Discovery of the Insurer's Claims File: Exploring the Limits of Plaintiff's Fishing License (Updated 2017)

By: Kathy J. Maus, John V. Garaffa and Julius F. "Rick" Parker III

Kathy J. Maus is a Partner at Butler Weihmuller Katz Craig, LLP, having joined the firm in 1991. She devotes her practice to first- and third-party coverage, extra-contractual matters, auto and premises liability defense. She has significant trial and appellate experience and is recognized in Florida as a Super Lawyer in Insurance Coverage. She graduated cum laude in 1991 from the Florida State University College of Law. She is an active member and former Director for IADC and DRI.

John V. Garaffa is a Partner at Butler Weihmuller Katz Craig, LLP. He graduated, cum laude from the University of Minnesota Law School in 1982 and received his LLM with distinction from Georgetown University Law School in 1991. He joined the firm in 2003 following 21 years on active duty as a member of the Judge Advocate Generals Corps, United States Navy. He devotes his practice to the litigation of coverage issues, construction defects, and cyber losses. He is active in both the ABA and DRI and has spoken and written widely on first-party coverage, punitive damages and privacy issues.

Julius F. "Rick" Parker, III is a Partner at Butler Pappas, having joined the firm in 2004 and devotes his practice to first and third-party coverage defense, extra-contractual matters, premises liability defense and appeals. He has significant trial and appellate experience. He graduated cum laude in 1998 from the Florida State University College of Law, where he served as Articles and Notes Editor for the Journal of Land Use & Environmental Law.

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EVERY defense counsel has been confronted with discovery from Plaintiff's counsel that demands some variation of "[a] complete copy of the entire claims file, cover to cover, including both sides of any jacket, including all notes, memoranda, and diaries, pertaining to the claim that is the subject of this litigation up until the date that the instant suit was filed." Such a demand is objectionable as made, but understanding and articulating the basis for the objection will often mean the difference between successful opposition to the demand and an order to produce much if not all of the items requested.

It has long been true that merely noting that Plaintiff's request constitutes a "fishing expedition" is not a valid objection to discovery.[1] In general, the scope of modern discovery suggests that demands for production can be broad, even encompassing material that both sides recognize will not be admissible at a trial of the actual facts at issue. The motivation for requesting such material can be the search for facts that lead to admissible evidence, an entirely permissible goal. However, in today's litigation environment, discovery in individual cases is increasingly a vehicle for the collection of evidence to be studied, shared and used to build later cases against the defendant by large plaintiffs' firms or affiliated plaintiffs' counsel in other jurisdictions. Regardless whether true, the insurer's claims file is perceived as a potential gold mine of such information. As a consequence, defense counsel for insurers should be increasingly

[1] *See* J. A. Pike, *The New Federal Deposition Discovery Procedure and The Rules of Evidence*, 34 ILL. L. REV. 1 (1939); A. Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205 (1942); *and* Piorkowski v. Socony Vacuum Oil Co., 1 F.R.D. 407, (M.D. Pa. 1940), *cited by* Hickman v. Taylor, 153 F.2d 212 (3d Cir. 1946), *aff'd*, 329 U.S. 495 (1947). While the expansive view of the Third Circuit was limited by the U.S. Supreme Court in *Hickman*, the basic observation of the Third Circuit remains true.

vigilant to protect their clients by taking steps to ensure that disclosures in individual cases are limited, as much as possible, to the proper discovery relevant to the facts actually at issue.

The purpose of this article is to outline the objections to Plaintiff's broad request for the insurer's claims file and the majority rules governing successful objections by defense counsel to discovery of the materials in that file. Correctly applied, these rules permit defense counsel to resist an all-encompassing demand like the one noted above, and respond appropriately to the more sophisticated attempts to achieve the same result by parsing the demand into discrete requests for the various components of the insurer's claims file.

I. Relevance: The General Rule of Discovery

The majority of U.S. jurisdictions adopted the expansive view of discovery set out in the pre-2016 version of Rule 26 of the Federal Rules of Civil Procedure.[2] Subsection (b)(1) provided the general rule of thumb that anything is discoverable so long as it is relevant to the subject matter involved in the litigation, stating:

> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having

[2] Rule 26 was amended effective December 1, 2016. It no longer provides for discovery of anything "reasonably calculated to lead to the discovery of admissible evidence." Rather it now provides for discovery of evidence:

> relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

FED. R. CIV. P. 26(b)(1) (2016). However, the rule still provides that, "Information within this scope of discovery need not be admissible in evidence to be discoverable." Thus, the concepts of admissibility and discoverability remain analytically distinct and the scope of discovery will likely be interpreted broadly.

> knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(I), (ii), and (iii).

Under the majority rule, the basic restriction on plaintiff's request for the claims file, as in the case of a request for any material, is relevance. A review of the rules of civil procedure in the various states reveals this standard is broad and often subjective. The modern view is that material is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the lawsuit more probable or less probable than it would be without the evidence.[3] The defect in Plaintiff's request for "the complete claims file" is that it simply fails to identify the material requested in a way that permits the Court to make a ruling on relevance and potential claims of privilege.

Simply put, there is a difference between "the claims file" as an object with all of its contents intact, and the documents contained within the file. For discovery purposes, the disparate types of documents within the insurer's claims file are no different than any similar collection of documents. In requesting that collection as an object, the Plaintiff makes the assumption that the mere presence of a document in that particular folder renders it relevant. The error of such an assumption was outlined by the Arizona Appellate Court in *Phoenix General Hospital v. Superior Court of Maricopa County.*[4]

In *Phoenix General Hospital* the plaintiff filed a motion to produce for inspection all books and records of the hospital corporation concerning financial operations of the hospital and its board of trustees since incorporation of the hospital. In rejecting the demand, the court held that the request was a blanket request not authorized by the rules of civil procedure permitting inspection and copying or photographing of designated documents. The court noted that it was committed to the liberal view of designation by categories where under the circumstances records are voluminous and hence it may be impossible to specifically designate

[3] *Hickman,*153 F.2d at 235.

[4] 402 P.2d 233 (Ariz. Ct. App. 1965).

each document sought. However, the essential factor in approving such a demand for discovery is that the category itself be sufficiently defined to aid the parties and so the court may understand with certainty the nature of the demand. According to the court, the categories must be defined with sufficient particularity: (i) to enable the opposing party to intelligently state any grounds for objection it may have to the requested production, and (ii) to enable the Court to intelligently rule on such objections.[5]

That certain materials within the typical claims file are subject to a basic relevancy objection is clear. In Florida, for example, the courts have determined that the insurer's claims file is not open to discovery simply because, as a matter of law, claim files, manuals, guidelines and documents concerning claim handling procedures of a homeowners' insurer are deemed irrelevant to a first-party dispute over the insurer's refusal to pay a claim under the policy.[6] While there is a temptation to view the Florida Court's ruling on requests for the claims file as a ruling on all its contents, an examination of subsequent cases shows that the focus is on whether the actual material within the file demanded falls within a privilege.

For example, in *Federal Ins. Co. v. Hall*,[7] Florida's Third District Court of Appeal granted certiorari and quashed the trial court's order to the extent that it ordered production of the adjuster's notes contained within the claims file. The court found that portion of the order constituted a departure from the essential requirements of law as the adjuster's notes were protected by the work-product privilege. In *State Farm Mut. Auto. Ins. Co. v. Cook*,[8] the insurer filed a motion to stay bad faith claims until the underlying issues of coverage were resolved. It also sought a protective order to avoid production of a number of documents relevant to the bad faith claims, including its claims files, litigation files, and internal operating manuals. The trial court denied both motions. In accordance with Florida law, the appellate court ruled that an insured's first-party action for benefits against the insurer had to be resolved before a cause of action for bad faith against the insurer accrued. Further, because the bad faith claims had to be stayed, the trial court's order denying a protective order for materials within the claims file was quashed

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[5] *Id*.

[6] State Farm Fire and Cas. Co. v. Valido, 662 So. 2d 1012 (Fla. Dist. Ct. App. 3d 1995).

[7] 708 So. 2d 976 (Fla. Ct. App. 1998), citing American Reliance Ins. Co. v. Rosemont Condominium Homeowners Ass'n, Inc., 671 So. 2d 250 (Fla. Ct. App. 1996), and *Valido*, 662 So. 2d 1012.

[8] 744 So. 2d 567 (Fla. Ct. App. 1999).

insofar as it addressed materials relating to the bad faith claims.[9]

Similar rulings concerning the relevancy of claims file materials related to bad faith in litigation to determine coverage were reached by the Rhode Island Supreme Court in *Bartlett v. John Hancock Mut. L. Ins. Co.*,[10] and the Federal District Court of Montana in *In re Bergeson*. [11] A contrary ruling, permitting discovery, was entered by the Federal District Court for the Middle District of North Carolina in *Ring v. Commercial Union Ins. Co*.[12] However, the rationale for the court's decision in *Ring* is consistent with respect to the issue of relevancy as discussed in the earlier cases. In *Ring*, the plaintiff's pleadings put bad faith at issue. As there would be one trial, the court denied the defendant's motion to bifurcate coverage and bad faith claims for discovery purposes, holding that it simply considered "it better to require that the discovery of the underlying contract claim and the bad faith claim proceed at the same time."[13]

A. The Expected Contents of the Claims File

As it is the contents of the actual documents themselves that must be legally relevant to the issues before the court, it is helpful to consider what the plaintiff expects to find within the claims file. Those documents may be organized into five categories: (1) entries in a claims diary or log; (2) reports by outside investigators; (3) materials generated by the insurer's personnel and outside investigators such as statements taken from potential witnesses; (4) internal communications and memoranda, including case evaluations; and (5) materials related to internal procedures and policies such as directives, guidelines and manuals. As noted above, all of these items may be relevant in a particular case and their presence within the "claims file" does not in itself insulate them from discovery. Rather, documents are discoverable unless they fall within the attorney-client or work-

[9] *Id.*, citing State Farm Fire & Cas. Co. v. Martin, 673 So. 2d 518, 519 (Fla. Dist. Ct. App. 5th 1996); Michigan Millers Mut. Ins. Co. v. Bourke, 581 So. 2d 1368, 1370 (Fla. Dist. Ct. App. 2d 1991).

[10] 538 A.2d 997, 1000-1001 (R.I. 1988).

[11] 112 F.R.D. 692, 697 (D. Mont. 1986).

[12] 159 F.R.D. 653, 658 (M.D.N.C. 1995).

[13] *Id.* at 656. *Cf.* Blake v. Nationwide Ins. Co., 904 A.2d 1071, 1080 (Vt. 2006), *and* Howard v. Dravet, 813 N.E.2d 1217, 1221 (Ind. Ct. App. 2004) (no error when the trial court refused to order the production of the insurer's claims file as the sole remaining issue in the case was whether plaintiff was acting within the scope of his employment when the accident occurred, contents of the claims file were irrelevant to the actual issue before the court; trial court abused its discretion by instituting a blanket privilege over the documents in the claim file; the privilege being invoked should be determined on a document-by-document basis).

product privileges.[14] While those privileges are discussed at length below, a brief review of some state court cases is instructive.

The North Carolina Appellate Court in *Evans v. United Services Auto. Assoc.*,[15] upheld the discovery of portions of the insurer's claims diary. In upholding the decision of the trial court, the *Evans* court noted that, in the context of insurance litigation, determining whether a document was created in anticipation of that litigation is particularly challenging because the very nature of the insurer's business is to investigate claims; from the outset the *possibility* exists that litigation will result from the denial of a claim. Citing *Ring*,[16] the court held that the general rule is that a reasonable possibility of litigation only arises after an insurance company has made a decision with respect to the claim of its insured.

Statements from witnesses contained within the insurer's claims file have also been afforded protection under the work-product privilege. However, the fact that the statements fell within the privilege did not ultimately prevent their discovery.[17] In *Fireman's Fund Ins. Co. v. McAlpine*,[18] the Rhode Island Supreme Court addressed the discovery of statements taken from eyewitnesses shortly after an event.

The court noted that such statements taken immediately after an event "are unique catalysts in the search for truth in that they provide an immediate impression of the facts, the substantial equivalent of which cannot be recreated or duplicated by a deposition or interview months or years after the event."[19] According to the court, the unique quality of such statements has been determined to provide special circumstances satisfying the undue hardship requirement needed to overcome

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[14] Some courts have referred to the Rule 26 protection afforded materials created in anticipation of litigation as a qualified privilege or qualified immunity. *See* Fireman's Fund Ins. Co. v. McAlpine, 120 R.I. 744, 391 A.2d 84 (1978); Evans v. United Svcs. Auto. Ass'n, 142 N.C. App. 18, 541 S.E.2d 782 (N.C. Ct. App. 2001). *See also* 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2022, at 324 (2d ed. 1994).

[15] *Evans,* 142 N.C. App. 18, 541 S.E.2d 782 (N.C. Ct. App. 2001).

[16] 159 F.R.D. at 658.

[17] Johnston by Johnston v. Lynch, 574 A.2d 934, 937 (N.H. 1990), citing United States v. Murphy Cook & Co., 52 F.R.D. 363, 364 (E.D. Pa. 1971) (mere lapse of time is enough to justify production of material otherwise protected as work product).

[18] 120 R.I. 744, 391 A.2d 84 (1978).

[19] *Id*., 120 R.I. 744, 755, 391 A.2d 84, 90, citing McDougall v. Dunn, 468 F.2d 468 (4th Cir. 1972); Southern Railway Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968); Teribery v. Norfolk & Western Ry., 68 F.R.D. 46 (W.D. Pa. 1975); Tiernan v. Westext Transp., Inc., 46 F.R.D. 3 (D.R.I. 1969); Johnson v. Ford, 35 F.R.D. 347 (D. Colo. 1964); DeBruce v. Pa. R. Co., 6 F.R.D. 403 (E.D. Pa.1947); Tinder v. McGowan, 15 Fed. R. Serv. 2d 1608 (W.D. Pa. 1970).

their protection as work product. Nonetheless, the court found that the plaintiff had failed to offer sufficient evidence to overcome the work-product privilege of the insurer and quashed the trial court's order to produce the statements demanded by the plaintiff.[20]

B. First-Party Coverage Disputes

In the first-party contract dispute between an insured and his or her insurer, the dispute centers on the denial of all or part of the coverage for an insured's loss. Frequently the insured will attempt to focus the litigation on the behavior of investigators or adjusters and away from more objective evidence concerning the contract's provisions and the actual damage to the insured property. The Plaintiff hopes that by convincing the jury that the claim was handled poorly in the field or in a way which was inconsistent with the insurer's own internal guidelines, the jury will conclude the decision as to coverage was in error.

The first step in this process is usually a demand for the production of materials related to the insurer's internal manuals, guidelines and documents concerning claim handling procedures. As noted in *Valido*, some state courts have rightly held that such demands are objectionable on relevancy grounds (as to the request for claims manuals, claims files, and operational guidelines). This position seems to be correct, as in the first party dispute, the actual facts at issue are the coverage provided by the policy, the nature of the damage claimed and the nature of the peril that the insured alleges resulted in the damage claimed. Whether the insurer's agents followed internal guidelines or procedures in the process of determining those facts is simply not relevant.

However, some states have taken the opposite view. In *Glenfed Development Corp. v. Superior Court*, [21] the court addressed whether the subcontractor's defective work was covered under the real estate developer's excess liability policy. The California Court of Appeal found that the insurer's claims manual was discoverable in a first-party dispute. In reaching its decision, the court admitted that there were no prior California cases specifically holding that an insurer's claims manual is discoverable. However, the court

[20] *Cf.* Recant v. Harwood, 222 A.D.2d 372 (N.Y. App. Div. 1995) (insured's statement to liability carrier protected from disclosure) *and Valido*, 662 So. 2d 1012 (witness statements to liability carrier protected from disclosure).

[21] 53 Cal. App. 4th 1113 (Cal. Ct. App. 1997).

noted that California courts had recognized that claims manuals were admissible in coverage dispute litigation.[22] The court reasoned that if claims manuals are admissible, it follows that they are discoverable. It is important to note however that each of the cases cited by the *Glenfield* court involved claims for bad faith, where the insurer's adherence to it own procedures would arguably be relevant.[23]

The difficulty with the cases permitting discovery of claims file materials such as guidelines, manuals and internal documents relating to the insurer's opinions concerning contract construction, is that they appear to be inconsistent with the parole evidence rule. Generally, it is only when an insurance policy is ambiguous and susceptible of more than one reasonable interpretation, that extrinsic evidence may be admitted to resolve the ambiguity. If the court has not found the policy to be ambiguous, such evidence should not be relevant to the issues before the court. Under the circumstances, discovery of such evidence regarding the contract seems to violate the limits of discovery under the rules of civil procedure in most jurisdictions.

Certainly, if the language of an insurance policy is fairly susceptible to more than one different interpretation, the court

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[22] *Id.* at 1117, *citing* Neal v. Farmers Ins. Exchange, 582 P.2d 980 (Cal. 1978) (action seeking compensatory and punitive damages for "bad faith" failure to pay uninsured motorist benefits); Downey Savings & Loan Ass'n v. Ohio Cas. Ins. Co. 189 Cal. App. 3d 1072 (Cal. Ct. App. 1987) (bad faith action by the association against an insurance company for denial of benefits under a fidelity bond issued by the company); Moore v. Am. United Life Ins. Co., 150 Cal. App. 3d 610 (Cal. Ct. App. 1984) (action for breach of a contract to provide disability benefits and bad faith denial of benefits).

[23] *Cf.* Blockbuster Entertainment Corp. v. McComb Video, Inc., 145 F.R.D. 402 (M.D. La. 1992) (plaintiffs had to prove that the policy provided coverage for the insured defendants' wrongful acts; therefore, any denial of coverage entitled the plaintiffs to explore the basis for denying coverage during discovery, including claim forms, manuals and other materials related to coverage, claims, claims processing, and claims similar to the ones in the case before the court) *and* Champion Intern. Corp. v. Liberty Mut. Ins. Co., 129 F.R.D. 63 (S.D.N.Y. 1989) (even recognizing extrinsic evidence of contract interpretation was irrelevant, the court ordered production of claims manuals discussing the disputed policy provisions for the period of coverage, "how-to-sell instructions" or guidelines for the period of coverage, drafting history documents, loss runs for the period starting from coverage on forward, and documents concerning the insurer's document retention or destruction policy). *See also* Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 623 A.2d 1099 (Del. Super. Ct. 1991) (where policy language was ambiguous, information relating to interpretation and drafting history of the policy language, and information concerning the association between insurers, trade organizations and committees who drafted the policies of insurance, were discoverable).

can determine the parties' intent by examining extrinsic evidence.[24] In such a case, the plaintiff can present internal insurer documents such as the policy's drafting history, or manual provisions related to the policy, to assist in determining a reasonable construction. Once at issue, these materials are clearly relevant and thus discoverable. Similarly, where the policy is indefinite, equivocal, or ambiguous with respect to the subject matter, persons or interests insured, or the policy beneficiaries, such evidence is admissible, and thus relevant for the purposes of discovery, to resolve those questions.[25] However, the relevance of such materials arises after the court finds an insurance clause ambiguous. Materials such as the policy's drafting history cannot be used to find a clause ambiguous.[26]

A close examination of the cases and the reasoning employed by the courts indicates that, in a first party dispute where the issue is coverage, and there is no determination of ambiguity, discovery of the insurer's internal manuals, guidelines and documents concerning its claims handling procedures should be denied on the grounds of relevance. Discovery of other materials related to the claim, such as investigative reports, photos, and internal memoranda will be subject to discovery, provided the insured can satisfy the court that they are not protected by the work-product privilege, or that the substantial equivalence of those materials cannot be otherwise obtained.

C. First and Third-Party Bad Faith Disputes

As touched on in the discussion above, first and third-party "bad faith" claims present different issues and thus different outcomes in disputes over demands for discovery of an insurer's claim and litigation files. That said, the guiding principle again appears to be the relevance of the requested material to the facts at issue before the court. While a detailed treatment of bad faith is beyond the scope of this article, some basics are important to underscore the nature of the evidence that will be relevant in such suits.

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[24] 44A Am. Jur. 2d *Insurance* § 2016 citing Cle Elum Bowl, Inc. v. North Pacific Ins. Co., Inc., 96 Wash. App. 698, 981 P.2d 872 (Div. 3 1999). As to the use of extrinsic evidence to construe ambiguous instrument, s*ee generally* 29A Am. Jur. 2d, *Evidence* § 1134.

[25] 44A Am. Jur. 2d *Insurance* § 2016, citing Howard Fire Ins. Co. v. Chase, 72 U.S. 509, 18 L. Ed. 524 (1866); Drisdom v. Guarantee Trust Life Ins. Co., 371 So. 2d 690 (Fla. Ct. App. 1979).

[26] 44A Am. Jur. 2d *Insurance* § 2016, citing Cook v. Evanson, 83 Wash. App. 149, 920 P.2d 1223 (Wash. Ct. App. 1996).

The basis for the tort of bad faith is the "implied covenant of good faith and fair dealing," which is imputed into insurance policies. Often the inquiry will center on whether an insurance company's conduct was inconsistent with "the very protection or security which the insured sought to gain by buying insurance." [27] While the cause of action is subject to different common law and statutory elements in each state,[28] bad faith may generally be found where the insurance company acts in a way that unreasonably deprives the policyholder of the benefits due under the policy.[29]

Insurance bad faith actions involve either first-party or third-party coverage. Generally, in a first party situation, the implied duty of good faith and fair dealing is breached if the insurance company (1) acts unreasonably in delaying or denying policy benefits and (2) acts knowingly or with reckless disregard as to the unreasonableness of its delay or denial.[30] In the third-party context, the implied duty of good faith and fair dealing is alleged to be breached if the insurance company, exercising exclusive authority to accept or reject settlement offers, and with the exclusive right and obligation of defending the claim, does so in a manner that results in a judgment against its insured that is in excess of the policy limits.[31]

While necessarily abbreviated, the description of both first and third-party bad faith highlights the factual difference between an insured's suit on the issue of coverage and a suit for first or third-party bad faith. As noted above, in the coverage dispute, the actual facts at issue are those which will determine coverage provided by the policy. The precise manner in which the insurer reached its decision and its internal documents, such as guidelines, manuals, and documents detailing the insurer's motivations, are not relevant as

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[27] *Id*., citing Rawlings v. Apodaca, 726 P.2d 565, 571 (Ariz. 1986), Kan. Bankers Sur. Co. v. Lynass, 920 F.2d 546, 548 (8th Cir. 1990); State Farm Mut. Auto. Ins. Co. v. Weiford, 831 P.2d 1264, 1266 (Alaska 1992); Walter v. Simmons, 818 P.2d 214, 223 (Ariz. Ct. App. 1991); Pemberton v. Farmers Ins. Exch., 858 P.2d 380, 382 (Nev. 1993); Pavia v. State Farm Mut. Auto. Ins. Co., 626 N.E.2d 24, 27 (N.Y. 1993); Austin Co. v. Royal Ins. Co., 842 S.W.2d 608, 610 (Tenn. Ct. App. 1992) *and* Koehrer v. Super. Ct., 226 Cal. Rptr. 820, 828 (Ct. App. 1986).

[28] Nelson v. State Farm Mut. Auto. Ins. Co., 988 F. Supp. 527, 533 n. 10 (E.D. Pa. 1997) ("It is nearly impossible to state with certainty the exact number of states recognizing a cause of action for bad faith or to classify the exact standards that they have established.").

[29] Randy Papetti, *The Insurer's Duty of Good Faith in the Context of Litigation*, 60 GEO. WASH. L. REV. 1931 (1992).

[30] Chris Michael Kallianos, *Survey, Bad Faith Refusal to Pay First-Party Insurance Claims: A Growing Recognition of Extra-Contract Damages*, 64 N.C. L. REV. 1421, 1435 (1986).

[31] Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954).

they will not tend to make the facts at issue more or less likely.

In the first and third-party bad faith case, however, the focus of the litigation will be on the insurer's handling of the claim, its motivations and the adherence of the insurer and its agents to internal manuals and guidelines. As those facts are at issue in the bad faith case, evidence tending to show how the insurer adjusted the claim and why it did what it did are relevant, and the materials related to those facts will be subject to discovery. However, discovery of those documents is not unfettered as many of the documents sought are still subject to assertions of work-product and/or attorney-client privilege, trade secret, confidentiality or other protections. As the court stated in *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.*, "[W]hile arguably it may be more difficult to prove a claim of bad faith failure to settle without examining an insurance company's claims file, that does not mean it is impossible."[32] Highlighting that an allegation of bad faith is not a license to embark upon a fishing expedition, the court held "[A] simple assertion that an insured cannot otherwise prove her case of bad faith does not automatically permit an insured 'to rummage through [the insurers'] claims file.'"[33]

However, the court in *Reavis v. Metropolitan Property and Liability Ins. Co*.[34] was far more accommodating to plaintiff's assertion that access to at least a portion of the insurer's claims file was critical to her case. The court held that the claims file is a unique, contemporaneously prepared history of the company's handling of the claim and that, in a bad faith action such as the plaintiff's, the need for the information in the file was not only substantial but overwhelming. The court further held that the "substantial equivalent" of the requested material could not be obtained through other means of discovery.[35]

While expansive in its treatment of work product, the court made its decision under the rubric of the "substantial need doctrine" contained in Rule 26, not on the basis that a claim for bad faith waived the work-product privilege. The court declined to order production of correspondence between defendant and its attorney or correspondence between the insurer and its insureds, finding that it was protected by the attorney-client and work-product privilege. On those grounds, the court also found that the recorded statements given

[32] 168 F.R.D. 554, 559 (E.D. La. 1996), citing *Ring*, 159 F.R.D. at 658.
[33] *Id.*
[34] 117 F.R.D. 160 (S.D. Cal. 1987).
[35] *Id.* at 164 (internal citations omitted).

by the insureds to the insurer's claims representative were privileged.[36]

The insurer's position with respect to demands for materials in the claims file is perhaps best stated by the court in *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*,[37] where the court rejected the claim that the mere assertion of a bad faith claim operates to change the rules governing the production of material protected by the attorney-client or work-product privilege. The court held "Rule 26(b)(3), . . . does not expressly create an exception for work-product material generated in a first party bad faith insurance action. Barring such language, it is inappropriate to treat first party bad faith insurance actions differently vis-a-vis other types of actions." [38] In responding to plaintiff's discovery requests, it will be the nuances of the attorney-client and work-product privileges, discussed at length below, that will govern the success of a defendant's efforts to keep discovery to its proper limits.

III. Attorney-Client Privilege

Once the court has determined that the materials requested from the insurer's claims file are relevant to the facts at issue in the litigation, it will be for the insurer to assert that the documents requested are nonetheless protected from discovery. The two primary grounds for such protection are the attorney-client privilege and the derivative and more recent attorney work-product doctrine.

While closely related, the two types of protections are, in theory, intended to shield different materials from discovery. However, as the cases illustrate, the precise line between attorney-client material and attorney work product is somewhat imprecise, and differs from jurisdiction to jurisdiction. The consequence of these differences may mean that, depending on the facts in an individual case, material protected in one jurisdiction may be discoverable in another. While an exhaustive review of the rules in the various states is beyond the scope of this article, the discussion below will highlight the primary factors upon which a court's decision to extend protection or permit discovery will turn.

A. The Origin and Purposes of the Attorney-Client Privilege

The attorney-client privilege is one of the oldest recognized privileges for confidential

[36] *Id.*

[37] 173 F.R.D. 7 (D. Mass. 1997).

[38] *Id.* at 11.

communications.[39] The privilege is said by some to have had its origins in Roman law. The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[40] As Lord Chancellor Brougham observed in 1833 in *In Greenough v. Gaskell*,[41]

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection … But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case.

Recognized at common law,[42] federal,[43] and state law,[44] the attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services.[45]

B. The Elements of the Privilege

In *U.S. v. United Shoe Machinery Corp*.[46] Judge Wyzanski advised that the attorney-client privilege applies only if:

(1) the asserted holder of the privilege is or sought to become a client;
(2) the person to whom the communication was made
    (a) is a member of the bar of a court, or his subordinate; and

[39] Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981), citing 8 JOHN H. WIGMORE, EVIDENCE, § 2290 (McNaughton rev. 1961); Hunt v. Blackburn, 128 U.S. 464, 470 (1888).
[40] *Id*. at 389.
[41] 39 Eng. Rep. 618 (1883), cited by *In re* Selser, 105 A.2d 395, 401 (N.J. 1954).
[42] U.S. v. Zolin, 491 U.S. 554 (1989).
[43] *See* FED. R. EVID. 501.
[44] *See, e.g.,* West's Tennessee Code Annotated § 23-3-105.
[45] *In re* Lindsey, 148 F.3d 1100, 1103 (D.C. Cir. 1998).
[46] 89 F.Supp. 357, 358 (D. Mass. 1950).

(b) in connection with this communication is acting as a lawyer;
(3) the communication relates to a fact of which the attorney was informed
(a) by his client
(b) without the presence of strangers
(c) for the purpose of securing primarily either:
(i) an opinion on law; or
(ii) legal services; or
(iii) assistance in some legal proceeding; and not
(iv) for the purpose of committing a crime or tort; and
(4) the privilege has been
(a) claimed; and
(b) not waived by the client.

While the rule varies somewhat in different jurisdictions, Judge Wyzanski's opinion has been widely accepted as correctly setting out the parameters of the attorney-client privilege [47] The North Carolina court in *Evans v. United Services Auto. Ass'n* [48] stated the elements more succinctly, holding that a party may assert the attorney-client privilege if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated, and (5) the client has not waived the privilege. Though more abbreviated, this statement of the privilege makes it clear that, notwithstanding the relationship between the attorney and the client, the client must have intended the communication to be confidential.[49]

C. The Scope of the Privilege

When the privilege applies, it affords confidential communications between lawyer and client complete protection from disclosure. [50] However, as the

[47] *See* Hopewell v. Adebimpe, 18 Pa. D. & C.3d 659, 661, 1981 WL 886 (Pa. Ct. Com. Pl. 1981); Perfection Corp. v. Travelers Cas. & Sur., 790 N.E.2d 817 (Ohio App. 8 Dist. 2003); Clausen v. National Grange Mut. Ins. Co., 730 A.2d 133 (Del. Super. Ct. 1997); Austin v. State, 934 S.W.2d 672 (Tex. Ct. App. 1996); State ex rel. U.S. Fidelity and Guar. Co. v. Montana Second Judicial Dist., 783 P.2d 911 (Mont. 1989); State ex rel. U.S. Fidelity and Guar. Co. v. Canady, 460 S.E.2d 677 (W. Va. 1995); People v. Belge, 59 A.D.2d 307 (N.Y. A.D. 1977); Hughes v. Meade, 453 S.W.2d 538 (Ky. 1970).

[48] 541 S.E.2d 782 (N.C. Ct. App. 2001).

[49] *See also* State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 583 S.E.2d 80 (W. Va. 2003).

[50] Conn. Indem. Co. v. Carrier Haulers, Inc., 197 F.R.D. 564 (W.D. N.C. 2000), citing

privilege has the effect of withholding relevant information from the fact-finder, the courts have made it clear that the privilege applies only where necessary to achieve its purpose.[51] As stated by the U.S. Supreme Court in *Fisher v. U.S.*,[52] the privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." Thus, while the privilege applies to confidential communications from the client to the lawyer, it may not protect communications from the lawyer to the client unless the facts show that the disclosure of the lawyer-to-client communications would directly or indirectly reveal the substance of the client's confidential communications to the lawyer.[53]

In the context of plaintiffs' efforts to discover the insurer's claims file, litigation has explored the limits of the privilege as it relates to the insured's communications with his or her insurer,[54] with the attorney hired by the insurer to defend the insured, and the attorney and the insurer. The cases that follow illustrate the limits of the privilege. Taken together, they show that courts struggle with the tension between a preference for open discovery of relevant evidence and the derogation of the attorney-client privilege. In these cases, the courts examine the facts in light of the discrete elements of the privilege to determine if discovery can be granted despite the arguable applicability of the privilege.

Highlighting the importance of the confidentiality element of the privilege, the court in *Dobias v. White*,[55] held the mere fact that the evidence relates to communications between attorney and client alone does not require its exclusion. According to the court, "only confidential communications are protected. If it appears by extrinsic evidence, or from the nature of a transaction or communication that they were not regarded as confidential, or that they were made for the purpose of being conveyed by the attorney to others, they are stripped of the idea of a confidential disclosure and are not privileged."[56]

Trammel v. U.S., 445 U.S. 40, 50 (1980); *In re* Grand Jury Subpoena, 204 F.3d 516, 519-520 (4th Cir. 2000); Hawkins v. Stables, 148 F.3d 379, 383 (4th Cir. 1998).

[51] 425 U.S. 391 (1976).

[52] *Id.* at 403.

[53] Journal/Sentinel, Inc. v. School Bd. of School Dist. of Shorewood, 521 N.W.2d 165 (Wis. Ct. App. 1994), citing JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE MANUAL, § 503(b)[03] n. 5 at 503-56 to 503-57 (1991).

[54] For a detailed treatment of this aspect of the privilege, *see* John P. Ludington, *Insured-Insurer Communications as Privileged*, 55 A.L.R. 4th 336 (originally published in 1987).

[55] 83 S.E.2d 785, 788 (N.C. 1954).

[56] *Id*.

Similarly, even "confidential" communications between counsel and the insurer may not be privileged if the attorney was not acting as a legal advisor when the communication was made[57] Thus, while the protection given to communications between attorney and client apply equally to in-house counsel, [58] an insurance company and its counsel may not avail themselves of the protection afforded by the attorney-client privilege if the attorney's advice relates to actions said to be in the company's normal course of business.

Consistent with this principle, the New York court, in *Bertalo's Restaurant Inc. v. Exchange Ins. Co.*,[59] held that reports made to the insurer by attorneys, employed to examine property damage claims before a decision had been made on coverage, were not protected from disclosure. The court noted that its review of the documents established that they consisted primarily of reports made by the attorneys who conducted the investigation of the claim on behalf of the defendant carrier, and communications from the carrier to those attorneys. The court held that the payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which actions to pursue are made in the regular course of its business. [60] Merely because such an investigation was undertaken by an attorney will not cloak the reports and communications with privilege.[61]

While it is clear that all communications with an attorney are not protected by the attorney-client privilege, courts have found that communications made by insureds to non-lawyer representatives of the insurer may nonetheless be protected from disclosure by the attorney-client privilege. The rationale for this extension of the privilege is that, in some situations, such communications are made for the dominant purpose of transmission to an attorney assigned to defend the claim. Thus, the court in *State v. Pavin*[62] held the privilege shielded

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[57] *Evans,* 541 S.E.2d at 791.

[58] *See generally Upjohn,*, 449 U.S. at 389*;* Shelton v. Am. Motors Corp., 805 F.2d 1323 n. 3 (8th Cir. 1986).

[59] 240 A.D.2d 452, (N.Y. App. Div. 1997).

[60] *Id.*, citing Landmark Ins. Co. v. Beau Rivage Rest., 121 A.D.2d 98 (N.Y.App. Div. 1986).

[61] *Id.,* citing Spectrum Sys. Intl. Corp. v. Chemical Bank, 581 N.E.2d 1055 (N.Y. 1991).

[62] 494 A.2d 834 (N.J. 1985). *See also* Jacobi v Podevels, 127 N.W.2d 73 (Wis. 1964); Langdon v. Champion, 752 P.2d 999 (Alaska 1988); DiCenzo v. Izawa, 723 P.2d 171 (Haw. 1986); Chicago Trust Co. v. Cook County Hosp., 698 N.E.2d 641 (Ill. Ct. App.1998); Soltani-Rastegar v. Super. Ct., 256 Cal. Rptr. 255 (Cal. Ct. App. 1989).

communications between the insured and the insurer's adjuster where the communications were in fact made to the adjuster for the dominant purpose of the insured's defense by the attorney and where confidentiality was the insured's reasonable expectation.

Other courts have taken a more restricted view of such communications between the insured and the insurer. In *In Varuzza by Zarrillo v. Bulk Materials, Inc.*,[63] the court held that a written statement given by a motorist to an investigator for his insurer one week after the accident was not protected by the attorney-client privilege and was thus subject to discovery by a second driver in the accident underlying the motorist's action. The court found that the insurer asserting the privilege failed to establish that an attorney-client relationship was even contemplated at the time of the statement. Instead, the court found that the statement was solicited by the insurer's investigator in accordance with the insurer's normal practice and not at the behest of or on behalf of an attorney.

D. Waiver

Whether one adopts Judge Wyzanski's elements or the North Carolina court's more abbreviated characterization of the privilege, it is clear that the attorney-client privilege may be waived. Such waiver may be express or implied.[64] An express waiver occurs when a client voluntarily discloses the content of privileged communications. [65] Generally, any such waiver is limited to the attorney-client communications on the matter disclosed or at issue.[66] An implied waiver occurs where the client has placed in issue a communication which goes to the heart of the claim in controversy.[67]

1. The "At Issue" Doctrine

The "At Issue" doctrine is an exception to the attorney-client privilege and the work-product doctrine and will result in the production of otherwise protected material. Courts applying the "at issue" doctrine in the context of insurance disputes have held that, where the facts contained in the otherwise privileged material have been placed in issue, a client may

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[63] 169 F.R.D. 254 (N.D. N.Y. 1996).

[64] 81 Am. Jur. 2d *Witnesses* § 348, at 322-323 (1992).

[65] Miller v. Continental Ins. Co., 392 N.W.2d 500, 504-505 (Iowa 1986) (privilege waived by the voluntary disclosure of the content of a privileged communication to a third party).

[66] *Id.*

[67] 81 Am. Jur. 2d *Witnesses* § 348, at 323 (1992).

not invoke the attorney-client privilege as a shield for discovery.[68]

A party waives its privileges when (1) by some affirmative act, (2) the party makes the protected information relevant to the case, and (3) the opposing party is thereby denied access to information vital to its defense.[69] A number of courts have acknowledged the importance of the attorney-client privilege and the work-product immunity and concluded that privileged information is "vital" only when the proponent of the privilege directly places the attorney's advice at issue in the litigation.[70]

It is important to note that the test enunciated above is a three-part test. Thus, it is the affirmative act on the part of the party holding the privilege that must first be proved. Mere relevance of the attorney-client material is not the standard for determining whether or not evidence should be protected from disclosure as privileged. That remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of the case.[71]

Express reliance on an advice-of-counsel defense would constitute an implied waiver of the attorney-client privilege as to that advice. [72] The more difficult question is whether and when an assertion short of an express advice-of-counsel defense waives the privilege. In his treatise on evidence, Judge Wigmore stated, "[A] waiver is to be predicated not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege. It is not to be both a sword and a shield. …"[73] The mere denial of allegations in the complaint, or an assertion that

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[68] *Hoechst Celanese*, 623 A.2d at 1125.

[69] Sax v. Sax, 136 F.R.D. 541, 542 (D. Mass. 1991); Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

[70] *See, e.g.,* North River Ins. Co. v. Philadelphia Reinsurance, 797 F.Supp. 363, 370 (D.N.J. 1992); State v. Hydrite Chem. Co., 582 N.W.2d 411, 418-419 (Wis. Ct. App. 1998); Aranson v. Schroeder, 671 A.2d 1023, 1030 (N.H. 1995).

[71] Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851 (3rd Cir. 1994). *See also* ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE at 253-254 (2d ed. 1994); Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1630 (1986).

[72] State Farm Mut. Auto. Ins. Co. v. Lee, 13 P.3d 1169 (Ariz. 2000). *See also* MCCORMICK ON EVIDENCE § 93, at 373 (5th ed. 1999); 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2016.2, at 253 (2d ed. 1994); McNeely v. Board of River Port Pilot Comm'rs, 534 So. 2d 1255, 1255-1256 (La. 1988).

[73] 8 JOHN H. WIGMORE, § 2388, at 855, cited by Throop v. F. E. Young & Co., 382 P.2d 560 (Ariz. 1963).

the denial of benefits was in good faith, is not an implied waiver.[74] However, where the insurer advances its own interpretation of the law as a defense, including what its employees knew of the law, the insurer places the legal advice it was given at issue.[75]

In *State Farm Mut. Auto. Ins. Co. v. Lee*,[76] the Arizona Supreme Court found the insurer had waived the attorney-client privilege despite its insistence that it was not asserting an "advice of counsel" defense. The court held:

> [A] litigant's affirmative disavowal of express reliance on the privileged communication is not enough to prevent a finding of waiver. When a litigant seeks to establish its mental state by asserting that it acted after investigating the law and reaching a well-founded belief that the law permitted the action it took, then the extent of its investigation and the basis for its subjective evaluation are called into question. Thus, the advice received from counsel as part of its investigation and evaluation is not only relevant but, on an issue such as this, inextricably intertwined with the court's truth-seeking functions. A litigant cannot assert a defense based on the contention that it acted reasonably because of what it did to educate itself about the law, when its investigation of and knowledge about the law included information it obtained from its lawyer, and then use the privilege to preclude the other party from ascertaining what it actually learned and knew."[77]

A contrary result was reached in *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.*,[78] in which the plaintiff asserted that the insurer affirmatively placed at issue the advice of counsel defense by asserting that it acted in good faith in compliance with the insurance policies and their legal obligations. In rejecting that claim, the court held that, under Louisiana law, a party waives the attorney-client privilege only when he "pleads a claim or defense in such a way that he will be forced inevitably to draw upon a privileged communication at trial in order to prevail."[79]

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[74] *Lee*, 13 P.3d 1169 at 1175.
[75] *Id*.
[76] 13 P.3d 1169 (Ariz. 2000).
[77] *Id.*, 13 P.3d at 1177.
[78] Dixie Mill Supply Co., Inc., v. Continental Cas. Co. 168 F.R.D. 554, 559 (E.D. La. 1996), citing *Ring*, 159 F.R.D. at 658.
[79] *Id*., citing Succession of Smith v. Kavanaugh, Pierson & Talley, 513 So. 2d 1138, 1145 (La. 1987).

2. The "Common Interest" Doctrine

Generally, when an attorney acts for two different parties who each have a common interest, communications by either party to the attorney are not necessarily privileged *in a subsequent controversy between the parties*. Under this doctrine, "when an attorney has been retained to represent both insured and insurer in a third-party action, communications by either party will not be privileged … if their interests later diverge."[80]

The doctrine typically arises in the context of demands for attorney-client material in "bad faith" actions prosecuted by an insured against his insurer for failure to settle within the policy limits of a liability policy. The general rule is that communications between the insurer and an attorney, who also represented the insured in the original tort action against the insured, are not privileged with respect to the insured.[81] The justification for the denial of the claim of privilege is that the attorney retained to defend the underlying tort claim is representing the interests of both the insurer and the insured.

The decision of the Pennsylvania court in *O'Brien v. Tuttle*[82] provides some sense of the nuances of the doctrine. In *O'Brien,* the plaintiff filed a complaint for medical malpractice. Shortly after forwarding the complaint in the lawsuit to his insurance carrier, the insurer sent the defendant doctor a questionnaire regarding the claim. The doctor completed the questionnaire and gave it to the attorney furnished by his insurance carrier to defend the lawsuit rather than returning the completed questionnaire to his insurance carrier, and thereafter asserted attorney-client privilege in response to a request for its production. The attorney later forwarded a copy of this questionnaire to the insurance carrier.

The court observed that if counsel was acting as counsel for both the doctor and his insurance carrier, the communication would be protected. The court found that the law recognizes a joint representation by a common

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[80] Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 1995 WL 411805 (Del. Super. Ct. Mar. 17, 1995).

[81] *See* Baker v. CNA Ins. Co., 123 F.R.D. 322 (D. Mont. 1988), citing Gibson v. Western Fire Ins. Co., 682 P.2d 725 (Mont. 1984); Longo v. Am. Policyholders Ins. Co., 436 A.2d 577 (N.J. 1981); Simpson v. Motorists Mutual Ins. Co., 494 F.2d 850 (7th Cir. 1974) (applying Ohio law), *cert. denied*, 419 U.S. 901 (1974); Dumas v. State Farm Mutual Auto Ins. Co., 274 A.2d 781 (N.H. 1971); Shapiro v. Allstate Ins. Co., 44 F.R.D. 429 (C.D. Penn. 1968); Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D. 37 (D. S.C. 1964).

[82] 21 Pa. D. & C. 3d 319 (Pa. Ct. Com. Pl. 1981).

attorney for the mutual benefit of two or more parties and thus, in this situation, the law extends the attorney-client privilege to any communication among the parties and their counsel in order to permit the free flow of information.[83]

On the waiver issue, the court noted there was a question about whether the privilege would be waived if the client had not authorized the transmission of the form by the attorney to the carrier because it is the client who is the holder of the privilege and only a client or his or her attorney, acting with the client's authority, may waive the privilege.[84] In addition, if the disclosure was made to further the insured's interests in connection with counsel's preparation of the litigation (e.g. to encourage the insurance carrier to settle its claim), it can be argued that the disclosure does not constitute a waiver of the attorney-client privilege.[85]

The case of *Dedham-Westwood Water Dist. v. National Union Fire Ins. Co. of Pittsburgh* is an example of the outer edges of the common-interest doctrine.[86] While facts of the underlying litigation are complex, the discovery arose in an action by the plaintiff against insurers, following settlement of an environmental claim.

The court's final comment in *Dedham-Westwood* suggests potential grounds for narrowing the doctrine even in those cases where the insurer participates in the underlying action. The court observed that the "common-interest" doctrine is less appropriate when the documents at issue were prepared in an atmosphere of uncertainty as to the scope of identity of interest shared by insurer and insured. As the court noted, "Particularly in the environmental liability context, the insured often enters and acts in the underlying litigation alone, with an apprehension of not only the outcome of that litigation, but also of the foreboding litigation with its insurers."[87] Under these circumstances, the argument that there was no reasonable expectation of privacy due to an identity of interest is "fiction," and the "common-interest" exception cannot apply.

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[83] *Id.* at 321.

[84] *Id.* at n. 2, citing MCCORMICK ON EVIDENCE, §97.

[85] *Id.* citing State v. Pratt, 398 A.2d 421 (Md. 1979); State v. Mingo, 392 A. 2d 590 (N.J. 1978); Pouncy v. State, 353 So. 2d 640 (Fla. Ct. App. 1977).

[86] Dedham-Westwood Water Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2000 WL 33593142 (Mass. Super. Ct. Feb. 4, 2000).

[87] *Id*., citing Pittston Co. v. Allianz Ins. Co., 143 F.R.D. 66, 70-71 (D. N.J.1992).

3. The Crime/Fraud Exception

Item C.(3)(d) of Judge Wyzanski's statement of the attorney-client privilege in *U.S. v. United Shoe Machinery Corp* provides that the privilege does not apply if the communication was for the purpose of committing a crime or tort. This exception to the privilege has been invoked for a wide variety of offenses including fraudulent pleadings, fraudulent insurance claims and conspiracy to fraudulently obtain a default judgment.[88]

The precise conduct that may give rise to the crime/fraud exception has been disputed. The court in *In re Sealed Case*[89] held that work-product materials may be subject to discovery if "the client actually committed or attempted a crime or fraud subsequent to receiving the benefit of counsel's work product." [90] Taking a more limited view, the court in *The Pritchard-Keang Nam Corp. v. Jaworski*[91] held that it is not enough that the alleged fraud merely follow the attorney-client communication. Instead, for the crime/fraud exception to apply, the legal advice must be sought or obtained in furtherance of or in relation to the fraudulent activity.[92]

There is also the suggestion that the standard for invoking the crime/fraud exception with respect to work product may be different from that applied in the context of material protected by the attorney-client privilege. The court in *In re Murphy* [93] found that, as Rule 26(b)(3) protects a broader and, to some extent different, type of material than the attorney-client privilege, the traditional exceptions to the attorney-client privilege cannot be automatically engrafted onto the work-product doctrine. According to the court, a careful analysis must be undertaken to ascertain whether or not the adoption of such an exception would be consistent with the purpose and proper functioning of the work-product privilege.[94]

The court in *In re Murphy* formulated the following test for the use of the crime/fraud

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[88] *See, e.g.,* United Services Auto. Assoc. v. Werley, 526 P.2d 28 (Alaska 1974) and cases cited therein.

[89] 676 F.2d 793 (D.C. Cir.1982).

[90] *Id.* at 815, citing *In re* Grand Jury Proceedings, 604 F.2d 798 (3rd Cir. 1979) and *In re* Murphy, 560 F.2d 326 (Minn. Ct. App. 1977).

[91] 751 F.2d 277 (8th Cir. 1985).

[92] *Id.,* citing *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1039 (2d Cir. 1984) (crime or fraud need to have "been the objective of the client's communication") and C. MCCORMICK, MCCORMICK ON EVIDENCE § 95, at 229 (E. Cleary 3d ed. 1984) (communication is not privileged "where the client's purpose is the furtherance of a future intended crime or fraud").

[93] 560 F.2d at 337.

[94] *Id.* at 338.

exception in cases where the material demanded was otherwise protected as work product:

> If there is a crime or fraud exception to the work-product privilege that would justify discovery of opinion work-product, the party seeking discovery has the burden of proving at least two elements. It must be established that (1) the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme and (2) the documents containing the attorney's opinion work-product must bear a close relationship to the client's existing or future scheme to commit a crime or fraud.[95]

In the insurance context, the assertion of this exception, or rather disqualification of the privilege, arises most frequently in the context of demands for the contents of the insurer's claims file in claims for bad faith. The results of these cases are mixed, but the majority view appears to be that the mere assertion of a claim for bad faith does not strip the insurer's file of protection, where warranted, of the attorney-client privilege.

In *United Services Auto. Assoc. v. Werley*,[96] though denying that the plaintiff was entitled to recover under the uninsured motorist clauses in the passengers' policies, the insurer asserted that, in the event it was held liable to the plaintiff, all the possibly interested claimants should be present to shield the insurer from double liability. In response to the insurer's interpleader action, the plaintiff filed a counterclaim for bad faith, asserting that the insurer was attempting to coerce him into accepting less than the full amount to which he was entitled under his policy.[97]

During discovery regarding his counterclaim against the insurer, Werley sought the production, in essence, of the entire claims file.[98] The insurer objected to any requested information not disclosed as protected by the attorney-client privilege. The insured filed a motion to compel which was granted by the trial court.

On review of an adverse discovery order, the appellate court held there must be a *prima facie* showing of fraud before the attorney-client privilege is deemed defeated. Once a litigant has presented *prima facie* evidence of the perpetration of a fraud or crime in the attorney-client relationship, the other party may not then claim

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[95] *Id.* at 338. *See also In re* Grand Jury Proceedings, 33 F.3d 342, 348 n. 13 (4th Cir. 1994).

[96] 526 P.2d 28 (Alaska 1974).

[97] *Id.* at 29, 30.

[98] *Id.*

the privilege as a bar to the discovery of relevant communications and documents.[99]

The court then found that the tortious activity alleged by the plaintiff satisfied the "civil fraud" requirement of the exception to the attorney-client privilege. According to the court, in order to compel disclosure of attorney-client communications in cases such as this, there is not only the requirement that one allege a bad faith refusal of an insurer to pay the valid claim of its insured, but also that a *prima facie* case of bad faith refusal be shown.[100]

The contrary view is stated in *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.*,[101] in which the court rejected the plaintiff's demand for attorney-client communications, holding that the reasonableness of the insurers' actions in a bad faith case can be proved by objective facts, which are not shielded from discovery and do not necessarily require the introduction of privileged communications at trial. [102] The Montana Supreme Court also rejected the proposition that a claim for bad faith allows access to material protected by the attorney-client privilege. [103] The plaintiff urged the court to find there was an exception to the privilege based on other theories such as civil fraud. The court rejected the reasoning of *Escalante v. Sentry Ins.*, [104] and *Werley*,[105] holding that those cases would extend the civil fraud exception to bad faith allegations. According to the court, the civil fraud exception to the attorney-client privilege has traditionally been invoked where an attorney or client is involved in unlawful or criminal conduct, or future fraudulent activity. [106] The court cited with approval the decision of the Florida Supreme Court in *Kujawa v. Manhattan Nat. Life Ins. Co.* [107] which held that the "legislature in creating the bad faith cause of action did not evince an intent to abolish the attorney-client privilege and work-product immunity."[108]

Despite the positive citation by the Montana Supreme Court in 1989, the present state of the law in Florida is now unclear. In *Allstate Indemnity Co. v. Ruiz*,[109] the Florida

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[99] *Id.* at 36.

[100] *Id*. at 33. *See also Recht*, 583 S.E.2d 80; Kessel v. Leavitt, 511 S.E.2d 720 (W. Va.1998).

[101] 168 F.R.D. 554, 559 (E.D. La. 1996).

[102] *Dixie Mill Supply Co., Inc*., 168 F.R.D. at 559, citing Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1327 (9th Cir. 1995).

[103] State ex rel. U.S. Fidelity and Guar. Co. v. Montana Second Judicial Dist., 783 P.2d 911 (Mont. 1989).

[104] 743 P.2d 832 (Wash. 1987).

[105] 526 P.2d 28.

[106] Citing 2 J. WEINSTEIN, WEINSTEIN'S EVIDENCE MANUAL § 503(d)(1).

[107] 541 So. 2d 1168 (Fla. 1989).

[108] *Id.* at 1169.

[109] 899 So. 2d 1121 (Fla. 2005).

Supreme Court receded from its decision in *Kujawa* and held that the work-product privilege did not protect the insurer's file from discovery in a statutory first-party bad faith claim. Though the attorney-client privilege was not at issue, the court's sweeping language has arguably created some doubt whether the privilege applies to protect such communications in bad faith actions.

After the decision was entered in *Ruiz*, the Florida District Court of Appeal in *XL Specialty Ins. Co. v. Aircraft Holdings, LLC*,[110] held that, notwithstanding the expansive language in *Ruiz*, the holding in that case applied only to the work-product privilege. In reaching its decision, the court in *XL Specialty* noted the statement of Justice Wells, in his separate opinion in *Ruiz*: "[t]he only issue being decided in this case is the discovery of work product in the claims file pertaining to the underlying insurance claim."

The court granted the insurer's petition for writ of certiorari and quashed the trial court's order compelling attorney-client privileged documents. It then certified the following question to the Florida Supreme Court as one of great public importance:

> Does the Florida Supreme Court's holding in *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla.2005), relating to discovery of work product in first-party bad faith actions brought pursuant to section 624.155, Florida Statutes, also apply to attorney-client privileged communications in the same circumstances?

The Supreme Court initially granted review, [111] but later dismissed review.[112] Therefore, the issue remains unaddressed by the Supreme Court. However, courts in Florida have generally followed *Ruiz*.[113]

E. The Parties' Respective Burdens

The person claiming the privilege bears the initial burden of establishing the applicability of the attorney-client privilege or the work-product exception. The claimant must show certain threshold requirements in order to avail himself or herself of the privilege or exception, including a showing that the communication originated in confidence, that it would not be disclosed, that it was made by an attorney acting in his or her legal capacity for the purpose of advising a client, and that it

[110] 929 So. 2d 578 (Fla. Ct. App. 2006), *rev. granted*, 935 So.2d 1219 (Fla. 2006).
[111] 935 So. 2d 1219 (Fla. 2006).
[112] 993 So.2d 510, (Fla. 2008).
[113] *See, e.g.,* Soricelli v. GEICO Indem. Co., 2017 WL 275967 (M.D. Fla. Jan. 20, 2017).

remained confidential. Thus, the burden of establishing the attorney-client privilege or the work-product exception, in all their elements, always rests upon the person asserting it.[114] Blanket claims of privilege are not favored and the party seeking to avoid discovery has the burden of establishing the essential elements of the privilege being invoked on a document-by-document basis.[115] It is well settled that, when challenged, the proponent of the privilege must establish that the privilege was not waived.[116]

Once the privilege is established as to the material requested, in balancing the need for discovery and the need to protect the attorney's work product, the burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.[117]

In the federal context, district courts enjoy broad discretion when resolving discovery disputes, which should be exercised by determining the relevance of discovery requests, assessing oppressiveness, when weighing whether discovery should be compelled.[118] The same rule applies in state courts.[119] Given the breadth of that discretion, the appellate courts will intervene in management of pretrial discovery only upon a clear showing of manifest injustice, *i.e.*, where the district court's discovery order was plainly wrong and resulted in substantial prejudice to an aggrieved party.[120]

Like the work-product exception, the attorney-client privilege may result in the exclusion of evidence which is otherwise relevant and material. Thus, courts are obligated to strictly construe the privilege and limit it to the purpose for which it exists.[121]

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[114] *See e.g., Ex parte* CIT Communication Finance Corp., 2004 WL 1950292 (Ala. 2004); Tury v. Superior Court, 505 P.2d 1060 (Ariz. Ct. App. 1973); Gonzalez v. Superior Court, 39 Cal. Rptr. 2d 896 (Cal. Ct. App. 1995).

[115] Petersen v. U.S. Reduction Co., 547 N.E.2d 860, 862 (Ind. Ct. App. 1989).

[116] *Carrier Haulers*, 197 F.R.D. 564, citing *In re Grand Jury Subpoena*, 204 F.3d at 522.

[117] *Id. See also*, 2,022 Ranch, L.L.C. v. Superior Court, 7 Cal. Rptr. 3d 197 (Cal. App. 4 Dist. 2003); *In re* Seigel, 198 S.W.3d 21 (Tex. Ct. App. 2006).

[118] FED. R. CIV. P. 37, cited by Favale v. Roman Catholic Diocese of Bridgeport, 233 F.R.D. 243 (D. Conn. 2005).

[119] *See e.g., Ex parte* Zoghby, 2006 WL 3239971 (Ala. 2006); Twin City Fire Ins. Co. v. Burke, 63 P.3d 282 (Ariz. 2003); Coleman v. PricewaterhouseCoopers, LLC, 902 A.2d 1102 (Del. 2006); Wisniewski v. Kownacki, 851 N.E.2d 1243 (Ill. 2006); *In re* City of Wichita, 86 P.3d 513 (Kan. 2004); Bugger v. McGough, 144 P.3d 802 (Mont. 2006); McNeil v. McNeil, 2006 WL 709115 (Pa. 2006); T.S. v. Boy Scouts of America, 2006 WL 2104204 (Wash. 2006).

[120] U.S. Steel v. M. DeMatteo Const. Co., 315 F.3d 43 (1st Cir. 2002).

[121] *Upjohn*, 449 U.S. at 389; State v. Smith, 50 S.E. 859, 860 (1905); Fisher v. United States, 425 U.S. 391, 403 (1976); E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.,

F. Contrasting the Attorney-Client Privilege and the Work-product Doctrine

The work-product doctrine, though related to the concept of attorney-client privilege, is distinct.[122] The doctrine serves a different purpose - one related to the adversary system of litigation: the protection of an attorney's private files and recorded impressions from discovery from opposing counsel.[123] Among the differences between the attorney-client privilege and the work-product doctrine are: (a) the work-product doctrine may be overcome by the party seeking discovery upon a showing that production of facts in those documents is essential to the preparation of the party's case; (b) the attorney-client privilege as applied in judicial proceedings is narrowly construed, whereas the work-product doctrine is broader in scope;[124] and (c) the work-product privilege may be asserted by either the client or the attorney.[125]

As some courts have noted, the work-product privilege may not be a privilege at all, but "merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case."[126] If it is a privilege, the work-product doctrine is "historically and traditionally a privilege of the attorney and not that of the client."[127] In contrast, it is the client who is the holder of the attorney-client privilege.[128]

IV. The Work-Product Doctrine

The federal work-product doctrine was established in *Hickman v. Taylor*.[129] In rejecting the plaintiff's demand for statements and other work product, the court noted that the proper

718 A.2d 1129 (Md. 1998); Delta Financial Corp. v. Morrison, 820 N.Y.S.2d 745 (N.Y. Supp. 2006). *See also In re* Shargel 742 F.2d 61, 62 (2d Cir. 1984); *In re* Special, September 1983, Grand Jury (Klein), 608 F.Supp. 538, 542, *aff'd*, 776 F.2d 628 (S.D. Ind. 1985); 8 JOHN H. WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. ed. 1961).

[122] Pratt v. State, 387 A.2d 779, 782 n. 2 (Md. Ct. App. 1978). *See also* John F. Wagner, Jr., *Protection from Discovery of Attorney's Opinion Work Product Under Rule 26(B)(3), Federal Rules of Civil Procedure*, 84 A.L.R. Fed. 779 (1987).

[123] Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 150 (D. N.J. 1976).

[124] *Forma-Pack*, 718 A.2d 1129.

[125] Edward J. Krauland and Troy H. Cribb, *The Attorney-Client Privilege in the United States - An Age-Old Principle under Modern Pressures*, 2003 PROF. LAWYER 37 (2003).

[126] City of Philadelphia v. Westinghouse Elec. Corp., 210 F.Supp. 483, 485 (E.D. Pa. 1962).

[127] Radiant Burners, Inc. v. Am. Gas Ass'n, 207 F.Supp. 771, 776 (N.D. Ill. 1962).

[128] Trupp v. Wolff, 335 A.2d 171, 184 (Md. Ct. Spec. App. 1975).

[129] 329 U.S. 495 (1947).

preparation of a client's case demands that the attorney assemble information, sift what he or she considers to be the relevant from the irrelevant facts, prepare legal theories and plan his or her strategy without undue and needless interference. The attorney's work is reflected in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly termed as attorney work product. The effect on the legal profession of opening that work product up to opposing counsel would be demoralizing and the interests of the client and the cause of justice would be poorly served.[130]

The central purpose of the work-product doctrine is to protect the mental processes of the attorney from discovery, providing a privileged area within which he or she can analyze and prepare the client's case. But, as the Supreme Court noted in *U.S. v. Nobles*,[131] "the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself."[132]

The work-product doctrine is now expressed in Rule 26(b)(3), Federal Rules of Civil Procedure, and the state court rules that have adopted it. The work-product rule enunciated in *Hickman* was expanded by subsection (b)(3) specifically to cover trial preparation materials of non-lawyers.[133] This expansion of the application of the restrictive work-product doctrine, however, applies by the terms of the Rule when the materials requested for production were prepared in anticipation of litigation or for trial.[134]

The Rule provides that documents "prepared in anticipation of litigation or for trial by or for another party or by or for

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[130] *Id.* at 511.

[131] 422 U.S. 225 (1975).

[132] *Id.* at 238.

[133] *Id.* at n. 13. The plain language of the rule does not require that an attorney be involved in the preparation of the material. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2024, at 205-207 (1970); Toledo Edison Co. v. G.A. Technologies, Inc., 847 F.2d 335 (6th Cir. 1988); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1219 (4th Cir. 1976); Scott Paper Co. v. Ceilcote Co., 103 F.R.D. 591, 594 (D. Me. 1984); Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367, 370 (N.D. Ill. 1972); Hawkins v. District Court, Fourth Judicial Dist., 638 P.2d 1372, 1376-1377 (Colo. 1982); Gold Standard, Inc. v. American Barrick Resources Corp. 805 P.2d 164 (Utah 1990).

[134] *Thomas Organ Co.,* 54 F.R.D. at 370.

that other party's representative" may be obtained in discovery "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[135] Thus, under the plain language of the rule, there are two kinds of work product with differing standards of protection: ordinary work product and opinion work product. In *Baker v. General Motors Corp*.,[136] the Eighth Circuit Court of Appeals explained the difference between them as follows:

> Ordinary work product includes raw factual information. *See Gundacker v. Unisys Corp*., 151 F.3d 842, 848 n. 4 (8th Cir. 1998). Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories. *See Id.* at n. 5. Ordinary work product is not discoverable unless the party seeking discovery has a substantial need for the materials and the party cannot obtain the substantial equivalent of the materials by other means. *See* FED. R. CIV. P. 26(b)(3). In contrast, opinion work product enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney is engaged in illegal conduct or fraud. *See In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977).[137]

The primary reasons for the protection given by the work-product doctrine to materials prepared in anticipation of litigation are to maintain the adversarial trial process and to ensure that attorneys are properly

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[135] FED. R. CIV. P. 26(b)(3).

[136] 209 F.3d 1051, 1054 (8th Cir. 2000).

[137] *Id.*, citing *In re* Murphy, 560 F.2d 326 (8th Cir. 1977). *See also* Haney v. Yates, 40 S.W.3d 352 (Ky. 2000) (documents containing the mental impressions or legal conclusions of an attorney are absolutely privileged); Limstrom v. Ladenburg, 963 P.2d 869 (Wash. 1998) (notes or memoranda prepared by an attorney from oral communications should be absolutely protected under the work-product rule, unless the attorney's mental impressions are directly at issue); Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 609 N.E.2d 460 (Mass. 1993) (order must protect against disclosure of mental impressions, conclusions, opinions or legal theories of attorney or other representative of party concerning litigation); Richey v. Chappell, 594 N.E.2d 443 (Ind. 1992) (even with a showing that the claimant is unable, without undue hardship, to obtain the substantial equivalent by other means of hardship, party seeking discovery is in no event entitled to mental impressions, conclusions, opinions, or legal theories of attorney or other representative of party concerning litigation).

prepared for trial by encouraging written preparation.[138] Attorneys should not be deterred from adequately preparing for trial because of fear that the fruits of their labors will be freely accessible to opposing counsel.[139] Finally, allowing discovery of work product could lead to a party's attorney being called as a witness.[140]

A. The Origin and Nature of the Doctrine's Balancing Test

Balanced against the importance of protecting work product is the fundamental consideration that procedural rules should be construed to allow discovery of all relevant information in order to facilitate a trial based on the true and complete issues.[141] Because work-product protection by its nature may hinder an investigation into facts relevant to the issues before the court, it should be narrowly construed consistent with its purpose, which is to "safeguard the lawyer's work in developing his client's case."[142]

1. The Three Prong Test of Rule 26(b)(3)

Rule 26(b)(3) sets out a three-prong test to determine whether matter is to be characterized as ordinary (not opinion) work product. The party asserting work-product privilege bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives.[143] Much of the litigation regarding the contents of the insurer's claims file addresses the second prong, *i.e.*, whether the material was in fact created in anticipation of litigation.

2. The Parties' Respective Burdens

As in the case of the attorney-client privilege, the burden to demonstrate that the matter being sought is indeed work product as defined by Rule 26(b)(3) is upon the party resisting discovery.[144] Once an insured moves to compel the production of the documents in an insurer's claims file, the burden

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[138] Hickman v. Taylor, 329 U.S. 495 (1947).
[139] *Hickman*, 329 U.S. at 511.
[140] *Hickman*, 329 U.S. at 517 (Jackson, J., concurring).
[141] *Hickman*, 329 U.S. at 507.
[142] *Evans*, 541 S.E.2d at 791, citing Suggs v. Whitaker, 152 F.R.D. 501, 505 (M.D. N.C. 1993).
[143] *Id.*, citing Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 355 (4th Cir. 1992).
[144] Sham v. Hyannis Heritage House Hotel, Inc., 118 F.R.D. 24 (D. Mass. 1987); *In Re* BP Products North America Inc., 263 S.W.3d 106 (Tex. Ct. App. 2006).

shifts to the insurer to establish that the requested documents were generated in anticipation of litigation and are thus protected by the work-product privilege. [145] Unless that party establishes that the privilege should attach, discovery of the requested documents will be permitted. [146] Even where the material qualifies as ordinary work product, discovery of that material will be granted when the party seeking discovery demonstrates a "substantial need" for the document and "undue hardship" in obtaining its substantial equivalent by other means.[147]

Where the material sought consists of opinion work product, items containing the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation" the material can only be discovered when the party seeking discovery establishes extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud.[148]

As in the case of other matters protected by privilege, the protection provided by the work-product doctrine is not absolute, and it may be waived.[149] Under the so called "waiver doctrine," voluntary disclosure of work product to an adversary waives privilege as to other parties.[150] The cases are mixed on whether inadvertent disclosure waives the privilege.[151] Some cases have said that, as the work-product privilege, unlike attorney-client privilege, does not exist to protect a confidential relationship but to promote the adversary system by safeguarding the fruits of an attorney's trial preparation from discovery attempts of an opponent, disclosure of work product to a third party does not waive its protection unless it substantially increases the opportunity for potential adversaries to obtain the information. [152] Others have held that, where disclosure of privileged documents is inadvertent rather

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[145] *Ex parte* State Farm Mut. Auto. Ins. Co., 761 So. 2d 1000 (Ala. 2000).

[146] Redvanly v. NYNEX Corp., 152 F.R.D. 460 (S.D. N.Y. 1993).

[147] *Forma-Pack*, 718 A.2d 1129.

[148] *Baker*, 123 F.R.D. 322, citing *In re Murphy*, 560 F.2d at 336; Juneau v. Avoyelles Parish Policy Jury, 482 So. 2d 1022 (La. Ct. App. 1986).

[149] *In re* Qwest Communications Intern. Inc., 450 F.3d 1179 (10th Cir. 2006). *See also* State ex rel. Ford Motor Co. v. Westbrook*e*, 151 S.W.3d 364 (Mo. 2004) (*en banc*).

[150] *In re* Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993).

[151] *See* Mendenhall v. Barber-Greene Co., 531 F.Supp. 951, 954 (N.D. Ill. 1982) (the better-reasoned rule is that mere inadvertent production does not waive the privilege).

[152] Shields v. Sturm, Ruger & Co., 864 F.2d 379 (5th Cir. 1989).

than a knowing waiver, discovery of the material will not be ordered.[153]

The majority view appears to be a middle ground stated by the court in *Hydraflow, Inc. v. Enidine Inc*.,[154] Under the *Hydraflow* test, the court should undertake a five-step analysis of the unintentionally disclosed document to determine the proper range of privilege to extend. These considerations are (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would be served by relieving the party of its error.[155]

3. State Law

As noted above, a majority of states have adopted the work-product protections of Rule 26 of the Federal Rules. For the most part, they have interpreted the state versions of Rule 26 with reference to interpretations by the federal courts.[156]

B. In Anticipation of Litigation

The question of whether particular material was prepared in "anticipation of litigation" has proven to be a major source of disagreement between the federal courts. Insurers assert the work-product doctrine to protect reports, memoranda and investigations made by their representatives after an accident. Such materials are undoubtedly created with an eye toward possible, and, depending on the severity of the incident giving rise to the claim, even highly-likely, litigation. In spite of this reality, the conflicting judicial decisions center on the question of whether the work-product doctrine embodied in Rule 26(b)(3) was intended to provide these materials broad privilege from discovery because of the *possibility* that litigation would ensue as a result of the claims which precipitate the insurer's investigation.

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[153] Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103 (S.D.N.Y. 1985).

[154] 145 F.R.D. 626 (W.D.N.Y. 1993).

[155] *Id.* at 378. For a list of state and federal cases adhering to the Hydraflow approach, *see* State ex rel. Allstate Ins. Co. v. Gaughan, 508 S.E.2d 75, 94 n. 40 (W. Va. 1998).

[156] *See* Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Court In and For County of Clark, 936 P.2d 844 (Nev. 1997) ("[E]ven though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of litigation."); Wells Dairy, Inc. v. American Indus. Refrigeration, Inc., 690 N.W.2d 38 (Iowa 2004); Springfield Terminal Ry. Co. v. Department of Transp., 754 A.2d 353 (Me. 2000).

In the context of insurance litigation, determining whether a document was created in anticipation of litigation is particularly challenging because the very nature of the insurer's business is to investigate claims. Because insurance companies regularly investigate claims, such investigations would normally seem to be in the ordinary course of business rather than in anticipation of litigation.[157] Although it seems clear that the possibility of litigation exists from the denial of any claim, the courts generally have held that statements or reports made by parties and their employees in the regular course of business are not work-product and should be produced for discovery when so requested by the opposing party.[158]

Courts are split on what standard to apply to determine whether a document has been created in anticipation of litigation and not in the ordinary course of business. The most troublesome area has been where the documents are prepared by non-lawyer investigators and adjusters before counsel is engaged by the insurer. Some courts have held that attorney involvement is required.[159] Other courts have held the opposite position, one that presumes that such reports were made in anticipation of litigation.[160]

A third group of courts rejected both approaches and have viewed attorney involvement as only one factor in a more fact-specific determination of whether material was prepared in anticipation of litigation.[161]

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[157] *See* M. Elizabeth Medaglia, et al., *Privilege, Work Product, and Discovery Issues in Bad Faith Litigation*, 32 TORT & INS. L. J. 1, 12 (1996), cited by *Evans*, 541 S.E.2d 782.

[158] *See* Burns v. New York Central R. Co., 33 F.R.D. 309, 310 (N.D. Ohio 1963); U.S. v. Swift & Co., 24 F.R.D. 280, 282 (N.D. Ill. 1959); Morrone v. Southern Pacific Co., 7 F.R.D. 214, 215 (S.D. Cal. 1947); Durkin v. Pet Milk Co., 14 F.R.D. 385, 391-394 (W.D. Ark. 1953); California v. U.S., 27 F.R.D. 261, 262 (N.D. Cal. 1961); Burke v. U.S., 32 F.R.D. 213, 214-215 (E.D. N.Y. 1963); Newell v. Capital Transit Co., 7 F.R.D. 732, 734 (D.D.C. 1948); Herbst v. Chicago, Rock Island & Pacific R. Co., 10 F.R.D. 14, 18-19 (S.D. Iowa 1950); Szymanski v. New York, N.H. & H.R. R. Co., 14 F.R.D. 82, 83 (S.D. N.Y. 1952); Brown v. New York, New Haven and Hartford R. Co.., 17 F.R.D. 324, 325 (S.D.N.Y. 1955).

[159] *McDougall*, 468 F.2d 468; Langdon v. Champion, 752 P.2d 999 (Alaska 1988); Henry Enterprises, Inc. v. Smith, 592 P.2d 915 (Kan. 1979).

[160] *McAlpine*, 391 A.2d 84. *See also* Basinger v. Glacier Carriers, Inc., 107 F.R.D. 771, 773 (M.D. Pa. 1985), citing Fontaine v. Sunflower Beef Carrier, 87 F.R.D. 89 (E.D. Mo. 1980); Almaguer v. Chicago, Rock Island & Pacific R. Co., 55 F.R.D. 147 (D. Neb. 1972).

[161] Moore v. Tri-City Hosp. Auth., 118 F.R.D. 646 (N.D. Ga. 1988); Basinger, 107 F.R.D. at 773-774; Scott Paper, 103 F.R.D. at 594; APL Corp. v. Aetna Casualty & Sur. Co., 91 F.R.D. 10, 18 (D. Md. 1980); Spaulding v. Denton, 68 F.R.D. 342, 345 (D. Del. 1975).

1. Presumption of Ordinary Course of Business

In *Thomas Organ Co. v. Jadranska Slobodna Plovidba*,[162] the court held that neither the transcription of dictation made by a marine surveyor hired by the insurer nor a letter from that surveyor, based in part on the dictation, could be considered as prepared in anticipation of litigation or for trial. The trial court noted that the documents might contain the surveyor's impressions, conclusions, and opinions. It also noted that the documents were prepared because of specific claims that had already arisen and that litigation was an identifiable contingency at the time of preparation. However, the documents were prepared months before the insurer paid the claim, received the subrogation agreement from the insured or caused suit to be instituted. Perhaps more importantly, the documents were prepared months before the attorney first became involved. As a consequence, the court held that both documents, being relevant, were discoverable without any showing of need.[163]

2. Presumption Against Ordinary Course of Business

A second group of courts has taken the position that documents prepared by non-lawyer agents of the insurer immediately following an accident are indeed made in anticipation of litigation. This interpretation of the rule, enunciated by the Maine Supreme Court in *Harriman v. Maddocks*[164] offers insurance claim files broad protection from disclosure under the work-product doctrine.

In *Harriman*, the plaintiffs filed a motion for discovery of the entire case file compiled by the insurer's adjuster. The trial court conducted an in-camera inspection, separating documents on the basis of whether they were relevant and, if relevant, determined whether they were nonetheless protected as work product. On appeal, the plaintiffs asserted that the court should have permitted discovery of the adjuster's entire file, assuming relevance, without requiring the plaintiffs to make any showing that the materials in the file were not prepared in anticipation of litigation, nor of a substantial need for the materials. In rejecting the claim of the plaintiffs, and citing the criticism of *Thomas Organ Co.,* the court advised there was no distinction between materials

[162] 54 F.R.D. 367 (N.D. Ill. 1972).

[163] *Thomas Organ Co.*, 54 F.R.D. at 370.

[164] 518 A.2d 1027 (Me. 1986).

prepared by an attorney and those that are prepared by a claim agent. Therefore, the involvement of an attorney is not a prerequisite to the application of Rule 26(b)(3).[165]

3. The Case-by-Case Method

The so call "case-by-case" method appears to be the majority rule on whether documents created by non-lawyer inspectors and adjusters who are not under the direction of an attorney are nonetheless entitled to work-product protection.[166] Under this rule, adopted by the court in *State Farm Fire & Cas. Co. v. Perrigan*,[167] whether the claims materials demanded by the plaintiff are subject to discovery depends upon the facts of each case.[168] The test in the case-by-case method is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. As under the other tests, there is no work-product immunity for documents prepared in the regular course of business (rather than for purposes of litigation) even though litigation is already contemplated, pending or even in progress.[169]

The advantage of the case by case approach is that it acknowledges that, at some point, an insurer must necessarily shift the focus of its activity from the ordinary course of business to litigation. As a practical matter, this shift in focus occurs at different times in different cases. Rejecting the idea that some blanket presumption can accurately govern when the shift occurs,[170] this method recognizes the factual differences in cases and focuses on that pivotal point where the probability of litigating the claim is substantial and imminent.[171] Some courts defined the factual inquiry as

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[165] *Id.* at 1033.

[166] *See* S.D. Warren Co. v. Eastern Elec. Corp., 201 F.R.D. 280 (D. Me. 2001). *See also Ex parte* Cummings, 776 So. 2d 771 (Ala. 2000); *Wells Dairy*, 690 N.W.2d 38; *Springfield Terminal Ry. Co*., 754 A.2d 353; Heffron v. District Court Oklahoma County, 77 P.3d 1069 (Okla. 2003); West Virginia Ex Rel. Allstate Ins. Co. v. Madden, 2004 WL 1144057 (W. Va. 2004); Lane v. Sharp Packaging Systems, Inc., 640 N.W.2d 788 (Wis. 2002).

[167] 102 F.R.D. 235, 238 (W.D. Va. 1984).

[168] Carver v. Allstate Ins. Co., 94 F.R.D. 131, 134 (S.D. Ga. 1982); *Spaulding*, 68 F.R.D. at 345-346; Am. Home Assur. Co. v. Libbey-Owens-Ford Co., 37 Fed. R. Serv. 628, 632 (D. Mass. 1983).

[169] *Hercules*, 434 F.Supp. at 151; Miles v. Bell Helicopter Co., 385 F.Supp. 1029, 1032-33 (N.D. Ga. 1974); Hi-G Inc. v. Ins. Co. of N. Am., 35 Fed. R. Serv. 861, 862 (D. Mass. 1982). *See also*, 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2024 at 198-199 (1970).

[170] Westhemeco Ltd. v. N.H. Ins. Co., 82 F.R.D. 702, 708 (S.D. N.Y. 1979).

[171] *Carver*, 94 F.R.D. at 134, citing *APL*, 91 F.R.D. at 21; Klawes v. Firestone Tire & Rubber Co., 572 F.Supp. 116, 125 (E.D. Wis. 1983).

whether litigation was reasonably foreseeable at the time the requested document was prepared.[172]

C. The Good Cause/Undue Hardship Doctrine

The basis for the "good cause" exception to the protection for otherwise privileged work product is Rule 26. In *Hickman v. Taylor*,[173] the Supreme Court denied the plaintiff's demand for an attempt to obtain work product holding that such discovery "without purported necessity or justification" fell outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. [174] Under the plain language of Rule 26, a finding that the material demanded by a litigant falls within the work-product privilege does not mean that the court will not order it produced. To obtain otherwise protected material, the claimant will have to show "good cause." Good cause will necessarily depend upon the facts of the individual case and, therefore, is not susceptible to a single definition.

Certainly, the mere assertion that discovery is necessary for a movant to investigate fully and prepare his case is insufficient as a statement of good cause warranting order for production of documents.[175] As the *Fulcher* court advised, "There must instead be some special circumstances in addition to relevancy. The discovery procedures were not intended to open an attorney's files to opposing counsel; nor were they intended to afford an attorney the luxury of having opposing counsel investigate his case for him."[176]

While good cause has been interpreted in differing ways,[177] in general the claimant will have to show an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.[178] What hardship is "undue" depends on both the alternative means available and the need for continuing protection from

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[172] Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980).

[173] *Hickman,* 329 U.S. 495.

[174] *Hickman*, 329 U.S.*,* at 510.

[175] 172 S.E.2d 751 (Va. 1970).

[176] *Id*.

[177] One commentator has advanced the following general test for good cause: Generally speaking, however, it was held that the moving party must demonstrate that inspection of documents to be produced is in some way necessary to the adequate preparation of its case … . In short, any showing that failure to order production would unduly prejudice the preparation of the party's case, or cause him hardship or injustice, would support the order. 4A MOORE'S FED. PRAC. § 34.08 (1974), cited by Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (N.C. 1975).

[178] *See* Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir. 1999), quoting *In* re Grand Jury Proceedings, 33 F.3d at 348; *Recht*, 583 S.E.2d 80.

discovery.[179] Discovery has also been allowed where crucial information was in the exclusive control of the opposing party.[180] On the other hand, the good cause requirement is not met if the discovering party merely wants to be sure nothing has been overlooked or merely hopes to unearth damaging admissions.[181]

Apart from those cases where the evidence sought is only to be had from the opposite party, the focus of litigation will usually be on whether the alternatives available to the person seeking discovery are substantially equivalent. Where both parties have an equal opportunity to investigate, and where all the witnesses to the accident are known and available to both sides, discovery should not be granted.[182]

With respect to the insurer's claims file, the good cause issue frequently arises in connection with demands for statements taken by the insurer's investigators or counsel. As noted above during the discussion of the expected contents of the claims file, such statements have been found to be protected as work product. The special nature of such statements, however, frequently results in their production despite the work-product privilege. The reason for such treatment was stated by the court in *Fireman's Fund Ins. Co. v. McAlpine*.[183] The court noted that such statements taken immediately after an event "are unique catalysts in the search for truth in that they provide an immediate impression of the facts, the substantial equivalent of which cannot be recreated or duplicated by a deposition or interview months or years after the event."[184] According to the court, the unique quality of such statements has been determined to provide special circumstances satisfying the undue hardship requirement needed to overcome their protection as work product.[185]

Some of the factors to consider in the case of witness statements were outlined by the West Virginia Supreme Court in *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*,[186] In *Recht*, the court

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[179] State ex rel. Chaparro v. Wilkes, 438 S.E.2d 575, 578 fn 2 (W. Va.1993).

[180] *See* Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577 (7th Cir. 1981); *Recht*, 583 S.E.2d 80.

[181] Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 557 (2d Cir. 1967); Alltmont v. U.S., 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

[182] Rakes v. Fulcher, 172 S.E.2d 751, citing Koss v. American Steamship Co., 27 F.R.D. 511, 512 (E.D. Mich. 1960); Herrick v. Barber Steamship Lines, Inc., 41 F.R.D. 51, 52 (S.D. N.Y. 1966).

[183] 391 A.2d 84 (R.I. 1978).

[184] *Id.* at 775.

[185] *Id.* citing *McDougall*, 468 F.2d 468; *Lanham*, 403 F.2d 119; *Teribery*, 68 F.R.D. 46; *Tiernan*, 46 F.R.D. 3; *Johnson*, 35 F.R.D. 347; *DeBruce*, 6 F.R.D. 403; *Tinder*, 15 F.R. Serv. 2d 1608.

[186] 583 S.E.2d 80 (W. Va. 2003).

held the "substantial need" and "undue hardship" standard is met where: 1) a witness is no longer available for questioning, 2) a witness is hostile and refuses to give a statement, or 3) the witness has a faulty memory and can no longer remember the details of the event in question. [187] Similar considerations have been used as the basis to order the production of an accident report containing the opinions of the investigator. [188] Other cases have held that the availability of the witnesses whose statements are sought obviates a finding of good cause.[189]

D. Waiver in Case of "Bad faith"

As in claims for materials protected by the attorney-client privilege, plaintiffs frequently assert that documents covered by the work-product privilege lose that protection when the cause of action is for bad faith. As noted above, some states, like Florida, have found that such materials must be produced in bad faith cases. [190] However, other courts have rejected that broad-brush approach.

In *State ex rel. U.S. Fidelity and Guar. Co. v. Montana Second Judicial Dist.*, [191] the Montana Supreme Court noted that the civil fraud exception to the attorney-client privilege has traditionally been invoked where an attorney or client is involved in unlawful or criminal conduct, or future expected fraudulent activity. It rejected the reasoning of cases that would extend the civil fraud exception to bad faith allegations.[192]

Other courts have compelled the production of the insurer's claims file but done so using the familiar standards for factual (rather than opinion) work product. For example, in *Prisco Serena Sturm Architects, Ltd. v. Liberty Mut. Ins. Co.*, [193] the court compelled production of the claims file noting that "[t]he claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but

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[187] *See also* Carmen v. Fishel, 418 P.2d 963, 972 (Okla. 1966).

[188] Ogea v. Jacobs, 344 So. 2d 953 (La. 1977). *Cf.* Holmes v. Gardler, 62 F.R.D. 70 (E.D. Pa. 1974*);* Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973) (approving the redaction of opinions contained within factual reports).

[189] *See* Uncle Ben's, Inc. v. Uncle Ben's Pancake Houses, Inc., 30 F.R.D. 506 (S.D. Tex. 1962); Richards v. Maine Cent. Rd., 21 F.R.D. 593 (D. Me. 1957); Goldner v. Chicago & N.W. Ry. System, 13 F.R.D. 326. (N.D. Ill. 1952).

[190] Ruiz v. Allstate Ind. Co., 899 So. 2d 1121 (Fla.2005).

[191] 783 P.2d 911 (Mont. 1989).

[192] *Id.,* citing 2 J. WEINSTEIN, EVIDENCE § 503(d)(1)(01); Annot., 31 ALR 4th 45.

[193] 1996 WL 89225, 1 (N.D. Ill. Feb. 27, 1996).

overwhelming. ... It follows that where allegations of bad faith exist against an insurance company, the plaintiff insured is entitled to know the substance of the investigation, the information available and used to make a decision, and the evaluations and advice relied upon for the decision."[194]

Still other courts have held the plaintiff in bad faith cases to a stronger showing of good cause. For example, the court in *Ring v. Commercial Union Ins. Co.*, [195] declined to order production of the insurer's claims file because the cause of action involved bad faith. The court noted "[w]hile arguably it may be more difficult to prove a claim of bad faith failure to settle without examining an insurance company's claims file, does not mean it is impossible." According to the court, the plaintiff could "thoroughly depose and examine the defendants' adjuster to find out all of his actions and decisions leading to the denial of the claim."[196]

V. Conclusion

As the cases above demonstrate, broad requests for the insurer's claims file are objectionable. A blanket request for the entire claims file is not sufficiently detailed to permit the parties and the court to understand with certainty the nature of the documents demanded. Instead, the request must be defined with sufficient particularity to enable the opposing party to interpose the grounds of objection it may have to the requested production. In addition, the request must sufficiently describe the documents sought to enable the Court to intelligently rule on the opposing party's objections.

In the insured's suit against the insurer following a coverage decision, demand for many of the items within the insurer's claims file will fail on grounds of relevance. While the standard for relevance under state and federal rules is broad, the material requested must either make a fact at issue more or

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[194] *Id.* at 1. Other courts have concurred with this result. *See, e.g.,* Silva v. Fire Ins. Exchange, 112 F.R.D. 699 (D. Mont. 1986); Brown v. Superior Court In and For Maricopa County, 670 P.2d 725, 734 (Ariz. 1983); Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos., 123 F.R.D. 198, 203 (M.D.N.C. 1988); Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992); Transport Ins. Co., Inc. v. Post Express Co., Inc., 1996 WL 32877, 3 (N.D. Ill. Jan. 25, 1996) (in finding a substantial need, the court compelled production of the file because the claims file sought was "the only record of how Transport handled the claim and, therefore, the only evidence on whether Transport acted reasonably or in good faith in failing to settle the claim against Post Express in the [insured's] lawsuit.").

[195] 159 F.R.D. 653, 658 (M.D.N.C. 1995). *See also* Bartlett v. State Farm Mut. Auto. Ins Co., 206 F.R.D. 623 (S.D. Ind. 2002).

[196] *Id.*

less likely than it would be without the requested material or reasonably lead to such material. The typical contents of the insurer's file, such as internal communications and memoranda, and materials related to internal procedures and policies such as directives, guidelines and manuals, are simply not relevant to the actual facts at issue, the nature of the damage claimed, or the nature of the peril that the insured alleges resulted in the damage claimed.

The other portions of the insurer's claims file, *i.e.*, entries in a claims diary or log, reports by outside investigators, and materials generated by the insurer's personnel and outside investigators, including statements taken from potential witnesses, are frequently subject to the attorney-client and work-product privileges. While the insurer must satisfy the court that each document meets the elements of one of these privileges, the mere fact that such material is relevant or even essential to the success of the plaintiff's case does not mean the court can order its production.

Finally, while some jurisdictions have granted wide exceptions to the work-product privilege in bad faith litigation, a blanket waiver of the work-product privilege in bad faith cases is not the rule. Even here, the plaintiff bears the burden of showing relevance and, if the privilege is deemed to apply, good cause to obtain the material. In most jurisdictions, this will mean a showing that the material cannot be obtained without hardship from any other source.

As noted at the beginning of this article, in the current environment, discovery in individual cases is increasingly a vehicle for the collection of evidence to be studied, shared and used to build later cases against the defendant by large plaintiffs' firms or affiliated plaintiffs' counsel in other jurisdictions. It will be for the insurer's counsel to protect her clients by ensuring that disclosures in individual cases are limited, as much as possible, to the proper discovery relevant to the facts at issue in the individual case before the court.