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THE PRIVILEGE OF COOPERATION: WHAT INSURERS AND INSUREDS NEED TO KNOW ABOUT PRESERVING THE PRIVILEGE

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It is hornbook law that documents prepared by a party in anticipation of litigation are protected by the work product privilege. In addition, an attorney's work product is afforded near absolute immunity. However, as insureds are often surprised to learn, the work product protection typically does not extend to documents shared with insurers. Insureds who are provided a defense to a lawsuit by their insurer must balance the duty to cooperate with the insurer with preventing waiver of the privilege based on disclosure of information to a third party. This article addresses the challenges associated with sharing privileged information with the insurer.

Duty to Cooperate

Liability insurance policies generally obligate the insured to cooperate in the insurer's investigation of the claim, to allow the insurer to associate in the defense of the claim, and prohibit the insured from prejudicing the insurer's rights. This is true for policies requiring the insurer to provide a defense or to pay for defense costs even if the insured is defending itself. As part of this "duty to cooperate," insurers typically request written reports from insureds or defense counsel that explain counsel's evaluation of the claims and damages and counsel's strategy of the case—counsel's core work product. While insureds and counsel may be reluctant to provide this information for fear of waiving privilege, the failure to do so may result in the insurer arguing that the insured's duty to cooperate has been violated and the insurer may be relieved of its duty to defend or advance defense costs.[1] The law on whether an insured must disclose privileged information to its insurer pursuant to the cooperation clause is far from settled.[2]

While insureds often feel that they face the Hobson's choice of providing documents requested by the insurer to satisfy their obligation to cooperate although risking a waiver of privilege or withholding such documents and jeopardizing coverage, many courts have applied the "common interest" or "joint defense" doctrine to prevent a waiver of privilege.[3]

However, the common interest doctrine can act as both a sword and a shield— a sword allowing insurers to get information from their insureds that they would not otherwise be allowed to get and a shield preventing third parties from accessing this information.

Common Interest Doctrine As a Sword

As noted above, the common interest doctrine has been used as a sword by insurers to demand privileged communications based on the cooperation clause. The law is unsettled on the issue of whether an insurer is entitled to these privileged materials in a later coverage dispute.[4] Additionally, in those jurisdictions permitting such discovery, courts may limit discovery to the period of time prior to the insured and insurer's interests becoming adverse.[5]

Common Interest Doctrine As a Shield

Fortunately for both insurers and insureds, the common interest doctrine also acts as a shield to prevent third parties' attempts to access privileged information shared between the insurer, defense counsel, and the insured. A recent Northern District of Alabama decision sheds light on the protection afforded these communications, particularly when sought by claimants.[6] There, the plaintiffs served a subpoena on certain defendants' insurers seeking all communications between the insurer and their insureds regarding the antitrust suit. The court held that "[a]s with any liability-carrier coverage, counsel representing the [defendants] share with the liability carrier information, opinions, assessments, and strategy related to the covered litigation [and] … [s]uch opinion work product documents, and attorney-client communications *made as part of a joint defense*, are almost certainly never subject to discovery."[7] The *Blue Cross* decision adds to the few decisions on this issue making clear that a claimant is not entitled to privileged communications exchanged between the insured, defense counsel, and the insurer.

Conclusion

In conclusion, the common interest or joint defense doctrine creates a sword and a shield in the insurance context. Insureds must be aware that information shared with defense counsel may become available to an insurer, potentially even to deny or limit coverage. And additionally, third parties, such as claimants, may argue that privilege has been waived and attempt to get access to defense work product. Insureds and insurers alike must assert that they share a common interest and joint defense, and if necessary, execute a non-disclosure and joint defense agreement to ensure there is no doubt.

Endnotes

[1] *See Travelers Indem. Co. of Connecticut v. Attorney's Title Ins. Fund, Inc.*, 2:13-CV-670-FTM-38CM, 2016 WL 3629606, at *9 (M.D. Fla. 2016), *appeal docketed*, No. 15-15387 (11th Cir. Aug. 10, 2016) (finding that insured who refused to turn over settlement documents to its insurer, citing the mediation privilege, materially breached the cooperation clause of the policy).

[2] *Compare Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 59, 730 A.2d 51, 63 (1999) (discussing disclosure in context of coverage dispute, but finding that the cooperation clauses did not require disclosure of privileged documents where the insurer had reserved its rights as insurers had failed to fulfill the predicate of associating in the defense as required by the cooperation clauses at issue), *with Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 192-93, 579 N.E.2d 322, 328 (1991) (holding that cooperation clause "renders any expectation of attorney-client privilege…unreasonable" and compelling disclosure of insured's defense counsel's files in coverage action).

[3] *See Sun Capital Partners, Inc. v. Twin City Fire Ins. Co., Inc.*, 12-CV-81397-KAM, 2015 WL 11921411, at *2 (S.D. Fla. 2015) (stating that the "common interest rule" "protect[s] the confidentiality of communications passing from one party to the attorney for another party where a joint defense or strategy has been decided upon and undertaken by the parties and their respective counsel"); *See also Coregis Ins. Co. v. Lewis, John, Avallone, Aviles & Kaufman, LLP*, 01 CV 3844 (SJ), 2006 WL 2135782, at *15 (E.D.N.Y. 2006) (stating that the doctrine "allows an insurer aligned in interest with the insured to have access to privileged communications between the insured and its counsel, without breach of the attorney-client privilege.").

[4] *Compare MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 613 (S.D. Fla. 2013) (finding that insureds "voluntarily purchased an insurance policy which included a cooperation clause and other provisions which made it obvious…that the insurer and insured would share the same legal agenda if faced with claims made against the insured."), *with E. Air Lines, Inc. v. U.S. Aviation Underwriters, Inc.*, 716 So. 2d 340, 343 (Fla. 3d DCA 1998) ("[T]he cooperation clause does not eviscerate the attorney-client privilege.").

[5] *See Sun Capital Partners, Inc.*, 2015 WL 1860826 at *5 (requiring insured to produce documents protected by work product privilege to insurer up until time that final denial letter was sent); And, further, communications between its insured and its coverage counsel (or defense counsel regarding insurance coverage) should not be discoverable because sharing such communications is not contemplated by the cooperation obligations under the policy.

[6] *See In Re: Blue Cross Blue Shield Antitrust Litigation*, MDL No. 2406, Case No. 2:13-cv-20000-RDP, Disc. Order No. 57 (N.D. Ala. July 6, 2017).

[7] *Id.* at pg. 5 (emphasis added).

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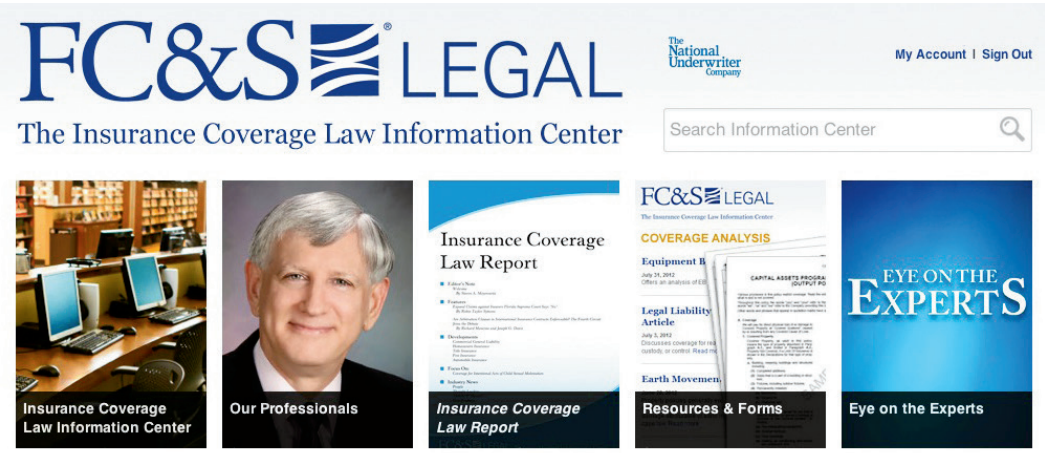

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