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Oops the cat is out of the bag: Attorney-Client Privilege and Work Product Protection Between Adjusters and In-House Counsel

I. Introduction

Communications and information exchanged between adjusters and in-house counsel for insurance companies present unique challenges for application of attorney-client privilege and work product protection, and the law is not uniform in this area. In this panel discussion we will explore the factors considered by courts in determining whether such communications and information are protected from disclosure to the insured and/or third-party claimant and the typical disputes that arise in both coverage and bad-faith litigation.

II. Attorney-Client Privilege

Courts typically examine privilege claims for communications with in-house counsel under the same criteria as privilege claims for outside counsel: a communication is privileged if it is (1) between and attorney and a client; (2) for the purpose of rendering legal services; and (3) intended to be kept confidential. Discussed herein are several considerations applying this rule that are particular to the insurance in-house counsel context.

Communication Between Attorney and Client

When an attorney has an organization as a client, as is the case with an in-house counsel and an insurer, it is not always clear whether certain employees or agents of the corporation qualify as the "client" for purposes of applying attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981). Generally, courts apply either the "control group" or "subject matter" test to make this determination.

Under the "control group" test, which focuses on the identity of the communicator, persons in a position to control or substantially participate in corporate decision-making have the capacity to act as a "client" in communicating with counsel. Under the "subject matter" test, which focuses on the nature of the communication, an employee of the corporation qualifies as the "client" if the employee communicates with the attorney at the direction of the employee's superiors or within the employee's duties. *See Upjohn Co. v. United States*, 449 U.S.

383 (1981).

Courts have ruled that an insurance adjuster with responsibility for handling the claim qualifies as a "client" under both tests. *E.g.*, *A & R Body Specialty & Collision Works, Inc. v. Progressive Cas. Ins. Co.*, No. 3:07CV929 WWE, 2013 WL 6044342, at *5 (D. Conn. Nov. 14, 2013) (confidential requests for legal advice from Progressive's employees to in-house counsel privileged from disclosure); *Smith v. Auto-Owners Ins. Co.*, No. 15-CV-1153 SMV/GBW, 2016 WL 11117291, at *1 (D.N.M. Oct. 5, 2016) (correspondence from adjuster to in-house counsel found to be privileged); *In re Goin*, No. 06-17-00047-CV, 2017 WL 2961478, at *4 (Tex. App. July 12, 2017) *citing In re Gen. Agents Ins. Co. of Am., Inc.*, 224 S.W.3d 806, 818 (Tex. App. 2007) (same). However, when an in-house counsel communicates with an investigator, third-party administrator, or other employee or agent of the insurer, those communications may not always be subject to the attorney-client privilege.

In addition, the mere fact that a person sends a document to in-house counsel does not make the document privileged, the privilege protects the communication, not the ~~factual information~~information communicated if it is otherwise discoverable. *E.g.*, *Ex parte Alfa Mut. Ins. Co.*, 631 So. 2d 858, 860 (Ala. 1993) (permitting deposition of in-house counsel to proceed where information sought was underlying facts or information of which the counsel had personal knowledge, not the privileged attorney-client communication with insurer).

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For the Purpose of Rendering Legal Services

The next factor is whether in-house counsel is acting as an attorney for purposes of the communication. The course of an insurance claim proceeds from the initial investigation, the insurer's coverage determination, and potentially litigation between the insurer and insured (and/or claimant) to resolve coverage disputes or bad faith claims. When in-house counsel is engaged in claims handling or investigation, as opposed to rendering legal advice, privilege does not attach. *E.g.*, *Triple Five of Minn., Inc. v. Simon*, 212 F.R.D. 523 (D. Minn. 2002), *aff'd* 2002 WL 1303025 (D. Minn. June 6, 2002) (insurer's in-house attorney's legal communications were privileged, but not communications related to his business-related capacity); *Anastasi v. Fid. Nat. Title Ins. Co.*, 341 P.3d 1200, 1218 (Haw. Ct. App. 2014), *aff'd in part, vacated in part on other grounds,* 366 P.3d 160 (Haw. 2016) (addressing attorney-client privilege when in-house counsel acted in dual roles of coverage counsel and claims handler; reversing trial court's ruling that all documents were privileged, because at least some documents or portions of documents "were not made to facilitate the rendition of legal services," even though some communications were marked by in-house counsel as subject to attorney-client privilege); *AKH Co., Inc. v. Universal Underwriters Ins. Co.*, 300 F.R.D. 684, 693 (D. Kan. 2014) (addressing privilege issues with insurer's in-house counsel, some of which were acting as claims professionals; ruling that communications to or from in-house counsel acting as claims professional were not privileged, but communications with other in-house counsel regarding settlement of claim were privileged).

Because the investigation and adjustment of claims is inherent in the business of the insurer, it can be difficult to separate standard claims handling from the provision of legal advice. Some jurisdictions developed guidelines to evaluate whether a ~~particular communication~~communication to or from an in-house counsel are privileged or merely normal business practices. For example, California employs a "dominant purpose test" when it is

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difficult to determine whether privilege applies, which looks to the "dominant purpose" of both the communication and the in-house attorney's work for the insurer at issue. *See 2,022 Ranch v. Superior Ct.*, 7 Cal. Rptr. 3d 197 (Cal. Ct. App. 2003) *disapproved of on other grounds by Costco Wholesale Corp. v. Superior Ct.*, 219 P.3d 736 (Cal. 2009)).

If an in-house attorney is only providing "business" advice to the adjuster, performing claims investigations, or negotiating on behalf of the insurer, communications related to these "non-legal" functions may be discoverable. *E.g.*, *Mehta v. Ace Am. Ins. Co.*, No. 3:10CV1617 RNC, 2013 WL 3105215, at *2 (D. Conn. June 18, 2013) (ruling that investigation performed by claims specialist who was an attorney was not protected from disclosure: "An insurance company may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigations") (*quoting First Aviation Servs., Inc. v. Gulf Ins. Co.*, 205 F.R.D. 65, 69 (D. Conn. 2001)).

~~Thus~~Thus, in states such as Colorado, a court recently found the results of a factual investigation into the validity of the claim conducted by in-house counsel were not privileged. *Olsen v. Owners Ins. Co.*, No. 18-CV-1665-RM-NYW, 2019 WL 2502201 (D. Colo. June 17, 2019). In *Olsen*, the court ruled that "claim investigations arising in the first-party context, like the claim at issue here, are 'made in the ordinary course of business and are discoverable.'" *Id.* at *3 (citing cases including *W. Nat'l Bank of Denver v. Emp'rs Ins. Of Wausau*, 109 F.R.D. 55, 57 (D. Colo. 1985) (noting that "investigations by a person who is an attorney but acting in the capacity of an investigator and adjustor for the insurance company" prepares an investigative file in the ordinary course of the insurer's business.)).

The privilege also does not apply if the attorney is merely serving as a conduit for information without the purpose of the communication being to further the rendering of legal advice. *E.g.*, *S. Guar. Ins. Co. of Ga. v. Ash*, 383 S.E.2d 579, 583 (Ga. Ct. App. 1989). Thus, courts have found attorney-client privilege not to apply when an attorney simply sends documents to an adjuster without comment or when an in-house attorney is simply one of many persons copied on an email chain. *See*, *e.g.*, *Johnson v. RLI Ins. Co.*, No. 3:14-CV-00095-SLG, 2015 WL 5125639, at *3 (D. Alaska Aug. 31, 2015); *Zurich Am. Ins. Co. v. Superior Ct.*, 66 Cal. Rptr. 3d 833, 846 (Cal. Ct. App. 2007).

Similarly, New York trial court recently concluded that certain communications with the insurer's counsel were not privileged because they were not predominantly of legal character or otherwise seeking legal advice. *See Otsuka Am., Inc. v. Crum & Forster Specialty Ins. Co.*, No. 650463/2018, 2019 WL 4131024 (N.Y. Sup. Ct. Aug. 30, 2019). There, Judge Andrea Masley of the Supreme Court of the State of New York, New York County, ruled that several communications between Crum & Forster ("CF") and its attorney (including the attorney's coverage opinion letter), were not privileged and must be produced. The Court found that CF retained counsel, in part, to provide an opinion on whether the insured's claim was covered. Determining whether a claim is covered is part of the regular business of an insurance company, according to the Court. As such, the Court deemed communications discoverable.

Other states such as Arkansas, however, find witness statements and accident reconstruction reports prepared at the request of counsel remain privileged, because the acquisition of that ~~factual information~~information is a necessary part of the attorney's process

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of providing legal advice to the client. Purely business or transactional advice by the in-house counsel, however, is not subject to the privilege. *Courteau v. St. Paul Fire & Marine Ins. Co.*, 821 S.W.2d 45, 47 (Ark. 1991) (finding because the statements "were made by clients and made at the request of and to inform their own and their corporate employer's attorney for the purposes of facilitating her rendition of legal advice to both," the communications were "absolutely privileged."). While *Courteau* involved outside counsel retained by the insurer, the tasks performed by that attorney are typical of investigative tasks that in-house counsel often undertake, and the same privilege issues would apply.

Intended to Be Confidential

Attorney-client privilege will not apply if the parties to the communication intend to be share it outside of the attorney-client relationship. For example, if in-house counsel drafts a coverage analysis to be shared with the insured, attorney-client privilege may not protect it from discovery by a third-party claimant.

III. Work Product Protection

Work product protection applies to (1) protect disclosure of an attorney's mental impressions (2) prevent discovery of materials prepared in anticipation of litigation or trial, unless the opposing party shows a substantial need for the material and an inability to obtain the substantial equivalent of the material by other means.

Category (1), also known as "opinion work product," and courts generally protect it from disclosure in all cases. However, some states, such as Delaware, allow discovery if the claimant shows a substantial need, though the mental impressions at issue must relate to the "pivotal" issue in the case and the need for discovery must be "compelling." *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 262 (Del. 1995) (*receded from on other grounds by E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 448 (Del. 1996)).

Issues arise in the insurance context with respect to category (2), known as "fact work product," because it is not always clear when an insurer first anticipates litigation is forthcoming. Some states, such as Montana, deem the insurer to anticipate litigation from the very opening of a claim, noting that in the claims adjusting there always is inherently some prospect of litigation. *Draggin' y Cattle Co., Inc. v. Addink*, 312 P.3d 451, 460 (Mont. 2013).

Other states, such as North Carolina, generally do not afford work product protection to materials prepared before the insurer issues a formal denial of coverage. *Evans v. United Servs. Auto. Ass'n*, 541 S.E.2d 782, 790 (N.C. Ct. App. 2001); *see also Amoco Oil Co. v. Hartford Acc. & Indem. Co.*, 93 CIV. 7295 (SS), 1995 WL 555696, at *1 (S.D.N.Y. Sept. 18, 1995) ("Because insurance companies are in the business of evaluating claims that may lead to litigation, courts have developed a presumption for analyzing their work product arguments: if a declination decision has been made, documents subsequently drafted are presumed to have been created in anticipation of litigation; if the claim has not yet been rejected the documents are part of the claim investigation process and are not work product.").

Finally, some federal courts and other states such as Virginia, Massachusetts, New York

and Colorado, eschew a bright-line test and evaluate work product claims on a case-by-case basis to determine whether a particular document was created in anticipation of litigation or merely in the regular course of the insurer's claims handling and investigation. *See S.W. Heischman, Inc. v. Reliance Ins. Co.*, 30 Va. Cir. 235, 1993 WL 13032168 (Va. Cir. Ct. March 1, 1993); *Amica Mut. Ins. Co. v. W.C. Bradley Co.*, 217 F.R.D. 79, 83 (D. Mass. 2003), *as supplemented* (Apr. 16, 2003) (work product determinations for material generated by insurer's claim investigation should be made on case-by-case basis); *Olsen v. Owners Ins. Co.*, No. 18-CV-1665-RM-NYW, 2019 WL 2502201, at *4 (D. Colo. June 17, 2019) ("Accordingly, the nature of the services rendered by Owners' attorneys to Owners at any given time drives whether the work product doctrine or attorney-client privilege attaches, not a particular chronology of events."); Travelers Indem. Co. v. Northrop Grumman Corp., No. 12 CIV. 3040 KBF, 2013 WL 1087234, at *2 (S.D.N.Y. Mar. 12, 2013) ("The Court does not believe that all SLCU documents are presumptively protected by the work product doctrine-before or after a coverage declination. Whether a document is protected as work product must be determined on a case by case (or, under certain circumstances, group by group) basis. The relevant question is whether the document reflects a lawyer's-or one working at the direction of a lawyer-mental impressions in relation to actual or potential litigation. …. Not all insurance declinations result in litigation; experienced counsel will be able to make judgments as to which are more likely than others to result in litigation.").

Unlike attorney-client privilege, courts do not consider work product protection "substantive" law. Accordingly, federal courts exercising diversity jurisdiction will apply federal law to determine whether information is protected work product, which can lead to disparities in treatment of information between federal and state courts in the same location.

While most states recognize that work product protection extends to materials prepared by any party in anticipation of litigation, including insurance adjusters who are not attorneys, other states such as Montana limit work product protection to documents produced by or for an attorney and do not extend the protection to documents produced before an attorney becomes involved in the claim. *Cantrell v. Henderson*, 718 P.2d 318, 322 (Mont. 1986); *see also Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991) ("Work product only protects documents produced by or for an attorney preparing for litigation.") (applying federal work product law); *compare Union Ins. Co. v. Delta Casket Co., Inc.*, No. 06-2090, 2009 WL 10665128, at *7 (W.D. Tenn. Dec. 1, 2009) (communications between adjuster and claims manager protected work product when made in anticipation of litigation)

IV. Application in Claims for Coverage

In litigation between an insurer and insured (and/or ~~third-party~~third-party claimant) seeking to determine whether coverage exists, insureds and claimants often seek discovery of an insurer's claim file and other documents that include attorney-client communications and work product materials.

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In some jurisdictions such as Florida, courts combine application of attorney-client privilege, work product protection, and relevancy principles to preclude discovery of the claim file during coverage litigation. *See*, e.*g.*, *Homeowners Choice Prop. & Cas. Ins. Co., Inc. v. Avila*, 248 So. 3d 180, 184 (Fla. Ct. App. 2018); *State Farm Fla. Ins. Co. v. Aloni*, 101 So. 3d 412, 414

(Fla. Ct. App. 2012) ("Generally, an insurer's claim file constitutes work product and is protected from discovery prior to a determination of coverage."). In federal courts, in contrast, an across-the-board protection does not apply, and courts will examine each document to determine whether privilege or work product protection applies. *E.g.*, *MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 628 (S.D. Fla. 2013) (discussing difference between Florida state and federal court approaches to discovery of insurer's claim file materials in coverage dispute). Further, because work product protection extends only to "opinion work product" and materials prepared in anticipation of litigation, as noted above some states permit discovery of non-privileged materials prepared prior to the denial of the claim.

Where claim file materials may be discoverable, insureds and claimants will also likely scrutinize the role in-house counsel played in the adjustment of the claim, and may seek discovery of communications and material prepared by counsel on the basis that the attorney was acting as an investigator or claims handler rather than preparing legal advice. *E.g.*, *Cont'l Cas. Co. v. Gen. Battery Corp.*, No. CIV. A. 93C-11-088, 1994 WL 682320 (Del. Super. Ct. Nov. 16, 1994) (in insurance coverage declaratory judgment action, insured argued privilege should not apply because counsel acted as adjuster in investigating claims).

V. Application in Bad Faith Claim

Different policy considerations are at issue in a bad faith claim, which focuses more on the insurer's actions and decision-making process as opposed to only the merits of the coverage position itself. An insurer's defense to a bad faith claim also tends to put its decision-making process at issue. Courts therefore generally allow broader discovery of privileged and work-product materials in the bad faith context.

To the extent that this broader discovery would permit the insured to obtain otherwise undiscoverable material by asserting a bad faith claim at the same time as the claim for coverage, courts will often stay or abate bad faith claims and associated discovery until the conclusion of the coverage litigation. *See*, *e.g.*, *Alden Leeds, Inc. v. QBE Specialty Ins. Co.*, No. A-2034-14T1, 2015 WL 4507151, at *11 (N.J. Super. Ct. App. Div. July 27, 2015) ("Decisions to pierce the attorney-client or other privileges with respect to bad faith evidence should ordinarily be deferred until the viability of the bad faith claim has been established.").

Express or Implied Waiver of Attorney-Client Privilege

Defending a bad faith claim often places the legal advice of an in-house counsel at issue. An express or implied waiver of an attorney-client privilege may occur where a client asserts a claim or ~~defense, and~~defense and attempts to prove that claim or defense by disclosing or describing an attorney-client privileged communication. This follows the general proposition that the insurer should not be able to use the advice of counsel both as a sword – in asserting that it acted in good faith by reasonably relying on its interpretation of the law – and a shield – in asserting that the advice of its attorneys on the interpretation of the law is privileged.

Courts have adopted various approaches to balance the necessity for discovery of relevant information to evaluate an insurers' bad faith defense and the goal of protecting attorney-client communications to not discourage clients from seeking legal advice.

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Approach 1: Automatic Waiver

Some jurisdictions hold that defending a bad faith claim automatically constitutes an implied waiver of the insurer's attorney-client privilege. These jurisdictions have broadened the traditional "crime-fraud" exception to the privilege to apply where the parties intended the attorney-client communications to further a tort as ~~well, or~~well or consider a claim of bad faith to be the substantial equivalent of a claim for fraud. The exception to attorney-client privilege applies and courts allow the insured to discover the entire claim file, including attorney-client privileged communications, created prior to the denial of coverage.

For example, in Alaska, courts reason that the crime-fraud exception to attorney-client privilege extends to situations where there was a "bad faith purpose" for a party's actions. Thus, when an insured pleads a bad faith claim asserting that the insurer intentionally or recklessly disregarded the insured's rights under the policy, the crime-fraud exception can require waiver of the privilege. To avoid abuse, however, courts require that the insured first demonstrate a *prima facie* case of bad faith, which can in part include an ~~*in camera*~~*in-camera* review of the communications asserted to be privileged. *Cent. Const. Co. v. Home Indem. Co.*, 794 P.2d 595 (Alaska 1990); *see also Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154, 157 (Ohio 2001); *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.2d 239, 246 (Wash. 2013); *Stewart Title Guar. Co. v. Credit Suisse, Cayman Islands Branch*, No. 1:11-CV-227-BLW, 2013 WL 1385264, at *6 (D. Idaho Apr. 3, 2013) (predicting Idaho courts would follow *Cedell*).

Approach 2: No Waiver Absent Express Reliance on Advice of Counsel

On the other end of the spectrum, some jurisdictions do not find a waiver of privilege unless the insurer expressly pleads a defense of advice of counsel as establishing its good faith. This approach emphasizes that the client holds the privilege and has the right to decide whether or not to waive it and values the certainty and predictability of a bright-line test preserving the privilege absent an express pleading of the defense.

For example, in Montana, even the fact that the insurer relied in part on advice of counsel in making its determination to deny the claim is insufficient to waive the privilege or permit disclosure of attorney-client communications, it is only where the insurer directly relies on advice of counsel as a defense to the claim of bad faith. *Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 111, 861 P.2d 895, 907 (1993) ("Although Farmers listened to the advice of counsel in deciding to deny Palmer's uninsured motorist claim, Farmers did not directly rely on advice of counsel as a defense to Palmer's bad faith claim."); *see also Union Ins. Co. v. Delta Casket Co., Inc.*, No. 06-2090, 2009 WL 10665128, at *8 (W.D. Tenn. Dec. 1, 2009) ("Although [adjuster] asserts that her opinion about coverage was based on advice of counsel, she has not asserted that [insurer's] handling of the claim was the result of advice of counsel.").

Approach 3: Implied Waiver if Defending Based on Reasonableness

As a middle ground, other jurisdictions examine the specific circumstances of the case to determine whether the insurer's position in the litigation impliedly waives the privilege. Thus, even if the insurer does not expressly plead an advice of counsel defense, it can still place the

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attorney-client privileged communications at issue by taking the position that it based its actions on a reasonable interpretation of the law and facts informed at least in part based on the legal advice received from its attorney. It is still possible, however, for the insurer to defend the bad faith claim

For instance, in Arizona, a court found an implied waiver of privilege in an underinsured/uninsured motorist claim where the insurer asserted its position on stacking after its counsel reviewed the applicable statutes and case law, and the attorneys' advice to the company was part of the basis for the insurer's coverage position. By maintaining that it acted reasonably based its subjective understanding of the law, as informed by the advice of the attorney, the insurer implicitly placed the advice of its counsel at issue. *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1175 (Ariz. 2000) (adopting test of *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)); *but see Robertson v. Allstate Ins. Co.*, No. CIV. A. 98-4909, 1999 WL 179754, at *4–6 (E.D. Pa. Mar. 10, 1999) (finding in the context of an advice of counsel affirmative defense to a bad faith claim, Allstate did ***not*** place at issue its communications with in-house counsel and explaining "Allstate has not taken the affirmative step of placing the advice of in-house counsel at issue in the instant matter. ... Plaintiff's simple assertion of bad faith does not entitle him to circumvent the attorney-client privilege.").

As an additional requirement, in some jurisdictions such as South Carolina the insured/third-party claimant must make ~~*a prima facie*~~prima facie showing of bad faith before courts will enforce the implied waiver of privilege and permit discovery. *See In re Mt. Hawley Ins. Co.*, 829 S.E.2d 707, 716-17 (S.C. 2019).

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Necessity Exception to Work Product

Work product protection does not apply if the opposing party shows a substantial need for the material and an inability to obtain the substantial equivalent of the material by other means. Some jurisdictions such as Florida have applied this exception to hold that an insurer's claim file is discoverable by the insured in a bad faith case, because the otherwise protected information is often the only evidence of an insurer's claims handling and reasons underlying its coverage determinations. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1122 (Fla. 2005); *Genovese v. Provident Life & Acc. Ins. Co.*, 74 So. 3d 1064, 1068 (Fla. 2011). Work product information regarding the insurer's litigation of the bad faith claim itself, however, would still be protected.

Potential Differences Between Bad Faith Claims Asserted by Insureds and Bad Faith Claims Asserted by Third-Party Claimants

In applying attorney-client privilege, some jurisdictions distinguish between bad faith claims asserted by an insured and bad faith claims asserted by a third-party claimant, either by right of direct action or through an assignment from the insured.

In West Virginia, for example, in a bad faith action brought by a third-party claimant courts permit the insurer a "quasi attorney-client privilege" which protects all communications generated on or after the date the claimant files suit against the insured. This creates a presumption of privilege from discovery, which the claimant can rebut. *State ex rel. Allstate Ins.*

Co. v. Guaghan, 508 S.E.2d 75 (W. Va. 1998). This quasi-privilege belongs to the insurer and cannot be waived by the insured. For bad faith actions brought by the insured, however, the court noted that in many cases where the insurer is defending the insured against a third-party's claim attorney-client privilege would not attach to the insurer's claim file "because the insurer created the file primarily on behalf of the insured." *Id*. at 87 n.17. However, the court also acknowledged that in some cases, such as when an insured asserts a first-party property insurance claim, the interests of the insured and insurer may be in conflict, such that privilege might apply.

Other jurisdictions such as Florida, however, apply attorney-client privilege and work product protections in the same manner in all bad faith litigation. *See Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005) ("We conclude that the better rule is recognition of the Legislature's mandate that the insurer's good faith obligation to process claims establishes a similar relationship with the insured requiring fair dealing, as has arisen in the third-party context, thus making the claim processing type file material discoverable under a claim for first-party bad faith just as with third-party actions. There simply is no basis upon which to distinguish between first- and third-party cases ~~with regard to~~about the rationale of the discoverability of the claim file type material.").

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VI. Takeaways

You Know the Saying about Assumptions

A communication may not be privileged simply because it is sent to or from an in-house ~~counsel, and~~counsel and involving in-house counsel in the claim does not necessarily assure greater protection from discovery. It is important to consider in-house counsel's role in the claims handling process and if ~~possible~~possible, to document which communications are made for the purpose of furthering the rendering of legal advice.

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Work product protection may also not apply simply because a claim is asserted. It also may be important for some jurisdictions to document when the insurer became aware of the possibility of litigation and that documents at issue were prepared in anticipation of same.

Understand the Applicable Law at Issue

As we have seen, privilege and work product protections for communications and information exchanged between in-house counsel and adjusters varies from state to state, and even from state to federal court. The law that will apply to the current or anticipated coverage or bad faith litigation can be a significant factor to evaluate in assessing the information that an adversary will be able to discover and present as evidence. The different scopes of discovery can also impact an insurer's decision on whether and where to institute litigation and whether to remove a lawsuit to federal court.

Think Before You Write

Because there is a risk that communications or other claims handling materials will be subject to disclosure to the insured and/or third party claimant in future coverage or bad faith

litigation, it is important to be mindful of: (1) who is included on the communication and who materials are shared with; (2) what "hat" the in-house counsel is wearing for purposes of the communication or material at issue and the claim in general; and (3) how the communication or material will reflect on the insurer should it be disclosed.