insurance policies at issue here to work a waiver of the attorney-client privilege, the court declines to follow the holding of *Waste Management* to find a contractual waiver of the privilege."); *State of Wis. v. Hydrite Chem. Co.*, 582 N.W.2d 411, 421 (Wis. App. 1998) ("We agree with Hydrite that the broadly-worded cooperation clause does not supersede the attorney-client privilege or work product doctrine."); *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381, 386 (D. Minn. 1992) ("This court finds the reasoning of [*Waste Management*] to be fundamentally unsound. This court rejects the conclusion that because an insured agrees to cooperate with the insurance company, in the event he is sued or otherwise makes a claim under the policy, that the

clause might not be deemed to contractually *obligate* an insured to share privileged information with its insurer; however, extensions of privilege such as the common interest doctrine discussed below, may *permit* an insured to do so without resulting in waiver of the privilege as to parties outside of the insurer-insured relationship, such as the underlying plaintiffs. In many cases, regardless whether the law of the applicable jurisdiction extends a cooperation clause's requirements to the provision of privileged information bearing on the defense, it may be in the insured's interests to share such information within the confines of the common interest doctrine, in order to facilitate an insurer's evaluation of the matter and settlement.

RISKS: WAIVING PRIVILEGE AND WORK PRODUCT PROTECTION

Most insureds who tender claims to their insurers wish to assist and cooperate with their insurers in defense of claims because they share a common interest in defeating unmeritorious claims and in minimizing liability when a claim has merit. So why should an insured and its insurer exercise caution in sharing privileged or protected information? Because voluntarily sharing privileged or protected information with third parties will destroy the privilege, absent special circumstances such as when the "joint defense" or "common legal interest doctrine" applies. *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012).

The common interest doctrine is an exception to the general rule that a party who discloses privileged or protected information waives the privileged or protected status of the information. The rule exists to enable parties who share a common interest in litigation to exchange privileged information in order to adequately prepare their cases for trial without losing the protection afforded by the privilege. *MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 605 (S.D. Fla. 2013).

> However, a shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception. *Id.* Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten. *Cf. Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir.1964).

In re Pac. Pictures Corp., 679 F.3d at 1129.

Certain requirements must be met to ensure that privileged communications and protected work product retain their status as such under the common interest doctrine. We address these in turn.

A. Attorney Client Privilege

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insured has thereby forever contractually waived the attorney-client privilege."); *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 416 (D. Del. 1992) ("Connecticut courts deciding the issue have explicitly rejected constructions of cooperation clauses that would compel the production of privileged documents in insurance cases."); *Allianz Ins. Co. v. Guidant Corp.*, 869 N.E.2d 1042, 1053 (Ill. App. 2007) (collecting cases).

"[U]nder federal law there are two approaches to the 'common interest' exception. The first is to require that the client and third party have a legal interest in common, as opposed to a merely commercial interest." *In re Int'l Oil Trading Co., LLC*, 548 B.R. 825, 832 (Bankr. S.D. Fla. 2016) (citing *Leader Technologies, Inc. v. Facebook,* 719 F.Supp.2d 373 (D. Del. 2010) and *Miller UK Ltd. v. Caterpillar,* 17 F.Supp.3d 711, 732 (N.D. Ill. 2014)). The second requires that the client and third party be "engaged in some type of common enterprise and that the legal advice relates to the goal of that enterprise." *In re Int'l Oil Trading Co., LLC*, 548 B.R. at 832-833 (citing *Rembrandt Techs., LP v. Harris Corp.,* 2009 WL 402332 (Del. Super. Ct. 2009), *Devon IT, Inc. v. IBM Corp.,* 2012 WL 4748160 (E.D. Pa.2012), and *Walker Digital, LLC v. Google Inc.,* 2013 WL 9600775 (D. Del. 2013)).

Using the latter approach, one federal court applying Florida law set forth three threshold questions to determine whether the attorney client privilege applies in the context of a common interest: "(1) whether the original disclosures were necessary to obtain informed legal advice and might not have been made absent the attorney-client privilege; (2) whether the communication was such that disclosure to third parties was not intended; and (3) whether the information was exchanged between the parties for the limited purpose of assisting in their common cause." *In re Int'l Oil Trading Co., LLC*, 548 B.R. at 832-833 (citing *Developers Surety & Indemnity Co. v. Harding Village, Ltd.,* 2007 WL 2021939 (S.D. Fla. 2007)).

Whether an insured and insurer are deemed joint clients in a tripartite relationship or merely parties who share a common interest in the insured's defense, most states apply the common interest exception to attorney-client communications between a defending insurer, its insured, and insurer-appointed or approved defense counsel. *See* Hal. S. Shaftel, *Applying the Attorney-Client Privilege Between Insurer & Policyholder,* Insurance Law 2015: Top Lawyers on Trends & Key Strategies for the Upcoming Year, Dec. 2014, 2014 WL 7666068. The same is not true for an insurer who denies a defense or an excess insurer who does not associate in the defense. *See e.g., Metropolitan Life Ins. Co. v. Aetna Casualty and Surety Co.,* 249 Conn. 36, 59-61 (1999); *Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 70-71 (D.N.J. 1992).

B. Work Product

Like attorney-client privilege, courts protect work product disclosed under the common interest doctrine, provided certain requirements are met. The three threshold requirements, described by one California court, include: "(1) the disclosure relates to a common interest of the attorneys' respective clients; (2) the disclosing attorney has a reasonable expectation that the other attorney will preserve confidentiality; and (3) the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing attorney was consulted." *Meza v. H. Muehlstein & Co.*, 176 Cal. App. 4th 969, 981, 98 Cal. Rptr. 3d 422, 431–32 (2009) (citing *OXY Resources California LLC v. Superior Court,* 115 Cal.App.4th 874, 891, 9 Cal.Rptr.3d 621 (2004).

> In a joint defense situation, strategic disclosure is consistent with the doctrine because transfer of a document made to a party with strong common interests in sharing the fruit of trial preparation efforts does not necessarily constitute waiver of the work product doctrine. *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296

(Temp. Emer. Ct. App. 1985); *MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 2013 WL 3853388 (S.D. Fla. 2013); *Stix Products, Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 162 U.S.P.Q. 508 (S.D.N.Y. 1969); *McKesson Corp. v. Green*, 266 Ga. App. 157, 597 S.E.2d 447 (2004) (holding that the transfer of documents to a party with "strong common interests" in sharing the work product does not waive the work product protection). Courts have held that the work product doctrine is not waived when parties represented by the same counsel share information relating to common interests. *See, e.g., U.S. v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1980-2 Trade Cas. (CCH) P 63533, 30 Fed. R. Serv. 2d 503 (D.C. Cir. 1980). Thus, the work product doctrine in the joint defense context may be waived only where the information released is unrelated to the common interests of the parties or is transferred to someone outside the sphere of the confidential relationship. *See, e.g., IBJ Whitehall Bank & Trust Co. v. Cory & Associates, Inc.*, No. 97 C 5827, 1999 WL 617842 (N.D. Ill. Aug. 12, 1999) (holding that, as "long as the parties keep the advice within their circle of common interest, the privilege is not waived"); *MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 2013 WL 3853388 (S.D. Fla. 2013); *Western Fuels Ass'n, Inc. v. Burlington Northern R. Co.*, 102 F.R.D. 201 (D. Wyo. 1984); *American Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443, 1976-2 Trade Cas. (CCH) P 61205 (W.D. Mo. 1976); *Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381 (S.D.N.Y. 1975).

Scott M. Seaman and Jason R. Schulze, *Joint Defense Privilege*, Allocation of Losses in Complex Insurance Coverage Claims, § 13:8, December 2017 Update.

COMMON INTEREST: DEFINING WHAT IT MEANS FOR THE INSURER AND INSURED

Pursuant to the common interest doctrine, attorneys representing clients with a common interest can share information without the risk of being compelled to disclose it generally even where their interests are not entirely congruent. Absent a written agreement defining the scope of their shared interests, however, parties chance leaving that determination to a court, which may construe their common interests more or less broadly than intended. The latter could lead to the loss of privilege and protection entirely for shared information courts deem to be outside the parties' common interest.

In a dispute surrounding the theft of certain Superman intellectual property, for instance, a comic book company lawyer ("Toberoff") disclosed certain confidential information to the federal government following his request that the government investigate the theft. The Ninth Circuit Court of Appeals held the disclosures were not privileged under the common interest doctrine:

> There is no evidence that Toberoff and the Office of the U.S. Attorney agreed before the disclosure jointly to pursue sanctions against Toberoff's former employee. Toberoff is not strategizing with the prosecution. He has no more of a common interest with the government than does any individual who wishes to see the law upheld. Furthermore, the statements here were not "intended to facilitate

> *1130 representation" of either Toberoff or the government. *Hunydee*, 355 F.2d at 185 (limiting privilege to those circumstances); *accord United States v. BDO Seidman*, 492 F.3d 806, 816 (7th Cir. 2007) (same).

In re Pac. Pictures Corp., 679 F.3d at 1129–30. As the opinion suggests, a written agreement defining the parties' common interest in sharing and maintaining the confidentiality of certain information, entered into *before* the disclosure of that information, may have led to a different result.

Once a common interest is acknowledged (whether orally or in writing), the parties must maintain the confidentiality of information received or learned by them from other members of the joint defense or common interest group.

> One member of a joint defense group cannot waive the privilege that attached to the information shared by another member of the group without the consent of that member, but any defendant could, of course, testify as to her own statements at any time. By agreeing to be a part of a joint defense, she only agrees not to disclose anything learned from her co-defendants through that joint arrangement, nor could any of those co-defendants disclose what she had told them or their attorneys in confidence. However, if the parties to that agreement are later in opposition with each other, statements which were made by one co-defendant to another defendant's attorney are not protected by privilege.

MapleWood Partners, 295 F.R.D. at 605-06.

Insureds and insurers who share a common interest in the defense but opposite views on coverage, being uncertain bedfellows, run a greater than usual risk that one may use the information against the other should subsequent litigation arise between them. Thus, parties wishing to avoid this should agree in writing concerning the scope of information to be shared in pursuit of their common interest and the terms of any future use of shared information.

Insureds and insurers should also take care to memorialize the role of individuals who participate in sharing information under a common interest agreement, particularly when the insurer and insured are represented by independent coverage counsel who may become privy to shared information. One California court noted that parties to a joint defense agreement have standing to seek to disqualify an attorney who once represented a party in the joint defense group when that attorney is retained by a different party in the same or related litigation who is not in the joint defense group. In so finding, the court noted that protection of attorney-client privilege and confidential work product can be grounds for disqualification of an attorney. *Meza v. H. Muehlstein & Co.*, 176 Cal. App. 4th 969, 980-981 (2009).

The case involved an attorney ("Drouet") for one defendant who obtained privileged and protected information from other defendants who were parties to a common interest agreement in a case filed against them by a plaintiff ("Meza"). Drouet was later hired by the law firm representing Meza. The California court disqualified Meza's entire law firm, relying primarily

on the fact that Drouet's disqualification was due to his prior representation of an opposing party. *Mid.* at 977–78. While the case in no way suggests that coverage counsel for one party may be disqualified from representing that party in subsequent litigation against another party to a joint defense agreement, it would behoove insurers and insureds to include a provision stating that counsel representing a party may not be disqualified from representing that party in future litigation as a result of their participation in a common interest agreement or receipt of shared information.

In summary, the best way to minimize the risk that sensitive information disclosed to an insurer could result in a waiver of privilege or work product immunity is to enter into a written common interest confidentiality agreement. Such agreements typically protect information shared between an insured and insurer by acknowledging the scope of the common interest between them, defining "confidential materials" subject to non-disclosure, and addressing the use and treatment of those materials during and after the case or common interest concludes. A sample agreement is attached.

ALTERNATIVES: USING MEDIATION PRIVILEGE TO SHARE INFORMATION WITH INSURERS

If the policyholder and the insurer are unable to complete a joint-defense/common-interest type of agreement that will protect shared information, they may want to explore using mediation privilege as a substitute. That is, if there is a mediation process in the underlying litigation, counsel for the policyholder may be able to use the confidentiality associated with the exchange of information in that mediation to share information about the underlying dispute with insurers, while still shielding it from discovery by the plaintiff.

But coverage counsel should not assume that anything that they share with an insurer will be protected merely because they stamp "Confidential Mediation Communication" on it, or copy the mediator. The so-called "mediation privilege" is largely a creature of state law - and like insurance law, state law on the subject varies. Some state law has been held to protect policyholder-insurer communications, some is less certain, and federal common law is difficult to predict.

To avoid this uncertainty, many experts advise using language in the mediation agreement to make it clear that such communications are protected.[6] But it is not always possible to precisely tailor mediation language –because the agreement has already been negotiated, because the underlying plaintiff may not agree to broad language, or because the policyholder does not want to alert the underlying plaintiff that coverage discussions are going on. Therefore, it will likely be important to understand the extent to which coverage-related

[6] Many of the decisions cited in these materials look to the wording of a mediation agreement, along with the relevant statutory or common-law protections, in assessing one party's bid to discover mediation communications. Some pointers on mediation confidentiality language to include in such agreements are available in a paper by Rachel Ehrlich, Maria Quintero, John Vishneski, Jessica Brown and Kelly Castriotta, presented at this conference in 2016, available at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016_insurance_coverage_litigation_committee/written_materials/1_how_confidential_are_mediation_communications_final_paper.authcheckdam.pdf.

communications may be protected under the applicable state or federal law, even if there is a mediation agreement in place.

In addition, there are longer-term strategic implications to consider. Invoking mediation privilege in the short term may have ramifications for later disputes between policyholder and insurer, preventing the introduction of evidence that may be critical to (for example) a bad faith claim. For these reasons counsel needs to proceed carefully if this option is being considered.

A. State Mediation Confidentiality Laws

1. Uniform Mediation Act Jurisdictions

Twelve jurisdictions have adopted the Uniform Mediation Act ("UMA") as of this writing: Hawaii, Illinois, Idaho, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington, Washington D.C. [7] Other states (Massachusetts[8] and New York) have considered the UMA in recent years and may yet adopt it. At least three states (Virginia, Florida, and Maine) have incorporated UMA principles into revised mediation confidentiality provisions of state law, or rules.

The UMA provides that mediation communications are not subject to discovery or admissible in evidence "in a proceeding" unless an exception applies, or the privilege has been waived. *See, e.g.*, 710 ILCS 35/4.[9] It extends its protections to non-parties to the litigation who participate in mediation. See, e.g., RCW 7.07.010 et seq.[10] Among its exceptions are evidence of "professional misconduct or malpractice" of a mediation party or nonparty participant, or representative of a party (e.g., an attorney). *See* RCW 7.07.010(1)(f).

Under the UMA, documents exchanged during mediation do not become privileged simply because of that fact. *See* RCW 7.07.030(3) ("Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.").

Just because a state has adopted the UMA does not mean that there are no longer traps for the unwary. For example, in *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wash. App. 383, 418, 161 P.3d 406, 424–25 (2007), *as amended on denial of reconsideration* (Oct. 9, 2007), the parties' mediation in the underlying litigation was not conducted under the UMA, but under another statutory scheme, which made communications confidential only if there was a written agreement or court order. In a subsequent coverage action the court allowed a party to testify about what happened during a mediation, because the insurer could not produce a document that satisfied the statutory requirements.

[7] *See* http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act (last visited 1/5/2018).
[8] In a 2016 case a Massachusetts court looked to both Massachusetts' mediation statute (M.G.L. c. 233, § 23C) and the UMA to reject a "fraud" exception to mediation privilege. *ZVI Construction Co. v. Levy, et al.*, 90 Mass. App. Ct. 412 (2016).
[9] Citation to the UMA as adopted in Illinois.
[10] Citation to the UMA as adopted in Washington.

2. California

California's statutory mediation privilege is among the broadest in the country. California Evidence Code section 1119(a) provides:

> No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled . . . .

Id. at § 1119(a).3. Section 1119(c) states that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." "Mediation consultation" is defined as "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." *Id.* at § 1115(c).

California courts have interpreted the statute strictly not to permit discovery of mediation communications in almost every circumstance. *See Cassel v. Superior Court*, 51 Cal. 4th 113, 135, 244 P.3d 1080, 1095, 119 Cal. Rptr. 3d 437, 455 (2011) (precluding use of evidence in attorney malpractice matter).

California's statute protects communications with insurers generally. *Houck Const., Inc. v. Zurich Specialties London Ltd.*, No. CV 06 3832 AG(PLAX), 2007 WL 1739711, at *2 (C.D. Cal. June 4, 2007). In particular, California's statute extends to insurers that are actual participants in the mediation of an underlying matter. *See, e.g., Travelers Cas. & Sur. Co. v. Super. Ct.*, 126 Cal.App.4th 1131, 1146, n. 18 (2005). It does not extend to non-defending insurers who are deemed not to be participants in the mediation of the underlying matter. *Continental Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510 (E.D. Cal. 2010) (applying California law). It also does not apply to documents not prepared for the mediation. *Rojas v. Superior Court*, 33 Cal. 4th 407, 417, 93 P.3d 260, 266 (2004) ("[A] party cannot secure protection for a writing—including a photograph, a witness statement, or an analysis of a test sample—that was not prepared for the purpose of, in the course of, or pursuant to, a mediation… simply by using or introducing it in a mediation or even including it as part of a writing—such as a brief or a declaration or a consultant's report—that was prepared for the purpose of, in the course of, or pursuant to, a mediation.") (internal citations and punctuation omitted).

3. Other States

Some other states have mediation rules or statutes that appear broader than the UMA, at least in some respects. For example, Alabama mediations conducted pursuant to the Civil Court Mediation Rules can take advantage of Mediation Rule 11, which provides that "all information" disclosed in the mediation is presumptively subject to its protections, which is broader than those jurisdictions (like California, and UMA states) that specifically exempt documents not created specifically for the mediation. *See* AL R MEDIATION Rule 11.

Other state laws regarding mediation may contain limitations that throw into doubt their applicability to policyholder-insurer discussions on the sidelines of the mediation. For example, Delaware's "Voluntary ADR Act" contains a provision protecting confidentiality that protects

communications by "any party." Del. Code Ann. tit. 6, § 7716 (West 2017).[11] Because the statute does not use broader terms that are used in other statutes (such as "participant") an argument could be made that only the parties to the underlying litigation may take advantage of the protection – meaning that communications to an insurer may not be protected. *See Exec. Risk Indem., Inc. v. Cigna Corp.*, 81 Pa. D. & C.4th 410, 2006 WL 2439733, at *9 (Com. Pl. 2006) (noting that New York and Pennsylvania mediation statutes only protected actual parties to the litigation, but holding that some insurers who signed the mediation agreement could invoke mediation privilege, while those that did not sign or actively participate could not).

Texas courts have held that the mediation privilege does not shield facts surrounding whether an insurer did or did not attend the mediation or otherwise follow requirements relating to attendance. *In re Daley*, 29 S.W.3d 915 (Tex. App. Beaumont 2000). However under the same state's law the privilege was applied to insurer representative conduct during the mediation. *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 452–53, 2000 WL 1728427 (Tex. App. 2000).

A leading case in Massachusetts gave a broad application to that state's mediation privilege. In *Modern Continental Const. Co., Inc. v. Zurich American Ins. Co.*, 21 Mass. L. Rptr. 114, 2006 WL 1258760 (Mass. Super. Ct. 2006), a first-party dispute under a builder's risk policy, in the insurer FOIA'ed information from a government agency that had mediated a change-order dispute with the policyholder; the agency inadvertently produced mediation communication. On the insureds' subsequent motion to exclude the evidence, the court held that Massachusetts law protected the exchanges.

4. Federal Common-Law Mediation Privilege

Some federal courts have recognized a federal mediation privilege. *See ACQIS, LLC v. EMC Corp.*, No. 14-CV-13560, 2017 WL 2818984, at *1 (D. Mass. June 29, 2017), collecting cases including *United States v. Union Pac. R.R. Co.*, No. CIV06-1740FCDKJM, 2007 WL 1500551, at *6 (E.D. Cal. May 23, 2007); *Microsoft Corp. v. Suncrest Enter.*, No. C03-05424JF (HRL), 2006 WL 929257, at *2 (N.D. Cal. Jan. 6, 2006); *Sheldone v. Pa. Tpk. Comm'n*, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1176 (C.D. Cal. 1998); and *In re RDM Sports Grp., Inc.*, 277 B.R. 415, 430 (Bankr. N.D. Ga. 2002); *see also Goodyear Tire & Rubber Co. v. Chiles Power Supply*, 332 F.3d 976 (6th Cir. 2003) (adopting broad "settlement" privilege that some have argued includes mediation communications).[12]

[11] Delaware's state-law protection for mediation communications is stronger than that of the UMA in other respects. "Unlike the UMA, the Delaware Voluntary ADR Act, Superior Court Rule 16.1 and Court of Chancery Rule 174 provide for only limited circumstances when statements made in the mediation process can be stripped of their confidential status, none of which pertain here. In the UMA, otherwise confidential statements made in the mediation process can be used as evidence in later proceedings when the court determines that a party's need for evidence substantially outweighs the interest in protecting confidentiality and that the evidence is otherwise unavailable." *Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 65, 2005 WL 2546911 (Del. Ch. 2005).

[12] The continued vitality of the federal mediation privilege in the Ninth Circuit may be in some doubt. In *Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1041 (9th Cir. 2011) the Court of Appeals rejected the trial court's invocation of a mediation privilege based on the trial court's local rules regarding ADR, holding that "it's doubtful that a district court can augment the list of privileges by local rule." The

Some courts, however, have refused to recognize such a privilege. *See, e.g., In re Grand Jury Subpoena Dated Dec. 17, 1996*, 148 F.3d 487, 493 (5th Cir. 1998); I*n re Subpoena Issued to Commodity Future Trading Com'n*, 370 F. Supp. 2d 201, 208 (D.D.C. 2005); *Willis v. GEICO Gen. Ins. Co.*, No. 13-280 KG/KK, 2016 WL 3876347, at *8 (D.N.M. Apr. 7, 2016).

Even where it has been recognized, however, the federal mediation privilege, as a creature of the common-law, does not have any kind of uniformity in its application and contours, making it hard to predict whether it will cover policyholder-insurer communications related to underlying litigation. *See ACQIS*, 2017 WL 2818984, at *1 (noting limitations placed by some courts, including that privilege does not apply to discussions after formal mediation has concluded)*; Molina v. Lexmark*, No. CV 08-04796, 2008 WL 4447678, at *12 (C.D. Cal Sept. 30, 2008) (noting that one decade after *Folb* the "contours of the [federal mediation] privilege [are]… unclear" and refusing to apply *Folb*, instead applying Fed. R. Evid. 408 to a mediation communication between the parties that gave notice of the amount in controversy).

For example, in *ACQIS* the district court held that "communications to which a mediator was personally privy, communications that were directly made at a mediator's explicit behest, or communications undertaken with the specific intent to present them to a mediator for purposes of mediation are protected by the federal mediation privilege." *ACQIS*, 2017 WL 2818984, at *2. It seems unlikely that a policyholder-insurer communication for purposes of fulfilling the duty to cooperate would fall within those parameters.

Federal trial courts may look to their own local rules dealing with ADR for guidance – even if the mediation is not being conducted under those rules (as is often the case). This can lead to conflicts. For example, the Northern District of California ADR Local Rule 6-12(a) contains exceptions that are not found in the California statute, and also suggests that the court balance the "interest in mediation confidentiality" against the "asserted need for disclosure," which conflicts with California's rather absolutist statute and court interpretations of the statute. Federal courts applying federal common-law or local rules routinely permit such evidence of bad-faith conduct during mediation. *See, e.g.*, *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1058-59 (E.D. Mo. 2000); *Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423, 424 & n.1 (10th Cir. 1996); *Angiolillo v. Collier County*, No. 10-10895, 394 Fed. Appx. 609, 615 (11th Cir. Aug.

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court also noted that the parties used a private mediator taking the mediation outside of the local ADR rules. *Id.* However the court did not directly address *Folb.* The Ninth Circuit excluded the mediation evidence based on the confidentiality provision in the parties' mediation agreement: "All statements made during the course of the mediation or in mediator follow-up thereafter at any time prior to complete settlement of this matter are privileged settlement discussions ... and are nondiscoverable and inadmissible for any purpose including in any legal proceeding... No aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial, or other proceeding." *Id.* Including such a provision in a mediation agreement where a defending insurer participates in the mediation would likely be effective for the purposes discussed in this paper, even if federal law applied. However, a more narrowly drawn mediation agreement (such as one that refers to "the parties") may not be effective in blocking a plaintiff in the underlying litigation from discovering policyholder-insurer communications.

25, 2010). By contrast, in *Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc.*, 26 Cal. 4th 1 (2001), the court interpreted California's statute to prohibit such evidence.[13]

B. Choice of Law Issues re Mediation Confidentiality

As demonstrated above, state law matters when it comes to the protection of communications with an insurer as part of a mediation process; therefore, choice of law principles assume great importance. Before choosing a strategy of sharing information with an insurer under "mediation privilege," then counsel need to know what mediation privilege law will apply – so that they can shield the information from discovery by the plaintiff or other party, or so that they can know how hard to push for mediation-agreement language that is appropriately protective.

Figuring out what state law will apply is not as easy as it may sound, because coverage disputes frequently cross state boundaries. Suppose that you have underlying litigation pending in California federal court, involving Delaware state law claims and also federal-law claims, being mediated in New York, and an insurance policy negotiated and delivered in Illinois. Will New York mediation law apply, or California? Is there a chance that Illinois mediation privilege law may apply? How about federal mediation privilege? Because these mediation privilege laws may differ, your strategy may depend on the answer. And the answer may depend on where the dispute over application of the privilege takes place.

1. Plaintiff Seeking to Enforce Subpoena in Underlying Litigation

If the plaintiff in the underlying litigation issues a subpoena to the insurer for information provided by the policyholder, a motion to compel obedience with the subpoena would be litigated in the California federal court, or in the federal court where compliance with the subpoena was requested. *See* Fed. R. Civ. P. 45. Therefore, the federal court would look to Federal Rule of Evidence 501 once the insurer invoked "privilege" as the basis for refusing to comply with the subpoena.

Under Fed. R. Evid. 501, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision," while "common law… governs a claim of privilege" for other claims. Because in our hypothetical the underlying litigation involves both state-law and federal-law claims, it is a "mixed" case – so what law applies? In the Ninth Circuit, and (it appears) other federal courts, federal common law would apply. *See Wilcox v. Arpaio*, 753 F.3d 872 (9th Cir. 2014); *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009); *see also Mem'l Hosp. for McHenry Cty. v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) (where "principal claim" was under federal law, federal common law on privilege would be applied in discovery dispute). And as noted above, federal common-law mediation privilege (if it exists at all) has been interpreted to be less protective of mediation communications than most state laws.

If the underlying litigation only involved state-law claims, then the state law governing those claims would govern the determination of the privilege to the policyholder-insurer

[13] *See In re Acceptance Ins. Co.*, 33 S.W. 3d 443, 452-53 (Tex. App. 2000) (interpreting Texas statute to preclude evidence of the "manner in which participants negotiate" in mediation).

communications.[14] Fed. R. Civ. P. 501. So, if we changed our hypothetical so that the underlying litigation only involved Delaware-law claims, then Delaware mediation privilege law would apply – which would provide broad protection, but potentially only for those communications made to and by the parties themselves, as noted above.

2. Disclosure Sought in Follow-On Coverage Litigation

To return to our hypothetical, let's assume that the California federal-court litigation involving Delaware state-law claims and federal claims settles without insurer participation, and that six months later the insurer files a declaratory judgment action in Illinois federal court for a declaration that the insurer has no obligation to reimburse the policyholder, based in part on the policyholder's purported failure to cooperate. What law will apply if the policyholder seeks to introduce evidence of what information was disclosed to the insurer during the mediation?

Because Illinois law (the place in which the insurance policy was negotiated) would most likely supply the "rule of decision," then Illinois mediation privilege law would apply, under Fed. R. Evid. 501. Note that at the time of the mediation (in New York) of the California lawsuit it is unlikely that anyone would have anticipated that Illinois mediation privilege law would have anything to do with their communications.[15]

C. Strategic Choices

Evidentiary issues are often in play while a policyholder and insurer are communicating during the underlying litigation. For example, experienced policyholder counsel know that a policy-limits settlement demand made "outside" of mediation (and labeled accordingly) holds much greater value than a mediation-protected demand that may be useless as evidence in later litigation. But there are strategic choices to be made that go beyond individual communications.

Courts generally do not countenance a party using mediation privilege (or any privilege) as both a "sword" and a "shield." In several coverage cases courts have taken parties to task for accusing the other side of misconduct during mediation and then trying to shield exculpatory information from discovery. These courts have sometimes invoked an equitable exception to mediation privilege, or constitutional due process, as the basis for refusing to shield mediation communications that are sought in follow-on coverage litigation. *See Strong v. GEICO Gen. Ins. Co.*, No. 8:16-CV-1757-T-36JSS, 2017 WL 1006457, at *4 (M.D. Fla. Mar. 15, 2017) (invoking Florida "sword and shield" doctrine to hold that insured could not use mediation privilege to prevent evidence of mediation when insured was alleging insurer bad faith based on failure to settle at mediation); *Milhouse v. Travelers Commercial Ins. Co.*, 982 F. Supp. 2d 1088, 1107, 2013 WL 6044306 (C.D. Cal. 2013) (insured failed to preserve error in admitting

[14] This may not be the case if the issue under consideration is a collateral procedural issue rather than the merits of the case. In *Molina v. Lexmark Int'l, Inc.*, No. CV 08-04796, 2008 WL 4447678, at *6 (C.D. Cal. Sept. 30, 2008) and *Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 975 (9th Cir. 2007), the courts applied federal common-law to the question whether a mediation communication could be used to establish the "start date" for the deadline to timely remove the case, despite the fact that state law controlled the substance of the claims.

[15] Unless they had attended this CLE.

mediation statements, but even if it had, due process required the mediation statements to be admitted), *aff'd*, 641 F. App'x 714, 2016 WL 707019 (9th Cir. 2016) (CA law) (upholding evidentiary ruling on basis that it was not preserved; not addressing due process issue); *but see Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 259, 2002 WL 31833440 (Tex. App. 2002), *review granted, judgment vacated, and remanded by agreement* (Mar. 26, 2004) (affirming exclusion of insured's conduct during mediation where insurer was accused of failing to settle first party claim promptly and sought to use insured's unreasonable conduct during mediation to explain delay).

As a result, counsel should consider how to strike a balance between fulfilling cooperation obligations, while shielding information from the plaintiff, and making sure that they will be able to introduce evidence that may need in later coverage litigation.

JOINT DEFENSE AND COMMON INTEREST AGREEMENT

This Joint Defense and Common Interest Agreement ("Agreement") is entered into by and among _____ and _____, including their affiliates, employees, and legal representatives (collectively the "Parties"), through their respective undersigned counsel.

A. Statement of Purpose - Common Interest

1. _____ is a defendant in the case styled _____ (the "Lawsuit").

2. The Parties have concluded that it is in their individual and mutual best interests in relation to the Lawsuit that the Parties be able to confer regarding the defense of the Lawsuit, and to share certain information pertinent to the Lawsuit. The Parties thus wish to share relevant information in confidence in order to: (a) further their common interest; and (b) comply with insurance policy provisions concerning their respective duties and obligations. Accordingly, and pursuant to this Agreement, the Parties wish to communicate regarding the Lawsuit without waiving attorney-client privilege, work product immunity or any other applicable privilege or immunity. Such communications will best enable the Parties to pursue their separate but common interests and meet the information sharing and cooperation requirements of the Policies. The Parties agree and understand that this Agreement does not – and is not intended to – restrain or limit the ability of _____ to conduct its defense, and the separate and independent representation of each party by its respective counsel.

B. Common Interest Materials

1. In order to meet the Parties' common interest and _____'s cooperation requirements under the Policies, the Parties have concluded that the common interests of the Parties are best served by _____ sharing with _____ certain information in writing, and/or orally, including but not limited to budgets, litigation plans, communications, documents, factual and legal analyses and memoranda, reports, and content/records of in-person, telephonic, or other electronic

meetings/conferences, all of which is included within the term "Common Interest Materials" used herein.

2. Nothing in this Agreement shall bind or obligate _____ to agree to a single course of action, disclose any communication, or to take any specific action with respect to the Lawsuit.

3. Nothing in this Agreement shall bind or obligate _____ to treat any of its own materials as Common Interest Materials.

4. Notwithstanding anything herein to the contrary, _____ may freely use and disclose materials which qualify as Common Interest Materials if such materials (i) are already lawfully within the possession of _____ or its counsel prior to the execution of this agreement (including any predecessor oral agreement), (ii) are or become generally available to the public (other than as a breach of this Agreement), or (iii) have been independently developed by _____ or its counsel. All other provisions of this agreement regarding disclosure of materials shall be read in conjunction with this provision

C. Expectation of Confidentiality

1. The Parties agree that all communications among and between the undersigned and any interviews of witnesses or prospective witnesses obtained by or on behalf of counsel who are a party to this Agreement shall be confidential and are protected from disclosure to any non-signatory by the attorney-client privilege, work product immunity and other applicable privileges and immunities. Common Interest Materials provided by _____ to _____ are provided solely for the internal use of _____ and its counsel with respect to the Lawsuit and administration of the Policies, shall be kept strictly confidential, and will not be disclosed to any third party except as provided in this Agreement or as otherwise required by law. All documents provided pursuant to this Agreement shall be marked "Privileged Common Interest Material" or shall be conveyed under cover of letter or email that is marked "Privileged Common Interest Material," but in any event shall be governed by the terms of the

Agreement. Failure to mark Common Interest Materials as such will not waive the attorney-client privilege, the work product privilege or other applicable privileges and immunities.

2. It is the desire, intention, and mutual understanding of the Parties: (a) that the sharing of Common Interest Materials between or among one another is not intended to, and shall not, waive or diminish in any way the confidentiality of such materials or their continued protection under the attorney-client privilege, the work product doctrine, or any other applicable privilege or protection; and (b) that all Common Interest Materials provided by a party pursuant to this Agreement that are entitled to protection under the attorney-client privilege, the work product doctrine, or other applicable privileges or protections, shall remain entitled to such protection under the joint defense and common interest doctrines, and may not be disclosed to persons other than those described in Paragraph 4 herein without the consent of the providing party. The Parties also intend and understand that any disclosure of Common Interest Materials pursuant to this Agreement will not constitute a waiver of any other available privilege or protection. Nothing contained in this Agreement shall require any party to this Agreement to share Common Interest Materials with any other party or parties.

3. Nothing contained in this Agreement shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney, and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any joint defense participant who testifies at any proceeding because of such attorney's participation in this Agreement. It is herein represented that each party has been specifically advised of the information in this Paragraph. Moreover, each party to this Agreement agrees that in the event that a party becomes adverse to any other party, nothing in this Agreement shall create a conflict of interest so as to require the disqualification of any counsel from the representation of his or her client and each party waives any such conflict of interest claim

4. The Parties further agree that they will not disclose any exchanged Common Interest Materials received by them from any other party to this Agreement to anyone except (a) any employee of _____ or _____, including, but not limited to, any employee of any affiliate, subsidiary and/or parent and/or auditor of those entities; (b) any reinsurer or regulator; (c) any outside counsel of record for any party to this Agreement; and (d) any paralegals, consultants, experts and/or support staff who are directly employed by or retained by and assisting undersigned and/or outside counsel. All authorized persons permitted access to Common Interest Materials shall be specifically advised that such Materials are privileged and subject to the terms of this Agreement.

5. Unless agreed to by the Parties, any shared Common Interest Materials, and the information contained therein, are to be used by each person or party receiving them solely in connection with the defense of _____ in the Lawsuit. Neither the Common Interest Materials nor the information contained therein may be used by any person or party receiving them for any other purpose whatsoever, unless independently obtained in discovery in another matter, or by agreement of the Parties.

6. If any other person or entity requests or demands access to Common Interest Materials provided pursuant to this Agreement, by subpoena or otherwise, the party receiving the demand or subpoena shall notify the party who supplied those materials of such request within a reasonable time. The party receiving the demand or subpoena shall take all reasonable steps necessary or appropriate to permit the assertion of all applicable rights and privileges with regard to said Common Interest Materials in the appropriate forums and shall cooperate with reasonable requests by the other Parties to this Agreement in any proceeding relating to the disclosure sought.

7. These limitations on disclosure do not prohibit or limit disclosure by _____ to accountants, consultants and other experts retained by counsel to assist in rendering legal advice in this matter, whose work is performed subject to applicable privileges. In addition, disclosures may be made

by _____ to governmental agencies, self-regulatory organizations or other third parties if necessary to fulfill _____'s legal obligations or its agreements to provide cooperation to regulators or the government.

8. All persons permitted access to Common Interest Materials disclosed under this Agreement shall be specifically advised that the Common Interest Materials are privileged, confidential and subject to the terms of this Agreement. Common Interest Materials shall be used by _____ and its counsel solely in connection with the Lawsuit and administration of the Policy.

D. Withdrawal Only Upon Prior Written Notice; Previously Shared Materials Remain Protected; Conclusion of Review

1. In the event that any party determines that it no longer has, or will no longer have, a mutuality of interest in a joint defense, such party will promptly provide written notice to every other party of its withdrawal from the Agreement, which will thereupon be terminated as to that party. Notwithstanding a party's withdrawal, this Agreement shall remain operative as to all previously furnished Common Interest Materials. Nothing herein shall preclude a party, after that party's withdrawal from this Agreement, from retaining and/or continuing to use its own Common Interest Materials, even if they were previously shared with the other party pursuant to this Agreement. _____ and its counsel shall immediately return all Common Interest Materials and copies thereof and shall continue to be bound by this Agreement with regard to any information learned or obtained pursuant to this Agreement.

2. At the conclusion of the Lawsuit or termination of this agreement, _____ and its counsel shall return all copies of all Common Interest Materials in their possession, or shall destroy those Common Interest Materials to the extent permitted by law.

E. Other Covenants

1. This Agreement is effective as of the earliest date that the Lawsuit was tendered to _____.

2. This Agreement may not be amended or modified except by a written agreement signed by both Parties. No additional parties may join this Common Interest Agreement without the express written agreement of all Parties hereto.

3. _____ agrees that it cannot and is barred from use of any Common Interest Materials provided pursuant to this Agreement in any dispute between the parties regarding the claim submitted by _____ to _____ for defense and indemnity as related to the Lawsuit.

4. If any provision of this Agreement is held to be invalid, illegal, or unenforceable, the remaining provisions of the Agreement will remain valid and enforceable.

5. No party shall reveal the existence of this Agreement without the consent of all Parties hereto, unless there is a specific inquiry about the existence of the Agreement from a Government Entity, in which case the Parties to this Agreement must be told of the disclosure promptly.

6. This Agreement shall be governed by the laws of the State of Florida, without giving effect to its conflict of law provisions. Any dispute under this Agreement shall be subject to the exclusive jurisdiction of the state and federal courts residing in Miami-Dade County, Florida. Each party hereby irrevocably waives, to the fullest extent it may effectively do so, the defense of an inconvenient forum to the maintenance of any action in Miami, Florida.

7. The respective signatories may execute this Agreement in separate counterparts, which taken together shall constitute one agreement.

8. The Parties each reserve all rights, remedies and contentions that they may have against each other generally and under the insurance policies issued by _____ save as modified by prior Agreements. Nothing in this Agreement is intended to, or is to be construed as, a waiver or contradiction of, or a support for, any allegation, assertion or position of a party taken outside the terms of this Agreement. Nothing in this Agreement shall be construed as an admission as to any fact or term referenced in this Agreement.

AGREED TO BY:

_____	_____
Name:	Name:
Title: Attorney for	Title: Attorney for
Date: _____	Date: _____