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Shameful Leaks or Legitimate Sharing?

Emerging Threats Arising out of the Relationship Between Insurers, Insureds, and Defense Counsel

(1) Avoiding estoppel of coverage positions in the aftermath of *Cosgrove v. National Fire & Marine Insurance Co.*, (D. Ariz., 14-2229, Apr. 10, 2017).

Can communications from insurance defense counsel, retained by an insurer, cause an estoppel of coverage defenses?

A defense counsel's report to an insurer was the basis of waiver in *Cosgrove v. National Fire & Marine Insurance Co.*, 14-2229 (D. Ariz. Apr. 10, 2017). The ruling was sealed and vacated on May 10, 2017, apparently the result of a settlement and definitely contemporaneous with a joint stipulation of dismissal filed by the parties. The case remains relevant, not only because it seems to have forced the insurer to settle, but also because an amicus group known as United Policyholders recently moved to un-seal and un-vacate the opinion.

Karen Cosgrove hired WTM Construction to remodel her home. WIM's insurer National Fire & Marine hired counsel and undertook the defense of WTM and the Mitzels under a reservation of rights. One of the policy provisions on which National Fire & Marine reserved its rights was the "Subcontractor Exclusion, pursuant to which if the insured uses subcontractors, and the subcontractors do not agree to indemnify and hold harmless the insured, and name the insured as an additional insured on their policy (or something along those lines) then no coverage is owed.

At the outset of the case, defense counsel wrote to the adjuster stating that he met with Mr. Mitzel and would "gather as much information as possible regarding the plaintiffs' allegations and the extent to which WTM Construction actually performed work at the Cosgrove residence." Shortly thereafter, defense counsel advised the adjuster that he had learned that "[a]ll construction work was done by subcontractors except for the framing" and that "[w]e have been unable to locate any sub-contract agreements." Defense counsel thought he learned this information from Mr. Mitzel and a review of the job file.

Ms. Cosgrove's case against WTM did not settle in part because National Fire & Marine was not willing to pay the settlement demands because it was placing value on its potential coverage defense – the Subcontractor Exclusion. WTM and Congrove entered into a settlement and Morris agreement and WTM assigned to Cosgrove all of WTM's rights under its policy with National Fire & Marine.

The court ruled that the insurer was estopped from asserting the Subcontractor Exclusion as a coverage defense. Cosgrove argued that defense counsel disclosed information that he obtained from Mr. Mitzel

– the fact that there no subcontractor agreements -- during the course of the attorney-client relationship and the insurer is relying on that information to deny coverage. The insurer countered that the attorney did not disclose confidential or privileged information, which the subcontractor information was not.

The insurer argued:

[T]he information that [defense counsel] learned about the subcontractors was not confidential information. Rather, defendant contends that all [defense counsel] learned was the identity of who had performed the work on the project and that WTM had no written agreements with its subcontractors. Defendant argues that there is no evidence that suggests that WTM intended to keep this information confidential or that Mr. Mitzel relayed this information to [defense counsel] in confidence. In short, defendant argues that the information about the subcontractors was simply routine information and that this information in a construction defect case is almost always a known fact based on the insured's job file.

The court disagreed:

[Defense counsel] used the attorney-client relationship with WTM to gather information that he gave to defendant, which defendant then used to the detriment of WTM and now wants to use to deny coverage. At the point [defense counsel] disclosed the subcontractor information to defendant, he knew, or had reason to know, that WTM's policy contained the Subcontractors Exclusion and that defendant may attempt to deny coverage based on this exclusion. Yet despite this knowledge, [defense counsel] communicated to defendant the very information that defendant would need to deny coverage based on the Subcontractors Exclusion. . . . [Defense counsel] owed his full loyalty to WTM, but it is clear that this loyalty was 'was diluted by his allegiance' to defendant.

The court also ruled that, contrary to the insurer's argument, "there is no requirement that the information in question be independently confidential." The information need only "have been obtained via the attorney-client relationship and that the disclosure of the information be to the detriment of the insured." Thus, the insurer was estopped from asserting the Subcontractor Exclusion as a coverage defense. The court indicated that the outcome would have been different if the insurer "had done its own investigation of WTM's claims, rather than relying on the information disclosed by the attorney retained to represent WTM."

If the "United Policyholders" (apparently a group of plaintiff attorneys looking to score in other coverage actions) succeeds in un-sealing and un-vacating the opinion, it will be a thorn in the sides of both insurers and attorneys.

(2) How to get Independent/Cumis Counsel to report necessary details to insurers without waiving privilege?

Without a tripartite retainer agreement, insurers sometimes have minimal leverage to mandate defense counsel's use of litigation guidelines or reporting.

The Cooperation Clause in most policies provides that the insured must cooperate with the insurer in the investigation or settlement of the claim. However, the extent of cooperation required by an insured pursuant to the insurance contract is often unclear.

Sometimes, courts around the country look to California cases interpreting its *Cumis* statute for persuasive authority regarding disclosure requirements for independent counsel. *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Op. 74, 357 P.3d 338, 341 (2015); *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993) (concur, Moore, J.) (looking to language of 2860 to determine insurer's rights). The California *Cumis* statute (Civil Code § 2860) provides:

When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

Accordingly, *Cumis* statutes mandate limited cooperation between a policyholder and an insurer. The duty encompasses evaluation documents that enable the carrier to decide whether to settle the lawsuit for the amount negotiated by *Cumis* counsel. *Assurance Co. of Am. v. Haven*, 32 Cal.App.4th at 88, 38 Cal.Rptr.2d 25 (listing "evaluations"); *Lectrolarm Custom Sys., Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567, 570–71 (E.D.Cal.2002) (statute requires insured's attorney to share with insurer information about "potential liability, probability of success, and possible range of damages").

Therefore, if applicable, this standard would require CB&I's counsel to give Zurich written updates on the litigation and settlement discussions. Cases applying the statute clarify that a policyholder is not required to disclose privileged, coverage-relevant information to the insurer. *See, Rockwell Int'l Corp. v. Superior Court*, 26 Cal. App. 4th 1255, 1264 (1994). The cases suggest an insurer's only remedy against a non-cooperating attorney is to file a separate lawsuit for negligent breach of his statutory duties. *Assurance*, 32 Cal.App.4th 78, 88–92.

In the absence of clear statutory language, the majority of jurisdictions have protected defense counsel's privileged files from disclosure to insurers. *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 60-63 (1999) (rejecting the cooperation clause and the "common interest" doctrine as grounds for compulsory disclosure); *Eastern Air Lines, Inc. v. United States Aviation Underwriters, Inc.*, 716 So. 2d 340, 343-44 (Fla. App. 1998) (denying an insurer's motion to compel discovery of communications between its policyholder and independent counsel, rejecting the insurer's arguments based upon the cooperation clause and the "at issue" doctrine); *RML Corp. v. Assurance Co. of Am.*, No. CH02-127, 2002 Va. Cir. LEXIS 392, *18 (Oct. 25, 2002) (rejecting insurer's common interest and "at issue" arguments); *Dedham-Westwood Water Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. Civ. A. 96-00044, 2000 Mass. Super. LEXIS 29, *15 (rejecting an insurer's argument that the cooperation clause and the common interest doctrine entitled the insurer to discover communications between the policyholder and its independent counsel during the underlying litigation); *State v. Hydrite Chem. Co.*, 220 Wis. 2d 51, 78-79 (1998) *First Pac. Networks, Inc. v. Atl. Mut. Ins. Co.*, 163 F.R.D. 574 (N.D. Cal. 1995); *North River Ins. Co. v. Columbia Cas. Co.*, No. 90 Civ. 2518, U.S. Dist. LEXIS 53 (S.D.N.Y. Jan. 5, 1995) (no common interest); *Owens-Corning Fiberglass Corp. v. Allstate Ins. Co.*, 660 N.E.2d 765, 769 (Ohio Ct. Com. Pl. 1993) (holding that there was no "common interest" between an insurer and policyholder where the insurer had neither defended nor indemnified the policyholder); *Int'l Ins. Co. v. Newmont*

Mining Corp., 800 F. Supp. 1195 (S.D.N.Y. 1992) (insurer's common desire for successful underlying defense is insufficient basis to establish common interest for privilege purposes).

In contrast, the Illinois Supreme Court, following a minority position, held that the attorney-client privilege did not prevent the insurer from discovering the policyholder's counsel's files in the underlying litigation—even though the policyholder had independent defense counsel in that litigation. *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 201 (1991). The court found that the relevant cooperation clause imposed a broad duty of cooperation which meant that the attorney-client privilege did not bar discovery of privileged communications to the insurer and held that the policyholder and insurers shared a common interest in defeating or settling the underlying claims. *Id.*

(3) Updates re Advice-of-Counsel defense in bad faith claims: how to protect yourself, and how extensive is potential waiver of privilege?

A. Brief background on the “advice of counsel” defense, use of counsel in insurance matters, and the loss / waiver of privilege that can occur in such cases

When an insurer is accused of bad faith for an improper settlement or coverage decision, it has the option to invoke an advice-of-counsel defense. If the insurer relied in good faith on counsel's input, this may help to portray the insurer as reasonable, avoiding a bad faith verdict. Still, the overall reasonableness of the insurer's actions will be examined. After all, the lawyer is not handling the whole process for the insurer. Indeed, if the lawyer is too closely involved with claims handling or business decisions, the privilege evaporates for that separate reason – as the lawyer's communications are non-privileged business communications as opposed to legal advice.

A major drawback to the advice of counsel defense is well-understood: it places the attorney's advice at issue, thereby waiving attorney-client privilege with respect to the subject matter of the advice. *See, Static Control Components, Inc. v. Lexmark Int'l., Inc.*, 250 F.R.D. 575, 580 (D. Colo. 2007) (citing *In re EchoStar Commc'ns. Corp.*, 448 F.3d 1294, 1302-1305 (Fed. Cir. 2006)). “This [waiver] rule allows the opposing party to probe fully all advice received by the alleged [wrongdoer] and which played any part in its belief concerning [the alleged conduct]. *Id.* Some courts allow counsel to protect the legal work and mental impressions (work product) that has not been shared with the client. *Id.*; *Nicholas v. Bitmous Cas. Corp.*, 235 F.R.D. 325, 333 (N.D. W. Va. 2006) (“[a]sserting the advice of counsel defense does not waive information protected by the work-product doctrine unless counsel communicated the information to the defendant.”); *see, Cordis Corp. v. SciMed Life Sys., Inc.*, 980 F. Supp. 1030 (D. Minn. 1997), *see also, Thorn EMI N. Am., Inc. v. Micron Tech., Inc.*, 837 F. Supp. 616, 620 (D. Del. 1993).

While this thrust of this waiver rule may seem to be straightforward – privilege being waived when an insurer invokes the advice of counsel defense -- courts in many jurisdictions today have expanded the rule to include a murkier concept of implied waiver. According to some courts, an implied waiver can occur whenever an insurer broadly asserts its good faith in handling a claim. The assertion of good faith, in turn, arguably places at issue all information known to the insurer, including legal advice. Courts have adopted a variety of approaches to the notion of applied waiver in these circumstances. We'll group them into three approaches for purposes of discussion, identify the real dangers for insurers, and follow some of the recent arguments and results.

B. Understanding courts' different approaches to finding an implied waiver of privilege

First, some jurisdictions have adopted a *per se* rule (nearly automatic waiver), meaning that an insurer loses its claim of privilege over certain key documents if it contests an allegation of bad faith. Courts in Ohio are a leading example of eliminating insurer's claims of privilege over certain key documents in bad faith cases. *E.g. Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 2001 Ohio 27, 744 N.E.2d 154, 158 (Ohio 2001) ("[I]n an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage."). The Ohio legislature, and some courts, have attempted to soften this rule in certain respects by bifurcating issues, requiring a *prima facie* showing of bad faith, and utilizing "in camera" reviews. But a number of Ohio courts are still fairly strict in requiring production of privileged materials without these protections in bad faith cases.

Second, on the other extreme, some jurisdictions are restrictive in finding a waiver and very protective of the privilege. These will only find an implied waiver if the insurer directly puts the attorneys advice at issue in the case. *Leaphart v. Nat. Union Fire Ins. Co.*, 2017 Mont. Dist. LEXIS 16, *26 (Mont. 8th Dist., July 28, 2017) (emphasizing that waivers should be voluntary, knowing, and intentional); *2,022 Ranch, L.L.C. v. Superior Court*, 113 Cal. App.4th 1377, 1395, 7 Cal. Rptr. 3d 197 (2003) ("waiver can only be shown by 'demonstrating that the client has put the otherwise privileged communication directly at issue'"); *see also, Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163-164 (Tex. 1993) (finding no waiver; setting rules which requires "offensive use" of the material in seeking affirmative relief, with the confidential material going to "the very heart of the affirmative relief sought").

Third, many jurisdictions take an approach which attempts to balance the need for discovery against the importance of maintaining the privilege under the circumstances. These courts may establish clear rules which: (a) require a plaintiff to establish a "prima facie" case of bad faith before discovery of privileged materials will be required; and/or (b) examine privileged materials in camera to determine if they provide any evidence of bad faith. *ContraVest Inc. v. Mt. Hawley Ins. Co.*, 2017 U.S. Dist. LEXIS 48638, *1-2, 2017 WL 1190880 (D. S.C., Mar 31, 2017). Or they may attempt to review the position of the insurer versus the nature of the discovery requested to determine if a waiver should be found. For example, in *Lee (Arizona)*, the insurer was deemed to have impliedly waived privilege where it argued that its interpretation of its policies, statutes, and case law were reasonable. The insurer did not seek to expressly rely upon the advice of counsel in defending itself, but the court ruled that the argument of "reasonableness" in its interpretation of legal materials placed "at issue" the advice that it had received from its counsel. The court thus found the privilege to be waived.

C. Defining the extent of the waiver if one is found

When the privilege is waived, as one recent court stated in the bad faith context, the opposing party is "entitled to discover the attorney-client communications relating to the subject matter of the advice." *Spargo v. State Farm Fire & Cas. Co.*, 2017 U.S. Dist. LEXIS 96823, *3-5, 2017 WL 2695292 (D. Nev., June 22, 2017). This proposition may seem reasonable, but defining the "subject matter" of the advice can be difficult. Some courts including California are restrictive, making clear that "[w]hether express or implied, the scope of a waiver must be narrowly construed and 'fit within the confines of the waiver.'" *Garcia v. Progressive Choice Ins. Co.*, 2012 U.S. Dist. LEXIS 105932, *9, 2012 WL 3113172 (S.D. Cal., July 30, 2012) (citation omitted); *Transamerica Title Ins. Co. v. Superior Court*, 188 Cal.App.3d 1047, 1052, 233 Cal. Rptr. 825 (1987) (scope of waiver must be "narrowly defined"). Other courts like those in

Ohio restrict the waiver on the basis of timing, stating that plaintiffs are entitled to materials “related to the issue of coverage that were created prior to the denial of coverage.” *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 2001 Ohio 27, 744 N.E.2d 154, 158 (Ohio 2001). In sum, a variety of approaches exist on the extent of waiver, depending on the jurisdiction.

D. Difficult choices are created for insurers facing the risks of implied waiver

The real danger for insurers arises not only when courts find *per se* waivers, but also when they undertake a balancing test for finding a waiver. In those cases, insurers are often placed in an untenable position of choosing either: (a) defending their actions on the basis of their own reasonable behavior, which can trigger a waiver of privilege; (b) conceding certain arguments about their behavior in favor of focusing only on purely contractual or legal issues; or (c) even avoiding legal counsel in the first place, despite a difficult issue, due to the chilling effect of waiver rules. Insurers and their counsel clearly prefer courts to respect the attorney-client privilege. In order to maximize the chances of preserving attorney-client privilege, it is important for them to understand the best current arguments and strategies for encouraging courts to uphold it.

E. Current arguments and strategies for avoiding a waiver in bad faith cases

There are at least 3 ways that insurers can work to reduce the likelihood of losing the protection of attorney client privilege in bad faith cases. First, they should keep lawyers out of the business of claims handling. If legal advice is needed on a specific issue, the request and response should be focused, with the lawyer remaining separated from the actual claims handling process.

Second, once a bad faith claim is filed, the insurer should carefully plan its defense, and if it wishes to protect all privileged items, it should affirmatively state that in its answer that it is not relying upon the advice of counsel defense. There could still be an implied waiver, but disclaiming this defense can be important.

Third, once privileged materials are sought, the insurer (and its counsel) should begin the argument by emphasizing that protection of privilege serves the interests of justice for everyone. Where the concept of privilege is strong, it encourages insurers to be honest in seeking legal advice in difficult situations, preventing legal errors and mistakes. Where it is weakened, insurers may be reluctant to openly share their concerns with counsel, inhibiting counsel from assisting them.

As noted above, some courts will seek to balance the plaintiff’s need for the materials against the benefits of protecting privilege. In that case, insurers should insist that: (a) trial and even discovery be bifurcated between coverage issues and bad faith issues; (b) plaintiff be required to make a prima facie showing of bad faith before privilege can be waived, and that any waiver be narrowly tailored to fit the purposes of the discovery; and (c) the court itself review the materials to determine whether they are relevant to proving bad faith. Further, some courts may allow insurers to invoke work product doctrine to protect certain materials.

(4) Latest developments on privilege issues re in-house counsel and use of outside counsel for claims analysis, with guidelines for the protection of communications between insurers and defense counsel.

Insurers are often able to extend the attorney-client relationship to materials the attorney provides to its client’s liability insurer, by establishing a “tripartite relationship” between the three

parties. *Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 61 Cal. 4th 988, 1012 (2015); *Raymond v. N. Carolina Police Benevolent Ass'n., Inc.*, 365 N.C. 94, 100 (2011); *Koster v. June's Trucking, Inc.*, 244 Mich. App. 162 (2000). The tripartite relationship among an insurer, insured, and defense counsel is the product of two separate contracts: the insurance contract, and the retainer agreement between the insurer and defense counsel. Charles Silver, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L.J. 255, 270 (1995). A tripartite relationship enables an insurer to mandate, via a retainer agreement, defense counsel's use of litigation guidelines and production of litigation reports. The tripartite relationship is formed only after an insurer retains counsel to defend against claims asserted against its insured. Prior to counsel entering into a retainer agreement with an insurer, only a bilateral relationship exists between the insurer and its insured as a result of the insurance policy.

The attorney-client privilege is limited to "those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended. *Cornhusker Cas. Co. v. Skaj*, No. 11-CV-110-S, 2012 WL 12541138, at *4 (D. Wyo. June 13, 2012). The client's disclosure to outside parties waives the privilege, but the common interest doctrine creates an exception. "Despite being labeled a 'privilege' by some courts, the common interest doctrine does not recognize an independent privilege, but is 'an exception to the general rule that the attorney-client privilege is waived upon disclosure of privileged information [to] a third party.'" *Ferko v. NASCAR*, 219 F.R.D. 396, 401-03 (E.D.Tex.2003). "When two or more persons, each having an interest in some problem, or situation, jointly consult an attorney, their confidential communications with the attorney, though known to each other, will of course be privileged in a controversy of either or both of the clients with the outside world, that is, with parties claiming adversely to both or either of those within the original charmed circle." *McCormick, supra*, at 219. The "common defense doctrine" also referred to as the "joint defense privilege" serves to "protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). The doctrine only protects communications when they are part of an ongoing and joint effort to set up a common defense strategy. *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3rd Cir. 1985). A party seeking the benefit of the joint defense doctrine must show that: (1) the communications were made in the course of a joint defense effort; (2) the statements were designed to further that effort; and (3) the privilege has not been waived. *Matter of Beville, Bresler & Schulman*, 805 F.2d 120, 125 (3rd Cir. 1986).

Cornhusker is one of the most illustrative cases. The plaintiff sued the insured employer and insured employee after an auto accident. The insured employee defaulted, so the plaintiff then sued the insurer in garnishment. The insured employee then reached an agreement to cooperate with the plaintiff, and signed an affidavit waiving attorney-client privilege with defense counsel retained by the insurer. The insured employer, however, cooperated with the insurer in defending the tort case. In the garnishment action, the plaintiff requested all attorney-client communications involving the insurer, both insureds, and defense counsel. The insurer claimed the privilege was not waived because of a "common-interest privilege" between all four parties. *Id.* at *4.

Applying Wyoming law (but citing cases from other states), the court recognized this privilege but noted: "the common-interest privilege does not apply between the clients if there has been a 'falling-out,' that is, adversary litigation between them exists." *Citing The Attorney-Client Privilege and the Work-Product Doctrine* 142, 144 (Edna Selan Epstein, ABA Section of Litigation, 3d Ed.1997). Further, "the privilege in respect to outsiders, however, is not breached by virtue of the falling-out of parties who had the common interests." *Id.* Accordingly, the court compelled production of communications between

defense counsel, the insurer, and the insured employee (with whom the insurer had “fallen out”) but not communications between the three of them that also included the insured employer (with whom the insurer had not “fallen out”). The court wrote:

Although [defense counsel] represented the common interests of Cornhusker, R & R [employer], and Steven Rosty [employee], there has been no “falling-out” between these clients. “The confidential communications between the insured, the insurer, and any counsel representing them regarding the matter of common interest are protected by the attorney-client privilege from discovery by third parties.” *Progressive Express*, 975 So.2d at 467. Steven Rosty’s waiver of the attorney-client privilege does not change this result. “One party to a privileged joint or common defense cannot unilaterally waive privileged materials learned during, or crucial to, that joint or common defense.”

Id. at *5, citing *The Attorney–Client Privilege and the Work–Product Doctrine* 145 (citing *Western Fuels Ass’n v. Burlington N. R.R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984) (“This limitation is necessary to assure joint defense efforts are not inhibited or even precluded by the fear that a party to joint defense communications may subsequently unilaterally waive the privileges of all participants, either purposefully in an effort to exonerate himself, or inadvertently.”)). See also, *In re Smirman*, 267 F.R.D. 221 (E.D. Mich. 2010) (“When parties enter into a common-interest agreement, any privileged communications remain privileged unless all parties agree to waive that privilege.”); *Robert Bosch LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 145–46 (D. Del. 2009) (in a joint representation relationship, the co-clients and their common counsel’s communications are protected from disclosure to persons outside the joint representation—waiver of the attorney-client privilege requires the consent of all joint clients). Notably, an argument exists, and has been successful in other states, that a reservation of rights letter constitutes a “falling-out.” *Progressive Express Ins. Co. v. Scoma*, 975 S.2d 461, 466–67 (Fla. Dist.Ct.App. 2007).

A California federal court rejected an argument for waiver due to common interest in *Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567 (E.D. Cal. 2002). In that case, the underlying plaintiff (Lectrolarm) sought discovery of documents sent by Pelco to its insurer, Fireman’s Fund, which was partially paying at least some of Pelco’s independent defense counsel expenses under a reservation of rights. *Id.* The court acknowledged that because of “inherent tension between the carrier’s interest and the interests of the insured,” and because of their separate counsel, “communications between Pelco and [its insurer] are not privileged per se,” and that “[g]enerally, disclosure of otherwise privileged communication to a third party waives the attorney client privilege and/or the attorney work product privilege.” *Id.* However, despite the parties’ potential adversity on coverage, the court held that the “common defense doctrine” precluded a waiver. *Id.*

Joint Defense Agreements

A written joint defense agreement should create additional support for protecting information shared with an insurer under the common interest doctrine. A Pennsylvania court enforced a joint defense agreement in *Executive Risk Indem., Inc. v. Cigna Corp.*, No. 1495, 2006 WL 2439733 (Pa. Ct. Co. Pls, 2006). There, the court noted that a joint defense agreement between an insurer and its insureds was valid until they disagreed on litigation strategy and terminated the agreement, writing:

Attorney-client privilege and work product privilege have been waived as to communications or documents exchanged between Plaintiff Executive Risk and the

other insurers after September 29, 2004. A clear divergence of interest occurred once Plaintiff Executive Risk expressed its unwillingness to attend the mediation. The interests of Plaintiff Executive Risk were no longer identical with the other insurers. The joint defense agreement ceased to exist. Accordingly, Cigna's motion to compel is granted as it pertains to any documents exchanged after September 29, 2004 between Plaintiff Executive Risk and the other insurers and denied as to documents prior to that date.

Id. at *8.

Likewise, a Massachusetts court upheld the privilege for materials shared with two insurers of a defendant in *Rhodes v. AIG Domestic Claims, Inc.*, No. CIV.A. 05-1360-BLS2, 2006 WL 307911, at *11 (Mass. Super. Jan. 27, 2006). The court refused to find waiver even though the two insurers disagreed about how to proceed, writing:

The plaintiffs contend that Zurich no longer shared the common interest with National Union necessary for a joint defense agreement when it tendered its \$2 million policy to the plaintiffs, since Zurich's interest following its tender was to settle the litigation immediately in order to minimize its payment of defense costs. This argument, however, fails for at least three reasons. First, since the plaintiffs rejected Zurich's settlement offer and proceeded to trial, Zurich continued to share a common interest with National Union in minimizing the plaintiffs' damage award at trial. Second, even after tendering its policy, Zurich still retained its obligations to its insured-GAF-to pay the legal fees incurred by Nixon Peabody-GAF's attorney-in defense of the tort litigation and to act reasonably to resolve the claim against GAF. Since Zurich and National Union each continued to owe a duty to their insured, GAF, they continued to share this common interest even after Zurich's tender of its policy. *See, First State Ins. Co. v. Utica Mut. Ins. Co.*, 870 F.Supp. 1168, 1175 (D.Mass.1994). Third, since Zurich was required to continue to pay Nixon Peabody's legal fees even after the tender, Nixon Peabody continued to represent both GAF and Zurich. GAF certainly shared with National Union an interest in limiting the amount of the damage award. Pragmatically, since GAF and National Union plainly shared a common interest after Zurich tendered its policy, and since Nixon Peabody jointly represented GAF and Zurich, it would be impracticable to find that Zurich was no longer part of the joint defense, since it would mean that Nixon Peabody would be barred from sharing joint defense documents with one of its clients (Zurich) without thereby waiving the privilege enjoyed by another client (GAF).

Id. at 11.

A California federal court held that the attorney-client privilege was waived where an insured voluntarily disclosed letters to its insurer, addressing the likelihood of success in the underlying defense, as well as a settlement demand by plaintiffs in that action in spite of a joint defense agreement signed by both the insured and their insurer. *In re Imperial Corp. of America*, 167 F.R.D. 447 (S.D. Cal. 1995). *Id.* The court deemed the joint defense agreement ineffective because the parties were potentially adverse due to coverage concerns. *Id.*

The main takeaway regarding joint defense agreements is that they help parties show a common interest, but they are not effective in creating a common interest, and are only effective to the extent

the common interest already exists.

Work Product Doctrine

Even if a court were to find that attorney-client privilege has been waived, disclosure may still be prevented by relying on the work-product doctrine. “Unlike the attorney-client privilege, the work product privilege is not automatically waived by any disclosure to third persons.” *Cornhusker* at *2. The work-product doctrine is governed by federal law, even in diversity cases. *Frontier Refining, Inc. v. Gorman–Rupp Co., Inc.*, 136 F.3d 695, 702 n. 10 (10th Cir.1998).

Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure provides in relevant part: “Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, **insurer**, or agent).” *Emphasis added*.

Notably, the Tenth Circuit has ruled: “[a]lthough the attorney-client privilege and work-product doctrine are distinct, courts have treated them identically when considering involuntary disclosure. *United States v. Ary*, 518 F.3d 775, 783 (10th Cir. 2008). Therefore, federal courts in Wyoming will see no distinction between the attorney-client privilege and work-product doctrine that would result in different standards of waiver for involuntary disclosure.

Regarding the work product doctrine, the federal court wrote in *Cornhusker*:

The work-product doctrine is intended to shelter “the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.” ... Thus, the work product privilege applies to material that discloses an attorneys’ or legal representatives’ mental impressions, conclusions, opinions, or legal theories and does not protect facts concerning the creation of work product or facts contained within work product. ...

To determine whether documents were prepared in anticipation of litigation, the Court should consider: “(1) whether that document was prepared because of a party’s subjective anticipation of litigation, as contrasted with ordinary business purpose; and (2) whether that subjective anticipation was objectively reasonable.” ...

Id. at *2.

The *Cornhusker* court did not apply this protection to the materials at issue because they involved coverage issues being litigated between the parties. The same court in Wyoming noted in an earlier case:

The joint defense privilege enables counsel for clients facing a common litigation opponent to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege. ... However, a party to joint defense communications may waive the attorney-client privilege by disclosing such confidential information to persons outside the scope of the joint defense relationship. ... Furthermore, a party to joint defense communications may waive the work product privilege by disclosing such privileged information to third parties in such a manner as is inconsistent with the purpose of maintaining the secrecy of such information from current or potential adversaries. ... But, disclosure of work product to

friendly litigants in related cases or to others with friendly interests is not beyond the scope of such privilege and will not constitute a waiver of the same. *Id.*

W. Fuels Ass'n, Inc. v. Burlington N. R. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984). In a non-insurance dispute, the court enforced work product protection between a party and a non-party which had been a co-defendant in prior litigation.

When federal courts evaluate the work product doctrine in the insurance context, they consider whether materials are either made in anticipation of litigation or part of the everyday adjustment process. This can lead to *in camera* review to determine the context in which materials were prepared. *Wachob Leasing Co. v. Gulfport Aviation Partners, LLC*, No. 1:15CV237-HSO-RHW, 2016 WL 3449897, at *3 (S.D. Miss. June 16, 2016). This can often be problematic, but should not be so in this case, because the relevant documents would clearly be oriented toward litigation rather than adjustment.