IBA Insurance Committee Substantive Project 2011

Privilege in Insurance Disputes:

"Shielding Privileged Information in the Midst of a Sword Fight"

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About the International Bar Association Insurance Committee

Insurance is present in every facet of commercial, industrial and private life. Lawyers practicing in many different fields encounter insurance and its problems and can greatly benefit from the knowledge which membership of this committee provides.

The Insurance Committee aims to provide its nearly 600 members, and the IBA Legal Practice Division as a whole, with information about developments in insurance and reinsurance law and markets throughout the world as well as with specialist knowledge to assist in the efficient solution of practical insurance problems. New insurance products are also brought to the attention of members.

In addition to this publication, the Committee produces a newsletter for its members which provides updates and commentary on developments and issues in the field.

The Committee also presents sessions at the IBA Annual Conference every year. In 2012, the Conference will be held in Dublin. Please see http://www.ibanet.org for more information on this and other upcoming events.

If you would like to join the Insurance Committee, or if you would like further information on the Committee's activities, please visit http://www.ibanet.org.

We also invite you to contact the IBA membership department on

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or by email at member@int-bar.org.

Note from the IBA Insurance Committee

We received an excellent response to our recent substantive projects. In 2009, with contributions from our members in 21 jurisdictions, the committee conducted a survey regarding liabilities to which corporate representatives are exposed and the insurance and indemnification products available to cover such liabilities. In 2010, with contributions from our members in 27 jurisdictions, the committee conducted a survey regarding the procedures and effects of insurance portfolio transfers around the world.

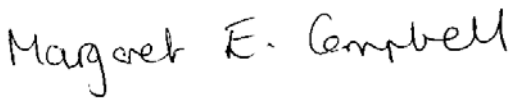
Building on this past success, this year we have conducted a survey regarding privilege in insurance disputes. Members from 27 jurisdictions have provided detailed discussion and insights into this often complex issue.

With insurance and reinsurance being a global enterprise, resulting in cross border disputes, often involving both common law and civil law jurisdictions, we hope that this comparative analysis will be valuable to lawyers and other (re)insurance professionals alike.

We would like to thank those who generously contributed your time and expertise to successfully complete this project.

Copies of this report will be made available to our members at the annual meeting in Dubai. You may also access this report on the IBA's website.

Best regards,



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Editorial

EDITORIAL

Privilege in Insurance Disputes: "Shielding Privileged Information in a Sword Fight"

The nature of insurance is to spread risk, often across national borders. A typical tower of liability coverage for a large U.S. or multinational corporation will include insurers from the U.S., the London Market, Bermuda, and other jurisdictions. Each of the insurers will likely reinsure a portion of their exposures to reinsurers in many different jurisdictions. When a significant loss event occurs, insureds, insurers and reinsurers need to exchange sensitive information relating to underlying litigation in order to evaluate coverage, coordinate defense of the underlying litigation, and establish reserves. They may also end up litigating or arbitrating coverage disputes with each other.

The genesis for this survey of the law regarding privilege in insurance disputes arose from frequent questions raised at past meetings of the IBA Insurance Committee by members with cross border practices. For example, lawyers representing insurers in civil law jurisdictions often expressed frustration and dismay that an insured in a common law country would hesitate to send information relevant to a claim on the grounds that it was privileged, and that the privilege could be waived by disclosure to the insurer. Similarly, reinsurers' counsel expressed frustration that reinsureds had been reluctant to disclose otherwise privileged legal analysis to their reinsurers for fear of waiving the privilege as to the insured or third parties. If the insurer expects to receive disclosure of all material information relating to a claim, how can that expectation be balanced against the insured's or reinsured's interest in maintaining the protections afforded by their own laws of privilege?

The following survey results reflect detailed analysis and discussion of the role that privilege may play in insurance disputes and best practices for preserving privilege when communicating with others in the context of an insurance claim or dispute. The surveys were submitted by IBA Insurance Committee members from 27 jurisdictions, including both common law and civil law jurisdictions.

As one would expect, there is a significant difference in the development of this law between common law jurisdictions and civil law jurisdictions. Issues of privilege arise in the context of pre-trial access to another party's documents or information, and with respect to the taking of evidence at trial or hearing. It is not surprising, therefore, that civil law jurisdictions with little or no pre-trial access to another's documents or information ("fishing expeditions" in the parlance of several jurisdictions) do not often confront the need to assert privilege over their client's files or other documents in the course of litigation. It is also not surprising that common law countries that allow for robust pre-trial discovery have more developed law in this area (necessitated by the general right to intrude on another party's otherwise confidential or proprietary information).

It is our hope that these surveys will inform practitioners about the risks and limitations imposed by some jurisdictions' legal systems, as well as the expectations for full disclosure created by other jurisdictions' legal systems. With this information, participants in insurance relationships should be able to chart a path that both enables the parties to exchange necessary information, while protecting applicable privileges.

A Note Of Appreciation

I would like to thank my colleagues at Jenner & Block, Jennifer Dlugosz and Kaija Hupila, who devoted significant time and effort to this project over the course of several months. This report would not have been possible without their substantial and persistent assistance.

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August 12, 2011

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This report is not intended to provide legal advice but to provide general information on legal matters. Transmission in not intended to create and receipt does not establish an attorney-client relationship. This report is not intended to replace legal advice and no responsibility for claims, losses or damages arising out of any use of this work or any statement in it can be accepted by the contributors or editors. Readers should seek specific legal advice before taking any action with respect to the matters mentioned in this report.

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Argentina

MANZANO, LÓPEZ SAAVEDRA & RAMÍREZ CALVO
MARTIN MANZANO

1. How do privilege issues arise in insurance disputes?

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

In Argentina, the law on the subject of privilege and insurance materials is not very developed. Except for certain specific and limited insurance rules, the civil law on confidentiality and privacy together with certain procedural rules of evidence would apply.

The civil law on confidentiality and privacy is common throughout the country (i.e., the same in all provincial jurisdictions), while the rules of evidence may be of a federal or provincial nature, depending on the case.

As regards insurance statutory provisions, one of the most important rules in respect of confidential information is article 74 of the Insurance Entities Act No. 20.091, pursuant to which the enquiries conducted by the insurance regulator in the furtherance of its surveillance powers are confidential and may not be produced in a civil court except by the relevant Insurer or the State. Data not destined to the public domain and sworn statements periodically filed by the Insurer with the regulator are also confidential.

In practice, however, virtually no privilege issues arise with respect to confidential information in insurance disputes.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedures/rules limit a party's ability to obtain access to insurance related documents?

An Insurer may typically be involved in a lawsuit: (i) as a plaintiff (e.g., on a recovery action); (ii) as a third-party defendant (e.g., through the so called "citación en garantía", which is an insurance device by which an Insurer may be impleaded by the third party claimant or the Insured), or (iii) as a defendant (e.g., Insured vs Insurer).

Discovery, as it is known in certain common law jurisdictions, is foreign to Argentinean law. In principle, the parties to a lawsuit and third parties must produce those documents that are essential to resolve the dispute (article 387 of the National Civil and Commercial Procedural Code). If a party intends to rely upon certain documents held by his or her opponent or a third party, such party must specifically identify the documents before the judge may order disclosure (articles 388 and 389 of the National Civil and Commercial Procedural Code). If the judge were satisfied as to the likelihood of the existence of the documents and their contents, he or she may draw a negative inference if the request is not complied with by the litigant (article 388 of the National Civil and Commercial Procedural Code).

A witness may refuse to answer certain questions if the answer would reveal privileged information, such as a professional, military, scientific, artistic or industrial secret.

In respect of documents required to be produced by third parties, in order to challenge disclosure they would need to show that the documents are of their exclusive ownership and that disclosure may cause a harm.

3. What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?

a. Are communications between Insureds and Insurers protected from third parties by attorney-client / solicitor-client privilege?

In principle, no.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

Please refer to answers to 1.a and 2.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

No. Under Argentine law the Insurer may not exercise a "reservation of rights". The Insurer has a specified term to accept or decline coverage (in principle, 30 days from receiving notice of a loss or all the additional relevant information on the loss).

ii. The Insurer provides a defense pursuant to a reservation of rights?

Please see our answer to 3.c.i above.

iii. The Insurer has denied coverage?

If the Insurer declines coverage, the Insured may sue or implead the Insurer to an already existing lawsuit.

iv. The policy provides only a duty to indemnify and not a duty to defend?

This would be highly unusual in Argentinean practice. In any case, either based on the Insurance Law or on procedural rules, the insurer may be impleaded to the lawsuit.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

If there is a dispute between the Insurer and the Reinsurer, the same rules as mentioned in our answers to 1.a and 2 would apply.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

In practice this type of issue does not arise in insurance disputes.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

No. Please refer to our answers to 1.a and 2 above.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

Under article 46 of the Insurance Law, an Insured who has suffered a loss must provide to the Insurer, at the Insurer's request, all of the necessary information to verify the loss and its economic significance. The Insurer may request documents that are reasonably required to verify and adjust the loss.

If the privileged communications sought by the Insurer are necessary and reasonably required to verify and adjust the loss, the Insured's failure to disclose them may harm the Insured's rights under the policy.

7. How can privilege be waived in insurance disputes?

Either by failing to exercise it or through a court order.

a. Who has the authority to waive privilege?

The court or the party who may be affected by disclosing privilege information.

b. Can privilege be waived inadvertently?

In principle, this would be a matter of fact and it is not regulated.

c. Bad Faith Actions

In Argentina, the action arising from a bad faith breach of contract would not give rise to separate tort and contractual actions, although it may be relevant with respect to the relief that may be available to the party who suffered the bad faith of the other party. The good or bad faith of the parties would have no bearing with respect to privilege and confidential information.

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

8. What are the best practices for maintaining privilege in insurance context?

There are no standard best practices in this regard. The applicable regime would be the one summarized in 1.a and 2 above.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

In principle, no.

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Australia

CLAYTON UTZ[1]
PETER MANN AND DAVID GERBER

1. How do privilege issues arise in insurance disputes?

Under the common law and statute in Australia[2], legal professional privilege attaches to confidential communications between (a) a client and the client's lawyer; or (b) a client or the client's lawyer and a third party, if made for the dominant purpose of (i) giving or receiving legal advice (**legal advice privilege**) or (ii) existing or reasonably anticipated litigation (**litigation privilege**).[3]

In the absence of legal proceedings by a third party, communications between an insurer and its insured are generally not protected from disclosure by legal advice privilege or litigation privilege. However, it may be possible for an insured and insurer to exchange privileged documents and maintain a claim for privilege in certain circumstances. At the outset the communications would need to have been prepared in circumstances which justify a claim of legal advice privilege or litigation privilege. It may then be possible to share the communications on a confidential basis, for a limited and specific purpose, with the result that there is a limited waiver as between the insured and insurer (but not as against third parties)[4] or if the insurer and insured have a common interest in considering the communications.

This is a difficult area of law which may give rise to dispute, the outcome of which is usually heavily dependent on the particular facts and circumstances.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

If an insurer and its insured are involved in a dispute regarding indemnity under a policy, there are likely to be few documents which are subject to a claim for privilege. The insured could ordinarily expect to seek access to:

- documents relating to the placement of the insurance
- the insurer's underwriting files
- communications between the insurer and its reinsurers
- claims files, including information regarding reserves, to the extent that they contain communications that were prepared by the insurer in the ordinary course of its business and without the benefit of legal advice or for the purpose of legal advice.

If a third party has a claim against an insured for which the insurer is providing indemnity (or in litigation brought by an insurer pursuant to rights of subrogation), the third party could possibly seek access to these documents if they are relevant to the proceedings. The third party may also seek access to the following documents which may give rise to disputes regarding privilege issues:

- the insured's notification of a claim or circumstances which may give rise to a claim
- the insured's files of documents and communications relevant to the issues in dispute
- the reports of loss assessors and experts.

Communications which may be subject to claims for privilege and which the insurer would seek to protect from disclosure are likely to include:

- statements made by the insured and provided to the insurer if they are confidential communications which first passed between the insured and its legal advisor and were made for the dominant purpose of enabling the insured to obtain legal advice, or for the purpose of actual or contemplated litigation
- the insurer's claim file to the extent that it contains documents which attract claims of litigation privilege or legal advice privilege

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[1] The authors acknowledge, with thanks, the contributions to this article of Scott Crabb (Partner, Clayton Utz), Norman Lucas (Partner, Clayton Utz), Nicole Ryan-Green (Special Counsel, Clayton Utz), Joseph Collins (Senior Associate, Clayton Utz) and Zoe Hannaford (Lawyer, Clayton Utz).

[2] This article refers to Commonwealth legislation which applies nationally in the Federal Court of Australia. Legislation in the various States and Territories may differ. We do not comment on the specific law applicable in each jurisdiction.

[3] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 and sections 118 and 119 of the *Evidence Act 1995* (Cth).

[4] *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275.

- correspondence between the insurer and its lawyers.

2. As a practical matter, does/do Australia's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

Legislation and rules of courts in different States and Territories regulate the types of documents that are required to be disclosed in litigation proceedings. Ordinarily, a document must be disclosed if it is relevant to an issue in dispute. The requirement of relevance is generally the key factor in limiting a party's ability to obtain access to insurance-related documents.

In most cases it is not necessary to disclose insurance policies because they are unlikely to be relevant to an issue in the litigation. It is usually not relevant to a determination of an issue that insurance may be available to improve the prospects of a successful litigant recovering the amount of a judgment. There may be some exceptions to the general position that third parties generally do not have a right to access the insurance policy of a defendant or potential defendant.[5]

Recently attempts have been made to access directors' and officers' liability insurance (**D&O**) policies. These have arisen, in particular, in the context of shareholder class actions or anticipated shareholder derivative claims against directors. In some cases, parties have been successful in gaining access to a D&O policy.[6] In other cases, the request for access has been refused.[7] At the time of writing this article, the High Court of Australia has not yet considered these divergent lines of authority and it remains unclear precisely what circumstances will justify a litigant gaining access to a D&O policy for the purpose of litigation.

In the context of arbitration, in many cases the ability of a party to access documents (including insurance-related documents) is likely to depend on the rules under which the proceedings are conducted and the terms of an agreement between the parties to submit their dispute to arbitration.

The UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) has force of law in Australia under and subject to the *International Arbitration Act 1974* (Cth).[8] Article 19(2) of the Model Law gives an arbitral tribunal power to determine the admissibility, relevance, materiality and weight of any evidence. There are similarly wide powers in commercial arbitration legislation in various States and Territories which governs domestic arbitrations.[9]

In general terms, arbitrators may order parties to produce documents. However, they may only do so with respect to parties to the proceedings. Under the Model Law a court may be approached for assistance to take evidence.[10] A party may obtain a court order compelling a person to produce documents under the commercial arbitration legislation. Otherwise, if issues of privilege arise in arbitrations they would be subject to the common law and legislation dealing with evidence.

3. What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?

a. Are communications between Insured's and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

It is clear that documents created so that an insurer can be informed generally and can in the ordinary course of business investigate a claim that might be made before deciding what to do are not privileged, in contrast to the situation where reports are prepared at a time when litigation is either likely or anticipated.[11]

Ordinarily an insured and insurer would not be in a relationship of client/legal adviser. Communications between them would not be protected by legal advice privilege. If a solicitor is involved in the communications, then there may be a basis for claiming privilege where the requirements for litigation privilege or legal advice privilege apply.

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[5] Andrew Miers, '*Third party access to insurance policies*' (2010) 21 ILJ 153.

[6] *Merim Pty Ltd v Style Ltd* [2009] FCA 314 and *Snelgrove v Great Southern Managers Australia Ltd (in liq) (receiver and manager appointed)* [2010] WASC 51.

[7] *Lehman Brothers Australia Ltd v Wingecarribee Shire Council* [2009] FCAFC 63 and *Kirby v Centro Properties Ltd* [2009] FCA 695.

[8] Section 16(1) of the *International Arbitration Act 1974* (Cth).

[9] See, for example, section 19(3) of the *Commercial Arbitration Act 2010* (NSW).

[10] Article 27 of the Model Law.

[11] *Sutton's Insurance Law in Australia* 3rd ed (LBC, 1999) at [15.98], as quoted with approval in *Re Southland Coal Pty Ltd* [2005] NSWSC 259 per Young CJ at [70] and [71].

b. Are there doctrines, such as joint client, joint defence, common interests, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

The doctrines of common interest privilege and joint legal privilege may operate to protect from disclosure to a third party certain confidential documents exchanged between an insured and its insurer.

Common interest privilege: Common interest privilege in Australia arises under both the common law[12] and legislation[13]. If common interest privilege applies, it operates to prevent a disclosure of confidential lawyer-client communications to a third party from constituting a waiver of privilege over that communication.

For example, the effect of s122(5)(c) of the *Evidence Act 1995* (NSW) is that where litigation is actual or anticipated, common interest privilege arises if, at the time of disclosure: (a) the communications that were disclosed were subject to legal professional privilege; (b) at the time of the disclosure, there existed a common interest between the client and the other party; and (c) the common interest is linked to the actual or anticipated proceedings in the context of which the legal professional privilege arises. In these circumstances, there will not be a waiver of privilege as a result of disclosure.

The *Evidence Act* does not provide guidance as to what constitutes a 'common interest'. This must be answered by case law, which suggests that "*the concept is not rigidly defined and it is a question of fact in each case*"[14].

There are limits on common interest privilege. For example, it is unlikely to exist if the interests of the client and the third party are selfish and potentially adverse to each other.[15] It is this limitation that creates a difficulty for insureds and insurers. This is discussed further in (c) below.

Joint legal privilege: Joint privilege arises when two or more people join together to seek the advice of the same lawyer. The privilege which protects these communications from disclosure belongs to all persons who joined in seeking the service or obtaining the advice.[16]

At common law, only one party need claim joint privilege for it to arise. The parties together are then entitled to maintain the privilege "against the rest of the world".[17]

The *Evidence Act* allows for joint parties to share information without losing the benefit of client legal privilege.[18] Again, it is sufficient for one party to assert the claim. Unlike with its provisions dealing with common interest, this legislation does not expressly limit joint privilege to interests relating only to proceedings.

"*Markus* discretion": There is sometimes said to be a judicial discretion arising from a decision of the Supreme Court of New South Wales[19] which allows the court to determine, in the interest of justice, whether to grant or deny access to a document. In that case, the court refused to allow access to a non-privileged report of a loss assessor in the interests of justice. However, recent case law suggests that the "*Markus* discretion" should not be considered a free-standing discretion divorced from the terms of the relevant legislation and rules.[20]

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

In these circumstances, there would be good grounds for arguing that the insured and insurer have a common interest in the defence of legal proceedings brought by a third party against the insured. If so, there ought not to be a waiver of privilege in documents exchanged between the insured and the insurer on a confidential basis for the purpose of the defence.

ii. The Insurer provides a defence pursuant to a reservation of rights?

[12] For example, in the context of insurance, see *Bulk Materials (Coal Handling) Services Pty Ltd v Coal and Allied Operations Pty Ltd* (1998) 13 NSWLR 689.

[13] Section 122(5)(c) of the *Evidence Act 1995* (Cth).

[14] *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 at 280.

[15] *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd and Others* (1995) 37 NSWLR 405 at 410.

[16] *Farrow Mortgage Services Pty Ltd (in Liq) v Webb & Ors* (1996) 39 NSWLR 601 at 608.

[17] Ibid.

[18] Section 122(5)(b) of the *Evidence Act 1995* (Cth).

[19] *Markus v Provincial Insurance Co Ltd* (1983) 25 NSWCCR 1.

[20] *Haplin and Others v Lumley General Insurance Ltd* [2009] NSWCA 372 per Sackville AJA at [77] (Tobias JA and Basten JA concurring).

If an insurer does not confirm indemnity under a policy and handles a claim (e.g. funding defence costs) subject to a reservation of its rights, there may not be common interest between the insured and its insurer. This is because their interests may diverge if indemnity is later denied. In these circumstances, there is a risk of waiver of privilege in communications exchanged between the insured and the insurer.

iii. The Insurer has denied coverage?

If an insurer has denied coverage, it is difficult to conceive of circumstances in which there would be common interest between the insured and its insurer. There is likely to be a waiver of privilege in documents that they exchange.

iv. The policy provides only a duty to indemnify and not a duty to defend?

The principles for seeking protection from waiver of privilege on the basis of common interest do not differ in these circumstances. However, it is a question of fact as to whether common interest exists. If a policy contains a duty to defend, this may be a factor in determining whether or not there is a common interest between an insurer and its insured.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

If a solicitor is involved in the communications between an insurer and reinsurer, then there may be a basis for claiming privilege where the requirements for litigation privilege or legal advice privilege are met. If an insured is the subject of the legal proceedings, the insurer and reinsurer may have a basis for arguing that common interest exists to protect the exchange of documents that attract a claim for legal advice privilege or litigation privilege. In theory, the insurer and reinsurer have a common interest in the successful defence of the litigation for which the insurer provides indemnity to the insured.

There is a risk of issues arising when a report (such as an expert report) is sent to reinsurers who may want information about litigation against the underlying insured. The reinsurer may want to know that the reinsured is taken adequate steps to investigate the circumstances. A question may arise as to whether the dominant purpose for commissioning the report was its use in anticipated litigation. It is possible that a report can be sent to a reinsurer for a consequential or secondary purpose with the result that a claim for privilege can be maintained.[21]

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

In-house counsel can fulfill the role of legal adviser. Indeed, there is an increasing number of lawyers employed by insurers to advise in relation to insurance disputes. The ordinary principles for establishing legal advice privilege or litigation privilege may apply to protect as privileged oral or written confidential communications between in-house counsel and their employer. This may occur if: (a) the communications are made for the dominant purpose of giving or receiving legal advice or of conducting actual or anticipated litigation; (b) the professional relationship of lawyer and client is maintained between the in-house counsel and the employer, ensuring independent advice; and (c) the in-house counsel is qualified and entitled to practise law, and is subject to the duty to observe professional standards and the liability to professional discipline.[22]

Difficulties arise in circumstances in which the in-house counsel performs a dual role - one which involves providing legal advice and another in which they act as an adviser to the business on non-legal issues or act as a director or company secretary. The question as to whether a communication was prepared for the dominant purpose of legal advice or litigation becomes particularly important in the context of in-house counsel (who may be asked to advise simultaneously on commercial or business considerations).[23]

To argue that there is privilege in their communications, the in-house counsel should be acting in a professional or legal capacity and the advice should be of a legal nature. The absence of a practising certificate does not conclusively establish that a claim for legal privilege will not arise.[24] However, whether the in-house counsel holds a current practising certificate would be a relevant factor in determining whether the person concerned is properly a legal adviser and therefore privilege exists.

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[21] *Harden Shire Council v Curtis* [2009] NSWCA 179.

[22] *Waterford v Commonwealth* (1987) 163 CLR 54 and *Vance v McCormack* [2005] ACTCA 35.

[23] *Seven Network Limited v News Limited* [2005] FCA 142 per Tamberlin J at [4].

[24] *Commonwealth and Anor v Vance* [2005] ACTCA 35 per Gray, Connolly and Tamberlin JJ at [32] to [35].

When giving advice, in-house counsel must be independent of their company and the advice they provide must not be influenced by their loyalties or duties to their employer.[25] It is important to have regard to the nature of the matter on which the in-house counsel is asked to advise.[26]

The difficulties associated with ensuring that communications with in-house counsel are privileged are not limited to matters related to insurance. In the context of insurance disputes, the most likely area of concern would relate to internal communications associated with claims that may be prepared for internal or employed counsel before formal legal proceedings have been instituted against the insured and external counsel are engaged. In these circumstances, the principles governing the creation and protection of privileged communications explained above would apply to the particular facts and circumstances.

5. Is there a concept of litigation privilege and how can it protect insurance related documents?

Litigation privilege in Australia extends to confidential communications made, and prepared, for the dominant purpose of a lawyer providing legal services relating to actual or anticipated litigation. It arises under common law and statute.[27] The scope of litigation privilege is considerably wider than the scope of legal advice privilege. Litigation privilege covers not only communications between lawyer and client, but also between lawyer and a third party, in relation to legal proceedings.

A core requirement for litigation privilege to arise is that there must be actual, anticipated or pending legal proceeding in Australia or overseas. Consequently, litigation privilege may apply to protect insurance related documents to the extent that they are made or prepared as confidential communications for the dominant purpose of a lawyer providing legal services relating to the proceeding. Documents relating to insurance proposals, underwriting, placement of a risk, reinsurance cessions and claims (before any litigation is contemplated) will not enjoy the protection of litigation privilege.

It is common for disputes to arise as to whether reports prepared by loss assessors are privileged.[28] Those reports must have been prepared for the dominant purpose of obtaining material for submission to legal advisers in circumstances in which the insured or insurer apprehended litigation for there was a real prospect at the relevant time. The communications may not be privileged if the purpose for which they were prepared was simply to enable the insurer to ascertain facts or investigate a matter (with any possible use in litigation being secondary or contingent).[29]

Difficulties may also arise in the context of expert reports and draft expert reports. The expert must create their documents for the purpose of being communicated to the client's lawyer for the purposes of litigation and the documents must have the necessary quality of confidentiality.[30]

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

The position set out by the English Court of Appeal in *Groom v Crocker* [1939] 1 KB 194 that the insured is a client of the insurer-appointed lawyer has generally been followed in Australian courts.[31] In these circumstances, difficult issues may arise when the insurer seeks access to privileged communications which the lawyer is obliged to keep confidential to protect the insured's claim for privilege. The lawyer would be under duties of confidentiality and undivided loyalty to the insured client not to divulge the information to the insurer without permission to the extent that the information was adverse to the insured's interests, unless the policy conditions clearly overrode any such obligation.[32]

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[25] Emilios Kyrou, '*Legal Professional privilege for general counsel wearing two hats*', (June 2000) 42 *Law Society Journal* 42

[26] See, for example, *Rich v Harrington* (2007) 245 ALR 106.

[27] Section 119 of the *Evidence Act 1995* (Cth).

[28] For a discussion on such disputes, see: Patrick George, '*Chasing Gold: Insurance Documents in Litigation*' (1996) 8 ILJ 21.

[29] *Brunswick Hill Apartments v CGU Insurance Limited* [2010] VSC 532 per Mukhtar AsJ at [29] to [31]; *Australian Competition and Consumer Commission v Australian Safeway Stores* (1998) 153 ALR 393.

[30] *New Cap Reinsurance Corporation Ltd (in liq) & Anor v Renaissance Reinsurance Ltd* [2007] NSWSC 258 per White J at [22]; *Australian Security and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438; *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No.1)* [1999] 1 Qd R 141.

[31] Geraldine Gray, '*Conflicts and Waiver of Privilege in the Insurance Relationship*' (1998) 10 ILJ 75.

[32] *Mercantile Mutual Insurance (NSW Workers Compensation) Ltd v Murray* [2004] NSWCA 151

Lawyers appointed by insurers may seek to address this by requiring the insured to execute a letter which allows the lawyer to disclose privileged documents to the insurer on the basis of a limited waiver of privilege over those documents (i.e. waiver as between the insured and insurer, but not as against third parties).

The use of such a waiver letter can itself create difficulties.[33] For example, s13 of the *Insurance Contracts Act 1984* (Cth) extends the common law duty of utmost good faith by implying in a contract of insurance a provision which requires each party to the contract to act towards the other party, in respect of any matter arising under or in relation to the contract, with the utmost good faith. There is a question as to whether the request and grant of the waiver of privilege would breach this duty. Some commentators have suggested that, in particular circumstances, it may not.[34] Of course, the insured would need to exercise their free and independent will when executing such a letter. Under the common law duty of good faith, the insurer may not use undue influence to coerce the insured into an agreement that it would not otherwise have entered.[35]

An important factor in determining whether the insurer may compel disclosure of communications for which the insured has a claim for privilege is the wording of the policy. Many policies in the Australian market contain express provisions imposing an obligation on the insured to co-operate with the insurer - both in the investigation of a claim and in the defence of legal proceedings. Often the extent of that obligation is limited by a requirement of 'reasonableness'. There is a question as to whether a court would consider it reasonable to compel disclosure in circumstances in which the disclosure could lead to a waiver of the insured's claim for privilege

Nevertheless, there may be circumstances in which compelling arguments could be made that disclosure is reasonable in a particular situation. For example, the insurer may require access to a communication that is essential for the insurer to be in a position to assess the insured's potential liability to a third party, the insurer may have granted indemnity without a reservation of rights (which would support a argument that there is common interest), the insurer may have a duty to defend the insured in litigation, and the insurer may undertake to treat the communication confidentially and to use it only for the limited and specific purpose of defending the proceedings against the insured. Subject to the relevance of the privileged communication to the defence of the party claim, these circumstances may be such that an insurer could argue that disclosure is reasonably required. However, the insurer may not be acting in good faith if its motive is to serve its own commercial ends or is acting unfairly with respect to enforcing its rights under the policy.[36]

7. How can privilege be waived in insurance disputes?

A person may waive privilege expressly or implied.[37]

If a person discloses the privileged document or communication to a third person, there may be an express waiver. On the other hand, implied waiver does not involve direct disclosure of privileged material. If a person entitled to the privilege does something which is inconsistent with the maintenance of privilege, there may be an implied waiver. For example, there may be an implied waiver if the person refers to part or all of the privileged communication in a non-confidential context.

As a general rule, at common law waiver of privilege occurs when a party entitled to the privilege "performs an act which is inconsistent with the confidence preserved by it."[38] In determining whether conduct of a person is inconsistent with the maintenance of confidentiality, the court may be informed by considerations of "fairness".[39] It is difficult to define the circumstances in which an implied waiver will occur and each case will generally be decided on its particular facts.[40]

Legislation also addresses waiver of privilege in similar terms to the common law position.[41] Statutes may provide legislative guidance as to what acts are (or are not) inconsistent with the maintenance of the privilege. For example, a party may be considered to have acted inconsistently with the maintenance of privilege in evidence if:

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per Mason P (Handley JA and Brownie AJA concurring) at [57].

[33] Geraldine Gray, '*Conflicts and Waiver of Privilege in the Insurance Relationship*' (1998) 10 ILJ 75.

[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] *Mann v Carnell* (1999) 201 CLR 1 at [28]-[29].

[38] *Cross on Evidence*, JD Heydon (1996) at [25.010]; *Mann v Carnell* (1999) 201 CLR 1 at [13].

[39] *Mann v Carnell* (1999) 201 CLR 1 at [29].

[40] *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 and *Goldberg v Ng* (1995) 185 CLR 83.

[41] Section 122 of the *Evidence Act 1995* (Cth).

- the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

- the substance of the evidence has been disclosed with the express or implied consent of the client or party.[42]

On the other hand, a client or party may be taken not to have acted in a manner inconsistent with the maintenance of privilege if:

- the substance of the evidence has been disclosed: (i) in the course of making a confidential communication or preparing a confidential document, or (ii) as a result of duress or deception, or (iii) under compulsion of law;

- the disclosure is by a client to another person and concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or

- the disclosure is to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.[43]

The general principles relating to waiver of privilege necessarily apply in the context of insurance disputes. Therefore, by way of example, an insured may waive privilege in a communication by disclosing it to the insurer in circumstances in which there is a dispute as to indemnity under the policy and therefore there is likely to be no common interest between them. Confidentiality is an essential requirement for the existence of a claim for privilege. If an insured discloses a privileged communication to an expert witness or a loss adjuster or claims assessor in circumstances in which there no agreement to keep the communication confidential, there is likely to be a waiver of privilege.

a. Who has the authority to waive privilege?

It is self-evident that the person who has the right to claim privilege, also has the authority to waive privilege.

A legal adviser to the person who is entitled to claim privilege may also act in a way which causes a waiver of privilege. The privilege belongs to the client and their legal adviser has a responsibility to claim privilege on their behalf. However, they also have authority (if not actual, then ostensible) to bind their client. If a legal adviser acts in manner which is inconsistent with a claim for privilege, their actions may bind the client and amount to a waiver of the privilege.

Legislation may provide for a waiver of privilege if a person makes a knowing and voluntary disclosure to a third party.[44] If the disclosure is made by an employee, agent or lawyer of the person, there will not be a waiver unless the employee, agent or lawyer is authorised to make the disclosure.[45]

The general principle under both common law and legislation[46] is that legal privilege is waived by the consent of the parties to which it belongs. In the case of joint legal privilege, all parties that are entitled to the privilege must consent before it can be waived.[47]

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

Yes, privilege can be waived indirectly.

For example, there may be a waiver if during litigation a party relies on material drawn from a privileged communication in such a way as to make it "unfair" or "misleading" for the other party not to have access to the whole of the privileged communication. Likewise, a party may waive privilege by putting in issue in litigation their state of mind when, in the circumstances, the privileged material bears directly on that state of mind (e.g. if the state of mind was formed on the basis of legal advice).[48]

There may also be a waiver if legal advice (i) is referred to in a document which itself is made public (e.g. a press release) or (ii) is discussed in board papers which are later produced in legal proceedings under subpoena or by way of discovery.[49] A person may waive privilege if they

[42] Section 122(3)(b) of the *Evidence Act 1995* (Cth).

[43] Section 122(5)(c) of the *Evidence Act 1995* (Cth).

[44] Section 122(3)(a) of the *Evidence Act 1995* (Cth).

[45] Section 122(4) of the *Evidence Act 1995* (Cth).

[46] Section 122(1) of the *Evidence Act 1995* (Cth).

[47] *Farrow Mortgage Services Pty Ltd (in Liq) v Webb & Ors* (1996) 39 NSWLR 601 at 608.

[48] *Standard Chartered Bank of Australia Ltd and Another v Antico and Others* (1993) 36 NSWLR 87.

[49] See, for example, *Ampolex v Perpetual Trustee Co (Canberra) Ltd* (1996) 137 ALR 28 and *BT*

disclose the substance of legal advice to a third party in order to advance their commercial interests.[50]

c. Can privilege be waived inadvertently?

A party may be taken to have waived privilege even though they did not subjectively intend to do so. The question is whether their conduct is inconsistent with the maintenance of confidentiality. However, inadvertent provision of a document can leave the privilege intact if it can effectively be reinstated.[51]

If a person discloses one privileged document, this may result in waiver of privilege over all other documents relating to that legal advice.[52]

d. Bad Faith Actions

The courts in Australia have not recognised a specific action in tort which may be brought if an insurer breaches its duty of utmost good faith or denies a claim in bad faith. In fact, it has been held that the authorities do not support a tortious duty on an insurer to act in good faith.[53]

Commonwealth legislation implies, in certain contracts of insurance, a provision requiring each party to the contract to act towards the other party, in respect of any matter arising under or in relation to the contract, with the utmost good faith.[54] This section has not been relied upon for the creation of a bad faith tort. Nevertheless, it has been suggested that the duty of utmost good faith obliges an insurer to make prompt indemnity decisions, i.e. to make up its mind and either to accept indemnity or to refuse it to the insured within an appropriate period of time.[55]

Australasia Pty Ltd v State of New South Wales & Telstra Corporation Ltd (No.7) (1998) 153 ALR 722.

[50] *AWB Ltd v Cole and Another (No.5)* [2006] FCA 1234.

[51] *Ghamrawi & Anor v GIO General Ltd* [2005] NSWCA 467 per Giles JA (Ipp JA and Brownie AJA concurring) at [23].

[52] *Australian Wheat Board Ltd (AWB) v Cole (No.5)* (2006) 234 ALR 651.

[53] *CGU Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193 per Mason P at [57] and [110] and Santow JA at [160] (Hodgson JA concurring).

[54] Section 13 of the *Insurance Contracts Act 1984* (Cth).

[55] *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; 235 CLR 1 at [180] per Kirby J (dissenting).

8. What are the best practices for maintaining privilege in the insurance context?

Since privilege may be waived in the circumstances discussed above, the corollary is that the best practice to maintain privilege will involve taking steps to avoid those circumstances.

- **Engage lawyers early**: The threshold test to establish privilege is best achieved if lawyers have been engaged.

- **Take care when instructing experts and assessors**: Disputes often arise in relation to whether reports and draft reports of experts and assessors are privileged. They should be briefed to prepare confidential reports for the purpose of providing the reports to lawyers.

- **Keep documents confidential**: An insured should not circulate confidential documents in which they may have a claim for privilege. If instructing an expert witness or other third party for the specific purpose of legal proceedings, it is advisable to limit the circulation and impose obligations on the recipient to keep the document confidential and to use it for the limited purpose for which they are engaged. It is important to note that, in certain circumstances, a confidentiality agreement may not be sufficient to avoid a waiver a of privilege. The operative legal principle is that the law will impute waiver when it would be unfair not to do so.

- **Avoid reference to legal advice**: A person should not disclose, and a legal adviser should advise their client not to disclose, the substance, gist or conclusion of legal advice. An insured defending claims by a third party should be cautious about asserting that the particular conduct in issue is justified on the basis that the insured acted on legal advice.

- **Seek early confirmation of indemnity**: There is a risk that an insured and insurer will not have a common interest in circumstances in which the insurer has reserved its rights on indemnity. In the face of a reservation of rights, insureds are often advised not to disclose to the insurer privileged communications unless the obligations under the policy compel them to do so. The circumstances may be such as to justify and allow a disclosure with minimal risk of a waiver of privilege as against third parties, but there is likely to be a waiver of privilege as between the insured and the insurer in any subsequent dispute about policy coverage.

- **Minimise disclosures made in discovery**: In the course of litigation and, in particular, discovery of documents, some practical steps can be taken to minimise the risk of inadvertent disclosure of privileged documents. These may be as simple as separating privileged documents from documents that must be produced, as soon as the claim for privilege is identified.

- **Adopt internal policies relating to privilege**: If a claims department in an insurance company wishes to create or maintain privilege, it is advisable to adopt formal written policies relating to privilege. These should include matters such as confidentiality, creation and distribution of documents, addressing communications to lawyers, and instructing experts and loss adjusters or claims assessors.

- **Structure legal departments to ensure independence**: In-house counsel must act independently and professionally if communications with them are to found a claim for legal advice privilege. Both insureds and insurers should take care in the way in which they structure and operate their legal department. Ideally, in-house lawyers should avoid acting in a dual capacity or it should be clear that, when legal advice is given, they are not acting in a 'commercial' capacity.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

For a person to claim privilege in a communication, they must act in a manner which is consistent with keeping the communication confidential. Confidentiality is fundamental to privilege. However, obviously, not all confidential documents are privileged.

It is important to distinguish between privilege and confidentiality, because it is only privileged documents that are protected by law from compulsory disclosure. Subject to the rules relating to discovery (e.g. whether a document is relevant to an issue in the proceedings), confidential documents must be disclosed in litigation proceedings. Privilege is based on a public policy rationale rather than contractual or professional obligations. Public interest in the truth prevails over a private duty to maintain a confidence.

Australia has privacy legislation which protects personal and sensitive information.[56] The National Privacy Principles contain restrictions on the collection, use and disclosure of personal information.[57] However, while this prevents disclosure of certain information in the course of commerce, it does not override any legal obligations to disclose personal information. Insurance companies are likely to collect information that is subject to the *Privacy Act* and National Privacy Principles. It is important that the insurer does not disclose personal information about an individual for a purpose, other than the primary purpose of collection, unless an exception in the National Privacy Principles applies.

A party to a dispute who has confidential or private information which is not subject to a claim for privilege, may take steps to avoid or limit the disclosure by:

- **Relying on rules relating to discovery**: A person need not disclose confidential or private information if the particular rules relating to discovery do not oblige the production of the documents in question.

- **Redacting confidential or private sections**: It may be possible to mask those portions of documents that are confidential or private if they are not relevant to issues in dispute. The court should be approached in advance for an order that this may take place.

- **Agreeing to a confidentiality regime**: In some cases, parties agree to a regime in terms of which commercially sensitive, confidential or private information is disclosed only to counsel and the solicitors representing their opponent in the litigation.

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[57] Schedule 3 to the *Privacy Act 1988* (Cth).

Belgium

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1. How do privilege issues arise in insurance disputes?

1.1. Four different situations can be distinguished in which privilege issues may arise in insurance disputes: these are to be found in the triangular relationship between the attorney, the Insurer and the Insured.

A. The attorney is the counsel of the Insured only

B. The attorney is the counsel of the Insurer only

C. The attorney is the counsel of both Insurer and Insured

D. The attorney is the Insured (in the framework of PI insurance).

In describing these suppositions, we will each time refer to the type of documents that may be sought in disputes with an Insurer. It must be generally noted that privilege rules will only apply in case of so-called secrets, i.e. documents that reveal information that the client has a material or moral interest in not revealing.

A. The attorney is the counsel of the Insured only

1.2. Few problems arise in this situation because the attorney is usually subject to the legal professional privilege. The attorney may not provide information to third parties, including the client's Insurer. The Insurer will have no access to any statements the Insured may have made to his attorney regarding the underlying event/occurrence/accident. This information cannot be used at trial.

1.3 In the case of legal expense insurance, where the Insurer covers the attorney's fees and costs, the Insurer will work to assess the amount of fees and costs. Because the Insured in that situation has a free choice of counsel, the Insurer cannot be considered the attorney's client. However, it is normal practice that the Insurer is kept informed of the services performed. In practice, it is therefore accepted that this particular situation will give rise to a relaxation of legal privilege rules. The Insurer (and sometimes even the broker) will frequently receive a copy of sent mail, draft written pleadings or other documents that are actually covered by legal privilege rules. Provided that the Insured is aware of this practice (e.g. by letters stating specifically that a copy will be sent to the Insurer or brokers), it is generally accepted that the attorney may consider to have implicit authorization of its client to send the information that is strictly necessary to determine the amount of benefits payable.

B. The attorney is the counsel of the Insurer only

1.4 Few problems arise when the attorney is the counsel only of the Insured. In that case, information in which the client has a material or moral interest – here, documents such as the (Re)insurer's file, including the internal analysis of claims and coverage – may not be provided to third parties. That information is could not be used by other parties, including the Insured, the aggrieved party, the co-Insurer or the reinsured. The co-Insurer or Reinsurer may find it helpful, however, to provide the other Co-insurers or Reinsured with this information, if this information is in the common interest of these parties. In that case, the client will have an interest in revealing this information. If these documents constitute confidential client-attorney communications, neither the client nor third parties may produce these documents at trial. Such communications remain confidential (see further, answer to question 3, b). In practice however, it often happens in industrial risk insurance policies for large companies that under pressure of brokers, the insured gets copies of (i) adjuster reports and/or (ii) legal advice on subrogation or recovery possibilities.

C. The attorney is the counsel of both the Insurer and the Insured

1.5 Often, the attorney will be the counsel of both the Insurer and the Insured, as in the case of an attorney who is designated by the liability Insurer to ensure the Insured's defense, or the attorney who represents both the Insurer and the Insured in a (subrogation) claim against third parties. In those situations, both Insurer and Insured will have a common interest. The Insurer and the Insured can also have a different but not a conflicting interest when the attorney is, for example, charged by the Insurer to take action against a third party while he is charged by the Insured to recover the deductible. It is generally accepted that the attorney can defend the interests of both the Insurer and the Insured, as long as they are not contradictory. The information the attorney will receive from both parties will in that case be available to both parties.

1.6. The rules change when the Insured and the Insurer have conflicting interests, however, as when the Insured has disclosed certain facts to its attorney, that could be used by the Insurer in order to refuse coverage. In that case, the attorney will be torn between two professional duties: a duty of

loyalty towards its client-Insurer and a duty of legal privilege towards its client-Insured. It is commonly accepted that in such a case, the attorney will have to discharge himself from the interests of both the Insurer and the Insured (or at least from the interests of the Insured in cases where the Insurer has conduct of proceedings). Some authorities state that in the case of conflicting interests, the attorney can stay involved, thereby communicating the new information to the Insurer, without comment, leaving him the task to analyze this information and take a position. In that case, the information still remains confidential. If the Insurer wants to refuse coverage, he will not be able to produce the attorney's communication as proof. In practice, however, attorneys will avoid the situation entirely by withdrawing as counsel for either the Insured or the Insurer.

D. The attorney is the Insured (in the framework of the attorney's PI Insurance policy)

1.7. In cases where a third party (such as a former client or other aggrieved party) institutes legal proceedings against the attorney himself for reasons of legal malpractice, it is generally accepted that the attorney may reveal information, even confidential, of its client. This disclosure can only be done under the strict condition that it is necessary for the attorney's own defence. Problems arise if the attorney refuses to communicate elements that could be useful for its defence, for instance to obtain satisfaction of its client, at the expense of the PI Insurer. In that case, the attorney will violate the general duty to provide the Insurer with all relevant information to determine the circumstances and ascertain the extent of the loss (article 19, §2 of the Belgian Statute on non-marine insurance contracts; see also answer to question 6).

2. <u>As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?</u>

2.1. Belgian litigation and arbitration rules do not provide for a discovery procedure. According to article 877 (civil litigation) and article 1696 (arbitration) of the Belgian judicial code, a court or an arbitration panel can, at its own initiative or upon parties' request, order the parties or third parties to submit specified documents, meaning that the court has to state exactly which documents have to be submitted. The order cannot be vague or general and can only be made if there are serious, specific and concurring suspicions that the party or the third party has a document containing proof of a relevant fact. This must be very precise. No fishing expeditions are allowed in the Belgian legal systems, and Belgian courts will not enforce orders that are fishing expeditions.

2.2. The third party or third person who is asked to produce documents can refuse, if it has a legitimate reason to do so. Case law provides that if the person who has to produce documents is bound by professional privilege (such as attorneys who are bound by "legal" privilege), he has the obligation to refuse production of documents that are covered by this professional privilege. Legal privilege can however not be diverted from its purpose, for instance in order to conceal the attorney's own wrongdoing.

2.3. Case law also provides that force majeure or Act of God can be a legitimate reason for refusing disclosure. Theft, destruction or even loss of documents has already been considered a case of force majeure. The force majeure exception can be relevant for documents that cannot benefit from legal privilege, such as documents that are found with the attorney's client, do not contain legal advice from the attorney or In-house legal counsel (see below, answer to question 4), or otherwise do not constitute confidential correspondence with the attorney. Case law also provides that in the particular case of annexes to insurance policies or report of premium payments, the Insurer cannot invoke destruction of documents as a legitimate reason to refuse disclosure. The failure to produce evidence, without a legitimate reason, can be subject to considerable financial penalties for non-compliance. (Article 882 of the Belgian judicial code). However, the contempt of court concept does not exist in the Belgian legal system.

3. <u>What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?</u>

a. Are communications between Insured and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

3.1. The communications between the attorney and its clients, by nature, have a confidential character, regardless of their content. Third parties will normally not be able to produce such communications at trial, regardless of how they came into their possession. An exception can be found in cases where third parties obtained the communications on a regular and legal basis. It is generally accepted that communications can in that case be produced at trial if the third party has the client's permission to do so. Such permission can be implicitly derived from the fact that the client has sent correspondence to these third parties without invoking legal privilege.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect

Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

3.2. Belgian litigation and arbitration rules, as already mentioned, do not know a discovery procedure. A court can, however, at its own initiative or upon parties' request, order parties or third parties to submit specified documents under certain well-circumscribed conditions. Fishing expeditions will however remain impossible. An application may only be made for a court order to request another party to produce a specific, identified document, but never to obtain all documents that may possibly be useful for the case.

3.3. Further, as already mentioned (answer to question 1, point B), parties with joint interests (Insurer and co-Insurer or Insurer and Reinsurer, even Insurer and Insured) may find it helpful to provide the other Co-insurers, Reinsured or Insured with certain information, if this information is in the common interest of these parties. If these documents form part of client-attorney communications, it will however not be possible for the client or for third parties, to produce these documents at trial. Such communications remain confidential, if this confidentiality has explicitly been stipulated or when this confidentiality appears from the content of the communication (such as in case of compromise proposals). If there is no legal privilege, however, these documents may have to be disclosed by court order. The legal privilege is the only doctrine in the Belgian legal system that protects documents from having to be disclosed by court or arbitrator order.

c. Is privilege applied in a different manner where

i. The Insurer has agreed to defend the Insured without reservation of rights?

3.4. As already mentioned (answer to question 1, point C), the attorney will, in case of non-conflicting interests (which normally will not be at hand in the case of a defense without reservation of rights), be allowed to make information he receives from Insurer and Insured available to both clients. Parties will be able to use this information at trial.

ii. The Insurer provides a defense pursuant to a reservation of rights?

3.5. As already mentioned (answer to question 1, point C), it is generally accepted that, in a case of conflicting interests (which normally will be at hand in the case of a defense pursuant to a reservation of rights), the attorney will have to discharge himself from the interests of both parties. It is sometimes stated that if the conflict of interests appears from information the attorney has received from the Insured, which could be used by the Insurer in order to refuse coverage, the attorney may still pursue its representation. He should thereby communicate the new information to the Insurer, without comment, leaving him the task to analyze this information and take a position. In this case, the information will in any event be confidential. If the Insurer wants to refuse coverage, he will not be able to use the attorney's communication as proof, but should seek alternative proof. In any case, in such scenario, the attorney usually has been instructed by the Insurer. He will see to it that the Insured is well aware and accepts the reservation of rights and its potential further impact on his own defense on the litigation, depending upon further developments in the proceedings.

iii. The Insurer has denied coverage?

3.6. Since, in this case, there is a clear conflict of interest, the attorney will not be able to defend both parties. Legal privilege remains intact. The Insurer, the Insured or third parties may not use information from communications with the other parties' attorneys.

iv. The policy provides only a duty to indemnify and not a duty to defend

3.7. In this case, the Insurer and the Insured will normally have different attorneys. For further information, please refer to the answer in question 1, point B and C.

d. How do privilege issues arise regarding Insurer/Reinsurer communications.

3.8. Privilege issues may arise if the Reinsurers' or the Insurers' attorneys have helped their clients in analysing the actual claim and the related coverage issues. The Insurer could have an interest in the Reinsurer's analysis and vice versa, because it will help them to complete their own analyses. Their analysis will, depending on the content of the reinsurance contract, also clarify to what extent the Reinsurer will be held. These analyses, which constitute client-attorney communications, may not be used at trial by the client or third parties if they are confidential. Such confidentiality will exist if it has been explicitly stipulated or when it appears from the exact content of the communication. It often happens that a Reinsurer will disclose to an Insurer his own legal advice as to whether the Insured's claim is covered or not under the original insurance policy. The Insurer can then freely rely on this legal advice in a coverage dispute with the original insured.

3.9. Privilege issues may also arise with regard to reserve information. Third parties (the injured party) may have an interest in such information in order to estimate their chances of coverage. If this

information forms part of the client-attorney communications, third parties will not be able to produce this information at trial.

4. Privilege and Internal/In-house/Employed Counsel: How does this issue arise in insurance disputes?

4.1. This issue may arise when the Insurer's In-house counsel has provided the Insurer with information or analysis of the claim or of coverage issues that are advantageous for the Insured or for third parties (such as in the case of a legal analysis resulting in a conclusion that the Insurer should actually have to cover, and the Insurer ultimately decides not to cover).

The issue may also arise when the Insured's In-house counsel has provided the Insured with information that is advantageous for the Insurer or for third parties, as in the case of a report that reveals information that would lead to a decision of the Insurer not to cover. (Note that the Insured will always be under the legal obligation to provide the Insurer with all relevant information to determine the circumstances and ascertain the extent of the loss; see above, answer to question 1, point D; see also below, answer to question 6).

4.2. Under Belgian law, In-house counsel do not fall under the same rules as attorneys. Confidentiality is guaranteed, but under more strict conditions. Where it concerns the investigation powers of the European Commission with regard to competition matters, In-house counsel will of course fall under the Akzo-Nobel doctrine. Outside these matters, In-house counsels will fall under the provisions of the Act of 1 March 2000 establishing the Institute of In-house counsel, which protects the confidentiality of communications with In-house counsel. Article 5 of this act states that the advice given by In-house legal counsels, members of the Institut des Juristes d'Entreprise (Institute of In-house Legal Counsels), "for the benefit of [their] employer and given in the course of their activity as In-house legal counsel, is confidential".

4.3. The protection of confidentiality is granted not to the person of the In-house counsel but rather to the advice that the counsel has given in the course of his/her duties as In-house counsel. (The protection provided by Belgian law is very similar indeed to that provided by "legal privilege" in common law countries.) Though there is a presumption in favour of the attorney that every document in his possession is confidential, the same cannot be said for In-house counsel. For in-house counsel, the conditions for meeting the requirements for confidentiality must be demonstrated for each and every document. Documents that contain no "legal advice", (such as those containing only business advice) are not protected. No distinction, however, is made between advice that relates to legal disputes and advice that does not. In-house legal counsel must therefore be sure to mention in their documents that the content is legal advice and therefore confidential and protected.

4.4. As is the case with attorneys' legal advice, parties can oppose the use of an In-house counsel's legal advice in legal proceedings. If production of legal advice is required under the compulsory disclosure rules of article 877 of the Belgian Judicial Code (see above, answer to question 2), the judge will have to decide whether the strict conditions of this provision are met so as not to permit parties to engage in fishing expeditions. If a document is protected by the privilege attached to the In-house counsel's legal advice, the refusal to produce that document will be considered legitimate.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

5.1. Belgian deontological rules provide that all communication between attorneys will in principle be confidential, but also provide for a limited list of exceptions. One of these exceptions is the communication of litigation documents, i.e. procedural actions or documents of which the communication is allowed or prescribed by the judicial code. A letter from one attorney to the other, in which the attorney states that his client acquiesces in the verdict or waives a claim, is considered a litigation document. The same can be said about the communication of written pleadings or other documents that must be exchanged by the parties during the proceedings. Not only attorney's actions but also actions of judges and the parties themselves fall within this exception. It is therefore hard to speak about a concept of "litigation privilege" in Belgium, that would protect such documents from disclosure.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

6.1 The fact that certain information is contained within privileged communications, does not relieve the Insured from his obligation to provide the Insurer with all relevant information to determine the circumstances and ascertain the extent of the loss (article 19, §2 of the Belgian Statute on non-marine insurance contracts). The same goes for the legal information duties of the Insurer. Attorneys of the Insurer and the Insurer will not be able to rely on the principle of confidentiality of their communications, in sending over such information.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

7.1 As many distinguished authors have recognized, legal privilege is part of public policy and has no contractual basis. Most authors agree that for this reason, legal privilege cannot be waived, including in insurance disputes. The rationale is that if the attorney cannot invoke legal privilege when the client has agreed to waive it, legal privilege would lose its effectiveness. The client could be under all kinds of pressure. It is also assumed that if the client would refuse a waiver, this refusal could be interpreted as a presumption of "guilt", which would of course be to the detriment of the client.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

7.2. Only in limited circumstances will it be possible to put privileged communications "at issue". The only example that can actually be found in Belgian practice is the case where a plaintiff is bringing a legal malpractice action. The plaintiff who, in order to make its claims, relies on the content of that allegedly bad advice cannot keep the advise that is at issue confidential. This result is in line with the rule that the attorney may reveal confidential information of its client when this is necessary in the attorney's own defence (see answer to question 1, D).

c. Can privilege be waived inadvertently?

7.3. No. If an attorney for instance communicates a document to his opponent and subsequently reports that this document was communicated inadvertently, the opponent may not produce this document at trial. When the attorney would thereafter be instructed by its client to maintain a position that is incompatible with the document concerned, the opponent may, however, call for the adaptation of the attorney's position with the President of the Bar of which he is member, in order to respect the loyalty of the debate. The President of the Bar indeed always has jurisdiction in the Belgian legal system to decide about discussions between attorneys who are members of the Bar on the privileged nature or not of a specific document.

d. Bad Faith Actions

7.4. N/A

8. What are the best practices for maintaining privilege in the insurance context?

8.1. In order to answer this question, a distinction should be made between the attorney-client context and the In-house counsel-"employer" context.

A. In the attorney-client context

8.2. As already mentioned (4.3), there is a presumption that every document in an attorney's possession is confidential. Conditions for meeting the requirements for confidentiality will thus not have to be demonstrated for each and every document. Best practices or recommendations are therefore not readily available. Communication with other attorneys is also confidential unless the letter falls under one of the deontological exceptions outlined above, in which case it will under certain, well circumscribed conditions be needed to explicitly mention that the communication is "official" and therefore not privileged.

8.3. In the ethical rules, it is further recommended that communications that are "official" be "short" and that information that should remain confidential, be done in a separate communication.

8.4. In case of certain procedural actions that need specific authorisation from the client (such as acquiescence in the verdict or waiver of the claim), it is recommended that the attorney obtain written permission beforehand from his client to communicate such actions. Communications of such procedural actions are not considered confidential, and if they are done without permission of the client, the latter will not be bound.

8.5. Confidential communication between attorneys may in principle not be communicated to the client, but it is accepted that a copy of this communication can be sent to the latter with removal of the letterhead and the signature and adding the word "confidential" (often handwritten). The rationale for that practice is that there is no proof that the communication originates from the opponent.

B. In the In-house counsel – "employer" context

8.6. Because confidentiality of legal advice from the In-house legal counsel must be demonstrated for each and every document, the Institut des Juristes d'Entreprise (Belgian Institute of In-house counsels) has formulated a list of recommendations and best practices that should facilitate invoking the principle of confidentiality in daily practice. The most important recommendations are as follows:

- Documents that meet the legal definition (see point 4.2 above) should be
  - o Stored separately;
  - o Identified as "legal advice" by stating "confidential – client-attorney privilege" or "confidential legal advice art. 5 Act Institute of In-house counsels";
  - o Be signed by the In-house counsel, stating his name and function;
  - o Preferably not be sent by e-mail;
  - o Not be distributed externally.

9. <u>Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?</u>

9.1. The difference between privilege and confidentiality is hard to draw under Belgian practice.

Confidentiality is aimed at the protection of the client's private interest. Confidentiality of communication between attorneys is aimed at the free exchange of views in order to find an amicable resolution of a dispute, without fear that information that is contained in this communication will later be used against the client. Rules on confidentiality are maintained on a disciplinary or contractual basis, while rules on legal privilege are maintained on a disciplinary as well as on a criminal law basis. Legal privilege does not only protect private interests, but also guarantees that one can be confident that what is entrusted to his attorney, will not be made public. In practice, legal privilege and confidentiality rules may overlap.

9.2. There is a difference between confidentiality/legal privilege rules on the one hand and privacy rules on the other hand. Privacy rules may sometimes protect insurance related materials that are not protected by confidentiality or legal privilege rules. They may also set different conditions under which certain documents may be revealed. Privacy legislation provides that Insurers shall have to take appropriate technical and organizational measures to protect data against accidental or unlawful destruction, accidental loss or alteration, or unauthorized or unlawful storage, processing, access or disclosure.

9.3. In the field of insurance the most obvious example of a different level of protection imposed by privacy rules is the Insured's medical records, which are protected under Articles 5 and 95 of the Belgian Statute on non-marine insurance contracts. Genetic data shall, in any event, never be disclosed. Belgian law, in contrast with other jurisdictions, is very strict on this. Further, medical data will be accessible to the Insurer, but only by following a strict procedure, providing that the Insured will have the right to choose a doctor, who shall, on request by the Insured, provide him with the medical certificates necessary for the conclusion or the performance of the contract. This information may only be handed over to the Insurer's medical adviser, who may only communicate information to the Insurer, that is relevant for the assessment of the risk insured. The Insured's doctor will further be able to forward a certificate showing the cause of death to the Insurer's medical adviser, if the Insurer proves the prior consent of the Insured.

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1. How do privilege issues arise in insurance disputes?

Privilege issues in the insurance context usually emerge during the litigation process. Broadly speaking, the rules of civil procedure, which in Canada are established by individual provinces and territories, require parties to litigation to disclose all relevant facts and materials through documentary and oral discovery. The only true exception concerns material to which a privilege attaches. While "the trend in Canada has been to limit the recognition of class privileges in favour of the search for truth in the judicial process," as provincial and territorial rules of civil procedure increasingly embrace a robust discovery process,[1] solicitor-client privilege, litigation privilege, settlement privilege and class-by-class privilege play an important role in protecting prescribed communications from disclosure.

Insurance involves numerous relationships between parties that are often adverse in interest – including insureds, insurers, reinsurers and third parties – a fact that frequently raises issues of privilege and contributes to the high degree of litigiousness surrounding insurance in Canada and other countries.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

Certain classes of documents created in the ordinary course of business in the insurance industry are frequently the subjects of disclosure and privilege issues. Examples include (i) statements given by insureds and witnesses to an accident or insurable event, (ii) the notes and files of the investigators and/or adjusters, (iii) adjuster's reports, (iv) expert reports and opinions, (v) communications between insurers and reinsurers, and (vi) ancillary documentary evidence obtained during investigations.

2. As a practical matter, does a particular jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

The specific disclosure obligations imposed on parties to civil litigation vary according to the rules of civil procedure in the Canadian province or territory where the litigation occurs. Despite this lack of uniformity, the trend across Canada has been towards increasingly robust pre-trial discovery and disclosure of all materials relevant to the litigation in the possession of the parties. With respect to the insurance industry, there are no specific rules that preclude or limit the ability of parties to access insurance-related documents in either litigation or arbitration. Indeed, the rules of procedure in several provinces expressly require the disclosure of insurance policies which indemnify parties to the litigation for all or part of a judgment.[2] Limits on the disclosure of insurance-related documents are determined with reference to both the relevant rules of civil procedure and common law privilege jurisprudence.

3. What types of relationships in the insurance context may be subject to the attorney client/ solicitor-client relationship?

Solicitor-client privilege is well established in Canada and is an important component of the legal system. The Supreme Court of Canada referred to solicitor-client privilege in *Solosky v. Canada* as a "fundamental civil and legal right"[3] and ruled in *McClure v. Canada* that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance."[4] The privilege is premised on the foundational idea that clients "must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent," without which "clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients". This helps to ensure the proper functioning of the legal system. Solicitor-client privilege is more than just a rule of evidence in Canada – it is a substantive right. The privilege belongs to the client, not the solicitor, and can be waived only by the client.

In order to establish solicitor-client privilege, the party asserting the privilege must satisfy a three-part test: (i) the communication must be between a solicitor and a client; (ii) the communication must be in respect of the seeking or giving of legal advice; and (iii) it must have been intended that the

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[1] Alan W. Bryant et al., *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed. (Toronto: LexisNexis Canada, 2009) at 14.3.

[2] For example, Ontario *Rules of Civil Procedure*, Rule 30.02(3).

[3] *Solosky v. Canada*, [1980] 1 S.C.R. 821.

[4] *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 35.

communication be kept confidential by the parties. The relationships between insureds and their individual counsel and insurers/reinsurers and their in-house counsel and/or external counsel are the most commonly protected relationships covered by solicitor-client privilege during insurance litigation.

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

Solicitor-client privilege is determined on the basis of whether the communication in question was between a solicitor and his or her client for the purposes of seeking or giving legal advice (and made on a confidential basis). In order to determine whether communications between insureds and insurers will be protected by solicitor-client privilege, these criteria must be satisfied. Generally speaking, it is unlikely that an insurer and insured's relationship would meet these requirements, with the consequence that the communications will not be protected by solicitor-client privilege and will be subject to disclosure under the relevant rules of civil procedure unless another privilege applies.

b. Are there doctrines, such as joint client, joint defense, common interest, or others that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

Common Interest Privilege

Common interest privilege applies in the Canadian insurance context to protect certain communications from disclosure during litigation. In many respects, common interest privilege is a subset of litigation privilege. Litigation privilege protects communications and/or documents created for the dominant purpose of litigation where there is a reasonable prospect of litigation. Litigation privilege itself is a limited exception to the general trend towards complete disclosure of all relevant materials to the litigation.

Common interest privilege is an exception to the general rule that disclosure of a privileged communication or document to a third party results in a waiver of privilege. It applies most notably where a third party is similarly situated to the plaintiff (or defendant) and shares or exchanges information with him or her but does not ultimately become a co-plaintiff (or co-defendant). Thus, adopting the principles outlined in the U.S. decision in *United States v. American Telephone & Telegraph Co.*,[5] the Ontario Court of Appeal in *General Accident Assurance Company v. Chrusz* stated that common interest privilege "should not be construed as narrowly limited to co-parties. So long as the transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts."[6]

Common interest privilege ends in the event of a dispute between the parties sharing the privilege. The Supreme Court noted in *Pritchard v. Ontario (Human Rights Commission)* that "should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication."[7] What level of "controversy or dispute" will result in termination of common interest privilege is unclear. Most cases suggest that such a dispute must rise to the level of litigation.[8] However, there is precedent which suggests that it is sufficient that there is a possibility that the parties might become adverse in interest at some point in the future.[9]

Settlement privilege

Settlement discussions are common in insurance disputes, particularly between insurers and insureds. Understanding the extent and scope of Canadian settlement privilege is therefore crucial for insurance law practitioners. Settlement privilege arises where: (i) a litigious dispute is in existence or contemplation; (ii) the communications in question are made with the express or implied intention that they will not be disclosed to the court in the event that negotiations fail; and (iii) the purpose of the communication is to effect a settlement.[10] Canada's legal system recognizes the benefits of negotiated settlements and encourages and incents parties to settle their disputes outside of the courtroom where possible. In order to facilitate an effective settlement process, parties must be able to make full and frank disclosure of their positions without prejudice in any future litigation. In recognition of these factors, settlement privilege protects from disclosure all discussions, offers, documents and correspondence made in furtherance of settlement, provided they meet the above noted criteria.

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5 642 F.2d 1285 (D.C. Cir. 1980).

6 *General Accident Assurance Company v. Chrusz* (1999), 45 O.R. (3d) 321 (CA) at para. 45.

7 *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at para. 23 ("*Pritchard*").

8 See e.g. *Lehman v. Insurance Corp. of Ireland et al.* (1983), 40 C.P.C. 285 (Man. QB).

9 *Supercom, supra.*

10 *LCBO v. Magnotta Winery Corporation et al.* (2009), 97 O.R. (3d) 665 (Sup. Ct. J.) at para. 46.

Case-by-Case Privilege

"Case-by-case privilege" is essentially a catch-all category for specific situations that can attract privilege despite not falling into one of the traditional categories of solicitor-client, litigation and settlement privilege. In order to obtain the benefit of privilege, the party seeking to assert it must demonstrate – in accordance with the "Wigmore test" adopted by the Supreme Court of Canada[11] – that: (i) the communications originate in a confidence that they will not be disclosed, (ii) this element of confidentiality is essential to the full and satisfactory maintenance of the relationship between the parties, (iii) the relationship is one which in the opinion of the community ought to be "sedulously fostered", and (iv) the injury that would inure to the relationship by the disclosure of the communications is greater than the benefit thereby gained for the correct disposal of the litigation.

An example of a type of communication relevant to the insurance industry that is frequently found (on a case-by-case basis) to be privileged is doctor-patient communications.

c. Is privilege applied in a different manner where:

i. the Insurer has agreed to defend the Insured without reservation of rights?

No.

ii. the Insurer provides a defense pursuant to a reservation of rights?

No.

iii. the Insurer has denied coverage?

No.

iv. the policy provides only a duty to indemnify and not a duty to defend?

No.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

In the context of communications between insurers and reinsurers, determinations relating to privilege will depend on the facts of the particular situation. Given that insurers and reinsurers are commonly represented by separate counsel and have different levels of involvement throughout the claims process, common interest privilege is one of the most commonly asserted privileges. However, parties are open to assert any privilege that can be proven on the basis of the factual record.

4. <u>Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?</u>

Canadian jurisprudence recognizes that in-house counsel occupy substantially the same position with respect to privilege as external counsel. As such, Canadian privilege principles apply to internal/in-house/employed counsel in the same manner as for external counsel, subject to the proviso that in-house counsel must be acting in the capacity of a solicitor during the time for which privilege is claimed. As Lord Denning noted in *Alfred Crompton Amusement Machines Ltd. v. Commissioner of Customs and Excise (No. 2)*[12]:

> [In-House Counsel] are regarded by the law as, in every respect, in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.

The Supreme Court of Canada decision in *Pritchard*[13] delineated the limits of solicitor-client privilege in the in-house context as follows:

> Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency…In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply.

Whether solicitor-client privilege will apply to in-house counsel depends upon a determination of the capacity in which the solicitor was acting during the activities in question. It is essential that in-house counsel is acting in a legal capacity and not in a

[11] See *Slavutych v. Baker*, [1976] 1 S.C.R. 254.

[12] *Alfred Crompton Amusement Machines Ltd. v. Commissioner of Customs and Excise (No. 2)*, [1972] 2 All E.R. 376.

[13] *Pritchard, supra*.

managerial or administrative role in order to obtain the benefit of the privilege. Ensuring that this is the case can sometimes be a challenge, considering the diverse responsibilities of in-house counsel.

Given the numerous tasks performed by in-house counsel that do not include a legal aspect, privilege claims involving in-house counsel are assessed on a case-by-case basis in order that a determination may be made as to whether or not the circumstances appropriately involve solicitor-client privilege. This determination involves an assessment of "the nature of the relationship, the subject matter of the advice, and the circumstances in which it was sought and rendered."[14]

It is imperative that in-house counsel be vigilant with respect to these limitations and adopt best practices to clearly identify and distinguish their legal advice in order to ensure that privileged information is afforded the appropriate protection from disclosure during litigation.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

Canadian jurisprudence has long recognized litigation privilege (comparable to the U.S. concept of "work product privilege"). While litigation privilege is often compared with (and confused with) solicitor-client privilege, it is actually a significantly different form of privilege. For example, litigation privilege is not limited to lawyers, but instead "contemplates, as well, communications between a solicitor and third parties, or, in the case of an unrepresented litigant, between the litigant and third parties."[15] In the words of the Supreme Court of Canada in *Blank v. Canada*, litigation privilege ensures "the efficacy of the adversarial process" in recognition of the fact that "parties to litigation, represented or not, must be left to prepare their contending position in private, without adversarial interference and without fear of premature disclosure."[16]

In an oft-cited passage adopted by the Supreme Court of Canada, Robert Sharpe (now a justice of the Ontario Court of Appeal) characterized the rationale for litigation privilege in the following terms:

> Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect — the adversary process — among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.[17]

Sharpe further described the distinction between litigation privilege and solicitor-client privilege as follows:

> The rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the [former] is the interest of all citizens to have full and ready access to legal advice. … Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.[18]

The test for litigation privilege has two components: (i) there must be a "reasonable prospect" of litigation; and (ii) the document must have been created for the "dominant purpose" of preparation for the litigation.

Anticipated litigation does not have to be the sole purpose of the document – there can be many purposes, so long as it can be demonstrated that the dominant purpose of the document was preparation for the litigation. Most importantly, as recently decided by the Supreme Court of Canada, litigation privilege is time-limited, i.e., except in certain circumstances where closely related litigation is still going on, it ends when the litigation ends.

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[14] *Pritchard*, *supra*, at para. 20.

[15] *Blank*, *supra*.

[16] *Blank*, *supra*, at para. 27.

[17] Robert J. Sharpe, "Claiming Privilege in the Discovery Process," from *Special Lectures of the Law Society of Upper Canada* (Don Mills: De Boo, 1984).

[18] *Blank*, *supra*, at para. 28; see also *The Law of Evidence in Canada*, *supra*, at §14.178.

An important distinction for insurance law practitioners is that, while litigation privilege protects documents created for the dominant purpose of litigation, only the actual documents are protected by the privilege as opposed to the facts contained in those documents. The treatment of the file of an expert witness illustrates this. Where a party intends to call an expert witness to testify at trial, "it is readily acknowledged that the facts and documents on which the expert relies should be disclosed." This has important implications for insureds, insurers and reinsurers seeking to utilize expert evidence at trial. However, if the expert is only retained to act as a "confidential advisor" to counsel for the purposes of assisting with the cross-examination of another party's expert witnesses, litigation privilege is not waived.[19]

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

While the courts do often "speak of a mutual obligation of good faith" in the context of insurance, it remains that "broad and unqualified statements to this effect should be treated with caution".[20] The scope of an insured's duty of cooperation or utmost good faith, neither of which is settled in the Canadian jurisprudence, does not extend so far as to permit insurers to compel insureds claiming privilege to disclose such communications or materials. With the exception of limited circumstances such as an imminent threat to public safety, the right of an accused under the *Canadian Charter of Rights and Freedoms* to make full answer and defence to criminal charges and the need to avoid wrongful convictions, Canadian courts consider solicitor-client privilege "as close to absolute as possible."[21] Compelling disclosure of material protected by litigation privilege is less of an issue given that the protection generally terminates once proceedings commence and parties make their submissions and that disclosure of the facts underlying litigation privileged materials is required as part of the discovery process.

In all other cases, insurers may only make arguments that the privilege claimed is invalid, that the insured has waived the privilege (either voluntarily or impliedly) or that the insured has put the privileged matter "in issue" and therefore the privilege should be waived.

7. How can privilege be waived in insurance disputes?

Privilege can be waived in three ways: voluntarily, by implication or accidently. A voluntary (express) waiver will typically be effective provided that each of the following is the case: (i) the client knows of the privilege; (ii) the client knows it had the right to claim privilege; (iii) the client has a clear intention to relinquish protection of privilege; and (iv) the client is aware of the consequences of waiver.[22] Implied waiver occurs where the client's conduct, considered on an objective basis, illustrates an intention or state of mind to waive privilege in the circumstances. Accidental waiver is considered in paragraph (c), below.

Canadian courts do not usually recognize partial waiver of a privileged communication unless the communication is severable from the undisclosed portion because it deals with separate subject matters; otherwise, the entirety of the communication must be disclosed. Partial waiver has been recognized, however, in situations where a party makes disclosure of privileged information to police as part of an ongoing criminal investigation.[23] In addition, a recent Ontario decision arising out of a case where privileged documents were partially disclosed to the company's auditors suggests that partial waiver may be permissible in certain circumstances where no more than a "minimal impairment" of the privilege occurs.[24]

a. Who has the authority to waive privilege?

Solicitor-client privilege and litigation privilege, along with most other types of privilege, are considered to "belong" to the client. As a result, client conduct is the focus of most waiver questions and clients retain the final authority to waive privilege. Nevertheless, lawyers must exercise caution in light of case law which has held that lawyers may act as the agents of their clients for the purposes of waiving privilege over communications or documents.

b. Can privilege be waived indirectly, for example, by putting privileged

[19] *The Law of Evidence in Canada*, *supra*, at §14.211; *Piché v. Lecours Lumber Co*. (1993), 13 O.R. (3d) 193 (Gen. Div.).

[20] Roderick S. W. Winsor, *Good Faith in Canadian Insurance Law* (Toronto: Canada Law Book, 2010) at §4.60.

[21] *McClure*, *supra*; see also *The Law of Evidence in Canada*, *supra*, at §14.164.

[22] *S.&K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] 4 W.W.R. 762 at para. 6.

[23] *British Coal Corp. v. Dennis Rye Ltd.*, [1988] 3 All E.R. 816 (CA); *The Law of Evidence in Canada*, *supra*, at §14.125.

[24] *Philip Services Corp v. OSC* (2005), 77 O.R. (3d) 209 (Div. Ct.).

communications "at issue" in a dispute?

There is precedent in Canada for the proposition that, as a matter of fairness, privilege can waived by implication where the party relying on the privilege puts the communication "at issue" in the proceeding.[25] For example, the courts have adopted this approach in situations where a party relies in its submissions upon the fact of its having received specific legal advice over which it simultaneously asserts privilege. In such a situation, given that it is the party itself who has made consideration of the privileged communications necessary for determination of the issues before the court, judicial fairness dictates that the privilege be waived to permit other parties to fully respond to all matters before the court.

c. Can privilege be waived inadvertently?

While the old common law rule in Canada provided that accidental or inadvertent disclosure results in a loss of the privilege,[26] courts increasingly are adopting a more nuanced approach to determining the implications of accidental disclosure of privileged information. In considering whether inadvertent disclosure to adverse or third parties constitutes waiver of privilege, the recent court decisions have given consideration to three principal factors: (i) whether the error was in fact inadvertent and thus excusable; (ii) whether an immediate attempt was made to retrieve the documents; and (iii) whether the preservation of the privilege would be unfair to the receiving party.[27]

d. Bad Faith Actions

Bad faith actions are an increasingly common aspect of Canadian insurance litigation. While other jurisdictions, such as the United States, recognize bad faith actions on several different legal bases, including breach of contract, tort, breach of fiduciary obligation and breach of statutory duty, Canadian bad faith cases most commonly proceed on the basis of breach of contract.[28]

While most insurance contracts do not explicitly set out a requirement on the part of the insurer to act in good faith, there is precedent in Canada that good faith constitutes an implied term of insurance contracts.[29] The courts have stated that an insurer's duty of good faith consists of two key elements. First, insurers must act to resolve and pay claims in a timely fashion unless there is a reason to dispute the claim. Second, insurers must "treat the customer fairly throughout the process of investigating and assessing the claim," with this standard "applied to both the manner of investigation and assessment and the decision whether or not to pay." This is meant to preclude an insurer "from using its economic muscle or the customer's economic weakness to extract a settlement favourable to itself."[30]

However, refusals to pay will not always amount to breaches of good faith, even in situations where an insurer is required to pay by a court or if the insurer changes its mind during the process of investigating the claim. In all circumstances, an insurer's conduct will be held to a standard of reasonableness. An insurer may deny coverage so long as the denial is based on a reasonable interpretation of its rights and obligations under the policy provided that there is a "genuine issue" pertaining to coverage.[31]

i. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

Allegations of bad faith on the part of an adverse party are not sufficient, absent other circumstances which would impugn the privilege, to bring privileged communications "into issue" so as to result in a waiver of that privilege. For instance, in *Davies v. American Home Assurance Co.*[32] the Ontario Divisional Court rejected an insured's demand that a legal opinion prepared for the insurer assessing its potential liability be disclosed, reasoning that mere allegations of bad faith on the part of the insured in its claim were not sufficient to require waiver of privilege due to the privilege being placed "at issue" in the dispute.

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[25] *The Law of Evidence in Canada*, *supra*, at §14.130-14.136.

[26] See e.g. *Calcraft v. Guest*, [1898] 1 Q.B. 759 (CA).

[27] *Spiral Aviation Training Co. v. Canada* (AG), [2009] O.J. No. 4033 (Sup. Ct. J.).

[28] *Good Faith in Canadian Insurance Law*, *supra*, at 2-2; *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595.

[29] See e.g. *Green v. Constellation Assurance Co.*, [1993] O.J. No. 1445 (Gen. Div.); see also John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 780.

[30] *Good Faith in Canadian Insurance Law*, *supra*, at 1024; *702535 Ontario Inc. v. Non-Marine Underwriters of Lloyd's London, England* (2000), 130 OAC 373 (CA).

[31] *Ibid.*

[32] *Davies v. American Home Assurance Co.* (2002), 60 O.R. (3d) 512 (Div. Ct.).

ii. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

No.

8. <u>What are the best practices for maintaining privilege in the insurance context?</u>

There are a number of best practices that can be adopted by legal practitioners in the Canadian insurance industry in order to assist in protecting and asserting privilege claims and ensuring that privilege is not inadvertently lost or waived in preparation for and during litigation. Examples include:

- keeping detailed notes as to the progress of investigations and the relevant dates and times of all aspects of any ongoing files in respect of outstanding insurance claims;
- marking documents as "Privilege and Confidential," "Prepared for in-house counsel for the purpose of providing legal advice" or "Prepared for in-house counsel for the purpose of litigation;"
- using separate legal department letterhead instead of corporate letterhead;
- signing memoranda and opinions as "legal counsel;"
- avoiding "reply all" responses to communications about legal issues;
- restricting dissemination of communications relating to contemplated or actual litigation on a "need to know" basis;
- ensuring that retainer agreements in respect of experts, independent adjusters or other professionals clearly state that the individual is being retained for the purpose of assisting counsel in providing legal advice and/or to prepare litigation;
- avoiding communication of business advice and legal advice in the same document; and
- marking settlement offers, documentation and related communications "Without Prejudice."

9. <u>Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?</u>

Canadian law distinguishes between privilege and confidentiality. Privilege protects communications arising in specified relationships, while confidentiality and privacy law relate to information that needs to be protected from public disclosure. Insurance companies are also subject to statutory confidentiality requirements. For instance, the federal *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") contains various requirements with respect to the treatment and collection of customer information.

However, despite the requirements of *PIPEDA* and other federal and provincial confidentiality laws, the provincial and territorial rules of civil procedure that govern the discovery process require parties to disclose all materials relevant to the litigation, subject to privilege. As such, documents that are "confidential" still have to be disclosed in litigation unless a privilege claim can be successfully asserted.

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1. How do privilege issues arise in insurance disputes?

Under Chilean law there are no specific provisions dealing with privilege issues in the context of an insurance dispute. The main rules are found in the Chilean Civil Procedural Code (hereinafter, the "CCP") and can be summarized as follows:

- People subject to confidentiality duties - Among others, in Chile clergymen, lawyers, notaries, clerks, doctors and midwives are not obliged to depose about facts communicated to them on confidential bases by reason of their situation, profession or activity.

- Disclosure - The parties to a dispute may request in trial -either from the counterparty or from a third party- the disclosure of documents relevant to said dispute. While the party who is asked to disclose a document may oppose this request, by arguing that the information requested is secret or confidential (for instance information which may be commercially and/or financially sensible or may breach a non-disclosure agreement) it is ultimately a court or an arbitrator, as the case may be, who will decide whether the information must be disclosed or not.

However, note that when the disclosure of information is requested as a prejudicial evidence measure (i.e. measures that can be adopted to secure access to evidence before formal legal proceedings have commenced), there is no defense based on the secret or confidential character of the information requested.

a. What type of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

As mentioned above, documents which are regarded as secret or confidential may be protected from disclosure.

However, it is worthy to note that in Chile contracts of insurance/reinsurance are subject to the principle of utmost good faith and the Insured/Reinsured is obliged to declare to his Insurers/Reinsurers all those circumstances which are material to the assessment of the risk by the time of inception.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

Please be referred to our comments on disclosure in 1 above.

3. What types of relationships in the insurance context may be subject to the attorney-client/ solicitor-client relationship?

In Chile the attorney-client/ solicitor-client relationship is a broad concept and there is no distinction between general and insurance practice. As explained above, attorneys in Chile are not obliged to depose on issues subject to confidentiality.

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

Strictly speaking, communications between Insureds and Insurers are not protected from third parties by the attorney-client/solicitor-client privilege. However, as mentioned above, the party who is summoned to disclose information may oppose this request by arguing that the information requested is secret and confidential.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

While similar doctrines as joint client, joint defense and common interest are recognized by Chilean law, they would not prevent a third party from having access to Insured/Insurer communications unless these can be considered by the court/arbitrator as secret or confidential.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

In first place, under Chilean law reservation of rights does not have the same effect it may have under other legal systems, therefore Insurers should not assume that by making a reservation of rights they will not be impeded from ascertaining a subsequent claim.

On the other hand, if Insurers agreed to defend the Insured, it is difficult to envisage that communications between attorney/solicitors and Insurers will benefit from the privilege and therefore the insured will be prevented from learning its

content, since the Insured has an actual and direct interest in the development and outcome of the legal proceedings.

ii. The Insurer provides a defense pursuant to a reservation of rights?

Please see our comments to question c.i above.

iii. The insurer has denied coverage?

If the Insurer has denied coverage, then general rules would apply, that is to say, communications between the Insurer and his attorneys/solicitors will benefit from the privilege. In turn, information which may be secret or confidential should be protected from disclosure to insured or third parties, subject to the decision of the relevant court/arbitrator.

iv. The policy provides only a duty to indemnity and not a duty to defend?

In this case same rules as in the previous question would apply. Communications between the Insured and his attorneys/solicitors would be protected by the privilege and on the other hand Insurers and third parties will be prevented from obtaining secret and/or confidential information, subject to a decision from the relevant court/arbitrator. However, claims control clauses may impose an obligation upon the Insured/Reinsured to provide information on the development of legal proceedings which may require in consequence the disclosure of secret or confidential information.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

This issue may arise in the event that a third party requests information either from the Insurer or the Reinsurer, which is secret and confidential. In this case a court/arbitrator should decide on whether or not to allow the disclosure of said communications.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

While not specifically protected as communications between client and his attorneys/solicitors, these communications may be protected from being disclosed in an insurance dispute provided they can be considered as secret and confidential by the court/arbitrator.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

Under Chilean law there is not such concept as litigation privilege. Still, it is worthy to mention that in practice the most common way to obtain evidence (mainly documents and communications) is through the so-called prejudicial evidence measure and the exhibition of documents during trial as previously mentioned. The practice of creating documents in anticipation of litigation, while permitted under Chilean law, is very seldom.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

If communications are protected either by the privilege between client-attorney/solicitor or because a court/arbitrator has established that the documents which disclosure is requested are secret or confidential, then -unless the Insured voluntarily discloses the communications requested- the Insurer will not have access to them.

That being said, we recall that under Chilean law, insurance and reinsurance are subject to the principle of utmost good faith; therefore, the Insured is obliged to disclose all material information that allows the Insurer to assess the risk which is being offered. In practical terms the Insured may be obliged to disclose documents or communications otherwise privileged but material to the assessment of a risk or the assessment of a loss. If the Insured does not fulfill this obligation of disclosure in the case of the assessment of a risk, the Insurer may request the avoidance of the insurance or reinsurance contract.

7. How can privilege be waived in insurance disputes?

Under Chilean law there are no formalities to waive a privilege. The privilege will be waived if the privileged information is submitted to the court or arbitrator.

a. Who has the authority to waive privilege?

The privilege can only be waived by the party whose communications are protected by the privilege, for instance the client in the client solicitor/attorney relationship or the owner of the information considered as secret or confidential.

b. Can privilege be waived directly, for example, by putting privileged communications "at issue" in a dispute?

Yes, it can. As mentioned above there are no formalities for waiving privilege beyond the submission of the communication to the court/arbitrator.

c. Can privilege be waived inadvertently?

By submitting a document/communication regarded as private or confidential or protected by the client-attorney/solicitor relationship that has not been requested by the counterparty a privilege can be inadvertently waived, but this waiver would only have an effect in respect to said document or communication and not in respect to every document/communication.

However, once secret or confidential information has been voluntarily disclosed it may be difficult to oppose further disclosures as it may conflict with the Estoppel Doctrine.

d. Bad Faith Actions

Under Chilean law there is no such concept of Bad Faith Actions; however, it is a general principle of law that a party cannot benefit from his own bad faith. In this respect, there is case law that has confirmed that the acts, including documents and communications, of a party which objective is to mislead a court/arbitrator or the counterparty in legal proceedings or during the negotiation and/or fulfillment of a contract, cannot be protected by privilege even if they are considered to be secret or confidential. Eventually, the party affected by the bad faith may request the avoidance of the contract and in the context of insurance the avoidance of the policy may be requested and claim damages (direct and moral damages and loss of earnings).

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

Only if bad faith is established by the Insured, the Insurer would be prevented from claiming a privilege or protection in regard to the files and/or communications even if these are labeled as secret or confidential.

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

No, it should not affect his ability to assert a privilege over claims files and/or communications with the Insurer's coverage counsel, unless they are essential to prove the bad faith of the counterparty, in which case they may need to be disclosed.

8. <u>What are the best practices for maintaining privilege in the insurance context?</u>

- Agree with the counterparty, either insured, insurer, broker or loss adjuster, that all documentation disclosed or communications exchanged during the negotiation of an insurance policy or the adjustment of a loss are to be considered private and confidential;

- Agree to specific non-disclosure agreements in respect of highly sensitive documentation;

- Include within employment contracts a non-disclosure clause, especially for key positions;

- Limit the number of people with access to secret and private information;

- Obtain appropriate counseling when highly sensitive information is requested to be disclosed;

- During legal proceedings do not disclose any document before obtaining proper counseling if there are doubts about its implications; and

- Do not waive any privilege without proper assessment of the implications of the waiver.

However, bear in mind that one of the principles of the Chilean legal system is the publicity of any legal proceeding, with some exception in family, labor and criminal law. Therefore, information that has been added to a court file can potentially be accessed by anyone, even if they do not have a direct interest in the proceeding and its outcome.

Even though the principle of publicity applies to arbitration proceedings as well, the documents/communications disclosed in said proceedings are somehow more protected from exposure to third parties. Unless an appeal remedy is filed against the arbitrator's award (usually decided by an Appeal Court), there is no obligation to make public the award beyond the parties directly involved in the proceedings, which in turn makes difficult the access to the evidence submitted by the parties.

In light of the above, the most useful practice to observe in order to avoid having to disclose documents or waive a privilege, is to avoid the counterparty to learn about the existence of said sensible information or communication, which if disclosed may affect the position of the Insured/Insurer. Once the court/arbitrator has learned about the existence of communications or

documents relevant to the dispute, especially between Insured and Insurer, it is hard to oppose an order to disclose.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

According to Chilean law a privilege exists in the context of some specific relationships, for example between a client and his solicitor/attorney or between the patient and his doctor.

In turn, confidentiality/privacy may protect communications and documents, not necessarily between client and one of the persons listed in the CCP, as mentioned in 1 above. While no specific rules or laws apply to insurance related documents, in order to protect a document or communication within an insurance context, they must be secret and confidential and this character must be declared by a court/arbitrator if their disclosure has been judicially requested by the counterparty or by a third party as previously explained.

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Introduction to Danish law on privilege issues

Under Danish law, privilege (the right to refuse disclosure of confidential information in a litigation or arbitration) is closely connected to the duty to keep information confidential. A number of professions, such as medical practitioners, lawyers (in Danish, advokater) and insurance companies are under a duty to keep information confidential, but not all professions enjoy the privilege of refusing to disclose confidential information in court or arbitration proceedings.

Privilege

Under Danish law, the duty to give evidence as a witness is a civic duty which in general prevails over the duty to keep information confidential.

According to section 170 of the Danish Administration of Justice Act ("the Administration of Justice Act") only priests, medical practitioners, defence counsel, mediators and lawyers cannot be compelled to give evidence on matters concerning information that has been obtained in connection with their work (in respect of lawyers and defence counsel, the attorney-client privilege). For medical practitioners, mediators and lawyers (except defence counsel in criminal cases), the court may on a discretionary basis limit the privilege and order the person to give evidence.

For other professions, such as insurance companies or accountants, privilege may be granted on a discretionary basis by order of the court if deemed material by the court.

If privilege is granted by statute or by order of the court, the privilege also applies to documents such as correspondence and memos, meaning that a lawyer cannot be ordered to disclose memos or correspondence with his client, and such documents may not be searched by the police in criminal cases.

Insurance companies are under a duty to keep information confidential, but in general they do not enjoy the privilege to refuse to give evidence in legal proceedings. The duty to keep information confidential is further modified by the general rule laid down in sections 298 and 299 of the Administration of Justice Act according to which the court may, at the request of one party, order another party or a third party to disclose specific documents during legal proceedings.

If a party does not comply with the court's order to disclose information, the court will, when weighing the evidence, take the non-compliance into consideration in favour of the other party which may give prejudice to the non-compliant party's case. However, if a third party does not comply with the order, the court may force him to do so by using the remedies under section 178 of the Administration of Justice Act.

In most Danish court cases the parties do not make use of sections 298 and 299 of the Administration of Justice Act and thus do not request the court to order another party or a third party to disclose specific documents. Often, a party will request the other party to disclose specific documents or request further and better particulars and if the party does not comply with the request, the requesting party may rely on the court taking the non-compliance into consideration in favour of the requesting party when weighing the evidence (the procedural rules on adverse inference).

Arbitration and privilege

Sections 298 and 299 of the Administration of Justice Act and the general duty to give evidence in a trial are not directly applicable in arbitration proceedings. A party to such proceedings may request that evidence is given before a court, thus bringing the duty to give evidence and to duty to disclose documents into play. In such case, the rules on privilege are equally applicable.

Pre-trial disclosure and privilege

Under Danish law, the procedural rules on disclosure and the giving of evidence apply only to a limited extent in the pre-trial phase. When applicable, the rules on privilege also apply.

1. How do privilege issues arise in insurance disputes?

Privilege issues in insurance disputes may arise in a number of situations, including, for example: (1) if an insured wants the insurance company to disclose the insurer's internal assessment of the case, internal expert opinions or communications with internal or external lawyers; (2) if the insurance company wants the insured to disclose medical records or other personal information; (3) if the insurance company seeks information in police records or medical records; or (4) if an injured party seeks access to information regarding coverage under a third party liability insurance policy.

Under Danish law, it is in general not possible to force a party to disclose information or give testimonial evidence because an order to disclose specific documents cannot be enforced by other

means than the procedural rules on adverse inference discussed above. Only third parties may, to a limited extent, be forced to disclose documents and to give testimonial evidence in a trial. As a result, as a practical matter privilege issues seldom arise out of a request for a court order to disclose information or give testimonial evidence. Instead, these issues are usually handled under the procedural rules on adverse inference.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

An insurer may encounter privilege issues when parties seek statements or information regarding its insured, as in the case of an insured party's request for statements that an insured has made about an accident to its insurer. In that situation, the insurer may request privilege under section 170(3) of the Administration of Justice Act.

Further, privilege issues may arise with respect to the insured/the injured party regarding medical records or other personal information, such as salary statements or tax records.

2. <u>As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?</u>

Section 117 of the Financial Business Act limits a third party's ability to obtain access to insurance related documents. That provision stipulates that insurance companies may not, without due cause, disclose or use confidential information obtained during the performance of their duties. However, this is not a procedural rule but represents the general duty for insurance companies to keep information confidential. There are no specific procedural rules applicable to insurance disputes, but there may be a legitimate interest in the information if it is necessary for the establishment, exercise or defence of legal claims.

3. <u>What types of relationships in the insurance context may be subject to the attorney-client/ solicitor-client relationship?</u>

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

Communications between the insured and the insurer are not protected from third parties by the attorney-client/ solicitor-client privilege under Danish law.

However, the communication between the insured and the insurer is protected under Section 117 of the Financial Business Act and may be given privilege by the court according to The Administration of Justice Act section 170(3). These provisions are described in the introduction to Danish law.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

No.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

No.

ii. The Insurer provides a defense pursuant to a reservation of rights?

No.

iii. The Insurer has denied coverage?

No.

iv. The policy provides only a duty to indemnify and not a duty to defend?

No.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

Privilege issues regarding insurer/reinsurer communications may arise under the same circumstances as addressed under question 1 above.

4. <u>Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?</u>

According to Danish law, lawyers have a duty of confidentiality. This duty applies equally to internal and external lawyers. It is noted that the duty only applies to lawyers authorised to practice law. Further, section 170(1) of the Administration of Justice Act sets out the general rule that said lawyers cannot be compelled to give evidence on matters concerning information that has been obtained in connection with their work.

It is not clarified under Danish law to what extent section 170(1) of the Administration of Justice Act is applicable to in-house lawyers. A guideline may be that, to the extent that an in-house lawyer performs the same tasks and responsibilities as an external lawyer, communications in this respect may be given privilege. It is noted that insurance companies may permanently employ (engage) lawyers on a basis which implies that the lawyers are formally regarded as external lawyers with their own businesses, accounts and letterheads. This implies that such lawyers enjoy the privileges of external lawyers.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

Under section 170(2) of the Administration of Justice Act, the court may order a lawyer to testify as a witness in a case on certain conditions. The lawyer's testimony must be deemed to be essential to the outcome and nature of the case, and the importance to the persons concerned or to society must legitimise the evidence.

However, section 170(2) of the Administration of Justice Act sets out the rule that lawyers cannot be compelled to give evidence on matters concerning information that has been obtained or given to them in confidence in connection with work related to legal proceedings. Norcan lawyers be compelled to give evidence concerning legal advice provided in connection with litigation. If lawyers have rendered general legal advice, section 170(2) does not apply and the lawyers can be compelled to give evidence.

Thus, these rules protect documents, including insurance related documents created in anticipation or for the purpose of litigation.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

Section 21 of the Danish Insurance Contracts Act ("Insurance Contracts Act") regulates the insured's duty to report any loss to the insurance company. According to this rule, an insured person is required to notify the insurance company of the occurrence of an insurance event without undue delay in the event that the insured intends to raise a claim against the company.

In addition, section 22 of the Insurance Contracts Act sets out that when raising a claim against the insurance company, the insured is required to provide the company with all information about the insurance event which is available to him and which may be of importance to adjusting the loss and determining the amount of indemnity payable. The insured is only obliged to provide relevant information and only to a reasonable extent.

The insurer may not force an insured to disclose information, but the insurer may base its decision of cover on the information available. Thus, the insurer may deny cover on the basis that the insured has not substantiated his claim under the insurance.

7. How can privilege be waived in insurance disputes?

Privilege may only be waived in insurance disputes if the person whose interests are protected under the duty of confidentiality has given his consent.

a. Who has the authority to waive privilege?

Under Danish law, privilege may only be waived by the person whose interests are protected under the duty of confidentiality.

However, if the person is a child, consent by the parent/guardian is required.

Further, if the person is dead, disclosure is controlled by the court. When making this decision, the court will consider the deceased party's wishes and presumed interests.

With respect to lawyers, the client may consent to the lawyer waiving privilege regarding specific documents or information. A client's consent to a privilege waiver is construed narrowly. Hence, the consent granted only covers its explicit content and can always be withdrawn by the client.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

If a party is exempt from the duty to give evidence under the Administration of Justice Act, the party is likewise exempt from providing documents, including memos and correspondence, regarding the same content.

This rule applies even if the privileged communication is at issue in a dispute. Moreover, if a party discloses (parts of) any privileged information, the court may be more inclined to limit the privilege and order a party to disclose documents and/or give evidence.

c. Can privilege be waived inadvertently?

As mentioned under question 7a, privilege may only be waived in insurance disputes if the person

whose interests are protected has given his consent thereto.

The Danish Act on Processing of Personal Data defines consent as "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed".

This interpretation may be applied in general. Accordingly, privilege may not be waived inadvertently.

d. Bad Faith Actions?

If the insurer denies an insurance claim in bad faith and there is a provable loss for the insured, the insured may bring an action in damages against the insurer. However, Danish law does not provide for punitive damages.

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

No. However, if a party substantiates a likelihood of bad faith actions, the court may be more inclined to limit a privilege or to draw an adverse inference.

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

No.

8. <u>What are the best practices for maintaining privilege in the insurance context?</u>

The best practices for maintaining privilege in the insurance context are:

- avoid creating records that may contain misleading or incomplete information, which may give rise to speculation that information is suppressed;
- involve external lawyers when it becomes clear that legal advice is required; and
- avoid disclosing any legal advice to any third parties.

9. <u>Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?</u>

Under Danish law, privilege (the right to refuse disclosure of confidential information in court or arbitration proceedings) is closely connected to the duty to keep information confidential.

Confidentiality

According to section 129 of the Administration of Justice Act and the Danish Code of Conduct for Lawyers, lawyers authorised to practise law (in Danish, advokater) and their partners, associates and employees are under a duty to keep information confidential.

In respect of insurance companies, section 117 of the Financial Business Act lays down the rule that directors, officers, general agents and administrators of an insurance company as well as other employees may not, without due cause, disclose or use confidential information obtained during the performance of their duties.

Moreover, section 152b of the Danish Penal Code sets out that any person who is exercising or who has exercised a trade or business by virtue of authorisation and who unlawfully forwards or exploits information which he has obtained in connection with his trade or business, and which is confidential with respect to private interests, will be liable to a fine or imprisonment for any term not exceeding six months. In some cases the penalty may be increased to imprisonment for any term not exceeding two years.

Furthermore, the Act on Processing of Personal Data regulates the processing and use of personal data.

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1. PRELIMINARY COMMENTS

1.1 What is Privilege?

Privilege entitles a party (or its successor in title) to withhold relevant evidence from production to a third party or court. This evidence may be either written or oral.

Once privilege has been established, an absolute right to withhold the document in question from inspection arises. In litigation, notwithstanding that the litigant is entitled to withhold inspection of privileged documents from the other side it must still disclose to the other side that the document exists.

If a dispute arises as to privilege, the burden is on the party asserting privilege to establish that the evidence in issue is privileged. The most common type of privilege relied upon is legal professional privilege although common interest privilege may also apply (see Section 3(b)).

1.2 Legal Professional Privilege

Legal professional privilege is split into two categories: legal advice privilege and litigation privilege.

(a) Legal advice privilege

Legal advice privilege covers communications between a lawyer and his client where those communications relate to giving or receiving legal advice. The purpose of this type of privilege is to enable a client to place unrestricted confidence in his lawyer. The courts have taken a restrictive approach to the definition of a client so that, for example, if a law firm is advising a large company, only the employees who are actually charged with instructing the lawyers will be deemed to be the 'client'.[1] Legal advice privilege is capable of being attached to all documents that fall within the continuum of communication between a lawyer and his client.

(b) Litigation privilege

Litigation privilege arises from the principle that a litigant or potential litigant should be free to gather evidence for the purpose of obtaining legal advice without being obliged to disclose the result of the investigations to his opponent. Litigation privilege can attach to communications between a lawyer and his client or between either of them and a third party. For litigation privilege to arise the litigation must be pending, reasonably contemplated or existing. The privilege will only attach to communications that have been made for the dominant purpose of litigation.[2] Litigation in this context includes arbitration, employment and civil and criminal proceedings but does not extend to complaints procedures.[3]

Dominant purpose test

The dominant purpose test is to be found in *Grant v Downs*[4], which was approved by the House of Lords in *Waugh v British Railways Board.*[5]

"[A] document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."

For either type of privilege to apply the evidence in question must be confidential. It follows that a privileged document which ceases to be confidential (because, for example, it has been made available to the general public on a website or, more controversially, to an auditor for the purpose of conducting a statutory audit) can no longer be the subject of a privilege claim. As discussed in Section 9, while privileged documents will always be confidential, confidential documents will not always be privileged. The disclosure and inspection of information that is merely confidential is governed by the normal rules of disclosure (set out in Section 2).

Save for the legal profession, no other professions in the UK benefit from an advisor-client relationship which gives rise to privileged communications. While discussions between doctor and patient, for example, may be confidential, in the event of a dispute, the communications will not be protected by privilege and, provided that they are relevant to the issues in the litigation, will be disclosed. The recent decision of Prudential v Special Commissioner of Income Tax[6], in which tax accountants tried and failed to assert privilege over advice that they had given, has confirmed the long

[1] *Three Rivers (No 5)* [2004] EWCA Civ 218

[2] *Waugh v British Railways Board* [1980] AC 521

[3] *Lask v Gloucester Health Authority* [1991] 2 Med LR 379

[4] (1976) 135 CLR 674

[5] [1980] AC 521

[6] *R. (on the application of Prudential Plc) v Special Commissioner of Income Tax* [2011] 2 WLR 50

held position that no professional other than a qualified lawyer can benefit from legal professional privilege.

1.3 "Without Prejudice" Communications

Another form of privilege is created by the 'without prejudice' rule. The rule states that communications made in a genuine attempt to settle an existing dispute are prevented from being put before the court as evidence of admissions against the interests of the party which made them. Whilst the general privilege rule is 'once privilege always privileged', the rule for without prejudice privilege is more complex, the usual position being that documents will be privileged save as to costs.

2. How do privilege issues arise in insurance disputes?

Insurance disputes can be broadly separated into two categories: coverage disputes and third party disputes. Privilege can arise within both types of these disputes.

Coverage disputes commonly occur between Insured and Insurer or Reinsured and Reinsurer. Where coverage is contested and the parties are hostile to each other, communications between those parties and their respective agents (brokers and other intermediaries) will not be privileged unless written on a 'without prejudice' basis (see Preliminary Comments).

Legal advice obtained in relation to coverage disputes by Insured or Insurers from their respective lawyers will be protected by legal advice privilege. If litigation is in reasonable contemplation, the communications and documents created for the dominant purpose of obtaining evidence will also be protected by litigation privilege. Where communications relating to coverage disputes take place between Insureds or Insurers and third parties, the only type of privilege available to protect them from disclosure is litigation privilege. This is dependant, as always, on litigation being pending, existing or in reasonable contemplation.

Privilege issues also arise in disputes between Insured or Insurer and third parties. This can occur where the Insurer steps into the shoes of the Insured and brings a subrogated claim against a party for causing or contributing to the Insured loss. The third party may seek disclosure of communications between the Insured and Insurer about the underlying event. Legal advice privilege will not attach to these communications as the Insured-Insurer do not form a solicitor-client relationship. However, if communications were made for the dominant purpose of obtaining legal advice in existing or anticipated proceedings, litigation privilege will apply.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

Documents that are created in the course of underwriting an insurance contract and documents that are created in the process of dealing with an insurance claim may be sought for disclosure during an insurance dispute. Relevant documents include statements made about underlying events, internal analyses of claims and coverage and loss reports commissioned for determining the quantum of claims.

Statements made by an Insured to an Insurer about an underlying event will not generally be privileged in a coverage dispute. Although statements may contain commercially sensitive information and as such be confidential, legal professional privilege will not attach to the insurance related communications. If the documents are relevant to the issues in dispute the Insurer has the right to inspect them either by way of the terms of the policy or as a procedural obligation.

However, in certain situations statements made by an Insured to an Insurer about an underlying event may be protected by privilege. The situation can occur where an Insured and Insurer are in the process of defending a third party claim in respect of a defence of which they have a common interest but subsequently turn hostile against each other. In these circumstances, the Insured may seek to limit the evidence that the Insurer can rely upon to avoid the policy by asserting privilege over documents in relation to the underlying event (see Section 3(c)(iii)).

The Insurer's understanding of the underlying insurable risk and claim are often evidenced in the underwriting files and claims files that are maintained by the Insurer. The Insurer may also have in their control documents exchanged internally between the underwriting and claims department or reports written for the basis of establishing the Insurer's exposure to a specific risk. While these documents are likely to contain confidential information, they are generally not privileged. The exception to this is where reports are commissioned for the dominant purpose of litigation. If litigation is in reasonable contemplation by the party commissioning the report and the report is generated for the purpose of either enabling legal advice to be sought or for seeking evidence to be used in connection with the proceedings, litigation privilege is capable of attaching to the document.

3. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

The disclosure of insurance related documents in litigation and arbitration proceedings in England is governed by the rules that operate in respect of disclosure generally.

In English legal proceedings, documents are disclosed according to Rule 31 of the Civil Procedure Rules ('CPR'). The purpose of disclosure is to make available documents which either support or undermine the respective parties' cases. It is designed to allow the court to do justice between the parties with all the facts in front on them.

Inspection is distinguished from disclosure in English law. Disclosure is defined in CPR 31.2 as 'stating that the document exists or has existed', whereas inspection is the process by which the party who has disclosed a document either allows the opponent to view the originals or, more commonly, provides the opponent with copies of documents disclosed. As such, insurance related documents that are privileged will appear on the disclosure list but will not be available for inspection by opponents.

In arbitrations the parties can agree whether there should be disclosure and, if so, the scope of it. In the absence of any agreement the tribunal can determine these questions.[7] In practice, the scope of disclosure in arbitration is usually far more limited than the disclosure required in English court proceedings. Typically, the parties disclose the documents they intend to rely on but also request the disclosure of limited categories of documents from the other party. If the other party declines to disclose the requested documents voluntarily, the tribunal has the power to rule on the disputed requests and insist that the documents are produced.

CPR 58.14 specifically relates to the disclosure of ships papers in proceedings relating to a marine insurance policy. The rule gives an Insurer the specific right to apply and for the court to make an order that all material documents are disclosed. Although an Insurer applying for an order is usually the defendant, the procedure is available to an Insurer who is suing as claimant, e.g. to recover overpayments induced by deception or mistake.[8]

4. What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?

a. Are communications between Insureds and Insurers protected from third parties by solicitor-client privilege?

Communications between Insured and Insurers are not protected from third parties unless legal professional privilege or common interest privilege (see Section 3(b) below) applies. Legal advice privilege cannot apply to communications between an Insured and an Insurer acting as such, as the solicitor-client relationship requirement is not fulfilled (see Preliminary Comments). However, communications can be privileged under litigation privilege if litigation is in reasonable contemplation. Sometimes an Insurer will offer legal advice as a term of the policy, for example in Freight, Defence & Demurrage policies. Then, provided the adviser is legally qualified, or as acting as a 'clerk' to a supervisor who is, such advice will be covered by legal professional privilege.

The leading authority of *Guinness Peat Properties v Fitzroy Robinson Partnership*[9] has confirmed the principle that privilege will attach to communications between Insured and Insurers if the purpose is to receive legal advice in, or to assist in preparing for and conducting, pending or contemplated litigation. In that case, the Plaintiff brought an action for breach of contract against the Insured Defendant, a firm of architects. The Insured Defendant's solicitors inadvertently included in their supplemental list of documents a letter for which they intended to claim privilege. The letter had been sent by the Insured Defendant to its insurers notifying them of the claim and expressing opinions as to liability. The Plaintiff's solicitors subsequently inspected the Insured Defendant's documents, including the said letter, and referred to it in their expert's report. As a result, the Insured Defendant sought an injunction preventing the Plaintiff from making further use of the letter. There was a dispute as to whether privilege could be maintained for the letter.

The court found for the Insured Defendant and granted the injunction. It was held that in order to decide whether the letter qualified for legal privilege, the dominant purpose for which the letter was prepared had to be ascertained and assessed objectively. In this case, the court found that: (i) the letter was brought into existence at the instance of the insurers in order to obtain legal advice or to assist in the conduct of litigation; and (ii) at the time when the letter was written, proceedings had been threatened by the Plaintiff and litigation was therefore reasonably in prospect. Accordingly, the letter was privileged. The court also held that it must have been clear to the Plaintiff's solicitors that the Insured Defendant's solicitors had made a

[7] Section 34(2)(d) of the Arbitration Act 1996

[8] *Boulton v Houlder Bros* [1904] 1 KB 784

[9] [1987] 1 WLR 1027

mistake and thus notwithstanding the rule that it was too late to claim privilege after inspection, the injunction should be granted.

However, if litigation is not reasonably in contemplation, the decision in Guinness Peat Properties cannot be relied upon. Where documents are principally created for a purpose other than taking legal advice, it is unlikely that they will be afforded any protection. For example, an incident report compiled for future risk management purposes was not privileged, even though a subsidiary purpose of its preparation was its use in a pending legal action.[10]

b. Are there doctrines, such as joint client, joint defence, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

The doctrine of common interest privilege has been successfully used in English law to protect communications between Insured and Insurer from third parties. It arises where a party voluntarily discloses a privileged document to another party, such as an Insurer, who has a common interest in the subject matter of the privileged document or in litigation in connection with which the document was brought into existence. Where common interest privilege applies, the document remains privileged in the hands of the recipient. The recipient can therefore and may indeed be under an obligation to assert the disclosing party's privilege against others.

The case of *Guinness Peat Properties* demonstrates that common interest privilege may apply to communications between Insured and Insurers where litigation is threatened against the Insured. The Plaintiff in that case argued that given the letter was written by the Insured Defendant to their insurers (who were independent third parties) rather than the Insured Defendant's solicitors, it would render the Insured Defendant's claim for privilege unsustainable. The court held that the letter was privileged in the hands of the Insured Defendants, relying on the following passage by Brightman LJ in *Buttes Gas and Another v Hammer and Another* (No. 3)[11]:

> "if two parties with a common interest and a common solicitor exchange information for the dominant purpose of informing each other of the facts, or the issues, or advice received, or of obtaining legal advice in respect of contemplated or pending litigation, the documents or copies containing that information are privileged from production in the hands of each".

The effect of common interest privilege is therefore beneficial to the insurance industry as it enables communications between Insured and Insurer and indeed from that Insurer to its own Reinsurers to take place without fear that correspondence will end up in the hands of those suing the Insured.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

Where the Insurer accepts that the Insured's claim is covered by the policy and the Insurer agrees to defend the Insured without a reservation of rights, privilege is applied in the usual manner. As such, if the requirements for legal professional privilege or common interest privilege are fulfilled, communications between Insured and Insurer can be protected against third parties.

ii. The Insurer provides a defence pursuant to a reservation of rights?

In English law, when an Insurer wishes to delay making a decision over the coverage of a claim, the Insurer can reserve their rights to refuse to indemnify the Insured. The act of expressly reserving this right does not affect the manner in which privilege is applied.

iii. The Insurer has denied coverage?

If an Insurer decides to deny coverage of a claim at the beginning of the claim's process, privilege will apply in the same manner as usual. However, where an Insurer has initially accepted coverage but later decides to deny coverage, the application of privilege to pre-existing communications between Insured and Insurer is less clear.

The leading authority on this area is *CIA Barca de Panama SA v George Wimpey*.[12] On the facts, both parties had jointly retained solicitors to defend a third party claim, only to later end up in hostile litigation against each other. Applying the general principle of the case, neither Insured nor Insurer would be able to claim legal privilege in relation to documents that came into existence for the purpose of defending the original claim. The reasoning is that the joint retainer of the solicitor created an implied waiver of legal advice privilege between the Insured and solicitor.

[10] *Buttes Gas & Oil Co. v Hammer (No. 3)* 3 All ER 475 CA

[11] [1981] QB 223.

[12] [1980] 1 Lloyd's Rep. 598

The Insurer, whilst he may therefore use and rely on such privileged material in his dispute with the Insured, is not entitled to disclose the material to a third party. The privilege persists (jointly held) as against third parties. The Insurer could use the material in his relations with his own Reinsurer where Insurer and Reinsurer have a common interest.

However, the general principle of Barca has since been limited in its application in insurance related disputes. In *TSB Bank Plc v Robert Irving & Burns*[13] the court stated that where an actual conflict of interest between the Insured and Insurer already existed at the time the communications were made, the Insurer could not rely (for the purposes of his denial of coverage) on evidence obtained via the joint instruction of a solicitor. Waiver of privilege extended to all communications passing between an Insured and the jointly instructed solicitors until the emergence of a conflict of interest and would last until the point in time when it would be reasonable for the Insured to reach a decision as to whether, in the light of the conflict of interest, new solicitors should be instructed.

iv. The policy provides only a duty to indemnify and not a duty to defend?

A duty to indemnify as opposed to a duty to defend is not a distinction that is material under English law for privilege purposes and privilege is applied in the usual manner.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

Where there are coverage disputes between Reinsured and Reinsurer, legal professional privilege will apply in the same manner as to coverage disputes between Insured and Insurer. Legal advice obtained in relation to the dispute by the parties' respective lawyers will be protected by legal advice privilege and, if litigation is in reasonable contemplation, documents will also be protected by litigation privilege. Where communications take place for the dominant purpose of litigation between Reinsured or Reinsurer and third parties, the only type of privilege available is litigation privilege.

Common interest privilege (see Section 3(b) above) also applies to the Reinsured/Reinsurer relationship. In *Svenska Handelsbanken v Sun Alliance & London Insurance*[14] the court held that 'a very close community of interest' existed between a Reinsured and Reinsurer. This meant that legal advice regarding the merits of the Insurer's dispute against the Insured, which the Insurer had passed to its Reinsurers, was privileged and could not be obtained on disclosure by the Insured. In this context, common interest privilege allows for open discussions between Reinsured and Reinsurer without fear that those communications will be disclosed at a future date.

Common interest privilege has also been used to obtain disclosure in coverage disputes, allowing for the Reinsurer to inspect the Reinsured's claims files. In *Commercial Union Assurance Co v Mander*[15] the reinsurance contract contained a 'follow settlements' clause that bound the Reinsurer to the Reinsured's settlements. The court held that the Reinsured could not withhold from their Reinsurer documents brought into being for the purpose of handling the original claim, even if they would be subject to legal professional privilege as against a third party. This rule has given rise to very difficult issues of conflicts of laws. Where US law would regard disclosure of an Insured's legal opinion to a Reinsurer as a waiver of privilege, English procedural and reinsurance law requires the Reinsured to produce it.

5. <u>Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?</u>

In matters of insurance law, in-house lawyers enjoy the same protection offered by privilege as external lawyers do, provided that they are acting in their capacity as legal advisers and not as executives,[16] that is, privilege would only be extended to such communication which relates to legal matters, but not administrative matters. Where in-house counsel give legal advice to their employer, communications will be covered by legal advice privilege. Documents that relate to the performance of the lawyer's professional duty are therefore protected. Further, where communications between a corporation's in-house counsel and their internal clients, litigation privilege would attach if such communication was for the dominant purpose of obtaining legal advice in view of pending or anticipated litigation.

However, it should be noted that pre-existing documents do not become privileged by the mere fact that they have at some time been submitted to a solicitor.[17] While privilege will cover the copy of the document due to its purpose of seeking legal advice, privilege will not extend to cover the original document.

[13] [2000] 2 All ER 826

[14] [1995] 2 Lloyd's Rep. 84

[15] [1996] 2 Lloyd's Rep. 640

[16] *Alfred Crompton Amusement Machines v Customs & Excise Commissioners (No.2)* [1972] 2QB 102

[17] *Graham v Bogle* [1924] 1 Ir. R 68

6. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

Litigation privilege is one of the two strands of legal professional privilege. As detailed in the Preliminary Comments, this type of privilege arises from the principle that a litigant or potential litigant should be free to seek evidence without being obliged to disclose the result of those investigations to his opponent. Unlike legal advice privilege, litigation privilege can attach to communications between a lawyer and a third party or a client and a third party as well as to communications between a lawyer and a client. Communications will only be protected where created for the dominant purpose of seeking legal advice or obtaining evidence in respect of litigation that is at least in reasonable contemplation.

The application of litigation privilege in an insurance context can be seen in *Axa Seguros S.A. de C.B. v Allianz Insurance plc*.[18] The court held that an engineer's report commissioned by the Reinsurer, which had the dual purpose of determining the quantum of the claim and of assessing the standard of construction of a highway, was not protected by litigation privilege. Although litigation was reasonably in prospect, the report was not produced for the dominant purpose of seeking legal advice or obtaining evidence in respect of the litigation. The case demonstrates the court's strict approach to the dominant purpose test in litigation privilege and the limits to which it can be relied upon.

7. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

Generally, an Insured must disclose to the Insurer all facts material to an Insurer's appraisal of the risk which are known or deemed to be known by the Insured but neither known nor deemed to be known by the Insurer. Non-disclosure by the Insured of any such material facts would be a breach of the Insured's duty of disclosure which may entitle the Insurer to avoid the contract of insurance.

However, an Insured is generally not required to disclose privileged communications to an Insurer. The duty of utmost good faith and the contractual obligations of co-operation do not generally compel the Insured to give up privileged documents to the Insurer. As such, the courts have refrained from compelling Insureds to disclose privileged information.

Insurance contracts are based on the principle of utmost good faith - *uberrimae fidei*. This principle imposes the burden of risk on the proposer of the insurance contract in terms of making sure that the Insurer has all the information that is required. The duty applies both before a contract is concluded and during the performance of the contact. It does not however force an Insured to disclose privileged information to an Insurer, unless the risk being covered includes matters that would themselves depend on the privileged materials e.g. after the event insurance.[19]

Insurance policies commonly contain provisions, typically known as claims co-operation clauses, allowing Insurers to control proceedings brought by or against the Insured that stem from the insured risk. The clauses impose an obligation on the Insured to co-operate with the Insurer which in turn encompasses a duty that the Insured discloses all relevant documents to the Insurer. However, unless the Insured has specifically contracted to disclose privileged documents to the Insurer, clauses of this type will generally not compel an Insured to disclose privileged communications to an Insurer.

Further, where an Insured is claiming under an insurance policy involving legal advice or action on his behalf paid for by the Insurer, it may be that the terms of the policy in fact operate to waive his privilege as against the Insurer[20]. However, as explained in section 3(b) above, common interest privilege would apply to protect such privileged information as between the Insured an Insurer as against third parties.

In the recent decision of *Quinn Direct Insurance v Law Society*[21] the court addressed the question of whether an Insured could be compelled to disclose privileged documents to their Insurer. The court held that an Insured solicitor under any form of 'claims made' policy was not entitled or bound to disclose to his professional indemnity Insurer privileged documents or information about clients without first obtaining the client's consent. In short the solicitor's duty of disclosure to an Insurer does not override the privileged nature of communications between the Insured and its clients.

8. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

Legal professional privilege is the privilege of the client and not of the lawyer. As such, privilege can only be waived by the client, or by a lawyer acting

[18] [2011] EWHC 268 (Comm)

[19] This is a type of legal expenses insurance that provides cover for the legal costs incurred in the pursuit or defence of litigation and arbitration.

[20] *Brown v Guardian Royal Exchange Assurance Plc* [1994] 2 Lloyd's Rep. 325, CA

[21] [2011] 1 WLR 308

on behalf of his client where the client has given their authority to do so. It is clear that an advocate at trial has implied authority to waive his client's privilege on his behalf, for example, by reading out the privileged document.

Privilege may be waived: (i) by express or implied agreement, (ii) by conduct in the course of litigation making a fair adjudication impossible without such waiver, or (iii) by destroying the confidentiality of the privileged material

Where two or more parties are jointly entitled to a privilege (that is, joint privilege), and there is no agreement between them governing the circumstances under which privilege can be waived, then all parties must join in for a waiver to be effective.

However, where two or more parties are severally entitled to a privilege (for example, common interest privilege), and there is no relevant agreement governing circumstances under which privilege could be waived, then any of them may waive privilege without the concurrence of the others before waiver of privilege is effective.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

If privileged documents are referred to in a statement of case (particulars of claim, defence, reply or counterclaim) the opponent can apply for specific disclosure of the privileged document pursuant to the CPR.[22] It is then up to the applicant to satisfy the court that the extent of the use of the document has been such that its confidentiality, and therefore privilege, has been lost. Case law shows that if direct or specific references or allusions to a document have been made in a statement of case, the documents referred to will lose their privileged status.[23]

As with statements of case, a mere reference to privileged information in witness statements or expert reports will not necessarily give rise to a waiver of privilege. The court instead requires a reference to the substance of the privileged information. In Vista Maritime Inc v Sesa Goa[24] an application for disclosure of privileged interview transcripts that were referred to in passages in both a served witness statement and an expert report was refused.

c. Can privilege be waived inadvertently?

Privilege can only be claimed for a communication that has been made confidentially. If a document inadvertently loses its confidential status it will generally lose its privileged status.

Where privileged information is disclosed to third parties there is a high risk that confidentiality and thus privilege will be lost. However, in limited circumstances, the courts have accepted that a client can waive privilege over a document for a specific and limited purpose by disclosing it to a third party without there being a consequent loss of privilege against others.[25] Situations where such allowances are made by the courts are rare and mainly reasoned by public policy considerations.

In circumstances where there has been inadvertent disclosure of a privileged document to an opponent's lawyers, the court may make an order preventing the lawyer from relying on or disclosing the information to their client. Indeed, if it is obvious to a reasonably competent solicitor that documents have been disclosed mistakenly, the solicitor has a professional duty to refrain from inspecting the documents.

d. Bad Faith Actions

Bad faith actions do not exist in English law. The case of *Sprung v Royal Insurance (UK) Ltd*[26] shows that where an Insurer's failure to pay a valid claim within a reasonable amount of time leads to the Insured suffering a significant uninsured loss, no award of damages can occur. The reasoning in Sprung arises from the historic rule that an Insurer's primary obligation is to 'hold the Insured harmless', and that, once an insured loss occurs, the Insured's remedy, technically, is for damages for the Insurer's breach of the promise not to hold him harmless.

Due to this anomalous approach (which the judges in *Sprung* deplored but were bound to apply) the Law Commission published an Issues Paper in March 2010[27] recommending reform in this area of law. After a six month period of consultation, the Law Commission published a summary of the responses in November 2010. The Law Commission's proposals are to either provide damages for a breach of an Insurer's duty of good faith[28] or to reverse the decision in *Sprung* and re-characterise the Insurer's duty as the duty to pay a valid claim within a reasonable time. The proposals were well received and the Law Commission

[22] CPR 31.12

[23] *Rigg v Associated newspaper ltd* [2003] EWHC 710 (QB)

[24] Unreported, 24 October 1997

[25] *British Coal Corporation v Dennis Rye Ltd and Another (No 2)* [1988] 1 WLR 1113

[26] [1999]1 Lloyd's Rep IR 111

[27] Damages for Late Payment and the Insurer's Duty of Good Faith

[28] by amending section 17 of the Marine Insurance Act 1906

intends to publish a consultation paper in spring 2011.

9. What are the best practices for maintaining privilege in the insurance context?

As discussed in the Preliminary Comments, the operation of legal advice privilege depends greatly on who is deemed to be the 'client'. The following points should therefore be considered before a matter is entered into:

a) Give serious consideration at the outset of a transaction or claim to the identity of the key players who will guide the transaction or claim;

b) Who will make the major decisions and who will most need to communicate with the legal advisers;

c) There is no set limit to the number of members of the 'client', save to say that the bigger it is, the more difficult it may be to justify; and

d) A contemporaneous note on how and why the inner client has been constructed may help in resolving later disputes.

The second set of points offer some more general practical pointers for establishing and maintaining privilege over insurance related communications from a client's perspective:

e) When seeking legal advice, make it clear that the document has been produced exclusively for that purpose;

f) If litigation is in contemplation, make sure that this is noted in any relevant files and in internal communications;

g) Clearly mark any documents for which you claim privilege (e.g. “Strictly Private & Confidential – Legally Privileged”) but be aware not to overdo it, lest the rubric lose credibility by over-use;

h) Ensure that any fact-finding exercises for the purposes of seeking legal advice are conducted only by those authorised to communicate with lawyers and any written report on the results of the fact-finding is presented and treated as far as possible as a communication with a lawyer, for the purpose of the giving or receiving of legal advice; and

i) Keep a separate filing system for privileged documents (both hard copy and electronic) which is clearly marked and appropriately protected.

10. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

As noted in the Preliminary Comments, the law on privilege is different than the rules on confidentiality. If a document is privileged it entitles the beneficiary of that privilege to withhold the document from a third party or court. All privileged documents must be confidential in nature and, as a consequence, if confidentiality is lost then so too is privilege. Although privileged documents will always be confidential, confidential documents will not always be privileged and may therefore be disclosed in court when disputes occur.

If insurance related documents are confidential, they are confidential due to some sensitive commercial information that they contain. Whether non-privileged confidential documents can be disclosed to a third party litigant or court depends on the normal rules of disclosure as set out in Section 2. If the documents are relevant to the issues in a dispute and either support or hinder a litigant's position then generally documents will be disclosed.

The law relating to privacy is a new and developing area of case law which is completely separate to the law of privilege. Privacy cases are typically brought by individuals against parties, often newspapers or magazines, which have disclosed personal information about an individual's private life. Cases are successful where such disclosures are in breach of a duty to respect privacy, established on the basis of a contractual or propriety right or a relationship of confidence. Privacy laws are therefore not relevant to privilege issues in insurance related documents.

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1. How do privilege issues arise in insurance disputes?

German civil law and, in particular, the Act on Civil Litigation Procedure (ZPO) do not sanction disclosure and/or discovery claims, but have endorsed the principle that fishing expeditions are strictly prohibited. German law would not even allow the enforcement of discovery of documents if the same is permitted or ordered by a foreign court, as such enforcement would be deemed to seriously violate German public policy. A claimant in Germany can therefore not expect to obtain documentary evidence in support of a contemplated claim by getting access to documents held by the potential defendant or any third party which might be indirectly affected by the contemplated lawsuit. Only in exceptional cases may a person claim access to documents, and that is when the law vests him or her with a specific claim in that respect. As a result of this, there has not been a genuine need to work out and develop a sophisticated doctrine of attorney-client privilege and/or work product protection in civil matters.

Only in connection with criminal prosecutions - where the prosecutors have the right to seize any and all documents which may be relevant for the investigation from the accused and/or from any third parties holding such documents - has the equivalent of an attorney-client privilege and work product protection found entry into the relevant legal provisions and been further developed by the courts and the legal doctrine. It may therefore be a viable strategy when pursuing a civil liability claim - in particular if it is in part a claim for personal injury - to induce the prosecutor (if the same has not acted on his own) to open a criminal investigation against the defendant (e.g. for negligent corporal injury) so that the prosecutor may collect all available documentary evidence. The lawyer representing the claimant will then be entitled to gain access to the prosecutor's file containing all the desired documents. This strategy obviously does not produce positive results in every case. A civil liability claim arising from civil tort does not always simultaneously qualify as a potential criminal act, e.g. misleading and negligent advice by a lawyer provoking a financial loss will be qualified under German law as a breach of contract and civil tort but does not, as a rule, constitute a criminal act.

a. What types of documents may be sought in disputes with an insurer which would give rise to privilege issues?

(i) Policy and policy file: The insured has the right to obtain from the insurer at any time copies of the policy, his application form and any other notices he has given to the insurer in connection with the policy, see Sec. 3, para. 3 and para. 4 Insurance Contract Law (VAG). The injured person will have the same claim against the insurer if his claim is based on compulsory liability insurance (e.g. motor vehicle liability insurance) and if he cannot obtain the respective documents or information from the insured.

(ii) The insured's tender of defence to an insurer and other statements by the insured to its insurer regarding the underlying events/occurrence/accident: No third party, including the plaintiff, is entitled to gain access to these documents in civil proceedings. In criminal proceedings, these documents may be seized or copies thereof may be made by the prosecutor's office. This had been heavily disputed for some time in Germany as the conflict situation arising for the insured is obvious: If the insured fails to provide to the insurer a true, complete and correct description of the insured event/occurrence or accident, the insurer might be entitled to refuse coverage; under the principles of criminal law, the insured, in contrast, has the right to remain silent or even to give an incorrect description of the circumstances in order to alleviate his responsibility. The German Federal Constitutional Court has held in its judgment of February 10, 1991 that the insurer is not entitled to retain the file containing the information given by the insured but has to supply it to the prosecutor, as insurers are not mentioned in the relevant provision of the German Act on Criminal Proceedings as being one of the parties entitled to retain information and/or documents. The Court recognised that the insured would, in principle, be entitled to expect the insurer to preserve the confidentiality of the communications with him or her, but that such confidentiality does not have a truly elementary significance. The policyholder can only expect his insurer to grant coverage in accordance with the terms and conditions of the policy but must not expect the insurer to protect his (unfair) interests in turning down an otherwise justified indemnification claim or evading punishment for a criminal act. (See again judgment of December 10, 1981).

(iii) Insurer's claim file: The same comments apply as noted in (i) and (ii) above.

(iv) Communications from a ceding insurer to its reinsurers (including loss reports and insurer's and reinsurer's reserve information): Such communications and/or reports would be considered to be confidential business information under German law. Such confidential business

information is protected in any kind of civil proceedings initiated by the insured or a third party. In the event of a criminal investigation, one would have to undertake a valuation of the interests of the insurer that such information actually remains confidential on the one hand and the interests of the investigators that such information be made available to them on the other hand. The interests of the insurers and reinsurers may prevail over the interests of the investigators because the relationship between the insurers and reinsurers would be of no true avail to the investigators as the determination of the reserves is based on a business judgment which should have no impact on a criminal prosecution.

2. Does the German jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance-related documents?

There is no pre-trial or in-trial access to documents, including insurance-related documents, under German law and a strategy to overcome this obstacle in some cases has been explained.

3. What types of relationships in the insurance context may be subject to the attorney-client relationship?

a. Are communications between insureds and insurers protected from third parties by the attorney-client privilege?

There is no need to have recourse to an attorney-client privilege in order to keep communications between insurer and insured protected under German law. Such communication is, by its nature, considered to be confidential and no third party will be entitled to obtain access. There is no protection by an attorney privilege or similar privilege in the event of a criminal investigation, with the result that such communication could be seized by the prosecuting authorities without any restriction whatsoever.

b. Are there doctrines that may protect insured/insurer communications from discovery/disclosure to third parties in insurance disputes?

Apart from the general principle that communications between two parties are, by their nature, confidential and should thus not be disclosed to any third party by either party to the communication, there is no need for any such doctrine under German law. It has to be observed, though, that the confidentiality of communications between an insurer and an insured is not a strict kind of confidentiality. It is subject to disclosure by either party if such communication is either meant to be used by the receiving party in relation to a third party (like, for instance, any information given by the insured to the insurer for the purpose of defence against a third party's liability claim) or if a superior right would justify the lifting of such confidentiality (for instance if the insured wants to complain publicly about alleged unfair treatment by the insurer)

c. Is privilege applied in a different manner where:

i. the Insurer has agreed to defend the Insured without reservation of rights?

ii. the Insurer provides a defence pursuant to a reservation of rights?

iii. the Insurer has denied coverage?

iv. the policy provides only a duty to indemnify and not a duty to defend?

Under German law, a summary answer is possible for all of these circumstances. As there is no privilege, no alteration of the access to documents is given under any of the afore-mentioned circumstances.

d. How do privilege issues arise regarding insurer/reinsurer communications?

Any such communications would be treated under German standards as confidential business communications to which no third party (including the insured and also an injured third party) would be given access. This confidentiality should also prevail in the event of a criminal investigation against the insured, as such correspondence would, as a rule, not provide any clarification concerning the occurrence or the extent of the responsibility of the insured.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

It is long-term standard practice within German insurers that they have established relatively large in-house legal departments that take care of handling claims of a certain size or a certain legal complexity. Outside counsel will be instructed, on average, if a lawsuit arises or before such aggravation only in the event of very significant and/or legally extremely complex claims. A large number of in-house counsel (and in particular practically all senior in-house counsel) will be admitted to the Bar, without, however, being permitted to represent the interests of their employer before courts, see Sec. 46, para. 1 German Act on the Legal Profession (BRAO). A German plaintiff suing the insured and/or his insurer

has no right to receive correspondence or other documents exchanged between the insured and his insurer and/or its in-house employed legal counsel. If the plaintiff should endeavour to cite the in-house counsel as a witness before the court in a kind of replacement for having failed to get hold of the communications between the in-house counsel and the insured, the court would have to refuse to hear the in-house counsel as a witness because this would be considered to be a prohibited fishing expedition. One could only conceive that an in-house counsel could be heard as a witness in the event of a coverage dispute where the insurer refuses coverage for the insured for not having given true and correct information about the occurrence or accident and the insured is defending his position by alleging that he had provided all required information to the in-house counsel in a meeting. In such case (and also in the event of a criminal investigation) the issue arises as to whether the attorney-client privilege pursuant to Sec. 383, para. 1, No. 6 ZPO, and to Sec. 53, para. 1, No. 3 German Act on Criminal Procedure (StPO) would entitle the in-house counsel to refuse to testify and to pass on documents. Many German legal authors want to draw a line between the work of an in-house counsel acting more as an employee and one acting more as an independent practitioner, see, for instance, Roxin in 1992 NJW, page 1129, and 1995 NJW, page 17. However, the courts are not willing to draw such a fine demarcation line between the two allegedly different professional activities of in-house counsel and thus treat in-house counsel in the same way as any other employee as long as he/she represents the interests of the employer, see Berlin District Court in 2006 NStZ, page 470, and District Court Bonn in 2007 NStZ, page 605. The majority of German legal authors have been critical of these and similar previous court decisions and continue to reiterate their view that either all employed in-house counsel should be treated in the same way as private practitioners in respect of the client-attorney privilege, or that such privilege should be availed to in-house counsel at least if their professional activity were more similar to the professional activity of a private practitioner than to the activity of an employee. After endorsement of the decision of the European Court of September 17, 2007 in the AKZO-Nobel Chemicals matter by judgment of the European Court of Justice of September 14, 2010, though, one can no longer expect the German courts to abandon their denial of the attorney-client privilege in favour of in-house counsel.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance-related documents?

Under German law, the communications between an attorney and his or her client are, per se, confidential communications if made for the purpose of furnishing or obtaining professional legal advice and assistance, and this applies to communications in the context of civil law matters as well as in the context of criminal investigations or prosecutions, see Sec. 53 ZPO and Sec. 97 StPO. As a consequence, any documents incorporating such communications must not be seized within the framework of a criminal investigation and the attorney is not allowed to disclose any such communications (if cited as a witness in civil proceedings) unless the client has granted a specific and explicit dispensation from the duty of confidentiality. An attorney disclosing such communications without the prior explicit and specific approval of the client would be subject to criminal prosecution and could be punished by a term of imprisonment of up to two years, with the further consequence of being debarred, see Sec. 203 German Penal Code (StGB).

This attorney-client privilege does not only protect direct communications between the attorney and the client, but also all notes and other papers which the attorney may prepare in connection with advising the client – whether they be notes on a conversation with the client or memoranda in preparation for a brief. This protection extends to any communications which the attorney might have with third persons, if such communication is made in the interests of the client represented. German law did not need a specific additional privilege for the protection of work projects, as the high importance and significance of the confidentiality of the client-attorney relationship automatically extends to such papers under normal rules of interpretation of the pre-cited legal provisions and the scope to protect everything that is prepared by an attorney for the legal support of his client.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

Pursuant to Sec. 31 VVG, the insurer has the right to request the insured to provide any and all information which is necessary or expedient to evaluate the insured event or occurrence or accident and to determine the equitable amount of indemnification payable to the insured. If documents are available to the insured which could contribute to the clarification of the claim, like, for instance, a repair invoice, the insurer can further summon the insured to supply the same to his hands. The information which the insurer is entitled to request from the insured does not only include information which is available to the insured at the time of receipt of the request, but also any such information which the insured can gather from third parties without too onerous an effort, see Federal Supreme Court in 52 BGHZ, p. 86, and 122 BGHZ, p. 250. The information which can be required by the insurer extends to any and all circumstances and evidence which a reasonable insurer may want to gather in order to evaluate the justification of the

claim, including any circumstances which would allow the insurer to verify whether the insured had supplied correct information in connection with the application form. The right to request information also pertains to circumstances which might be detrimental to the insured's claim, like e.g. information relating to the consumption of alcoholic beverages before an accident, see Federal Supreme Court decision in 2000 VersR, p. 222. The extent of the information to be supplied by the insured is to be determined under application of the principle of good faith, but in the relationship between the insured and the insurer, this principle is applicable only to the same extent as in all other contractual relationships. The principle of utmost good faith is recognised broadly in Germany only for the relationship between insurers and reinsurers or between reinsurers and retrocessionaires. It should be very briefly mentioned that the German Insurance Contract Act did not prescribe a duty on the part of the insured to supply information to the insurer corresponding to the right of the insurer to request such information. The provision of information by the insured is, so to speak, dictated by reason, as the law does not indicate any consequences triggered by a failure to provide information. The complex doctrines developed around this right to information without corresponding duty and the consequences of a failure to supply information do not need to be further discussed here for a simple reason: any and all relevant terms and conditions of policy provide for such consequences by prescribing that the fraudulent and/or wilful failure to provide information will entitle the insurer to refuse the cover. The insurer will be entitled to reduce the indemnification if the insured has failed to provide the required information acting in a negligent manner in proportion to the level of negligence, see Sec. 28 VVG.

The insurer's right to information extends to privileged information and documents, in particular medical records in the event of bodily injuries, although the insurer cannot request such information directly from a third privileged party unless the insured has given his explicit prior approval thereto. Such approval may be given in connection with the application for the policy and needs to be specific so that a catch-it-all clause would not suffice. Pursuant to Sec. 213 VVG, the insured has to be alerted to the fact that an insurer is actually seeking such privileged personal health related information from a third party, for instance from a medical doctor, and the insured has the right to restrict his general approval at any time to the effect that each and every request for privileged information from a third party would need his specific prior approval.

In summary, one may therefore state the following for Germany: The insurer is not entitled to pierce the protecting wall surrounding privileged information and documents at its own discretion by requesting information from privileged persons; it would need the insured's prior specific approval thereto. A refusal to grant such approval may be held against the insured and may eventually trigger a refusal to pay the claim.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

The original owner or originator of the confidential information is the one who is always entitled to lift the veil of confidentiality or to waive the privilege; it is not the holder of the privilege who has the power to take this decision. The client who describes an event in full details to his lawyer is later on quite naturally entitled to supply the same description to the court, or the delinquent who has made a confession to a priest obviously does not require the priest's approval before making the same confession to a judge. It is, however, true that you would not ask under German law whether the insurer or the attorney who has received confidential information from the insured/client is entitled to waive the privilege, but rather whether the recipient is entitled to disclose such confidential information under civil law aspects or whether, by doing so, he would even commit a felony. This legal situation may best be explained by an example: A person who is not feeling too well visits a medical doctor who has newly arrived in his community and is informed by that doctor that he has contracted a dread disease which would leave him with a life expectancy of not even 12 months. The person keeps this information absolutely confidential and is shortly thereafter killed in a fatal accident caused by a reckless driver. The wife and children of the person killed claim compensation and damages for their loss from the driver and his insurer. Under German law the amount of indemnification would be very significantly reduced if it could be established that the husband and father would have passed away anyway within a certain number of months. As the wife and children of the late husband are not aware of the dread disease, their claim against the reckless driver and his insurer would not be a malicious claim. If the doctor were to disclose the knowledge he had acquired by carrying out the check-up to the insurer upon his own initiative, he would commit a felony. If he were to offer to disclose the information for remuneration, the punishment would be more serious than in the first case where he would only have supplied the information. If we assume that the doctor does not want to disclose the result of the check-up but is not quite sure of his professional duties in such a case and thus notifies his professional indemnity insurer of the situation in order to obtain advice. And if we further assume that the professional indemnity insurer reassures the doctor that he has to stick to

the obligation of confidentiality, but itself passes on this information to the insurer of the reckless driver (expecting reciprocity in the future), then the situation is different: the professional indemnity insurer and its personnel are not part of the group of people obliged to keep confidential information secret under threat of prosecution if they do not act accordingly. However, the professional indemnity insurer is contractually bound to keep information secret vis-à-vis the doctor and indirectly vis-à-vis the doctor's patients. The doctor and/or the wife and children of the late husband could sue the insurer for damages for breach of secrecy. It should be added that confidential information, if coincidentally obtained from a third party even if the same has committed a breach, could be used by the parties in civil proceedings.

An insurer or a lawyer or anybody else who has to comply with the obligation of professional secrecy does not have a right of his or her own to disclose confidential information received from a client. The client may specifically authorise his attorney to disclose confidential information or, for instance, authorise a doctor to supply a medical report to the court, but the lawyer must not rely for such disclosure on a general power of attorney given to represent his client's interests. The consent to disclose is a genuinely individual right of the client/patient and if the lawyer gives his approval to disclose, he does not act as a true proxy but only as a kind of mouthpiece of his client.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

It has already been mentioned before that German law, in some instances, vests a claimant with the right to request another party (for instance the defendant in a lawsuit) to supply a copy of a document. Such claim is given for example if two parties have signed a contract and one party has lost his copy, as then the contractual partner would be obliged to supply a copy thereof to the other party. The scope of the respective legal provision under Sec. 810 German Civil Code goes somewhat beyond that by also allowing such a claim if he or she has a kind of legal right to obtain access to certain documents. This will, for instance, be the case if a person receives a certain part of the profit of a company or a partnership and such a person would have the right to inspect the accounts in order to assess whether or not the profit had been calculated properly. The Code of Civil Procedure has granted a very limited extension of the claim to request a third party or the adversary to supply documents: one party to a litigation has a right to request the other party to supply a document if that other party has cited the document as evidence and proof for its representations in the dispute. Such citation of a document without simultaneously supplying the document to the court, however, practically never happens and should not occur if the submission to the court has been diligently prepared. Under the revised wording of Sec. 142 ZPO, the court now has the opportunity to request a party to a lawsuit to supply a document to the court and to the adversary, even if that party had only otherwise referred to or mentioned a certain document in its submissions to the court without wanting to use that document as evidence and proof. Whilst it was obvious that Sec. 142 ZPO would allow one party to request the court to order the other party to supply a document once the other party had referred to such document, it had been debated whether the court could also request the production of a document if one party had referred to a document held by the other party which that other party did not want to produce and was not legally obliged to provide. The majority of legal authors shared the view that such extensive interpretation of the wording of Sec. 142 ZPO should not be allowed as German procedural law is governed by the prohibition of fishing expeditions, see Stein/Jonas, ZPO, 22 Edition 2005, Sec. 142, No. 20; Baumbach/Lauterbach, ZPO, 69th Edition 2011, Sec. 142, No. 6. However, the Federal Supreme Court did not endorse this view in its decision of June 26, 2007 (2007 NJW, page 2989), but rather held quite the opposite: If one party is able to represent to the court that the other party holds a document which is relevant to the outcome of the lawsuit, then a court may, within its reasonable discretion, request the other party to supply a copy of that document to the adversary and to the court. One should, however, not jump to the conclusion that German courts are therewith on the verge of permitting discovery of documents in the near future. An order to produce a document will only be issued if the party concerned is able to identify the document and to indicate the approximate contents and the party must, moreover, convince the court that it is unfair and inequitable of the other party to retain such document which is relevant to the outcome of the litigation. If these requirements are met with, the court could not only order the adversary to supply such document but also order a third party holding the document to do the same. If the other party does not comply with the court's order, there are coercive measures available to the court to enforce the order, but the court has a right to take representations from the first party as to the contents of the document being true and correct.

The court's right to order the submission of documents does not, however, extend to documents which are protected by professional secrecy; a party assuming that a medical doctor had prepared a medical report which would prove his representations to the court would not be able to obtain such order from the court, as a medical doctor is not permitted to disclose such reports to third parties.

c. Can privilege be waived inadvertently?

Under German law, confidential information is protected against disclosure by certain privileged individuals and this structure of protection automatically results in any such information given to a privileged individual (attorney, member of the medical profession, priest, etc.) being protected only for as long as it remains confidential, i.e. is not available to third parties. If a lawyer leaves his file containing confidential information unattended so that third persons could easily inspect the file and do so, such information is no longer confidential and the third person who is not under a duty to keep professional secrecy may disclose such information to third parties. The lawyer, though, could be prosecuted for not having kept the information confidential, as his professional duties not only oblige him not to disclose but he also has to take adequate safeguards to maintain the confidentiality of the information received.

In summary, one can say that any negligent act or omission by a privileged person, which allows a third party not bound by professional secrecy to gain access to confidential information, deprives such information of its confidential character.

d. Bad Faith Actions

German law does not provide for the possibility of bad faith actions.

8. What are the best practices for maintaining privilege in the insurance context?

Under German law it is more a question of substantive law whether or not certain kinds of information or a document is confidential or whether an individual is entitled or obliged to keep certain information received from a third party secret than a question of marking such information or document confidential. However, there is another issue which could arise: the recipient of information may have the right to ask himself whether by being supplied with certain information he has received tacit consent to pass the information on to a third party. A reporter having received information about a civil servant who has accepted sludge money may be right in assuming that the supplier of the information does not only agree but, in fact, wants him to publish this information. An insured who wants to be on the safe side should therefore mark information which is indeed meant to be kept confidential as confidential when giving it to his insurer. Such measure of utmost precaution is, however, unnecessary vis-à-vis individuals who are subject to an obligation of professional secrecy. They automatically have to keep all information received in connection with their office confidential regardless of whether or not it has actually been marked or designated as such.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance-related documents are protected by confidentiality/privacy rules/laws?

These questions have already been answered above by explaining the German system for protecting information, papers and documents which might be confidential in the relationship between the insured and the insurer.

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1. PRELIMINARY COMMENTS

It should be noted at the outset that the law in relation to privilege in Hong Kong follows closely to the English position. The English case authorities referred to in this note have either been applied or are likely to be followed by the Hong Kong courts.

1.1 What is Privilege?

Privilege entitles a party (or its successor in title) to withhold relevant evidence from production to a third party or court. This evidence may be either written or oral.

Once privilege has been established, an absolute right to withhold the document in question from inspection arises. In litigation, notwithstanding that the litigant is entitled to withhold inspection of privileged documents from the other side it must still disclose to the other side that the document exists.

If a dispute arises as to privilege, the burden is on the party asserting privilege to establish that the evidence in issue is privileged.

The most common type of privilege relied upon is legal professional privilege although common interest privilege may also apply (see section 4(b)).

1.2 Legal Professional Privilege

The aim of legal professional privilege is to enable a client to place unrestricted confidence in its lawyer.

The fundamental nature of legal professional privilege was discussed in the decision by the Court of Final Appeal of *Akai Holdings Ltd (in compulsory liquidation) v Ernst & Young* (a Hong Kong firm).[1] The starting point is that legal professional privilege protects client-lawyer communications from disclosure to a client's prejudice and contrary to its wishes. Privilege is a right belonging to the client. In Hong Kong, such right is a constitutional one and stems from Article 35 of the Basic Law where it is expressly stated that "Hong Kong residents shall have the right to confidential legal advice".

Legal professional privilege consists of two limbs: legal advice privilege; and litigation privilege.

(a) Legal advice privilege

Legal advice privilege covers confidential communications between a lawyer and his client where those communications relate to giving or receiving legal advice. The courts have taken a restrictive approach to the definition of a client so that, for example, if a law firm is advising a large company, only the employees who are actually charged with instructing the lawyers will be deemed to be the 'client'.[2] The protection is not restricted to specific requests for advice and to documents containing advice. It extends to all communications aimed at keeping a client advised generally of developments.

Legal advice is often sought or given in connection with current or contemplated litigation. However, a connection with litigation is not a necessary condition for legal advice privilege to attach.

(b) Litigation privilege

Litigation privilege applies to confidential communications between a lawyer and his client or between either of them and a third party, which are made for the dominant purpose of litigation.[3] The litigation must be pending, reasonably contemplated or existing. Litigation in this context includes arbitration, employment and civil and criminal proceedings but does not extend to complaints procedures.[4]

Dominant purpose test

The dominant purpose test is to be found in *Grant v Downs*[5]*, which was approved by the House of Lords in Waugh v British Railways Board*[6]*, and* has been followed by the Hong Kong courts in *Akai Holdings Ltd*:

> "[A] document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was

[1] [2009] HKEC 286

[2] *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474

[3] *Waugh v British Railways Board* [1980] AC 521; *Akai Holdings Ltd (in compulsory liquidation) v Ernst & Young (a Hong Kong firm)* [2009] HKEC 286

[4] *Lask v Gloucester Health Authority* [1991] 2 Med LR 379

[5] (1976) 135 CLR 674

[6] [1980] AC 521

> produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."

For either legal advice or litigation privilege to apply, the evidence in question must be confidential. It follows that a privileged document which ceases to be confidential (because, for example, it has been made available to the general public on a website or, more controversially, to an auditor for the purpose of conducting a statutory audit) can no longer be the subject of a privilege claim. As discussed in section 10, while privileged documents will always be confidential, confidential documents will not always be privileged. The discovery and inspection of information that is merely confidential is governed by the normal rules of discovery (set out in section 3).

It should be noted that legal advice privilege does not, however, apply to other professionals outside the legal profession such as accountants. While discussions between doctor and patient, for example, may be confidential, in the event of a dispute the communications will not be protected by privilege and, provided that they are relevant to the issues in the litigation, will be subject to disclosure and inspection. The recent decision *Prudential v Special Commissioner of Income Tax*[7], in which tax accountants tried and failed to assert privilege over advice that they had given, has confirmed the long held position that no professional other than a qualified lawyer can benefit from legal professional privilege.

1.3 "Without Prejudice" Communications

The rule regarding oral and written "without prejudice" communications prevents admissions made by litigants in the course of settlement negotiations from being used against them at trial. They can thus offer to compromise their position without fear that the compromise will later be used against them if the settlement negotiations fail. The usual and best practice will be for the parties to label their written offers of compromise "without prejudice", and to communicate unequivocally to the other side that a conversation is taking place on a without prejudice basis. If they fail to take this step, however, the protection will still be available if it is clear that the communication was on a "without prejudice" basis. The test is one of substance, not form.

The general rule as stated in *Gross Fortune International Limited v Set Win International Limited*[8] is that a party is entitled to disclosure irrespective of the issue of the later admissibility of the document. It is a matter for the parties giving the disclosure to decide whether to list the "without prejudice" documents in the list of documents as documents which are privileged from production, but in any event, the "without prejudice" documents need to be listed and disclosed to the other side.

2. How do privilege issues arise in insurance disputes?

Insurance disputes can be broadly classified as one of two categories: coverage disputes; and third party disputes. Privilege can arise in either of these categories.

Coverage disputes commonly occur between Insured and Insurer or Reinsured and Reinsurer. Where coverage is contested and the parties are hostile to each other, communications between those parties and their respective agents (brokers and other intermediaries) will not be privileged unless written on a "without prejudice" basis (see section 1).

Legal advice obtained in relation to coverage disputes by Insured or Insurers from their respective lawyers will be protected by legal advice privilege. If litigation is in reasonable contemplation, the communications and documents created for the primary purpose of being used in aid of pending, actual, or contemplated litigation will also be protected by litigation privilege. Where communications relating to coverage disputes take place between Insureds or Insurers and third parties, the only type of privilege available to protect them from disclosure is litigation privilege. Again, this is dependant, on litigation being at least in reasonable contemplation.

Privilege issues also arise in disputes between Insured or Insurer and third parties. This can occur where the Insurer steps into the shoes of the Insured and brings a subrogated claim against a party for causing or contributing to the Insured's loss. The third party may seek disclosure of communications between the Insured and Insurer about the underlying event. Legal advice privilege will not apply to these communications as the Insured and Insurer do not form a solicitor-client relationship. However, if communications were made for the dominant purpose of existing or anticipated proceedings, litigation privilege will apply.

[7] *R. (on the application of Prudential Plc) v Special Commissioner of Income Tax* [2011] 2 WLR 50

[8] (unreported, CACV 192/1999, 22 October 1999) (CA)

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

Documents that are created in the course of underwriting an insurance contract and documents that are created in the process of dealing with an insurance claim may be sought for disclosure during an insurance dispute. Relevant documents include statements made about underlying events, internal analyses of claims and coverage and loss reports commissioned for determining the quantum of claims.

Statements made by an Insured to an Insurer about an underlying event will not generally be privileged in a coverage dispute. Although statements may contain commercially sensitive information and as such be confidential, legal professional privilege will not apply to the insurance-related communications. If the documents are relevant to the issues in dispute, the Insurer has the right to inspect them either by way of the terms of the policy or as a procedural obligation.

However, in certain situations, statements made by an Insured to an Insurer about an underlying event may be protected by privilege. Such a situation can occur where an Insured and Insurer are in the process of defending a third party claim in respect of a defence of which they have a common interest but subsequently turn hostile against each other. The Insured may seek to limit the evidence that the Insurer can rely upon to avoid the policy by asserting privilege over documents in relation to the underlying event (see section 4(c)(iii)).

The Insurer's understanding of the underlying insurable risk and claim are often evidenced in the underwriting files and claims files that are maintained by the Insurer. The Insurer may also have in their control documents exchanged internally between the underwriting and claims department or reports written for the basis of establishing the Insurer's exposure to a specific risk. While these documents are likely to contain confidential information they are generally not privileged. The exception to this is where reports are commissioned for the dominant purpose of litigation. If litigation is in reasonable contemplation by the party commissioning the report and the report is generated for the purpose of either enabling legal advice to be sought or for seeking evidence to be used in connection with the proceedings, litigation privilege will apply to that report.

3. <u>As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?</u>

There are no specific discovery rules for insurance-related documents. The discovery of insurance-related documents in litigation and arbitration proceedings in Hong Kong is governed by the rules that operate in respect of discovery generally.

The purpose of discovery is to make available documents which either support or undermine the respective parties' cases. It is designed to allow the court to do justice between the parties with all the facts in front on them.

In Hong Kong, discovery of documents is governed by Order 24 of the Rules of the High Court/Rules of the District Court.

Under Order 24, parties must disclose to each other all relevant documents that are or have been in their possession, custody or power, including documents adverse to their case, by listing and briefly describing them in a list of documents. In this regard, relevant documents refer to all those documents "relating to matters in issue"[9] in the proceedings. In addition to the obligation to disclose all relevant documents, parties must allow their opponents to inspect and to copy their relevant, unprivileged documents.

Accordingly, if an insurance-related document is relevant to the dispute in question, it must be disclosed in the litigant's list of documents. If the document is privileged, then there is no obligation to give the document to or allow the same to be inspected by an opponent. All that is required is that the document for which privilege is claimed be described in the list of documents with a sufficient statement of the grounds of the privilege claimed.

In arbitrations, the parties can agree whether there should be disclosure and, if so, the scope of it. In the absence of any agreement, the tribunal can determine these questions.[10] In practice, the scope of disclosure in arbitration is usually far more limited than the disclosure required in court proceedings. Typically, the parties disclose the documents they intend to rely on but also request the disclosure of limited categories of documents from the other party. If the other party declines to disclose the requested documents voluntarily, the tribunal has

[9] Order 24, r.1.

[10] Section 2GB(1)(c) of the Arbitration Ordinance (Cap 341); Section 56(1)(b) of the new Arbitration Ordinance (Cap. 609) (effective from 1 June 2011)

the power to rule on the disputed requests and insist that the documents are produced.[11]

4. What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?

a. Are communications between Insureds and Insurers protected from third parties by solicitor-client privilege?

Communications between Insured and Insurers are not protected from inspection by third parties unless legal professional privilege or common interest privilege (see section 4(b)) applies. Legal advice privilege is not applicable to communications between an Insured and an Insurer as it does not give rise to a solicitor-client relationship (see section 1). However, such communications may be covered under litigation privilege if litigation is in reasonable contemplation.

The English case of *Guinness Peat Properties v Fitzroy Robinson Partnership*[12] has confirmed the principle that privilege will attach to communications between Insured and Insurers if the purpose is to receive legal advice in, or to assist in preparing for and conducting, pending or contemplated litigation. In that case, the Plaintiff brought an action for breach of contract against the Insured Defendant, a firm of architects. The Insured Defendant's solicitors inadvertently included in their supplemental list of documents a letter for which they intended to claim privilege. The letter had been sent by the Insured Defendant to its insurers notifying them of the claim and expressing opinions as to liability. The Plaintiff's solicitors subsequently inspected the Insured Defendant's documents, including the said letter, and referred to it in their expert's report. As a result, the Insured Defendant sought an injunction preventing the Plaintiff from making further use of the letter. There was a dispute as to whether privilege could be maintained for the letter.

The court found for the Insured Defendant and granted the injunction. It was held that in order to decide whether the letter qualified for legal privilege, the dominant purpose for which the letter was prepared had to be ascertained and assessed objectively. In this case, the court found that: (i) the letter was brought into existence at the instance of the insurers in order to obtain legal advice or to assist in the conduct of litigation; and (ii) at the time when the letter was written, proceedings had been threatened by the Plaintiff and litigation was therefore reasonably in prospect. Accordingly, the letter was privileged. The court also held that it must have been clear to the Plaintiff's solicitors that the Insured Defendant's solicitors had made a mistake and thus notwithstanding the rule that it was too late to claim privilege after inspection, the injunction should be granted.

However if litigation is not reasonably in contemplation the decision in *Guinness Peat Properties* cannot be relied upon. Where documents are principally created for a purpose other than taking legal advice, it is unlikely that they will be afforded any protection. For example, an incident report compiled for future risk management purposes was not privileged, even though a subsidiary purpose of its preparation was its use in a pending legal action.[13]

b. Are there doctrines, such as joint client, joint defence, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

The doctrine of common interest privilege which exists at common law has been used to protect communications between Insured and Insurer from third parties. It arises where a person voluntarily discloses a privileged document to a third party who has a common interest in the subject matter of the privileged document or in litigation in connection with which the document was brought into existence. Where common interest privilege applies, the document remains privileged in the hands of the recipient. The recipient can therefore and may indeed be under an obligation to assert the disclosing party's privilege against others.

The English case of *Guinness Peat Properties* demonstrates that common interest privilege may apply to communications between Insured and Insurers where litigation is threatened against the Insured. The Plaintiff in that case argued that given the letter was written by the Insured Defendant to their insurers (who were independent third parties) rather than the Insured Defendant's solicitors, it would render the Insured Defendant's claim for privilege unsustainable. The court held that the letter was privileged in the hands of the Insured Defendants, relying on the following passage by Brightman LJ in *Buttes Gas and Another v Hammer and Another (No. 3)*[14]:

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[11] Article 23, Hong Kong International Arbitration Centre Administered Arbitration Rules; Article 3, IBA Rules of Evidence on the Taking of Evidence in International Arbitration

[12] [1987] 1 WLR 1027

[13] *Buttes Gas & Oil Co. v Hammer (No. 3)* 3 All ER 475 CA

[14] [1981] QB 223.

> "*if two parties with a common interest and a common solicitor exchange information for the dominant purpose of informing each other of the facts, or the issues, or advice received, or of obtaining legal advice in respect of contemplated or pending litigation, the documents or copies containing that information are privileged from production in the hands of each*".

The effect of common interest privilege is therefore beneficial to the insurance industry as it enables communications between Insured and Insurer and indeed from that Insurer to its own Reinsurers to take place without fear that correspondence will end up in the hands of those suing the Insured.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

Where the Insurer accepts that the Insured's claim is covered by the policy and the Insurer agrees to defend the Insured without reservation of rights, privilege is applied in the usual manner. As such, if the requirements for legal professional privilege or common interest privilege are fulfilled, communications between Insured and Insurer can be protected against inspection by third parties.

ii. The Insurer provides a defence pursuant to a reservation of rights?

At common law, when an Insurer wishes to delay making a decision over the coverage of a claim, the Insurer can reserve their rights to refuse to indemnify the Insured. The act of expressly reserving this right does not affect the manner in which privilege is applied.

iii. The Insurer has denied coverage?

If an Insurer decides to deny coverage of a claim at the beginning of the claim's process, privilege will apply in the same manner as usual. However, where an Insurer has initially accepted coverage but later decides to deny coverage, the application of privilege to pre-existing communications between Insured and Insurer is less clear.

The English case of *C.I.A Barca de Panama SA v George Wimpey*[15] demonstrates this. On the facts, two parties had jointly retained solicitors to defend a third party claim, only to later end up in hostile litigation against each other. It was held in this case that where there was a joint retainer, or the same solicitors acted for two clients in related matters in which they had a common interest, neither client could claim legal professional privilege against the other in relation to documents that came into existence, or communications that passed between them and the solicitors, within the scope of the joint retainer or matter of common interest. If one were to apply the general principle of this case, neither Insured nor Insurer would be able to claim legal privilege in relation to documents that came into existence for the purpose of defending the original claim.

Whilst the Insurer may use and rely on such privileged material in his dispute with the Insured, or vice versa, the jointly held privilege against third parties still persists. The Insurer could use the privileged material in his relations with his own Reinsurer where Insurer and Reinsurer have a common interest.

However, the general principle of *Barca* has since been limited in its application in insurance related disputes. In *TSB Bank Plc v Robert Irving & Burns*[16], the court stated that where an actual conflict of interest between the Insured and Insurer already existed at the time the communications were made, the Insurer could not rely (for the purposes of his denial of coverage) on evidence obtained via the joint instruction of a solicitor. Waiver of privilege extended to all communications passing between an Insured and the jointly instructed solicitors until the emergence of a conflict of interest and would last until the point in time when it would be reasonable for the Insured to reach a decision as to whether, in the light of the conflict of interest, new solicitors should be instructed.

iv. The policy provides only a duty to indemnify and not a duty to defend?

A duty to indemnify as opposed to a duty to defend is not a distinction that is material for privilege purposes and privilege is applied in the usual manner as discussed above.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

Where there are coverage disputes between Insurer (that is, the Reinsured) and Reinsurer, privilege will apply in the same manner as to coverage disputes between Insured and Insurer. Legal advice obtained in relation to the dispute by the parties' respective lawyers will be protected by legal advice privilege and if litigation is in reasonable

[15] [1980] 1 Lloyd's Rep. 598

[16] [2000] 2 All ER 826

contemplation, documents created for the purposes of obtaining or giving advice in regard to such litigation, or of obtaining evidence to be used in such litigation, will also be protected by litigation privilege. Where communications take place between Insurer and Reinsurer, or Insurer/Reinsurer and third parties, such communications would only be protected by litigation privilege if, and only if, such communications came into existence for the dominant purpose of obtaining legal advice in existing or anticipated proceedings.

Common interest privilege (see section 4(b) above for definition) also applies in the context of an Insurer/Reinsurer relationship. In *Svenska Handelsbanken v Sun Alliance & London Insurance*[17], the court held that "a very close community of interest" existed between an Insurer and a Reinsurer in general. As such, legal advice obtained by the Insurer regarding the merits of the Insurers' dispute against the Insured, which the Insurer had passed to its Reinsurers, would remain privileged in the Reinsurer's hands and would not need to be disclosed to the Insured on discovery.

Common interest privilege has also been used to obtain disclosure in coverage disputes, allowing for the Reinsurer to inspect the Insurer's claims files. In *Commercial Union Assurance Co v Mander*[18], the court held that where the subject reinsurance contract contained a 'follow settlements' clause that bound the Reinsurer to the Insurer's settlements, so as to create a community of interest between the Insurer and Reinsurer in the original claim, the Insurers could not withhold from their Reinsurers, on the grounds of privilege, documents brought into being for the purpose of handling the original claim, even if they would be subject to legal professional privilege as against a third party.

5. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

The same privilege attaches to communications between a party and their in-house counsel as to communications with external lawyers, provided that such in-house counsel are acting in their capacity as legal advisers and not as executives[19], that is, privilege would only be extended to such communication which relates to legal matters, but not administrative matters. Where in-house counsel gives legal advice to their internal clients within a corporation, such communications will be covered by legal advice privilege. Further, where communications between a corporation's in-house counsel and their internal clients, litigation privilege would attach if such communication was for the dominant purpose of obtaining legal advice in view of pending or anticipated litigation.

However, it should be noted that pre-existing documents do not become privileged by the mere fact that they have at some time been submitted to a solicitor, whether in-house or external, even in circumstances where such document was handed to a solicitor for the purpose of obtaining the solicitor's advice in view of pending or anticipated litigation.[20]

6. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

Litigation privilege is one of the two strands of legal professional privilege. Litigation privilege arises to protect from production communications made after litigation is commenced or is in reasonable contemplation, between (i) a lawyer and a client, or (ii) either a lawyer or a client and a third party, for the dominant purpose of such litigation, whether such purpose was for seeking or giving advice in relation to such litigation or for obtaining evidence to be used in it, or for obtaining information leading to such obtaining of evidence.

In an insurance context, once circumstances that may give rise to claims under an insurance policy arises, litigation privilege as explained above would attach to communications passing between (i) a lawyer and a client, or (ii) either a lawyer or a client and a third party, for the dominant purpose of such potential litigation or claims in accordance with the general rules explained above.

7. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

Generally, an Insured must disclose to the Insurer all facts material to an Insurer's appraisal of the risk which are known or deemed to be known by the Insured but neither known nor deemed to be known by the Insurer. Non-disclosure by the Insured of any such material facts would be a breach of the Insured's duty of disclosure which may entitle the Insurer to avoid the contract of insurance.

However, an Insured is generally not required to disclose privileged communications to an Insurer.

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[17] [1995] 2 Lloyd's Rep. 84

[18] [1996] 2 Lloyd's Rep. 640

[19] *Alfred Crompton Amusement Machines v Customs & Excise Commissioners (No.2)* [1972] 2 QB 102

[20] *Graham v Bogle* [1924] 1 Ir. R 68; *Ventouris v Mountain, The Italia Express* [1991] 3 All E.R. 472, CA

The duty of utmost good faith and the contractual obligations of co-operation do not generally compel the Insured to give up privileged documents to the Insurer.

Insurance contracts are based on the principle of utmost good faith – *uberrimae fidei.* This principle imposes the burden of risk on the proposer of the insurance contract in terms of making sure that the Insurer has all the information that is required. The duty applies both before a contract is concluded and during the performance of the contact. It does not, however, require an Insured to disclose privileged information to an Insurer, unless this has been specifically provided for and agreed between parties under the terms of the subject insurance policy.

Insurance policies commonly contain provisions, typically know as claims co-operation clause, allowing Insurers to control proceedings brought by or against the Insured that stem from the Insured's risks. The clause imposes an obligation on the Insured to co-operate with the Insurer which in turn encompasses a duty that the Insured discloses all relevant documents to the Insurer. However, unless the Insured has specifically contracted to disclose privileged documents to the Insurer, clauses of this type will generally not compel an Insured to disclose privileged communications to an Insurer.

Further, where an Insured is claiming under an insurance policy involving legal advice or action on his behalf paid for by the Insurer, it may be that the terms of the policy in fact operate to waive his privilege as against the Insurer[21]. However, as explained in section 4(b) above, common interest privilege would apply to protect such privileged information as between the Insured an Insurer as against third parties.

In the recent decision of *Quinn Direct Insurance v Law Society*[22] the court addressed the question of whether the Insured solicitors could be compelled to disclose privileged documents to their professional indemnity Insurer in circumstances where the privileged documents sought were all documents of the Insured solicitors relevant for the purpose of considering whether the Insurer was obliged to indemnify a partner of the Insured solicitors. The court held that an Insured solicitor under any form of 'claims made' policy was not entitled or bound to disclose to his professional indemnity Insurer privileged documents or information of clients unless the client consents or his privilege is impliedly waived by a claim against the Insured solicitor. As such, the Insured solicitor's duty of disclosure to an Insurer cannot override the entitlement of the Insured solicitors' clients to the privilege attached to the communications between the Insured solicitors and its clients.

8. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

Legal professional privilege is the privilege of the client and not of the lawyer. As such, privilege can only be waived by the client, or by a lawyer acting on behalf of his client where the client has given their authority to do so. It is clear that an advocate at trial has implied authority to waive his client's privilege on his behalf, for example, by reading out the privileged document.

Privilege may be waived: (i) by express or implied agreement, (ii) by conduct in the course of litigation making a fair adjudication impossible without such waiver, or (iii) by destroying the confidentiality of the privileged material

Where two or more parties are jointly entitled to a privilege (that is, joint privilege), and there is no agreement between them governing the circumstances under which privilege can be waived, then all parties must join in for a waiver to be effective.

However, where two or more parties are severally entitled to a privilege (for example, common interest privilege), and there is no relevant agreement governing circumstances under which privilege could be waived, then any of them may waive privilege without the concurrence of the others before waiver of privilege is effective.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

Where privileged communications are merely referred to in pleadings, it is unlikely to amount to an implied waiver of privilege. However, any reliance on such privileged communications would amount to a waiver of privilege.

Similarly, a mere reference to privileged documents in affidavits, witness statements or expert reports will not necessarily give rise to a waiver of privilege. Instead, the test is whether the contents of the privileged document were relied on, rather than its effect.

[21] *Brown v Guardia Royal Exchange Assurance Plc* [1994] 2 Lloyd's Rep. 325, CA

[22] [2011] 1 WLR 308

c. Can privilege be waived inadvertently?

Privilege can only be claimed for communication that has been made confidentially. If a document inadvertently loses its confidential status through the actions (or inactions) of a party or his lawyers, then such document will generally lose its privileged status also.

Inadvertent waiver may occur in the following circumstances: (i) where counsel examines a witness on a privileged document, or (ii) where part of the privileged document has been read out in court by counsel, or introduced in evidence, for example, by way of reference in a report subsequently produced to the other side. Where evidence was given by a party or his lawyer of privileged material, privilege will be lost even if evidence was being adduced to try to maintain privilege.

In circumstances where there has been inadvertent disclosure of a privileged document to an opponent's lawyers, the court may grant an order for an injunction restraining the lawyer from relying on or disclosing the information to their client. Indeed if it is obvious to a reasonable solicitor that documents have been disclosed mistakenly, the solicitor has a professional duty to refrain from inspecting the documents. However, it should be noted that whether or not a party's opponent will be permitted to use documents which have been inadvertently disclosed in support of his case is a matter of admissibility of evidence, and not legal professional privilege.

d. Bad Faith Actions

The concept of "bad faith actions" in an insurance specific context does not exist under Hong Kong Law.

9. <u>What are the best practices for maintaining privilege in the insurance context?</u>

Ten rules for retaining privilege		
1.	**Involve lawyers at the beginning**	• Where legal advice is likely to be required, involve lawyers at the beginning so that privilege is on the agenda before potentially damaging communications are produced and internal structures can be put in place to minimise the creation of unnecessary non-privileged records. • Where there is no present prospect of proceedings, privilege only attaches to confidential communications between **clients** (see rule 2) and lawyers for the purpose of seeking legal advice (and some incidental communications between them as part of that process).
2.	**Identify the client**	• The "client" is the group of employees whose role is to request and receive legal advice from the lawyers in relation to the matter on which legal advice is being sought. It is neither everyone in the company, nor is it likely to be everyone in a particular division or department of the company. • It is important to try to identify (with the assistance of the lawyers involved) who is in the "client team" at the outset and to keep that under review as the matter develops. • Where there is no present prospect of proceedings, communications between lawyers and people outside the "client team", and between people inside and outside the "client team" will generally **not** be privileged.
3.	**Avoid creating unnecessary records**	• If you are part of the "client team" your written communications with your lawyers for the purpose of obtaining/receiving legal advice should be privileged. If you have to discuss those issues with someone else (other employees or third parties) in circumstances where there is no present prospect of litigation, such discussions may not be privileged: a telephone call or meeting will therefore be a better option than a note or an e-mail. • Where possible, limit circulation/dissemination of legal advice that you have received: circulation to people outside the "client team" or to third parties runs the risk

		of the loss of privilege and should only be done with care and where possible after consulting your lawyers. TIP: If you must circulate legal advice outside the "client team", circulate the original advice. Do not create a new document, such as a summary or a commentary, which is less likely to be privileged. TIP: Review an e-mail string before forwarding it to be sure that it does not include material that may be privileged. If in doubt, send a fresh email. TIP: A document with manuscript notes on it is a different document from the version without those notes. Unless they are privileged, your notes may have to be produced in any subsequent proceedings
4.	**If you are asking for legal advice in writing, say so**	• Start any request to lawyers for advice with the words "I want your advice on…" or similar. Not only will that support any claim to privilege later on, but it will help you focus on whether you are really asking for legal advice at all (and therefore whether you may potentially be able to claim privilege). • When asking for legal advice, label your communications with lawyers "privileged & confidential" or "for the purposes of legal advice". This is not conclusive (the court will decide whether records are privileged or not) but can help to persuade a court or regulator of the true purpose and nature of a record. TIP: Do not merely cc the lawyers as a way of asking for advice. Create a fresh request for advice from the lawyers - and cc others in the "client team" if necessary.
5.	**Spot the dispute (and record it)**	• Because the likelihood of legal proceedings widens the range of subsequent communications which may be privileged, it is helpful to be able to point to when that likelihood arose. • Identifying this point in time can be difficult. Proceedings must be reasonably in prospect: a general apprehension is not enough, although a greater than 50% chance is not required. When you think you are over the threshold, make a note on the file and record the point in your next communication with your lawyers. If in doubt, check with your lawyers.
6.	**Clear further communications with your lawyers**	• Once proceedings are likely, get advice from your lawyers about who you should and should not discuss the dispute with, both internally and externally, and how to do it. Remember that comments about a dispute made at the outset may be particularly interesting and potentially helpful to your opponents in subsequent proceedings. • Once proceedings are likely, and apart from communications with your lawyers, you should try not to forward or create new records in relation to the dispute or general information about it, without agreeing an appropriate process with your lawyers first. Any record of this sort might have to be produced. TIP: Label documents that you prepare in relation to a dispute as "privileged and confidential – prepared for the purpose of proceedings". Remember, though, that this is not conclusive.
7.	**Stick to the facts**	• Make all communications as factual as possible. Unless you are communicating with your lawyers, or the lawyers have said that a communication will be privileged, try not to record your views on whether something was done well or badly or on potential weaknesses. • If, as sometimes happens, the business requires you to create records which are unlikely to be privileged, they should be factual and accurate: always consider how

		they might be deployed in the hands of opposing lawyers if they have to be produced.
8.	**Let the lawyers direct the leg work**	• Records of information gathered internally or externally (even for the purpose of obtaining legal advice or for proceedings) may not be privileged. • Your lawyers should direct the process of collecting the information necessary to produce the legal advice and/or to deal with the proceedings. • Be careful about investigating the circumstances surrounding a possible dispute or collecting evidence yourself (for example, by interviewing staff or producing reports) unless you have been advised by your lawyers that the records you produce will be privileged.
9.	**Be careful in discussing the dispute with the counter party**	• Any communications with a counterparty will probably have to be produced in subsequent proceedings unless they are part of "without prejudice" negotiations. • Once proceedings are on the horizon, check with your lawyers whether communications with the counter-party are appropriate and, if so, what form they should take. Unless you have checked with your lawyers, such communications should be avoided. TIP: There is no such thing as an "off the record" conversation in litigation. Only conversations that are agreed to be "without prejudice" are protected from disclosure.
10.	**If litigation is in prospect, don't destroy anything potentially relevant**	• Destroying relevant records after proceedings are on the horizon can be extremely damaging. As soon as proceedings look like a possibility, steps should be taken to preserve any potentially relevant records. • Ask your lawyers for advice on what needs to be preserved.

10. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

As noted in section 1, the law on privilege is different to the rules on confidentiality. All privileged documents must be confidential in nature and as a consequence, if confidentiality is lost then so too is privilege. Although privileged documents will always be confidential, confidential documents will not always be privileged and may therefore be disclosed in court when disputes occur.

In Hong Kong, privacy interests of living individuals in relation to "personal data" are protected under the Personal Data (Privacy) Ordinance (Cap.486) ("**PDPO**"). The PDPO covers any "personal data" relating directly or indirectly to a living individual (data subject), from which it is practicable to ascertain the identity of the individual and which are in a form in which access or processing is practicable. It applies to any person (data user) that controls the collection, holding, processing or use of personal data.

Under the PDPO, data users must follow the fair information practices stipulated in the data protection principles set out in the PDPO. The PDPO also gives certain rights to data subjects. Data subjects have the right to confirm with data users whether their personal data are held, to obtain a copy of such data, and to have personal data corrected. Data users may also complain to the Privacy Commissioner for Personal Data about a suspected breach of the PDPO's requirements and claim compensation for damage caused to them as a result of a contravention of the PDPO through civil proceedings.

It should be noted that because insurance related documents generally contain personal data of the Insured where the Insured is a living individual, Insurers, as data users, would need to observe the requirements relating to the protection of such personal data of the Insured, as data subjects, and also comply with any "personal data requests" made by the Insured for a copy of such personal data, under the PDPO.

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1. How do privilege issues arise in insurance disputes?

To be able to successfully represent its client, a lawyer must be aware of all data concerning its client that are relevant to the case. In Hungary there is no general concept of legal privilege, however, lawyers do have a duty of professional confidentiality, according to which a lawyer may not disclose or give evidence relating to any confidential information regarding its client that the lawyer becomes aware of during their professional activities. This encourages clients to disclose all information relevant to the case as professional confidentiality is a guarantee to them that the lawyer will handle their confidential information with discretion. The scope of the data to which the professional confidentiality applies includes, but is not limited to, all communications with the client including legal advice, or broader legal assistance, communications with third parties in relation to the client and any documents containing confidential information regardless of whether these documents were prepared by the lawyer or by a third party. The client may release the lawyer from its obligation of professional confidentiality.

In the case of insurance disputes an additional privilege issue arises, which allows not only the lawyer but also its client (i.e. an insurance company) to refuse the disclosure of certain documents. Pursuant to Act LX of 2003 on Insurance Institutions and Insurance Businesses (hereinafter referred to as the "Insurance Act"), all data in the possession of insurance companies, reinsurance companies, insurance intermediaries and insurance consultants that refer to the personal or financial circumstances of their clients (the "Insureds"), or to the contracts of such Insureds concluded with insurance and reinsurance companies are considered insurance secrets unless these fall into the category of classified data. Unless otherwise provided by law, the owners, directors and employees of insurance companies, insurance intermediaries, insurance consultants and all other persons having access to such insurance secrets in any way or form during their activities in insurance-related matters shall be required to maintain confidentiality with no time limit whatsoever.

These insurance secrets may only be disclosed to third parties with the express prior consent of the Insured to whom they refer or their legal representative precisely specifying the insurance secrets that may be disclosed or if the Insurance Act provides an exemption from the aforementioned confidentiality obligation. According to the latter, the insurance company shall not refuse the disclosure of documents containing insurance secrets alluding to its confidentiality obligation, if such disclosure is formally required in writing – among others – by investigating authorities or the public prosecutor, acting in a pending criminal procedure (especially in connection with drug abuse, money laundering, any terror activities, abuse of explosives etc.); by a court proceeding in connection with criminal or civil cases, if the court believes that the disclosure of such documents could clarify a substantial issue in dispute; or by a reinsurance company, etc. Consequently, in cases defined by the Insurance Act, the owners, directors and employees of insurance companies, insurance intermediaries, insurance consultants and all other persons having access to insurance secrets are exempt from their confidentiality obligation i.e. in such cases they are required to disclose insurance secrets without the prior consent of the Insured.

However, if an insurance company is represented by a lawyer in a dispute, such insurance company may only disclose data concerning its Insureds to the lawyer with the Insured's prior express consent. Such consent of the Insureds is limited to the disclosure of insurance secrets to the representing lawyer; it does not mean the simultaneous release of the lawyer from its obligation of professional confidentiality. The latter requires an additional consent from the Insured, not the insurance company who is represented by the lawyer.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

As mentioned above, all data in the possession of insurance companies, reinsurance companies, insurance intermediaries and insurance consultants that refer to the personal or financial circumstances of their clients or to their insurance contracts concluded with the insurance and reinsurance companies are classified as insurance secrets which may give rise to confidentiality issues in a litigated dispute. Nevertheless, the disclosure of summarized data from which the client or its business information cannot be identified is not considered as a breach of the confidentiality obligation in respect of insurance secrets. Please note, however, that there is no standard disclosure procedure requiring litigating parties to disclose all relevant documents to the other party or to the court under Hungarian law.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

According to Section 119 of Act III of 1952 on the Code of Civil Procedure (hereinafter referred to as the "Civil Procedure Act"), parties and their representatives may exercise the right to access documents kept by the court for inspection and to make copies, where such documents contain business secrets, confidential information (such as insurance secrets) and other secrets described in specific other legislation, subject to a written consent of the entitled party (i.e. Insured) -, according to the rules and under the conditions laid down by the judge hearing the case. If, however, the party entitled to grant an exemption from the obligation of confidentiality makes a statement in which he refuses to allow access to the document containing any business secret or confidential information, apart from the court and the keeper of the minutes, no other person shall be allowed to have access to that part of the document containing such secrets, and it may not be copied and no extracts can be made thereof.

3. What types of relationships in the insurance context may be subject to the attorney-client/ solicitor-client relationship?

As mentioned above, the owners, directors and employees of insurance companies, insurance intermediaries, insurance consultants and all other persons having access to insurance secrets in any way or form during their activities in insurance-related matters shall be required to maintain confidentiality with no time limit whatsoever regardless of whether the insurance agreement is concluded in the end or not. Attorney-client/ solicitor-client relationships in insurance matters usually arise if any of the above persons is represented by the lawyer as its client in a legal dispute or if such persons seek other legal advice in insurance matters in the course of which the lawyer becomes aware of confidential information.

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

Lawyers do have a duty of professional confidentiality, according to which the lawyer may not disclose or give evidence relating to any confidential information regarding its client that the lawyer becomes aware of during its professional activities. Should the communications between the Insureds and Insurers contain any such confidential information, these are protected by the lawyer's duty of professional confidentiality.

b. Are there doctrines, such as joint client, joint defence, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

If Insured/Insurer communications contain classified information, such communications may not be copied and no extracts can be made thereof by any third parties. This is in addition to the general protection that applies to insurance secrets.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

No, the obligation of confidentiality in respect of the Insurer applies in the same manner regardless of the terms and conditions the Insurer and the Insured agrees on. The Insurers are entitled to process personal data of the Insureds during the existence of the insurance or contractual relationship and as long as any claim can be asserted in connection with the insurance or contractual relationship, consequently the Insured is expected to comply with its confidentiality obligation during this time.

ii. The Insurer provides a defence pursuant to a reservation of rights?

No, the obligation of confidentiality in respect of the Insurer applies in the same manner regardless of the terms and conditions the Insurer and the Insured agrees on. The Insurers are entitled to process personal data of the Insureds during the existence of the insurance or contractual relationship and as long as any claim can be asserted in connection with the insurance or contractual relationship, consequently the Insured is expected to comply with its confidentiality obligation during this time.

iii. The Insurer has denied coverage?

No, the obligation of confidentiality in respect of the Insurer applies in the same manner regardless of the terms and conditions the Insurer and the Insured agrees on. The Insurers are entitled to process personal data of the Insureds during the existence of the insurance or contractual relationship and as long as any claim can be asserted in connection with the insurance or contractual relationship, consequently the Insured is expected to comply with its confidentiality obligation during this time.

iv. The policy provides only a duty to indemnify and not a duty to defend?

No, the obligation of confidentiality in respect of the Insurer applies in the same manner regardless of the terms and conditions the Insurer and the Insured agrees on. The Insurers are entitled to process personal data of the Insureds during the existence of the insurance or contractual relationship and as long as any claim can be asserted in connection with the insurance or contractual relationship, consequently the Insured is expected to comply with its confidentiality obligation during this time.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

According to the Insurance Act, the Insurer does not breach its confidentiality obligation when, upon a formal written request, it discloses data about the Insured to a Reinsurer. In a dispute, however, should the lawyer become aware of any of these communications containing references to insurance secrets (i.e. confidential information), the lawyer's duty of professional confidentiality applies.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

In-house counsels are normally not members of the Hungarian Bar, therefore they have no duty of professional confidentiality in the context of legal proceedings. In the event of an in-house counsel being a member of the Hungarian Bar, he may legitimately refuse to disclose communications with company employees and other lawyers. In the event of insurance disputes, however, even in-house counsel may only disclose data or communications containing insurance secrets with the prior express consent of the Insured.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

As mentioned in question 2 above, the Civil Procedure Act regulates the access to documents in this case. Insurance related documents containing business secrets may only be accessed by the parties and their representatives subject to a written consent of the entitled party i.e. the Insured. In the absence of such consent, these litigation documents are protected by law so that nobody may obtain access to these but the court and the keeper of the minutes and no copies or extracts may be made thereof.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

It is a general rule stipulated by Act IV of 1959 on the Civil Code (hereinafter referred to as the "Civil Code") that in the course of exercising civil rights and fulfilling obligations, all parties shall act in the manner required by good faith, and they shall be obliged to cooperate with each other. Accordingly, parties shall cooperate during the conclusion of a contract, and they shall respect each others rightful interests as well as inform each other regarding all material circumstances and information in relation to the proposed contract before the contract is concluded. Such cooperation obligation is also required during the performance of a contract i.e. parties are required to act in the manner that can generally be expected in the given situation and inform each other of all important circumstances affecting performance of the contract.

In addition to the abovementioned general requirement of cooperation, the Civil Code lays down special provisions applicable to insurance matters in this regard. Accordingly, for the purpose of an insurance contract, the Insured must disclose all information and circumstances which the Insured was or must have been aware of that are material in terms of providing insurance coverage. The Insured's disclosure obligation is deemed as satisfied if he truthfully fills out the questionnaire compiled by the Insurer. However, leaving some questions unanswered does not in itself constitute a breach of such disclosure obligation, consequently, the Insurer cannot compel the Insured to disclose otherwise protected information that is not material. Furthermore, the Insurer may require the Insured to promptly report any changes regarding any of the material conditions specified in the contract to the Insurer in writing.

In practice, it is in the interest of both parties to an insurance contract that the Insured complies with the above disclosure obligation providing as much information as necessary. The provisions of the Civil Code stipulates a guarantee for the Insurer in this regard, namely in the event of a breach of the above obligation to disclose and report changes, the Insurer can refuse to carry out its obligations under the insurance contract, unless it is proved that the Insurer was aware of the concealed or undisclosed circumstance at the time the contract was concluded or that such circumstance had no influence on the occurrence of the insurance event.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

Confidentiality of insurance secrets may be waived by the person who is affected by the confidential information, which is generally the client (i.e. Insured) or its legal representative in insurance

disputes. The Insurer who is bound by confidentiality itself has no authority to waive confidentiality in respect of the Insured towards third parties. Consequently, the Insurer may only disclose certain confidential information containing insurance secrets to the lawyer with the prior consent of the Insured, and an additional consent is required from the Insured to release the lawyer from its duty of professional confidentiality in respect of such information.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

The court can order a party to disclose a document whether supportive or adverse to its case if the court believes that the document exists, the other party has no access to it and it could clarify a substantial issue in dispute. A mandatory order of this type can be made at any stage of the proceedings.

c. Can privilege be waived inadvertently?

In the event of disclosure of documents or communications containing confidential information to third parties, the express prior consent of the entitled party, i.e. to whom such documents refer, or its legal representative precisely specifying the scope of the confidential information that may be disclosed must be obtained. Consequently, under Hungarian law, it is not very conceivable that such waiver could take place inadvertently, unless the entitled party is deceived or misled as to for what purpose or to what extent the confidential information will be used.

d. Bad Faith Actions

Pursuant to the Civil Code, under an insurance contract the Insurer is obliged to pay a certain amount of money or perform another service upon the occurrence of a specific future event (the insurance event), and the Insured is obliged to pay an insurance premium in exchange for this. As we referred to above, in the course of exercising rights and fulfilling obligations, the parties are expected to act in a manner required by good faith, and they are obliged to cooperate with each other.

Under Hungarian law, the Insurer can reject an insurance claim if the damage is caused by the Insured unlawfully, wilfully or by gross negligence. Once an insurance contract is entered into, the Insurer may also refuse to comply with its obligation to pay if the Insured breaches its disclosure obligation or its obligation to report any material changes in its relevant circumstances, provided that the Insurer was not aware of the unrevealed circumstance at the time when the contract was entered into and such circumstance affected the occurrence of the insurance event. The Insured is required by law to report to the Insurer the occurrence of the insurance event and must make sure that the required information is provided and made available for inspection. Should the Insured fail to fulfil this obligation – as a consequence of which important circumstances become undetectable – the Insurer is not obliged to pay.

In cases other than the above, the Insurer cannot reject an insurance claim; otherwise his conduct would not be in compliance with the law and the refusal of performance would result in breach of contract as well as breach of duty of good faith, whereby the Insured – based on the Insurer's breach of contract – is entitled to demand performance, or, if performance no longer serves the Insured's interest, he may withdraw from the contract irrespective of whether the Insurer has offered an excuse for his default or not; and the Insured is also entitled to claim damages.

1) Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

There are no specific provisions relating to bad faith denying of insurance claims.

2) Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

No.

8. <u>What are the best practices for maintaining privilege in the insurance context?</u>

In Hungary, insurance related documents and communications are protected by law, accordingly all data in the possession of insurance companies, reinsurance companies, insurance intermediaries and insurance consultants that refer to the personal or financial circumstances of their clients, or to the contracts of such clients concluded with the insurance and reinsurance companies are considered to be insurance secrets. Unless otherwise provided by law, the owners, directors and employees of insurance companies, insurance intermediaries, insurance consultants and all other persons having access to such insurance secrets in any way or form during their activities in insurance-related matters shall be required to maintain confidentiality. Due to the above legal provision

which ensures the confidentiality of insurance related documents, it is a general requirement for everybody having access to insurance secrets protected by law to process these maintaining confidentiality.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

In Hungary, the concept of legal privilege is not generally known; instead lawyers have a duty of professional confidentiality, which not only applies in the case of communications between lawyers and their clients but also protects all confidential information regarding their clients that the lawyers become aware of during their professional activities which include all communications with the client including legal advice, or broader legal assistance, communications with third parties in relation to the client and any documents containing confidential information regardless of whether these documents were prepared by the lawyer or by a third party. The lawyer may not disclose or give evidence relating to any of these in a legal dispute unless the client releases him from this confidentiality obligation.

However, the disclosure of insurance related documents that classify as insurance secrets to third parties are subject to an additional protection provided by law, according to which such information may only be disclosed with the express prior consent of the Insured to whom they refer or its legal representative precisely specifying the insurance secrets that may be disclosed. In the absence of such consent, insurance secrets may only be disclosed if an authority or the court orders so in particular cases defined by the Insurance Act such as pending criminal procedures or in certain civil law disputes.

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1. How do privilege issues arise in insurance disputes?

1.1 In this jurisdiction, the term Legal Professional Privilege covers both legal advice privilege and litigation privilege. Legal advice privilege protects documents containing advice or requests for advice between a solicitor and client from disclosure in legal proceedings. However, legal advice privilege does not attach to communications relating to legal assistance. For example, administrative tasks carried out by a lawyer are not protected.[1] Litigation privilege protects documents containing communications between a client and his lawyer or a third party in contemplation of litigation or after litigation has commenced. It also protects documents produced for the purpose of the litigation. However, the sole or dominant purpose of the communication or document must be the litigation.[2]

1.2 Irish law also recognizes the principle of common interest privilege. Communications from in house counsel which fall within the definition of Legal Professional Privilege are also protected.

1.3 Privilege issues can arise in insurance disputes in the context of discovery and in an investigation by a Regulator/Administrative Sanctions enquiry.

1.4 In the context of insurance related disputes, a party may seek discovery of any documents as long as they are relevant to the proceedings and necessary for fair determination of the matters at issue in the case. This could include an Insurer's underwriting file and/or claim file, reserve information and communications between an Insurer and a broker and between an Insurer and Reinsurer. These examples mainly relate to documents which are likely to be sought in the context of a coverage dispute. In the context of a coverage dispute, any documents or correspondence, made or produced in contemplation of the dispute, would be protected by litigation privilege. Any legal advice given on policy wording would be protected by legal advice privilege.

1.5 Legal advice given to an Insurer or an Insured on policy wordings or a claim would be protected by legal advice privilege and would not be discoverable. Most legal advice proffered in the context of an insurance claim or coverage dispute will be in contemplation of litigation and, therefore, the legal advice/legal assistance distinction will generally not arise.

1.6 Irish law also recognizes a "without prejudice" privilege in the context of settlement of insurance disputes. The general rule is that written letters and oral communications made during negotiations for the purpose of settling a claim and which are expressed to be "without prejudice" cannot generally be admitted into evidence. Insurance documents and expert reports can also be provided on a "without prejudice" basis. Therefore, any communications for the purpose of settling an insurance claim or coverage dispute will be protected by privilege.

In the context of briefing expert witnesses the documentation provided to the expert is protected by litigation privilege as is the report of the expert.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

1.7 The type of documents sought in disputes with an Insurer which gives rise to privilege issues include documents seeking or containing legal advice in the context of an insurance claim or legal advice proffered on a particular policy wording. Any documents containing legal advice in the context of an investigation by a Regulator would also give rise to privilege issues.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

2.1 Insurance documents are treated equally to all other documents in litigation or arbitration procedure. There is no specific procedure or rule in this jurisdiction which limits a party's ability to obtain access to Insurance related documents.

3. What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

[1] Smurfit Paribas Bank v AAB Export Finance Limited [1990] 1 IR 469, Mc Mullen V Kennedy [2007] IEHC 263

[2] Gallagher v Stanley & The National Maternity Hospital [1998] 2 I.R. 267

3.1 Communications between Insureds and Insurers are not generally protected from third parties and would not generally be protected by solicitor-client privilege. In order for the solicitor-client privilege to attach to a communication it must either involve a qualified solicitor or barrister or it must have been created with the dominant purpose of litigation. These communications may, however, be protected by litigation privilege or common interest privilege.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

3.2 Irish law recognizes the principle of common interest privilege. This is particularly important in the context of insurance disputes as privileged documents are likely to be shared between Insured and Insurer or between Insurer and Reinsurer and their legal advisors. In the seminal case in this jurisdiction, Redfern Limited v O' Mahony & Ors,[3] the court stated the following in relation to common interest privilege:

> "It is accordingly clear that privilege may be waived by disclosure. If the document comes into the public domain privilege will be lost. It will not, however, be lost where there is limited disclosure for a particular purpose or to parties with a common interest."[4]

3.3 In the aforementioned case, the Plaintiff disclosed an opinion from senior counsel in relation to a joint venture to the management committee of a shopping centre and to a solicitor for the local council. Although this was potentially a very wide disclosure, the court held that the common-interest in the opinion from senior counsel among all of the relevant parties in the joint venture meant that the privilege was not waived in this instance.

3.4 Irish courts have also applied the doctrine of common interest to co-defendants in a litigation context.[5] This is due to the fact that in many cases it is likely that the Defendants will have a potential common interest in minimizing or defeating the plaintiff's claim. While this doctrine will not protect normal communications between defendant parties in an insurance dispute it will protect any legal advice which is shared between parties. It must also be noted that any "without prejudice" correspondence between co-defendants regarding a settlement between co-defendants will be protected from disclosure to the Plaintiff.

3.5 Common interest privilege has been found to exist between Insured and Insurer in *Guinness Peat Properties Limited v Fitzroy Robinson Partnership*[6] and reinsurer and reinsured in *Svenska Handelsbank v Sun Alliance.*[7] Although both of the aforementioned cases are English decisions they would be of persuasive authority in this jurisdiction.

c. Is privilege applied in a different manner where:

(i) The Insurer has agreed to defend the Insured without reservation of rights?

(ii) The Insurer provides a defense pursuant to a reservation of rights?

(iii) The Insurer has denied coverage?

(iv) The Insurer provides only a duty to indemnify and not a duty to defend?

3.6 In this jurisdiction, none of the above scenarios would have any impact on the application of privilege. In the case of (iv) above, it is worth noting that common interest privilege would arise in the context of any documents shared with an Insurer who only provides a duty to indemnify.

4. <u>Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?</u>

4.1 Irish law recognizes privilege in the context of communications from in-house counsel. This is important in the insurance context as the in-house legal team may be asked to provide initial advice and a legal opinion before outside counsel is instructed on a claim. Irish law only protects members of the in-house legal team who are qualified barristers or solicitors. Therefore, it is important to ensure individuals working in an insurance client's in-house legal team are qualified lawyers, as documents created by legal executives may not benefit from privilege.

[3] [2009] 3 IR 583

[4] [2009] 3 IR 583 at paragraph 17 page 590.

[5] Moorview Developments Limited & Ors V First Active plc, & Ors [2009] 2 IR 788

[6] [1987] 2 All ER 716

[7] [1995] 2 Lloyd's Rep 84

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

5.1 As outlined above Irish law recognizes the concept of litigation privilege. The privilege applies whether the purpose of the advice sought relates to the case, to obtaining evidence to be used in the case or obtaining information leading to obtaining such evidence.

5.2 The two strands of the test to establish litigation privilege, firstly, that litigation must be contemplated or commenced when the document was produced and, secondly, that the dominant purpose of the document must have been to prepare for that litigation were established in Ireland *in Silver Hill Duckling Ltd. v Steele Ireland*.[8]

5.3 In *Silver Hill Duckling* O'Hanlon J stated that: '…once litigation is apprehended or threatened, a party to such litigation is entitled to prepare his case, whether by means of communications passing between him and his legal advisers, or by means of communications passing between him and third parties, and to do so under the cloak of privilege.'

5.4 He further stated, with respect to the dominant purpose test, that documents that are in existence prior to litigation being apprehended cannot come within litigation privilege because their primary purpose was not the preparation for litigation.

5.5 The Irish Supreme Court in *Gallagher v Stanley and the National Maternity Hospital*[9] followed the *Silver Hill* decision. O'Flaherty J stated that litigation must be 'reasonably apprehended' before a claim of privilege can be sustained. The court further stated that in order to maintain a claim for privilege it was not the case that a document must have been produced solely in contemplation of litigation but that the dominant purpose in its creation must have been the contemplation of litigation.

5.6 Irish law will protect from disclosure any Insurance related documents which fall within the confines of the litigation privilege test. This would include expert reports on quantum or liability. Litigation privilege also attaches to communications with third parties. Therefore communications between an insured and an insurer or insurer and reinsurer in contemplation of litigation or after litigation has commenced will come within the concept of communication with a third party. The privilege does not cover unsolicited communications from a third party, that is to say parties who have volunteered information to evidence the claim without being asked for such information.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

6.1 An Insurer does not have a defined/statutory right to compel an Insured to disclose privileged communications in this jurisdiction. However, under the duty of co-operation and good faith enshrined in all insurance policies the Insured must share all information in relation to a claim with an Insurer. Therefore in circumstances where the Insured is managing the defence of the claim and the Insurer is providing an indemnity the Insurer would be entitled to see all privileged documents. This would include all documents and reports the Insured has in relation to the claim. However, in the context of a coverage dispute, an Insured who has received legal advice on any issue relating to coverage under the relevant policy would not be obliged to share this information with an Insurer.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

7.1 The privilege is considered to belong to the client and may only be waived with the client's consent. For a lawyer, it is important to determine who your client is in an insurance dispute. In this jurisdiction, if you represent an Insurer/ Reinsurer who has provided cover in an insurance dispute the Insured/Reinsured is your client and it is their privilege to waive. Therefore, any legal advice shared with an Insurer or Reinsurer would be subject to common interest privilege and/or litigation privilege.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

7.2 If a client puts the contents of legal communications in issue he will be deemed to have waived privilege. For example, in *McMullen v Carty*[10] where a client sued his solicitor for negligence, the client was considered to have put the communications in issue and thus implicitly to have waived his privilege with respect to communications between both his solicitor and counsel. The court held that as a matter of fairness a client could not subject his confidential

[8] [1987] IR 289.

[9] [1998] 2 IR 267.

[10] Unreported Supreme Court 27 January 1998.

relationship with its solicitor to public scrutiny whilst also seeking to preserve the confidentiality of the relationship. However, the Irish Supreme Court has held that the loss of privilege by the mere instigation of proceedings is limited to negligence actions instituted by a client against his solicitor.[11] The privilege attached to transactions with other solicitors, however closely related or relevant is not affected.

c. Can privilege be waived inadvertently?

7.3 Accidental disclosure of documents may lead to privilege being waived inadvertently. The court will look at two issues.[12] Firstly, whether it was evident to the solicitor receiving the documents that a mistake had been made. Secondly, whether objectively it would have been obvious to a hypothetical reasonable solicitor that the disclosure was inadvertent.

7.4 The volume of the documentation disclosed has been considered indicative as to whether such disclosure was unintended. In Byrne v Shannon Foynes.[13] the court commented that in light of the number of documents that had been disclosed, which included solicitor/client correspondence, "the hypothetical receiving solicitor, would have found it difficult to accept that such a large number of disparate documents had been the subject of an inadvertent failure to claim privilege."

7.5 The number of people to whom a document is disclosed will not necessarily affect the privilege.[14] In *Redfern Limited*, the Supreme Court was prepared to allow a potentially wide disclosure, to all lessees of a large shopping centre and all members of South Dublin County Council, once the disclosure was for a particular purpose or to parties with a common interest.

d. Bad faith actions

Irish Courts do not recognize bad faith as a cause of action under Irish Insurance Law.

8. <u>What are the best practices for maintaining privilege in the insurance context?</u>

(a) Identify who the client is and route all communications to legal counsel through the client.

(b) Keep the group to whom advice and correspondence with legal counsel is circulated narrow.

(c) Prior to seeking written instructions or advice from legal counsel keep any internal consultation or investigation in oral form.

(d) Keep any draft comments or instructions to legal counsel to a minimum and limit circulation.

(e) Only have one working draft of documents in use at any one time.

(f) Although labeling is not determinative, it is good practice for all communications to be marked with a header (or footer) with the legend "Privileged and Confidential".

(g) If there is any doubt as to whether a communication will be protected by privilege seek oral advice prior to committing it to writing.

(h) Keep privileged documents separate from all other communications.

(i) Involve legal counsel in fact-finding interviews or investigations (especially if litigation is not contemplated).

(j) Do not release documents outside of the solicitor-client circle unless absolutely certain that privilege has been waived.

9. <u>Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?</u>

9.1 There is a distinction in Irish law between privilege and confidentiality/privacy. The mere fact that a client has confidential correspondence with his legal counsel does not render the correspondence privileged.[15] The lawyer must ensure that the document contains legal advice or was created with the dominant purpose of bringing or defending litigation. There is no right to exclude documents which contain confidential or commercially sensitive information under Irish law. This is of course subject to the relevancy principles

[11] Redfern Limited v O'Mahony [2009] IESC 18.

[12] Shell E&P Ltd v McGrath [2006] IEHC 409; Byrne v Shannon Foynes [2007] IEHC 315.

[13] [2007] IEHC 315.

[14] Redfern Limited v O'Mahony [2009] IESC 18.

[15] Miley v Flood [2001] 1 ILRM 489.

outlined above in the context of discovery. If a document contains confidential material that is not relevant to the dispute it is common practice for the parties to redact that information. Should redaction be challenged, the party may have to apply to court to have documents redacted if they can demonstrate that some of the information contained on the documents is not relevant to the particular proceedings.

9.2 A party to litigation will, therefore, be required to disclose documents unless the usual rules of privilege apply.

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1. How do privilege issues arise in insurance disputes?

Privilege issues arise when a party is required by the law or by Court to disclose information which it considers privileged. In insurance disputes, the disclosure duties are mainly discussed in the following contexts:

(a) Disclosure duties in legal proceedings:

Principally, according to the Israeli Civil Proceedings Regulations - 1984, a party to litigation has the right to review documents which are or which have been under the control of the other litigating parties, as long as the said documents are relevant to the claim.

In many judgments the Courts ruled that the disclosure of documents and information serves the purpose of revealing the truth and thus the scope of disclosure should be as wide as possible and the legal proceedings should be handled "with all the cards on the table" (MCA 4234/05 ***The United Mizrahi Bank v. Faltz***; MCA 1412/94 ***Hadassah Medical Organization v. Gilad***, PD 49(2) 516).

Nevertheless, the disclosure is not unlimited. There are several privileges which may apply to documents and information. When dealing with an insurance dispute, the main privileges which may be relevant are the attorney-client privilege and the privilege of documents created towards litigation.

In insurance litigation, disclosure-related disputes mainly focus on the following questions: (1) Is a certain document relevant to the claim; and if so - (2) does the said document fall within the framework of certain privilege.

(b) Disclosure duties set in the Insurance Contracts Law:

According to the Insurance Contracts Law - 1981, once an insured event occurs, an insured has the duty to provide the insurer with all information and documents required in order to examine the existence of policy coverage. If the insured does not possess the required documents, it has the duty to assist the insurer to obtain them (section 23). A privilege issue may arise in cases where the insured refuses to provide documents and information required due to an alleged privilege which applies thereto.

a. What types of documents may be sought in disputes with an insurer which would give rise to privilege issues?

- Documents created in order to prepare for legal proceedings: In this situation, the Insurer may try to include the following documents: the initial notice of the claim; the insurer's claim file; the insured's statements to the insurer and investigations; and loss adjuster's reports (see more details in response to question 2).

- Documents which are irrelevant to the claim: The disclosure duties in legal proceedings are limited to documents and information relevant to the claim. There are several insurance related documents and information which the insurer may argue have no relevance to the claim. This may include the insurer's communications with the reinsurers and the insurer's reserve information.

- Trade Secrets: In a case involving a motion to approve a class action against several insurers, the plaintiff filed a motion to order the insurers to disclose actuary calculations made in order to determine the premiums charged from the insureds. The insurers objected to the motion claiming that the calculations constituted a trade secret and therefore were privileged. In its decision, the court ruled that the calculations were irrelevant at the current stage of the proceedings, and thus the insurers were not required to disclose them. However, if the claim was approved as a class action, the actuary calculations could become relevant, and thus the court could order their disclosure subject to examination as to whether they were indeed trade secrets (C.C. (District Court - Tel Aviv) 1519/06 ***Tzipuy Matachot v. Migdal Ins. Co. Ltd***).

2. <u>As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?</u>

The Israeli Courts tend to allow broad discovery of documents and interpret the privileges in a narrow manner. Only in rare circumstances will the Courts enable an insurer to avoid disclosure of documents based on privilege.

There is no specific privilege which refers to insurance related documents. However, there are general privileges (mainly the attorney-client privilege and the privilege of documents prepared towards litigation) which can - under certain circumstances - also apply to insurance related documents.

The Israeli court's tendency to interpret privileges narrowly was strengthened in a Supreme Court precedent handed down in 1995. Until then, a document was considered privileged if **one** of the purposes for its creation was to prepare for possible litigation (C.A. 327/68 ***Zinger v. Beinon***, PD 22(2)602). In its precedent, the Supreme Court determined that privilege protection will apply only in cases where the **main** purpose of the creation of the document was to prepare for possible litigation (M.C.A. 1412/04 ***Hadassah Medical Organization v. Gilad***, PD 49(2) 516).

Accordingly, in several cases courts have ruled that documents gathered and prepared by an insurer as part of its usual course of business (namely, in order to examine its liability) do not fall under the privilege granted to documents prepared towards legal proceedings, even if one of the purposes of the documents is to prepare for possible litigation (M.C.A. 5756/06 ***Eliyahu Ins. Co. v. P.I.D Ltd.***; C.C. (Magistrates Court, Beersheva) 39482/05 ***Davidovitch v. Menora Ins***. Co.; C.C. Magistrates Court, Tel Aviv) 24395/99 ***Hatuka v. Arieh Ins. Co***.).

For example, in respect of a loss adjuster's report obtained by an insurer, the Tel Aviv Magistrates Court stated:

"*An insurer sends a loss adjuster as a matter of routine in cases where an insured event was reported and often bases its decisions in respect of the insurance benefit on the loss adjuster's opinion. Also sending an alarm expert and an accountant are not unusual in cases in the extent of the current case … Thus we are dealing with acts made as part of the normal way of conduct. It is possible that there were certain expectations to the existence of legal proceedings in the future, however this does not grant the documents privilege. There is no based evidence that the dominant purpose of preparing the professional opinions was the preparation for litigation.*" (C.C. (Magistrates Court, Tel Aviv) 633323/03 ***Maabadot Galaxi Electronics 1985 Ltd. v. Arieh Ins. Co.***)

Similarly, it was determined that an insured's notice regarding an insured event cannot be considered as a document mainly prepared towards legal proceeding, and as such is not privileged (C.M (Magistrate Court, Beer Sheva) 13121/07 ***Mordechai Binyamin v. Viktor Barzinski***).

In addition, the courts ruled that in cases where the insured cooperated with the insurer in the preparation of the documents - then no privilege will apply (C.C (District Court, Tel Aviv) 2739/99 ***Tzag Elita Computers Systems v. Hacsharat Hayesuv Ins. Co. Ltd.***).

Furthermore, in C.A. 1786/02 ***Lustig Brothers Ltd. v. Lloyds*** the Tel Aviv District Court ruled that merely because a communication between an insurer and the loss adjuster it appointed was made through the insurer's attorney is not sufficient to establish that the loss adjuster's report was prepared towards expected legal proceedings. As a result, the court ordered the insurer to disclose the report to the insured.

3. <u>What types of relationships in the insurance context may be subject to the attorney-client relationship?</u>

(a) Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

According to Section 48 of the Evidence Ordinance [New Version], information and documents exchanged between an attorney and his or her client or someone on his/her behalf in connection with the professional services provided by the attorney are privileged, and thus the attorney is not required to present them as evidence unless the client waived the privilege.

In addition, Section 90 of the Bar Association Law - 1961, prohibits an attorney from disclosing in any legal proceeding, interrogation, or search documents or information exchanged between the attorney and the client in connection with the professional services provided by the attorney to the said client unless the client waived the privilege.

Courts have ruled that two clients who are jointly represented by the same attorney will be considered as if they waived their privilege towards one another (C.A. 442/81 ***Grumet v. Sarus***, PD 36(4) 221). However, their attorney-client privilege continues to exist toward third parties.

Therefore, in cases where the insurer and the insured are jointly represented by an attorney, the communications between them and their attorney will be privileged.

It should be noted, that the Israeli law allows a third party to bring a direct action against the liability insurer of the tortfeasor (Section 68 of the Insurance Contracts Law -1981). Therefore, commonly a third party claim is brought against both the tortfeasor and its liability insurer. If no conflict exists, then the insured and the insurer can be jointly represented in the third party's claim. In such case, communications between them will be privileged.

(b) Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

The fact that the insurer and the insured are handling a joint defense and have a common interest, does not - in itself protect the communications between them from discovery. However, the communications between them can be protected under the attorney-client privilege (if they are jointly represented) or under the privilege granted to documents prepared towards legal proceedings.

In C.C. 1040/98 ***Leon Bichecho v. Hadassah Medical Center*** the Jerusalem District Court determined that letters exchanged between the Haddasah Medical Center and its liability insurers in connection with a third party's malpractice claim should be considered as prepared towards legal proceedings and are therefore privileged.

(c) Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

There is no specific privilege which applies to communications between an insured and an insurer. Such communications may be privileged only if they fall under a privilege acknowledged by the courts or by the law, such as the attorney-client privilege or the privilege of documents prepared towards litigation proceedings.

The attorney-client privilege can apply to communications between the insured and the insurer in cases where they are considered as joint clients of the same attorney so long as the attorney is involved in the communication.

An attorney can be considered as representing both the insured and the insurer only in cases where there is no conflict of interest between them. Therefore, in cases where the insurer agreed to defend the insured with no reservation of rights, and the communication between them involved an attorney, that communication can be protected under an attorney-client privilege.

ii. The Insurer provides a defense pursuant to a reservation of rights?

As mentioned above, an attorney can represent both the insured and the insurer only in connection with matters where no conflict of interests exists. If the reservation of rights by the insurer created a conflict between the insurer and the insured in connection with the insured's defence, the insured and the insurer cannot be represented by the same attorney, and thus the communications between them will not be protected by the attorney-client privilege.

iii. The Insurer has denied coverage?

See response to ii above.

iv. The policy provides only a duty to indemnify and not a duty to defend?

In Israel, an attorney representing a client in litigation proceedings must receive a power of attorney from his/her client. Accordingly, a defence attorney appointed to represent an insured in litigation must receive a power of attorney from the insured - no matter who initiated his/her appointment and who is financing the defence.

Therefore, even when the policy provides only a duty to defend, the defence attorney's client will be the insured, and thus all communications between the defence attorney and the insured will fall under the attorney-client privilege.

In cases where there is no conflict, the defence attorney can be considered as the insurer's attorney as well. However, if a conflict arises, the attorney cannot continue the joint representation of the insured and the insurer, and thus the communication between the insured and the insurer will not be privileged. Furthermore, because the defence attorney would be acting according to the power of attorney provided to him/her by the insured in that case, it could be argued that the attorney cannot disclose information he/she discovered during the insured's representation to the insurer, even in cases where he/she was appointed by the insurer to defend the insured.

(d) How do privilege issues arise regarding Insurer/Reinsurer communications?

There is no general privilege which applies to communications between insurers and reinsurers. However, the disclosure duties in civil proceedings are limited to documents and information which are relevant to the claim. Therefore, an insured will be entitled to receive communications between the insured and the reinsurer only if the insured shows that such communication is relevant to the claim.

In C.F. (Magistrates Court, Herzliya) 1065/04 ***Hirsh Eran v. Kedar Ins. Agency*** the Court declined an insured's motion to receive from the insurer details of the reinsurer. The Court determined that generally there is no contractual connection between the insured and the reinsurer and thus, the reinsurer's details are irrelevant to the insured's insurance claim.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

The attorney-client privilege also applies to communications between an entity and its internal legal advisor (C.C. (Magistrate Court, Netanya) 14954/01; however, this privilege applies only to communications relating to legal advice provided by counsel.

In C.C. (Jerusalem) 9370/00 ***The Guardian General v. Agudat Atara LeYoshna*** it was determined that not every letter which was prepared by the internal legal adviser and not every meeting held with the presence of the legal advisor will be privileged. Privilege can be asserted only as to those communications which are connected to the internal counsel's legal advice.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

According to Court precedents, documents created in preparation for expected legal proceedings are privileged. However, the privilege applies only in cases where the main purpose of the creation of the documents was to prepare for the expected litigation.

In several Court rulings, it was determined that insurance related documents gathered and created in order to examine the existence of policy coverage as part of an insurer's normal course of business will not be considered as prepared towards an expected litigation. Only those documents gathered and created for the main purpose of preparing for expected litigation will be privileged (see more in question 2 above).

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

The insured's duty to provide the insurer with all documents required to examine the insurer's liability is set in Section 23 of the Insurance Contracts Law. In principle, the insurer's duty to pay insurance benefits to the insured arises only after it received all documents required. Therefore, the insured's refusal to provide the required documents based on their alleged privilege may be used by the insurer to avoid payment of insurance benefits.

There is no Court precedent that has dealt with such a situation. However, in view of the insurer's duty to act in good faith, in order to justify the non-payment of insurance benefits in such case, the insurer will be required to prove that without obtaining the privileged communication, it cannot examine the applicability of policy coverage.

It should be noted that in Israel, an attorney-client privilege can be waived by the client. Therefore, an insured may face a decision whether to waive the privilege and provide its insurer with the requested documents or to maintain the privilege and risk its rights to receive insurance benefits.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

An attorney-client privilege can be waived by the client only. As mentioned above, in litigation the defence attorney's client is the insured and thus only the insured can waive the privilege.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

The client's agreement to waive an attorney-client privilege can be made specifically or can be implied from the circumstances. According to Court rulings, a client's agreement to waive the privilege can be implied from the following:

- The client's agreement to disclose the privileged information to a third party who is not connected to the client.
- The client's agreement to disclose part of the communication documents with his/her attorney

- The client's decision to allow his/her attorney and to testify in court thus exposing the attorney to a cross-examination

c. Can privilege be waived inadvertently?

See section b above

d. Bad Faith Actions

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

An insured's allegation of bad faith does not affect an insurer's ability to assert privilege over claims files and communications with the insurer's coverage counsel.

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

An insurer's assertion of good faith does not affect its ability to assert privilege over documents. However, if the insurer wishes to support such allegation by presenting part of the documents in its claim file or part of the communications with its attorney, it will be required to disclose the full file, communication or documents. In other words, the insurer cannot waive a privilege selectively.

8. <u>What are the best practices for maintaining privilege in the insurance context?</u>

- Where there is no conflict of interest between the insured and the insurer, a joint presentation can create an Attorney-Client privilege

- State in the documents that they were created mainly for the purpose of preparing for legal proceedings. Note, however, that the Court is expected to examine whether legal proceedings were actually expected at the time the documents were prepared.

9. <u>Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?</u>

Privilege is a protection from disclosure duties set by law and prevents disclosure in legal or administrative proceedings. Confidentiality or secrecy is a standard which prohibits a professional or a person exposed to secret information from disclosing it to the public.

In the absence of an agreement between the insured and the insurer, there is no specific confidentiality which applies to communications between them. However, an insurer is subject to the general prohibition on the use or disclosure of secret and private information for a purpose other than that for which it was received (Section 2 of the Protection of Privacy Law; also see: S.C. (Magistrate Court, Jerusalem) 3900/09 ***Danny Zion v. Shaul Ben Ari***). Nevertheless, an insurer may be required to disclose such information within the framework of legal proceedings. Generally, the court will order disclosure in cases where it is convinced that the information is relevant to the claim and that there is no alternative evidence which can be used instead (MCA 1917/92 ***Yacov Scholar v. Nitza Garby***, PD 47(5) 764).

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1. How do privilege issues arise in insurance disputes?

Before describing possible privilege issues in Italian insurance disputes, it should be preliminarily noted that in Italy, privilege and confidentiality are mainly governed by the Attorneys' Code of Practice and the provisions set forth by the Italian Code of Criminal Procedure. While the Attorneys' Code of Practice states the confidentiality obligations and privilege rules for attorneys, the provisions of the Italian Code of Criminal Procedure establish the right of attorneys to abstain from deposition.

The scarcity of rules regarding privilege is a result of two features of the Italian legal system (i) the absence of pre-trial discovery and (ii) the role of the judge, who is in charge of the acquisition of the probative material in the proceeding.

Hence, in insurance disputes, privilege issues may arise when a party exercises its right to request to the judge the acquisition at trial of correspondence or any other legal documents prepared by an attorney registered with the Italian BAR for his client.

Recently enacted Italian legislation, dictating compulsory mediation for insurance disputes (before a court proceeding may be initiated), is likely to pose new privilege issues. In fact, statements made and information acquired during mediation process may not be exploited in related Court proceedings. Moreover, this law grants mediators the same right to abstain from deposition as that generally recognized to attorneys.

a. What type of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

In a dispute involving insurers and insureds, documents and communications over which privilege may be asserted are those originated or exchanged with external attorneys registered with the Italian BAR.

As explained in detail under question 4, in-house counsel's communications and documents are not protected by privilege (as those of external lawyers). Thus, internal documents are not protected by general privilege and can be sought by a counterparty in compliance with the limits established by the Italian Code of Civil Procedure.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

The limits to a party's right to access and acquire insurance related documents are established by Article 210 of the Italian Code of Civil Procedure. Pursuant to such provision, a party may request a judicial order for the acquisition of documents – for evidence purposes - in so far as:

(i) the party has specifically identified the document to be acquired as evidence;

(ii) the document sought is unavailable to the requesting party;

(iii) the party has provided evidence of the existence of such document;

(iv) the party has provided evidence that the document is within the availability of the other party;

(v) the document is necessary in order to prove the allegations of the requesting party.

Following the request, the judge verifies (a) whether the requirements above are met; and (b) whether the acquisition of the requested document might result in severe damages to the other (or a third) party, or breach the privilege set forth by the Italian Code of Criminal Procedure.

3. What type of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?

As a general remark, privilege may be asserted in the insurance context in relation to (i) correspondence between an attorney registered with the BAR and his client (insurer, insured or reinsurer), (ii) correspondence among attorneys representing the parties, and (iii) legal documents prepared by attorneys registered with the BAR for their clients. On the contrary, privilege does not protect correspondence between an Italian attorney and a party other than his client (e.g. cease and desist letters).

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

A third party may seek documents and correspondence between an insured and his insurer within the limits described under question no. 2.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

There are no doctrines that may protect communications between insurers and insureds from being acquired by the judge within a dispute; the only limits encountered by a third party are those set forth by article 210 of the Italian Code of Civil Procedure described above.

c. Is privilege applied in a different manner where:

As a general remark, under Italian law privilege is based on the author of a document rather than the context in which it is created.

i. The Insurer has agreed to defend the Insured without reservation of rights?

No.

ii. The Insurer provides a defense pursuant to a reservation of rights?

No.

iii. The Insurer has denied coverage?

No.

iv. The policy provides only a duty to indemnify and not a duty to defend?

No.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

There are no specific instances in which a privilege issue may arise between an insurer and a reinsurer given that privilege attaches to the author of a communication irrespective of the circumstances surrounding its creation. Therefore, communications exchanged between an insurer and his reinsurer may be subject to a judicial order pursuant to article 210 of Italian Code of Civil Procedure.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

Italian law does not recognize to in-house/employed counsels the same status as external Italian attorneys registered with the BAR. Hence, communications and/or legal documents prepared by in-house counsels are not protected by privilege.

The Akzo Nobel case has reopened the debate on whether in-house counsel's work (e.g. correspondence, legal opinions, etc.) should be protected by privilege, so as to avoid disclosure of documents against the company. Indeed, in-house counsel strongly feel that the lack of provisions in the Italian legal system (i.e. the lack of privilege in respect of documents and correspondence for in-house counsel) results in a disadvantage when the company they work for is in dispute with an entity based in a nation recognizing such privilege.

Under an insurance perspective, the absence of such privilege for in-house counsel entails that their documents prepared internally may be exploited in litigation. For example, provided that the requirements and the limits described above (sub question 2), legal opinions on coverage of a claim prepared by an in-house counsel could be used against the insurer in a dispute. The only documents that would be protected by privilege are those exchanged with external attorneys by reason of the privilege recognized to the documents prepared by the latter.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

Privilege recognized to communications and documents prepared by attorneys registered with the Bar applies irrespective of the context in which such documents are prepared: in sum, whether or not a legal document is prepared in view of litigation, it shall be protected by the general privilege recognized to Italian attorneys.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

In general, insurers are entitled to request to their insureds all the documents regarding a third party claim that may be necessary to assess coverage. The insured, on the other side, has a duty to disclose such documents in compliance with the general duty of good faith in the performance of contracts.

However, in case of refusal of the insured, an insurer may compel the insured only via the judicial order described in question 2 in litigation and within the limits thereof.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

A party has the authority to waive privilege over its correspondence with the Italian attorney when it is necessary for defence.

The attorney may waive privilege over information and documents regarding the client when it is necessary to avoid a criminal offence by the client.

Privilege over correspondence among attorneys representing different parties may be waived by the parties if related to an agreement entered into by such parties.

On a related note, privilege over statements and information acquired during the mediation process (described under question 1 above) may be waived by the party itself.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

Privilege may be waived over information or other documents when necessary to prove facts in a dispute between an attorney and his client.

c. Can privilege be waived inadvertently?

Privilege may not be waived inadvertently without incurring in a breach of the Italian Attorneys' Code of Practice.

d. Bad Faith Actions

Italy does not recognize bad faith actions in tort. However, the violation of the duty of good faith between parties in the performance of a contract is qualified as a breach under Italian contract law.

8. What are the best practices for maintaining privilege in the insurance context?

In the absence of specific legal provisions, the following may be implemented in order to maintain privilege over insurance related documents:

- all communications between an insurer and its external attorney should be marked as "strictly confidential" and/or "attorney-client correspondence";

- legal documents received and prepared by an external attorney (correspondence, legal opinions, etc.) should be filed as confidential and marked as regarding external attorneys' work;

- when sharing within the insurance company an opinion/document prepared by an external attorney, in-house lawyers should avoid amending the document: comments should be added separately to maintain the external attorney's authorship of the document.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

Yes; Italian Attorneys' Code of Practice distinguishes between the privilege as a state of a document or correspondence which cannot be acquired in a proceeding due to its authorship. Confidentiality, instead, concerns a more general duty of non-disclosure by attorneys of information or documents regarding a client and gathered in the performance of legal services.

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1. How do privilege issues arise in insurance disputes?

Under Mexican Law, any party in a trial (including in insurance disputes) may ask the Court to request its opponent or any third party to disclose information or documents that are relevant to the dispute. As a general rule, all persons are obligated to disclose information and documents to a Court when such information is relevant to the matter, unless such information is "privileged".

Pursuant to the Commercial Code (*Código de Comercio*), family members, spouses and individuals who are bound to maintain professional secrets pursuant to the Regulatory Law of the Fifth Constitutional Article relative to the Practice of Professions in the Federal District (*Ley Reglamentaria del Artículo 5o Constitucional, Relativo al Ejercicio de las Profesiones in the Federal District*) and the equivalent laws in other States ("**Attorney/Client Privilege**"), are exempted from the obligation to disclose the information even if ordered by Court.

In principle, confidential or private information which is not qualified as "privileged" should be disclosed, prior to a formal request from the Court.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

A party in a trial may seek from the Insurer any document without giving rise to any privilege issues, as long as the documents are relevant to the dispute.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

Mexican commercial proceedings do not provide for a "discovery" process, and a party's ability to obtain access to evidence is limited in the pre-trial stage.

During the trial stage, as a general rule, a party may have access to insurance related documents of the other party or other third parties, as long as, **(i)** the documents are relevant to the dispute, and **(ii)** the Court admits the documents as evidence and requires that such information be provided to the opponent or third party.

3. What types of relationships in the insurance context may be subject to the attorney client/solicitor-client relationship?

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

These communications are deemed confidential and private information. Consequently, they may only be used as authorized by the disclosing party and may not be transferred to third parties. Notwithstanding the foregoing, under Mexican law these communications are not protected by attorney-client or solicitor-client privilege and, therefore, they must be provided in a Mexican proceeding if required by Court.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

No. Mexican law does not recognize any of these doctrines. However, in the event of a joint client and joint defense arrangement, the lawyer who is bound by the Attorney/Client Privilege must maintain the professional secrecy of the information provided by each client.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

No. Under Mexican law, the Attorney/Client Privilege would apply in the same manner and, in this case, it would only apply between the professional appointed by the Insurer and the Insured.

ii. The Insurer provides a defense pursuant to a reservation of rights?

No. Under Mexican law, the Attorney/Client Privilege would apply in the same manner and, in this case, it would only apply between the professional appointed by the Insurer and the Insured.

iii. The Insurer has denied coverage?

No. Under Mexican law, the Attorney/Client Privilege would not apply.

iv. The policy provides only a duty to indemnify and not a duty to defend?

No. Under Mexican law, the Attorney/Client Privilege would not apply.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

These communications are deemed confidential. Therefore, they may only be used as authorized by the disclosing party and may not be transferred to third parties. Notwithstanding the foregoing, under Mexican law these communications are not protected by any right of privilege. As a result, they must be provided in a Mexican proceeding if required by a Court.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

Professionals who are under a labor relationship are subject to the Mexican Labor laws and the confidentiality obligations thereunder. Under Mexican Labor Laws, these professionals are not granted with the attorney/client privilege and are not bound to maintain professional secret; therefore they would not be exempted from their obligation to provide information requested by Court in the event of an insurance dispute.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

Under Mexican law, there is no concept of litigation privilege that will protect parties and their lawyers from liability for statements made in Court.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

The Insured is not obligated to provide to the Insurer communications protected by the Attorney/Client Privilege; however, the Insured must provide to the Insurer confidential or private communications, in the following cases:

(a) When contracting the Insurance Policy, the Insurer or its representative has the obligation to disclose in writing to the Insurer all the relevant facts and information required to qualify the risk to be insured under an insurance policy, including confidential and private information, pursuant to the respective questionnaire.

(b) In the event of an insurance claim under the Insurance Policy, the Insurer has the right to request from the Insured or beneficiary all information, communications and documents related to the claim and that are required to determine the circumstances and consequences of the event that gave rise to the claim.

(c) In the event of a Mexican proceeding, the Insurer may request the Court to order the Insured to provide all relevant information, communications and documentation, even if such information is qualified as confidential or private.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

The client whose information is protected under the Attorney/Client Privilege is the only person authorized to waive such right.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

No. Attorney/Client Privilege may only be waived directly by the client.

c. Can privilege be waived inadvertently?

No. Attorney/client privilege may only be waived directly by the client.

d. Bad Faith Actions

Under Mexican law, there are no punitive or exemplary actions.

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

No, the general rules set forth herein will apply.

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

No, the general rules set forth herein will apply.

8. What are the best practices for maintaining privilege in the insurance context?

Regarding information protected by Attorney/Client Privilege, the client whose information is protected and its lawyer should enter into a Professional Services Agreement, pursuant to which, among other things, the parties expressly set forth the obligation to maintain the professional secrecy of all communications, information and documentation disclosed by the client regarding a specific matter.

Likewise, all confidential information should be protected by a confidentiality agreement and marked as "confidential".

Finally, regarding private information, the Insured owner of such information must grant limited authority to the Insurer to use its personal data and transfer it to third parties.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

(a) Confidentiality and Privacy

In general terms, for purposes of Mexican law, "confidentiality" is the duty of a party receiving certain information or documents to use them only in the manner authorized by the disclosing party or by law and not to transfer such information and documentation to any third party unless expressly authorized by the disclosing party or required by the law or Court. The information is deemed to be "confidential" if the parties granted such qualification to certain information or if such information is considered "confidential" by law. Under the Mexican Insurance Law and regulations, the following is deemed confidential: **(i)** the information of the members of Board of Directors and members of the Advisory Boards, regarding all acts and facts relating to the insurance company, and **(ii)** the information of the Insured or beneficiaries received by the Insurance Company as part of the Know Your Customers policies.

"Privacy" concerns the protection of personal information of individuals. Privacy is regulated in Mexico by the Federal Law for the Protection of Personal Information in Possession of Private Persons (*Ley Federal de Protección de Datos Personales en Posesión de Particulares) ("***Data Protection Law***").* The Data Protection Law defines "personal information" as any information regarding an individual previously identified or that may be identified. Regarding insurance related information, the Data Protection Law protects the personal information disclosed and transferred by the insured (individual) to the Insurer. The Insurer has the duty to maintain the confidentiality of such personal information, and to treat and transfer such information only in the manner and to the third parties authorized by the insured. Likewise, the insured has the right to access, rectify, cancel or oppose the use of its personal information.

(b) Privilege

As a general rule, all individuals are bound to disclose information and documents to a Court when such information is relevant to the matter, unless such information is "privileged". "Privilege" is a special right granted under law that exempts certain individuals from disclosing information even if required by a competent Court. Under Mexican Commercial Code (*Código de Comercio*), family members, spouses and individuals who are bound to maintain professional secrets pursuant to the Regulatory Law of the Fifth Constitutional Article relative to the Practice of Professions in the Federal District (*Ley Reglamentaria del Artículo 5o Constitucional, Relativo al Ejercicio de las Profesiones in the Federal District*) and the equivalent laws in other States, are exempted from the obligation to disclose the information even if ordered by Court.

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1. How do privilege issues arise in insurance disputes?

In The Netherlands, in general it is difficult to obtain copies of documents which are in the possession of a party who is not willing to submit such documents. In principle, a party is not obliged to provide insurance documents or insurance related information to a third party who is not in any way an interested party (co-insured, loss payee) under the relevant insurance policy. There are circumstances, however, under which a third party plaintiff may attempt to seek disclosure of insurance documents, for instance as a means to discover whether the defendant has assets that can be attached when seeking recourse.

Furthermore, privilege issues may arise in legal proceedings when an attorney or civil-law notary is called as a witness to give evidence in court.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

Dutch law does not allow broad discovery or exchange of documents. Therefore, a request for disclosure of insurance related documents by a third party plaintiff will in general not be allowed. This means that privilege issues may rise with respect to all relevant types of documents that are sought in disputes with an Insurer.

There is not much case law in this respect. Recently, however, a court in first instance[1] allowed the request of a third party plaintiff that the defendant disclose copies of the insurance policies. The court granted the request because of very special circumstances, including that

- the plaintiff's claim would probably be allowed and was not disputed;
- the damage was considerable and it was in the interest of all plaintiffs to determine whether they could seek recourse; and
- the plaintiff was the Dutch State, which represented the public interest.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

There is an important difference between pre-trial discovery practices in common law countries, in particular the U.S., and civil law countries such as The Netherlands. In The Netherlands, the court gathers the evidence and not the parties. There is only one provision in the Dutch Code of Civil Procedure ("DCC") that covers the right for a party to request disclosure of documents (art. 843a DCC).

Art. 843a DCC provides the only option for a party to obtain documents by means of making a motion during civil proceedings or in separate preliminary relief proceedings. In order for the request to be allowed, a party must show a legitimate interest. Such interest exists if a party has the burden of proof in civil proceedings. Furthermore, the party requesting for documents must specify which documents it is willing to obtain. So-called 'fishing expeditions' are not allowed. This means that the requesting party needs to describe in as much detail as possible which documents it wishes to obtain. In any event such description should be sufficiently concrete so that the court can determine which documents the requesting party is referring to and whether the requesting party indeed has a legitimate interest. Finally, the documents must be related to a certain legal relationship with the requesting party (or its predecessor). In general, a legal relationship between the requesting party and the requested document is rather easily established.

3. What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?

Attorneys are considered to have absolute privilege, except with respect to documents that are the object of a criminal offence or that contribute to the commission of a criminal offence. They have the right to decline to give evidence if requested to appear in court. This includes the right to refuse to testify as well as the right to refuse to disclose documents, including in the abovementioned art. 843a DCC-proceedings. Attorney-client privilege applies equally in civil, administrative and criminal proceedings.

[1] Court of Breda, 6 April 2011, docket no. 232613/KG ZA 11-179, LJN: BQ0360.

As a general rule, this privilege only applies to information that was entrusted to an attorney in his professional capacity. It is the attorney who should decide whether such is the case. The court only marginally reviews this decision. Documents that the attorney holds in another capacity, for instance as a trust agent, would not be privileged.

The privilege is limited to documents that are prepared for the purpose of legal proceedings, including legal advice on the chances of success. A document that is specifically produced by an attorney for a third party merely commenting on proceedings would not be privileged. In addition, privilege can be lost if a privileged document is used for a non-privileged purpose. Accordingly, a letter of advice commenting on the chances of success in litigation would risk losing privilege if shown to a third party, if such exposure would mean that the document is used for a non-privileged purpose.

No distinction is made between confidential and non-confidential information. The privilege covers all information provided to and from an attorney in his professional capacity and includes notes, correspondence with the client and correspondence to and from other advisers relating to the privileged information.

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

Communications between Insureds and Insurers may be protected by the attorney-client privilege if the communications were made by or to the attorney who was instructed by the Insured or Insurer. Communications between the parties themselves are not covered by the attorney-client privilege.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

No.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

No.

ii. The Insurer provides a defense pursuant to a reservation of rights?

No.

iii. The Insurer has denied coverage?

No.

iv. The policy provides only a duty to indemnify and not a duty to defend?

No.

v. How do privilege issues arise regarding Insurer/Reinsurer communications?

We are not aware of any privilege issues that arise regarding Insurer/Reinsurer communications.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

In The Netherlands, attorneys – meaning legal practitioners who have been officially sworn in as members of the Bar and who are authorised to appear in court – can be employed with a company such as an insurance company. Such in-house attorneys may have the same privilege as attorneys who have their practice within a law firm. Other legal counsel employed with a company do not have an attorney-client privilege.

The existence of a derivative attorney-client privilege is generally accepted under Dutch law. This would mean that persons who are instructed by the attorney can invoke the same privilege as the attorney. In principle, such derivative privilege also applies to other legal counsel as long as they are instructed by the attorney and not by the client directly.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

There is not a concept of litigation privilege under Dutch law.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

No, see the answer to question 7.

7. How can privilege be waived in insurance disputes?

The prevailing view under Dutch law is that privilege belongs to the attorney and not to the client. As a consequence, the client cannot waive the attorney's privilege and cannot force the attorney to provide documents.

a. Who has the authority to waive privilege?

In principle, the attorney has the authority to waive privilege. However, the attorney is bound by the Conduct Rules for Attorneys 1992, which oblige the attorney to keep the information entrusted to him in his professional capacity confidential. Violation of the Conduct Rules can result in disciplinary proceedings. In addition, intentional violation of professional confidentiality is a criminal offence.

The duty to keep information confidential can be waived by the client. As a consequence, privileged information can only be submitted to a third party if the attorney waives his or her litigation privilege and the client waives the confidentiality obligation.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

No. In The Netherlands, the attorney's privilege needs to be waived explicitly.

c. Can privilege be waived inadvertently?

No. An attorney may still invoke a privilege with respect to certain information even if he or she has provided other privileged information.

d. Bad Faith Actions

Bad Faith Actions do not exist in The Netherlands.

8. What are the best practices for maintaining privilege in the insurance context?

In the event of communication and exchange of documents where attorneys are involved, the parties should make sure that the communication is only made through their attorney. In order to avoid a successful motion on the basis of art. 843a DCC for the submission of documents, parties can consider to send all relevant documents to the attorney and not keep copies. The attorney can invoke his privilege and is not obliged to hand over the documents.

In the event that no communication with an attorney is involved, a solution would be to include confidentiality clauses in the insurance documents and insurance related communications. The confidential nature of a document may be sufficient reason to refuse to submit a document to another party.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

An attorney's privilege is derived from the Conduct Rules, which oblige an attorney to observe secrecy. The confidentiality or privacy, however, relates to the contents of a document and can also be invoked by other people or institutions than attorneys. For instance, email correspondence by an employee may be protected by the Dutch Privacy Act; in principle the employer is not entitled to disclose such e-mails without the employee's consent.

There are no specific rules or laws dealing with the confidentiality or privacy of insurance related documents. In legal proceedings, a party is allowed to refuse to disclose insurance related documents if the contents of such documents are confidential or contain company-sensitive information. The court will consider whether such refusal is justified.

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New Zealand

SIMPSON GRIERSON
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1. How do privilege issues arise in insurance disputes?

In New Zealand, privilege issues in insurance disputes typically arise when:

o an insurer refuses to indemnify an insured, and the insured then commences litigation against the insurer;

o insured parties seek to inspect documents held by insurers which have been compiled by third parties at the instance of the insurer or the insurer's legal advisers and which are subsequently relied upon to decline cover.

o a lawyer acts for both insurer and insured, and:

- a lawyer appointed by an insurer to act in the defence of a claim against the insured obtains information from the insured which indicates that the policy may not provide cover, see *Nicholson v Icepak Coolstores Ltd* [1999] 3 NZLR 475; or

- an insurance policy covers only some of the areas in dispute between the parties; and/or

o reports made by or on behalf of insurers have dual or mixed purposes, e.g. advising on policy response and advising for the purpose of apprehended litigation.

(a) What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

Generally, the type of documents that are sought in disputes with an insurer which give rise to privilege issues are documents prepared by assessors, loss adjusters, lawyers or experts such as accountants, engineers or fire cause and origin investigators.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance-related documents?

The key legislation in New Zealand regarding privilege is the Evidence Act 2006.

In principle, documents which have a tendency to prove or disprove anything that is of consequence to the determination of a proceeding are relevant and admissible in court proceedings under s7 of the Evidence Act 2006. However, there are a range of reasons why a party may have only a limited ability to access documents held by another party.

There are no rules or procedures that specifically limit access to documents because they are insurance-related. There may be limited access to insurance-related documents for a variety of reasons, such as privilege (see for *example Brandlines Limited v Central Forklift Group Limited* 11/2/11, High Court, Wellington CIV-2008-485-2803; CIV-2009-485-384).

Subject to limitations arising (e.g. as a result of privilege) a party may obtain discovery of certain documents either before a proceeding has commenced (if the intending plaintiff can show the existence of documents and necessity of those documents for its case) and/or after a proceeding has commenced.

In arbitration, unless otherwise agreed, the parties are assumed to have agreed that the arbitral tribunal has the power to order the discovery and production of documents or materials within the possession or power of a party (see Schedule 2, cl 3(1)(f) to the Arbitration Act 1996). The tribunal may also request the Court's assistance in making an order for the discovery of documents (see Schedule 1, cl 27(2)(c)(i) to the Arbitration Act 1996).

Legal adviser privilege, litigation privilege and common interest privilege are discussed below.

3. What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?

Legal adviser privilege under s 64 of the Evidence Act 2006 may apply to a wide range of relationships in insurance contexts, e.g. insured/insurer relationships and relationships between co-insurers.

Correspondence between lawyer and client are subject to legal adviser privilege pursuant to s 54 of the Evidence Act 2006, if the correspondence was:

a) intended to be confidential; and

b) made in the course of and for the purpose of:

i) the person obtaining professional legal services from the legal adviser; or

ii) the legal adviser giving such services to the person.

Documents created by third parties will only be protected by legal adviser privilege if the third party acted as an agent (e.g. for the insurer) in communicating with the lawyer and the communication was for the purpose of obtaining or providing legal advice for the third party's principal. The third party must have acted as "the man on the spot" and on the client's behalf (e.g. on the insurer's behalf). A third party does not qualify as an agent when acting as an "independent contractor": *Brandlines Limited v Central Forklift Group Limited* 11/2/11, High Court, Wellington CIV-2008-485-2803; CIV-2009-485-384.

(a) Are communications between Insureds and Insurers protected from third parties by the attorney-client/lawyer-client privilege?

Communications between insureds and insurers may be protected from third parties by legal adviser privilege, e.g. where the dominant purpose of the communication was in order to obtain legal advice or to assist in the conduct of litigation, see for example *Guinness Peat Properties Limited v Fitzroy Robinson Partnership* [1987] 2 All ER 716 and *Fresh Direct v J M Batten* 1/10/09, High Court Auckland, CIV-2008-404-4757.

(b) Are there doctrines, such as joint client, joint defence, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

Both joint interest privilege and common interest privilege may be available.

Section 66 of the Evidence Act 2006 enables parties who jointly hold an existing privilege in relation to communications or documents to have access to the privileged material and to assert joint interest privilege against third parties. Although only one of the joint interest holders needs to assert the privilege, it can only be waived jointly. The privilege is likely to apply where the parties have a joint retainer, but something less is sufficient if the joint interest exists between the parties at the time of the communication.

Common interest privilege has a broader application than joint interest privilege. Where parties have a common interest in the subject matter of communications, common interest privilege may apply and the holders of the common interest privilege can assert the privilege against third parties. Like joint interest privilege, the documents must be subject to an existing privilege (see *Fresh Direct v J M Batten* 1/10/09, High Court Auckland, CIV-2008-404-4757). However, unlike joint interest privilege, the common interest between the parties must exist at the time of disclosure of the documents, rather than at the time the communication or document was created. Whether there is sufficient common interest to invoke common interest privilege is a question of fact in each case (*Hedley v Kiwi Co-operative Dairies Ltd* (2000) 15 PRNZ 2010 at 218).

Extracts from two recent cases confirming the availability of common interest privilege in an insured/insurer context are set out below:

Common interest privilege was discussed in *Contractors Bonding Limited v The Whangarei District Council* High Court Auckland, CIV-2004-488-756, 3 November 2006 at [46] as follows:

"That an insurer and an insured have a common interest in the subject matter of legal advice in these circumstances has been accepted in other jurisdictions. In Bulk Materials (Coal Handling) Services Pty Ltd v Coal and Allied Operation PTY Ltd (1988) 13 NSWLR 689 it was held that in circumstances where an underwriter had not yet extended, but was likely to extend, indemnity to an insured and otherwise had interests in the anticipated litigation identical with those of the insured, there was a common interest apt for the application of common interest privilege to documents and copy documents passing from the underwriter to the insured. See also Guinness Peat Pty v Fitzroy Robinson Partnership [1987] 1 WLR 1027, where the insured's correspondence with the insurer came into existence for the purpose of the insurer's obtaining legal advice on the claim and for use in any ensuing litigation."

In *Public Trust v Hotchilly Ltd*, High Court Wellington, CIV-2009-485-704, 31 March 2010, the High Court held at [25] that:

"Where an insurer and its insured have a common interest in the anticipated litigation, common interest privilege applies to documents created on behalf of the insurer even if the insurer is not a named party to the proceedings: see Contractors Bonding Limited v The Whangarei District Council, High Court Auckland, CIV-2004-488-756, 3 November 2006 at [46]."

(c) Is privilege applied in a different manner where:

(i) The Insurer has agreed to defend the Insured without reservation of rights?

The same general principles apply. Prior to the Evidence Act 2006, the High Court in *Nicholson v Icepak Coolstores Ltd* [1999] 3 NZLR 475 held that,

in some instances, questions may arise as to whether a lawyer instructed by an insurer to defend an insured is under an obligation to keep information confidential from the insurer, and that the insured and insurer did not have a common interest in some information provided by the insured to the lawyer (also see the discussion at question 6). Ordinarily, if the lawyer has a joint instruction from the insurer and the insured, then the insured and insurer will have a common interest and legal adviser privilege will apply.

(ii) The Insurer provides a defence pursuant to a reservation of rights?

Again, the same general principles apply. Whether privilege exists in the particular context will depend on the nature of the interests of the parties and the instructions to the lawyer.

(iii) The Insurer has denied coverage?

While the same general principles would apply, ordinarily the insurer and insured would not have a common interest, at least not from the point where coverage is denied.

(iv) The policy provides only a duty to indemnify and not a duty to defend?

Although it is not clear, it seems likely that the same general principles would apply. Whether privilege would exist in the particular context would depend on the nature of the interests of the parties and the instructions to the lawyer.

(d) How do privilege issues arise regarding Insurer/Reinsurer communications?

Section 54 of the Evidence Act 2006 would again apply. No relevant case law in New Zealand regarding privilege issues between insurer and reinsurer has been identified in preparing this report.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

Under s51 of the Evidence Act 2006 and s6 of the Lawyers and Conveyancers Act 2006, the expression 'legal adviser' will apply to in-house/employed lawyers. The Evidence Act does not impose an obligation of independence. Communications between in-house lawyers and their client will be privileged if the requirements of s54 (summarised under question 3 above) are met. Issues of this nature can arise where the advice is given by an in-house lawyer who is employed by an insurer or an insured.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance-related documents?

The concept of litigation privilege exists in New Zealand and is provided for in s56 of the Evidence Act 2006. An insurance-related document will be protected by litigation privilege if it is made, received, compiled or prepared for the dominant purpose of enabling a party or their legal adviser to conduct or advise regarding a proceeding or an apprehended proceeding. These principles largely codify the pre-existing common law – see *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596.

There are two limbs which must be satisfied before privilege attaches. First, the document must have come into existence when litigation is in progress or apprehended. That situation must be in existence at the time that the document was created. Secondly, the dominant purpose of its preparation must be to enable the legal adviser to conduct or advise regarding litigation. Under the common law approach this was judged not only by the purpose of the person creating the document, that is the intention of its actual composer, but also regard was had to the intention of the person or authority under whose direction, whether particular or general, it had been produced or brought into existence (*Carlton Cranes Ltd v Consolidated Hotels Ltd* [1988] 2 NZLR 555 at 557).

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

An insured may be obliged to disclose material to an insurer for a variety of reasons, e.g. under a duty of utmost good faith when making a proposal, or pursuant to contractual provisions in an insurance policy. These obligations do not necessarily apply to privileged communications. In *B v Auckland District Law Society* [2004] 1 NZLR 326, the Privy Council (New Zealand's highest Court before the Supreme Court of New Zealand was established) held that, except in cases where the privileged communication was itself the means of carrying out a fraud, the privilege is absolute; once the privilege is established, the lawyer's mouth is "shut forever". This is of course subject to the doctrine of waiver discussed under question 7.

Except where contractual provisions clearly require disclosure to an insurer, an insured appears not to be obliged to disclose to an insurer privileged communications involving only an insured and the insured's lawyer.

Before the Evidence Act 2006 was enacted, the High Court in *Nicholson v Icepak Coolstores Ltd* [1999] 3 NZLR 475 (also referred to under question

3(c)(i)) considered the status of information provided by an insured to a lawyer who acted for both insurer and insured in a claim against the insured. During the course of the proceedings the insured provided the lawyer with information which revealed breaches by the insured of the terms and conditions of the insurance policy. As a result, the insurer declined cover. The insured then joined the insurer in the proceedings. The insurer sought to adduce as evidence the information received from the lawyer which revealed the breaches by the insured. The High Court held that the insurer was not permitted to rely on that information as it was subject to legal adviser privilege between the insured and the lawyer.

Under s67 of the Evidence Act 2006 a judge must disallow a claim of privilege in respect of communication if satisfied that there is a prima facie case that the communication was made or received for a dishonest purpose.

7. How can privilege be waived in insurance disputes?

(a) Who has the authority to waive privilege?

In principle, only the holder of the privilege can waive the privilege (s 65(1) Evidence Act 2006). In relation to lawyer-client privilege, only the client or the client's successor in title has the authority to waive the privilege. In principle, the lawyer does not. However, s 65(2) Evidence Act 2006 provides that "*a person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality*." A similar approach was taken before the Evidence Act 2006 came into force (see B v Auckland District Law Society [2004] 1 NZLR 326 at 346).

In settlement negotiations, without prejudice communications between the parties can only be waived by consent, not unilaterally (s57 Evidence Act 2006).

(b) Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

Section 65(3) of the Evidence Act 2006 provides that a privilege holder waives privilege if that person:

a) acts so as to put the privileged information in issue in a proceeding; or

b) institutes a civil proceeding against a person who is in possession of the privileged information the effect of which is to put the privileged matter in issue in the proceeding.

Section 65(2) of the Evidence Act 2006 provides that privilege is waived if a privilege holder voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged information in circumstances that are inconsistent with a claim of confidentiality.

The effect of the Evidence Act 2006 in this regard is broadly the same as the effect of the common law rule which applied before the Act came into force – see *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) and Shannon v Shannon [2005] 3 NZLR 757 (CA).

(c) Can privilege be waived inadvertently?

In general, privilege is not waived if disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege. The general principle is that a document, once privileged, is always privileged, unless privilege is waived (s65 Evidence Act 2006).

However, if a privileged document is expressly or impliedly put at issue in proceedings (or, for example, if such a document is introduced into the record by quoting it in an opening statement or used in the cross-examination of a witness), the privilege attaching to the document may be lost.

Whether a waiver should be imputed depends on whether it would be unfair or misleading to allow a party to refer to or use material, and yet assert that the material or material associated with it is privileged from production.

Where a privileged document has been mistakenly included in the non-privileged part of a list of documents for discovery, the document will remain privileged if prior to inspection the recipient is notified that it has been delivered in error. However, if the privileged document has already been inspected it will generally be too late for a party seeking to claim privilege to correct the mistake by seeking an injunction to restore the status quo.

(d) Bad Faith Actions

Claims can be made in New Zealand on the basis of a breach of an insurer's duty to act in utmost good faith, *inter alia*, in relation to response to and/or payment of an insurance claim. Damages for consequential losses and sometimes general damages (e.g. for stress and health problems) may be awarded where an insured has suffered losses as a result of an insurer's wrongful denial of a claim,

e.g. *Bloor v IAG New Zealand Ltd* (2010) 16 ANZ Ins Cas 61-845.

8. What are the best practices for maintaining privilege in the insurance context?

In order to maintain privilege in an insurance context, parties and their advisers should carefully consider the context in which information is to be provided and the relationships between those involved, and should ensure that the relevant circumstances are clearly recorded.

In some cases, it may be appropriate for insurers to instruct external parties such as loss adjusters to act as the insurer's "man on the spot" and agent, in order to facilitate a claim for privilege of the type discussed in Brandlines. Routing of documents through solicitors is not of itself sufficient to confer privilege.

Where documents are prepared for the dominant purpose of apprehended or existing litigation, this too should be recorded so that there is a contemporaneous record of the position.

Where limited access to privileged documentation is being provided, care should be taken to carefully record the limitation, the reservation of privilege and/or the fact that privilege is not waived.

Information intended to be disclosed in the context of court proceedings should be checked to ensure that privilege is not waived without the person who has the privilege deliberately authorising the waiver.

Communications intended to be made on a without prejudice basis should generally be explicitly recorded as being made on this basis.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance-related documents are protected by confidentiality/privacy rules/laws?

Privilege, confidentiality and privacy are separate concepts in the New Zealand legal context.

Privilege

A person who has a privilege in respect of any information has the right to refuse to disclose the information in a proceeding (s53 Evidence Act 2006). Information may be privileged for a number of different reasons, including legal adviser privilege, litigation privilege, privilege for settlement negotiations or mediation, privilege for communications with ministers of religion, privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists, privilege against self-incrimination and informer privilege.

Confidentiality

Confidentiality applies in a much wider range of circumstances than privilege, and can be over-ridden more readily than privilege.

Sections 68-70 of the Evidence Act 2006 provide a court with the power to protect the confidentiality of information if necessary to protect matters of State, journalists' sources, or any other instance where the public interest justifies the protection (or disclosure) of confidential material (s69 Evidence Act 2006). In deciding whether to make an order under s69, a court must have regard to a number of factors, including the likely extent of harm that may result from disclosure and the nature of the information.

Courts will on occasion provide protection for non-privileged confidential information, but the protection is often limited eg allowing access to named individuals (eg counsel and experts) only.

Privacy

In New Zealand, the Privacy Act 1993 deals with the protection of individual privacy and personal information. Personal information is defined as information about an identifiable individual which is not in the public domain, and which is held by any individual or organisation. This includes personal information of an insured held by an insurance company.

In principle, personal information is not to be disclosed, subject to a number of exceptions, which includes disclosure necessary to avoid prejudice to the maintenance or enforcement of the law, or for the conduct of proceedings before any court or tribunal (Privacy Principles 10 and 11 as set out in s6 Privacy Act 1993). The Privacy Act also confers rights of access on individuals who are the subject of the personal information. This can result in claimants having to obtain documents for insurance claim purposes and can require insurers to disclose personal information held about insured individuals.

The courts will also recognise in some situations a claim in tort for breach of common law rights of privacy.

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Norway

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1. How do privilege issues arise in insurance disputes?

Privilege issues would first and foremost arise in the context of litigation, either between the parties to an insurance dispute, in a direct action from a third party claimant against an insurer under a liability insurance, or in third party disclosure requests. It is also possible to seek disclosure in advance of commencement of proceedings, where privilege issues may also be relevant. Please see the answer to 1(a) below for a more detailed introduction to disclosure and privilege in Norwegian civil procedure practice.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

It will probably benefit understanding if, as an introduction to this answer, a general introduction to the Norwegian civil procedure framework is given. Insurance disputes would be subject to the same rules as any other civil dispute. The Norwegian Civil Procedure Code (CPC) will apply unless private arbitration is chosen. While the "default rules" of private arbitration are embodied in the separate Arbitration Act (AA), the same broad principles apply under both regimes, and in the event of matters dealt with in the CPC but not the AA, it is to be expected that an arbitral tribunal would look to the CPC for guidance. An important difference is that many of the rules under the AA may be deviated from by agreement of the parties (including the rules of evidence). We have assumed that the "default rules" of arbitration apply, and therefore do not as a rule distinguish between the provisions of the CPC and AA in the below analysis, choosing to refer to both as "ordinary civil procedure".

In ordinary civil procedure, all documents that are, broadly speaking, relevant to the matter at hand must be disclosed (and may be sought disclosed if their existence is known or suspected). It is of no consequence if the document is advantageous or not to the disclosing party. Though mostly relevant in instances of excessive disclosure, there is also a general requirement that disclosure should be "proportional" to the matter at hand. Disclosure requests must also, however, have regard to the principle of proportionality. "Blanket" disclosure requests will not usually be accommodated. It should be "clear" from the request which items of evidence are sought. The court does nonetheless have discretion to lift the requirement of specificity if it is unreasonably difficult to meet and there are grounds to believe that the request will yield useful evidence. Apart from these general qualifications to the duty of and right to request disclosure - which are hard to characterise as "privilege issues" as such - certain exemptions do exist, in respect of which particular privilege issues would arise.

Examples of exemptions that may be relevant to insurance practice would be: documents containing what may be characterised as “business secrets” (though here the court retains considerable discretion), self-incriminating evidence, evidence obtained by "illegitimate" means and documents subject to special statutory protection (e.g. privileged medical documents, attorney-client privileged documents etc). The client-attorney privilege will be the focus of the below answer.

While it is difficult to define with any certainty categories of documents over which privilege not only may be asserted, but also accepted by the courts/arbitral tribunal exercising their discretion in this respect, one would typically expect privilege issues in insurance to be particularly relevant for attorney-client correspondence as well as documents evidencing commercially sensitive information. Documentation on individual health covers may also pose challenges. It is more difficult to imagine self-incriminating or "illegitimate" evidence being relevant in insurance relations, though potentially there could be issues with certain offences such as corruption/bribery, fraudulent practices and regulatory breaches, or evidence obtained by breaches of privacy etc.

While private confidentiality undertakings or implied duties of good faith and loyalty, recognised in Norwegian contract law, may be invoked in seeking to protect documentation, such obligations do not enjoy statutory exemption (unless, of course, they also fall within one of the categories that do). Documents described as "confidential" merely by inter partes arrangements, or the assertion of a party, are not exempted. This could potentially apply where insurance contracts import confidentiality obligations, or with documents that are deemed confidential according to internal company procedures.

2. As a practical matter, does your jurisdiction’s litigation or arbitration procedure/rules limit a party’s ability to obtain access to insurance related documents?

Ordinary civil procedure permits wide-ranging disclosure of documents during litigation. It is also possible – in certain circumstances – to seek disclosure in advance of commencing proceedings,

i.e. a form of interim disclosure, sharing characteristics with other forms of interim remedies such as injunctions, arrest of assets etc.

Apart from the specific exemptions to the duty of disclosure discussed above in the answer to 1(a), there are also the general requirements of relevance and proportionality against which a party's access to documents must be tested. Also, the necessity of sufficiently specifying a disclosure request may hinder access.

3. <u>What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?</u>

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

There is no specific protection for communications between Insureds and Insurers as such. Instead, the rules contained in section 22-5 of the CPC, concerning inter alia client-attorney privilege, will apply. Under these rules, protection applies to communications between clients and their attorneys including their attorneys' "subordinates and assistants".

The term "attorney" refers to persons authorised as attorneys under Norwegian law, while "subordinates and assistants" would typically include associate attorneys, secretaries and administrative personnel. The Norwegian Supreme Court has also indicated that the Norwegian rules on client-attorney privilege apply to foreign attorneys.

To be afforded client-attorney privilege, information must be "confided to" attorneys "in their professional capacity". This is not limited to information that the client has told the attorney, but also covers information contained in documents that the attorney has been provided with.

The privilege also covers information that the attorney has gathered from third parties as part of an instruction. For instance, the Supreme Court has held that information gathered by a private investigator in connection with an instruction from a client was privileged finding that "confided" information is: "what the attorney in his professional capacity and as part of a client relationship gathers or gains access to on behalf of the client."

An attorney's own advice to his client is protected by privilege.

The expression "professional capacity" limits the privilege to information which the attorney has acquired in connection with his role as legal adviser/counsel. To the extent an attorney also conducts other tasks, for example acts as trustee, company secretary and the like, client-attorney privilege will not apply.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

No. The rules set out above on client-attorney privilege in the CPC apply.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

No. The rules on client-attorney privilege in the CPC will apply as set out above.

ii. The Insurer provides a defense pursuant to a reservation of rights?

Please see c. i. above.

iii. The Insurer has denied coverage?

Please see c. i. above.

iv. The policy provides only a duty to indemnify and not a duty to defend?

Please see c. i. above.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

There is no specific privilege protection afforded to insurer/reinsurer communications. Under Norwegian law, whether client-attorney privilege or other forms of privilege may apply to such communications will be determined by the specific circumstances. This means, among other things, that simply marking a document as "privileged and confidential" or "attorney privileged" will not necessarily protect the document from production.

4. <u>Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?</u>

Norwegian case law has established that in-house counsel, who are licensed to practise as attorneys, are covered by client-attorney privilege. As with attorneys in private practice, for information to be protected by client-attorney privilege, information

must have been "confided to" in-house counsels "in their professional capacity" (see 3 (a) above).

The question of whether information supplied to in-house counsel is protected by client-attorney privilege must be decided on the individual facts of the case. The Supreme Court has held that: "If the document in question results from a counseling service by the employed attorney that can be equalled with the function an independent attorney would have had, the confidentiality obligation of the said attorneys would be the same."

Consequently, if a particular type of work carried out by an in-house attorney could have been performed by persons belonging to other professions, the client-attorney privilege will not apply. However, if the work concerns legal issues, the client-attorney privilege is likely to apply.

In-house lawyers who are not licensed can only be regarded as "assistants or subordinates" to a licensed in-house lawyer. Information provided to an unlicensed in-house lawyer is therefore only subject to the client-attorney privilege if the information is intended for a superior/supervising authorised attorney.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

There is no separate litigation privilege rule and the rules on client-attorney privilege as well as the general qualifications to disclosure and other specific exemptions will apply.

As discussed below, Norwegian courts may order a party (or a third party) to disclose specific documents but not if such disclosure would set aside the rules on client-attorney privilege.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

The answer to this depends on the form of privilege asserted. Documents for instance protected by client-attorney privilege need not as a rule be disclosed for the purpose of litigation, unless the party entitled to the privilege consents. As mentioned, the courts do however retain a degree of discretion in respect of certain forms of privilege; for instance the "business secrets" privilege may be overridden by the courts.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

Section 22-5 (3) of the CPC provides that it is the person entitled to confidentiality under the client-attorney privilege rules who may consent to such a waiver. For certain "lesser" forms of privilege, such as that in place for "business secrets", the court may override the privilege.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

The main rule for client-attorney privilege is that it is absolute. However, if for instance evidence of such privileged communications were adduced in a dispute, for example by way of a witness statement by the attorney, legal theory suggests that the opposing party could require the disclosure of the underlying communications.

c. Can privilege be waived inadvertently?

The rules in the Act are somewhat unclear with regard to the situation where information subject to client-attorney privilege has been provided to a person who is not subject to the confidentiality rules contained in section 22-5. However, according to Norwegian legal theory, it is likely that privileged communications provided to such a third party who is not bound by the confidentiality rules will remain privileged.

d. Bad Faith Actions

Bad Faith actions of the type which are common in the United States do not exist in Norway.

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

N/A

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

N/A

8. What are the best practices for maintaining privilege in the insurance context?

We would be hesitant in recommending specific practices for maintaining privilege, as the Norwegian system is discretionary and will treat each case on its own facts, cf. the answer to 3(d) above. As such, no practice we recommend could guarantee protection of privilege in all circumstances.

However, where there is a legitimate need to protect privilege, the following points may be helpful to remember for guidance only. Correspondence or reporting intended to be "attorney privileged" should be addressed to an attorney as simply copying in the attorney will not necessarily attract client-attorney privilege. By the same token, it will not suffice to merely mark a document "attorney privileged" and not address it to an attorney in the correspondence. As the privilege may be waived by consent, it is useful to have strict procedures in place whereby the group of individuals entitled to give consent is clearly defined, and where the distribution of documents intended to be "attorney privileged" is strictly controlled. Communications directly from opponents or opponent counsel in matters where the client has legal representation should be treated with caution, and the client should refer such communications to their appointed attorney so as to limit the risk of inadvertent disclosure. For "lesser" forms of privilege, such as that applicable to "business secrets", there should be systems in place which clearly define a document as containing business secrets with distribution limited accordingly. Again, however, it will not suffice to merely mark a document as "confidential for business reasons" or similar if the document in fact contains no "business secret".

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

There is a difference between privilege pursuant to the CPC and confidentiality/privacy more generally. Unless the document in question falls within one of the specific categories of documents exempted from disclosure under the CPC, they are not as a rule protected and must be disclosed (subject always to the principles of relevance and proportionality). However, many of the types of documents that would be private by statutory protection, e.g. pertaining to medical information, or types of documents that could only be obtained by gross breaches of privacy, e.g. by unauthorised surveillance of personal email accounts, would probably fall within one or more of the specific exemptions to the rule of full disclosure.

Documents described as "confidential" are not protected by their mere description as such. However, a document may for instance be described as "confidential" because it contains a "business secret". In that case, the "business secret" would be protected, though not necessarily the document itself. Even if a confidential document contains a business secret, those parts of the document which do not constitute a business secret would nevertheless not enjoy privilege, and may be required disclosed in redacted form.

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1. How do privilege issues arise in insurance disputes?

In accordance with Polish law, all information relating to insurance contracts are protected by the so-called "insurance secret". This means that insurance companies, persons employed by them, or persons and subjects with whose assistance the insurance companies perform their insurance acts, are obligated to ensure secrecy with respect to each insurance contract. The common view held in Poland is that the information protected by the insurance secret is not only that which is included in the insurance contract, but also all other information related to the insurance relationship (including those disclosed to the insurer before the conclusion of the insurance contract). There are specific exceptions where the insurance companies are authorized, or obliged to disclose the information protected by the insurance secret, which include among others: information requested by the courts or public prosecutor, if they are necessary for the purpose of pending proceedings, information requested by the policyholder, insured, beneficiary, or person entitled from the insurance contract, as well as information provided to the reinsurer in relation to a concluded reinsurance contract. In cases where such exceptions are not explicitly regulated by Polish law, insurance companies, persons employed by them, or persons and subjects with whose assistance insurance companies perform their insurance acts, cannot disclose any information to any third party subject to criminal liability. Please note that such obligation is only imposed on insurers (their employees/contractors), not on policyholders, the insured, or beneficiaries, etc.

Another relevant issue is that in cases of lawyers performing within regulated professions, in particular, advocates (adwokat) and attorneys-at-law (radca prawny), all information relating to their relationship with their clients is protected under legal confidentiality (attorney-client privilege). Theoretically, in cases of criminal proceedings, in certain circumstances, the court can release such lawyers from the duty to protect confidential information, if such information is necessary for the purpose of the court proceedings. However, the ethical codes applicable to the above-mentioned legal professions do not allow the disclosing of confidential information relating to clients in all circumstances (there is an on-going dispute as to how wide the confidentiality obligation actually is, and whether it also applies in cases where the court decides to waive the obligation to maintain the confidentiality of the information). In general, advocates (adwokat) and attorneys-at-law (radca prawny) treat the obligation to protect confidential information relating to their clients as absolute; there being no exceptions. In practice this issue is usually irrelevant in insurance disputes, since legal confidentiality is commonly respected.

Another important issue is medical confidentiality. Physicians and health care establishments are not allowed to disclose any information relating to their patients (including medical documentation) except in cases where Polish law explicitly permits for such disclosure. In most cases in order to assess a claim the insurers need to examine the medical documentation relating to the insured. In such cases insurers can only obtain relevant information from the health care providers subject to the express written consent of the insured.

The consent of the insured is unnecessary for the purpose of obtaining the relevant information by the insurers from the courts, Police, public prosecutor, as well as other state institutions and bodies, if certain conditions have been fulfilled: information can be disclosed only to the extent of the tasks performed by the insurer and in order to perform the same, in connection with an accident, or an occurrence constituting the basis for establishing a liability, where the required information is indispensable for establishing the circumstances of those accidents or fortuitous events, and the amount of an indemnity or benefit.

The rules on processing personal data should also be taken into account. The Data Protection Law is harmonized within the EU, and the Polish Act on Personal Data Protection implements Directive 95/46/EC into the Polish legal system.

Another issue is the entrepreneurs' secret which may be the basis for not disclosing certain information regarding a contractual relationship. The entrepreneurs' secret is understood as being technical, technological, or organisational information, or other information having a commercial value regarding the entrepreneur, that has not been made available to the public, and in relation to which the entrepreneur has undertaken considerable efforts to keep such information confidential.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

As explained in item 1 above, all information relating to insurance contracts concluded by insurers are protected by the insurance secret. It is a generally shared opinion that the insurance secret covers all the information relating to the insurance relationship between the policyholder/insured and the insurer, among others: the information provided by the policyholder/insured to the insurer before the conclusion of the insurance contract, the insurance contract itself, claim forms, claim files, and the decisions of the insurer accepting/declining the claim, etc.

The insurer may seek for documents protected by medical confidentiality, as well as confidential documents possessed by the courts, Police, public prosecutor, or other state institutions and bodies.

2. <u>As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?</u>

The above-explained rules relating to the insurance secret, medical confidentiality, and data protection are issues of substantive law, rather than litigation procedure. As regards the rules regarding legal confidentiality, they are regulated by substantive law, the ethical codes relating to advocates and legal advisors, and litigation procedure.

As regards civil litigation procedure, the most important provision in this respect is art. 248 sec. 1 of the Code of Civil Procedure which provides that everyone is obliged to disclose, at the court's order, in a specified time and place, the document being in his/her possession which constitutes evidence of factual importance for the resolution of the case, unless such document contains classified information. There are specific exceptions where a person can be released from the obligation to disclose such document to the court, e.g. in cases where such person is not obliged to testify because of his/her relationship with a given party. This provision is quite often used during court proceedings (also relating to insurance disputes), because it enables the party to obtain the documents from the other party in cases where such party cannot, or does not wish to disclose the documents directly to the requesting party. Please also note that the insurance secret does not apply when the court requests the insurer to provide documents which are necessary for the purpose of the proceedings. Generally, it is up to the court recognizing the claim to decide whether a given document is necessary for the purpose of settling the case. The Code of Civil Procedure does not provide for a list of documents which can or cannot be requested by the court on the basis of art. 248 sec. 1 of the Code of Civil Procedure.

In cases of civil proceedings, advocates (adwokat) and attorneys-at-law (radca prawny) can refuse the court's request to answer questions, or provide documents relating to their relationships with clients (attorney-client privilege).

3. <u>What types of relationships, in the insurance context, may be subject to the attorney client/solicitor-client relationship?</u>

As explained above, the insurance secret covers all information relating to insurance contracts concluded by insurance companies.

Information and documents related to the relationship of the client to the advocate or legal advisor are protected under legal confidentiality (attorney-client privilege).

a. Are communications between the Insured and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

Such communications are protected by the insurance secret and, depending on the situation, may also be protected under legal confidentiality (attorney-client privilege).

b. Are there doctrines, such as joint client, joint defence, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

We are not aware of any such doctrines in Poland. Such communications are protected by the insurance secret.

In cases where the insured is represented before the court by an advocate or attorney-at-law, the communications between the client and the advocate/legal advisor are protected under legal confidentiality (attorney-client privilege).

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

No, the general rules discussed above apply.

ii. The Insurer provides a defence pursuant to a reservation of rights?

No, the general rules discussed above apply.

iii. The Insurer has denied coverage?

No, the general rules discussed above apply.

iv. The policy provides only a duty to indemnify, and not a duty to defend?

No, the general rules discussed above apply.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

Polish law expressly provides that an insurer is allowed to disclose information protected by the insurance secret to the reinsurer, within the scope of the insurance contracts covered by the concluded reinsurance contract. The reinsurer is not directly obliged, by Polish law, to protect the insurance secret, but this duty may arise from the direct relationship of cooperation with the insurer. The information obtained by the reinsurer is also protected by the Law on Personal Data Protection and any confidentiality clauses included in the reinsurance contracts.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

Communications between the insurer and its Internal/In-House/Employed Counsel (in practice - its legal advisor) are protected under legal confidentiality provided that such lawyer is an advocate or attorney-at-law. Furthermore, such lawyer, as a person acting for and on behalf of the insurer, is obliged to protect the insurance secret. As it has been explained above, in practice, this issue is usually irrelevant in insurance disputes, since legal confidentiality is commonly respected, and no one attempts to obtain any confidential information from lawyers.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

There is no such concept in Polish law. The general rules as discussed above apply.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

As regards the issue of obtaining information by the insurer, please see the general explanations provided in items 1 and 2 above. In general, the insurer cannot compel an Insured to disclose privileged communications. The insurer may try to obtain such information from other sources, if the law allows for such actions (e.g. information from the Police). In cases of court proceedings, the insurer can ask the court to request certain documents from the insured, or from other entities, but in certain cases this will not be possible (e.g. information protected under legal confidentiality). Often the insurers regulate the issue of providing information by the claimants for the purpose of paying the insurance benefit in the general insurance terms and conditions. For example, the general insurance terms and conditions sometimes provide that the insurer may refuse to pay the insurance benefit, if the claimant does not provide the insurer with all the requested documentation. However, the admissibility of such clauses is problematic under Polish law, for example, if the duty of payment arises from other documents.

7. How can privilege be waived in insurance disputes?

From the point of view of the insured or another claimant who is not a subject to the obligations relating to the insurance secret, medical confidentiality, legal confidentiality, etc., privileged information is not an issue. Such persons can disclose all the information and documents they possess for the purposes of insurance disputes. As regards entities obliged to protect privileged information, generally there is no possibility for them to disclose such information except in those cases expressly regulated by law (e.g. as specified above, the court may release lawyers from the duty to protect confidential information). However, there is no general “waiver” procedure or doctrine.

a. Who has the authority to waive privilege?

As was explained above, the insured or other claimant who is not subject to the obligations relating to the insurance secret, medical confidentiality, legal confidentiality, etc., can disclose all documents for the purposes of insurance disputes. Within the above meaning it can be stated that such persons have the authority to waive privilege, i.e., they can disclose documents which are protected by law. If such persons are represented by attorneys-at-law or advocates, the power of attorney and the agreement between the attorney and client should regulate the scope of actions which the attorney is authorized to undertake on behalf of the client.

b. Can privilege be waived indirectly, for example, by putting privileged communications “at issue” in a dispute?

Please see the explanations above. There are no specific regulations in this respect.

c. Can privilege be waived inadvertently?

As was explained above, in Polish law there is no formal procedure or doctrine relating to the waiver

of privilege. A person who is not obliged to protect the confidential nature of documents (e.g. the insured) can disclose documents which are otherwise protected by the insurance secret, or legal confidentiality (attorney-client privilege). On the other hand, entities obliged to protect the confidential nature of documents (e.g. the insurer) can disclose such documents only in cases expressly regulated in Polish law. Therefore this issue is irrelevant under Polish law.

d. Bad Faith Actions

In Polish law, there is no concept of "bad faith actions" in relation to insurance disputes and privileged information. The general concept of loss incurred by the insured in cases where he/she has not been awarded payment on time, applies. As regards privileged information and documents, the general rules discussed above apply.

1. Does an Insured's allegation of bad faith claims handling, or a refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

N/A

2. Does an Insurer's assertion of good faith investigation, or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

N/A

8. What are the best practices for maintaining privilege in the insurance context?

Maintaining privileged information and documents in the insurance context is more an issue of fulfilling the obligations imposed by law, rather than an issue of practice. Disclosing the information or documents protected by the insurance secret to unauthorized entities is subject to criminal liability and administrative sanctions from the supervisory authorities, therefore the insurers must apply appropriate procedures and technical measures in order to protect such information and documents. Information protected by the insurance secret falling within the scope of personal data is protected at the same time by the Law on Personal Data Protection, which imposes specific requirements and obligations on entities processing personal data. Some information can also be protected by the entrepreneurs' secret. As regards advocates and legal advisors, they are subject to specific requirements imposed by the law and their self-government (ethical codes, by-laws, resolutions) relating to the protection of information and documents protected under legal confidentiality (attorney-client privilege).

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

Please see the explanations above (in particular, the general explanations in item 1 on page 1).

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1. How do privilege issues arise in insurance disputes?

Privilege issues may arise in an insurance dispute in different situations. For example, when an insured or injured party files a lawsuit against an insurer for its refusal to provide coverage following an extrajudicial claim settlement, the persons involved in the claim settlement or the documents exchanged during the pre-judicial period may involve privilege issues.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

In a dispute with an insurer, parties may seek documents such as correspondence between lawyers, the notification of the claim, and the documents exchanged between the Insurer and the Insured.

2. As a practical matter, do your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

Insurers may not disclose to third parties facts that they learn in the course of carrying out their activities. However, the Insured may access the documents related to its insurance.

3. What types of relationships in the insurance context may be subject to the attorney client/solicitor-client relationship?

When an Insurer has an in-house Legal Department that analyses and resolves questions related to claims made under policies it has issued, the Insurer's lawyers will be subject to the attorney client/solicitor-client relationship.

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

Yes. Insurers may not disclose to third parties facts that they learn in the course of carrying out their activities. Therefore, even if in the context of a lawsuit they can refuse to testify as a witness.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

The documents that are exchanged between an Insurer's lawyer and an Insured's lawyer may not be used in an insurance dispute. Such documents are protected by professional secrecy and can only be used with the Portuguese Legal Bar's prior consent.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

If an Insurer agreed to defend an Insured, the Insurer may use some privileged information in order to defend their common interest. However, the Insurer and Insured in that case must agree to the disclosure of information subject to professional secrecy.

ii. The Insurer provides a defense pursuant to a reservation of rights?

Portuguese law provides no answer to this question. However, the information may be disclosed to third parties solely for the interests of the Insured and within the limits agreed by the parties.

iii. The Insurer has denied coverage?

In this case, the Insured may disclose the information to third parties solely to defend their rights and interests. The information remains confidential and, except as provided by law, cannot be accessed by persons outside the contract.

iv. The policy provides only a duty to indemnify and not a duty to defend?

The situation here is similar. Whether or not the defense agreed, the information is confidential and, except as expressly provided by law or by court order, cannot be disclosed to third parties.

v. How do privilege issues arise regarding Insurer/Reinsurer communications?

The Insurer, all those acting in its service and representation, and all who cooperate with it must maintain the confidentiality of data they obtain. The Insurer's agents are bound by this duty of

confidentiality even if they have not agreed to it and even after they leave the insurer's service.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

All officials and employees of the Insurer are covered by the duty of confidentiality with respect to information obtained in the course of their duties. That obligation does not cease after the completion of their duties.

Also, the officials and employees of lawyers and other law enforcement agents are covered by the same duty of confidentiality.

Finally, under Portuguese law, all communications sent by a lawyer are covered by professional secrecy, which can only be removed as provided by law or by express permission of the Portuguese Bar Association, and therefore cannot be used in legal proceedings or insurance disputes.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

In general, all communications and documents submitted by counsel, even on behalf of the client or the Insured are covered by the duty of confidentiality and cannot be used in court proceedings unless the confidentiality is waived by their authors as provided by Portuguese law or by court order. Nonetheless, the secrecy is not absolute and may be broken for reasons of public or private interest when those interests should prevail over secrecy. Under Portuguese law, there is no special protection in litigation.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

The insurer cannot compel the Insured to waive its right to secrecy with respect to documents or information covered by professional secrecy, even under the duty of cooperation or good faith. As mentioned above, the duty of confidentiality is not absolute and may be broken for reasons of public and private law in order to protect interests that should prevail over secrecy. In fact, according to criminal and civil law, there are specific cases where, despite the opposition expressed by the insured, professional secrecy can and should be removed, especially in the context of criminal investigation, defense of personal rights, rights of others who also deserve protection and advocacy of public policy.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

Privileged information can only be revealed under the provisions of criminal law and criminal procedure, or, where there is another provision which limits the privilege. Courts also can waive the privilege in order to better resolve a dispute.

In other way, the insured and the insurer (or the client's lawyer but always in his representation), if the information relates to personal data of the insured, the Insured can bring that information to the dispute – even though the Insurer cannot, unless its properly authorized by Court.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

Privileged information is sometimes revealed in a legal dispute proceeding before a court. However, if that privileged information was not properly authorized – and if it occurs in a dispute – the courts will disregard that information and remove it from the lawsuit.

For example, if the insured uses information that he provided to the Insurer, but that information only refers to his personal condition (such as medical data supplied by the insured to the insurer) the privilege is waived. On the contrary, the Insurer cannot bring to the dispute that information without the proper authorization.

c. Can privilege be waived inadvertently?

The answer given above also applies to this question.

d. Bad Faith Actions

In the Portuguese legal system, these actions do not exist.

However, bad faith can arise in a common indemnification action. If a party is found to have proceeded in bad faith in that situation, as by omitting known information or using the courts to delay the discovery of truth, it can be required to pay compensation to the other party or a fine.

Normally, the bad faith allegation arises when the dispute is already in court, and is associated with other kinds of requests or other actions.

D.1 (does not apply)

D.2 (does not apply)

8. What are the best practices for maintaining privilege in the insurance context?

- The Insurer must keep privileged any information he received in the elaboration or execution of a contract even if no contract has been entered, is invalid or has ceased;
- The duty of confidentiality is also incumbent on directors, employees, agents and other assistants of the insurer, and that duty does not cease with the completion of their duties;
- The members of Portugal's Insurance Institute and all the people who are pursuing or have pursued a professional activity there are under a duty to maintain confidentiality of the facts which they have learned exclusively in the course of their duties.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy/laws?

For example, during the term of the contract, the Insurer and the policyholder or the Insured shall notify each other of any changes in the risk relating to the subject of the information provided when the policy was elaborated. No Insurer shall communicate to third parties contract amendments that may affect them, with the exception of third parties who have rights to that information and beneficiaries of the insurance policy who are identified in the policy. However, this duty does not apply if the duty of confidentiality has been stipulated in the contract.

In any event, there is not a strict difference between confidentiality and privilege, and they are mentioned interchangeably throughout legislation.

The following are covered by the obligation of privilege: (1) all technical and non-technical information, commercial or otherwise, for products or services, (2) documents, drawings, plans, specifications, trade secrets, methods, formulas and *know-how*; and (3) in general, everything that concerns the business of insurance and insurance intermediaries, their clients, statutory bodies, employees (including organizational charts, fees charged or function), suppliers and service providers.

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1. How do privilege issues arise in insurance disputes?

Privilege issues arise in insurance disputes where a party seeks disclosure of documents that may justifiably be withheld on the basis of privilege. In South African insurance litigation this may occur where claim-related documents are sought by any party to litigation. Most commonly such issues may arise in subrogated recoveries or defences where the claimant seeks the insurer's investigation documents, including loss adjuster's reports or expert investigation reports.

Forms of privilege

Legal professional privilege is one of the few privileges entitling a person to refuse to disclose certain kinds of confidential information which may be relevant in the proceedings and otherwise admissible. It is a rule of law, not procedure.

The law favours disclosure and so the rules of privilege are narrow and are interpreted restrictively. Examples of other privileges are:

- Without prejudice communications. These are communications made in the course of good faith settlement negotiations of a dispute. Where settlement negotiations arise in the course of an insurance dispute, privilege may attach.

- Marital privilege. Spouses cannot be compelled in criminal proceedings to disclose communications made to each other during the marriage.

- Privilege against self-incrimination. This privilege entitles a person to refuse to give evidence against themselves, i.e. to make a confession. This is the right to silence.

These privileges and the legal professional privilege are private interest privileges and can be waived. There are also public interest privileges – in such cases, whether the communication or material is disclosed depends less on rules and more on the balancing of public interest in protecting the material from disclosure against the public interest in disclosing it.

Legal professional privilege describes two related rules:

- The first is that all confidential communications passing between lawyer and client and between the different lawyers acting for the client in relation to seeking legal advice are privileged. This is known as the legal advice privilege.

- The second, known as the litigation privilege, protects communications made between the client and lawyer and between the client or their lawyer and third parties, for example expert witnesses, for the purposes of legal advice in contemplation of litigation. It protects materials prepared for use in litigation from disclosure.

The distinction is important. Litigation privilege may attach to communications with those categorised as third parties, whereas legal advice privilege does not.

In a 1912 decision of the Transvaal Provincial Division in *General Accident, Fire and Life Assurance Corporation vs Goldberg 1914 TPD 494* Smith J, in considering whether an assessor's report was privileged from disclosure in the course of insurance litigation said:

> *"I think it is clear …. that our rules, are taken directly from the English rules on the subject, and that we should be guided by the decisions which the English courts have given upon these rules."* (page 500)

Like all rules their content, scope or purpose changes over time, as courts interpret their application and seek to apply them, or not to apply them, in changing circumstances. Undoubtedly South African courts have had close regard to decisions of the English Courts in applying the rules of legal professional privilege. In more recent times, with the advent of the Constitution and a need to balance fundamental rights, the courts look further afield in considering a need for flexibility.

While our Courts have also recognised the right of legal professional privilege as a fundamental right or principle upon which our judicial system is based, they have also recognised the possible relaxation of the privilege. In the pre-Constitution case *of S vs Safatsa 1988 1 SA 868 (A)*, an Appellate Division decision, Botha JA said (without deciding whether the rule of privilege applicable in that case could ever be relaxed):

> *"Any claim to a relaxation of the privilege …. must be approached with the greatest circumspection".* (page 886)

Legal advice privilege is not one which covers every communication between a client and the legal advisor. The communication must be made in confidence and it must pass for the purpose of advice or litigation. The advice must also be directed towards a lawful end. A distinction between legal advice and presentational advice or tactical advice has not been considered.

As far as the litigation privilege is concerned materials and communications obtained from third parties as agents of a client (for example a loss adjuster) made in preparation for litigation must be made *"in reference to actually pending or contemplated litigation" : General Accident, Fire and Life Assurance Corporation Ltd vs Goldberg* (above).

Materials and communications of a witness who is not a client's agent are not privileged. That witness may be asked what they said or did or what was shown to them at any consultation or interview with a client's legal advisor, other than documents for which in themselves privilege is claimed: *International Tobacco Co vs United Tobacco Cos Ltd 1953 3 SA 879 (W)*.

In *General Accident, Fire & Life Assurance Corp Ltd v Goldberg*, the insured made a claim upon a policy of fire insurance. An assessor was appointed by the insurance company to investigate and advise whether the claim was one which ought to be met.

The insurer alleged that the report was required for the purposes of submitting it, if necessary, to the company attorneys. The assessor reported that the claim should be resisted and suggested that his report be forwarded to the insurer's attorneys. Litigation then followed.

The court held that it was clear that the report was obtained by the insurer, not with a view to any litigation which was not even then contemplated, but with a view to seeing whether they should pay the insured's claim under the policy:

> "*There must be really some contemplated litigation, some fact to indicate that litigation is likely or probable. It must not be a mere possibility which there is nothing to lead one to believe would be converted into reality according to the facts of the case.*"

In *Potter v South British Insurance Co. Ltd & Another 1963 3 SA 5 (W)*, the Plaintiff claimed damages for personal injuries following a motor accident. A statement made by the driver in writing to the insurance company had not been obtained from the driver for the purpose of litigation or for the purpose of obtaining advice from the insurance company's attorneys. Accordingly there was no professional privilege.

In Boyce v Ocean Accident & Guarantee Corp. Ltd. 1966 1 SA 44 (SR), the insurers attempted to claim privilege in respect of the contents of a claim form which had been headed "*Witness Statement for Submission to the Company's Attorneys*". The court said that the insurer cannot claim blanket privilege against having to make disclosure of any such statement made to the insurer in cases where a third party is involved, irrespective of the likelihood of a claim being made.

There is a debate in the law as to whether to be privileged the "*substantial purpose*" for which a document has been made must be for submission to a legal advisor as material upon which the person should give advice. That test has now been shown to be based on a misreading of *General Accident Fire and Life Assurance Corporation v Goldberg 1912 TPD 494*. See in that regard *A Sweidan and King (Pty) Ltd and Others v Zim Israel Navigation Co Limited* 1986 (1) SA 515 (D).

The second view that the submission must be the dominant purpose comes from an English decision decided after 30 May 1961 and is not binding on South African courts.

In our opinion a better approach is that of *A Sweidan and King* which says that the preparation of the document must have a definite purpose of being submitted to a legal advisor but it does not matter whether there are other purposes or not. That is an approach adopted by the Witwatersrand Local Division of the High Court in *Drakensburg Sun Hotel Shareblock Limited and Others v SM Goldstein and Company (Pty) Ltd* handed down on the 11th of May 1998. The judgment dealt *inter alia* with an attempt by the Defendant to breach the privilege claimed by the Plaintiff in respect of certain discovered documents. The documents constituted statements and reports prepared by a forensic fire expert appointed by the Plaintiff. The court approved of the statement in: *United Tobacco Companies of South Africa Limited v International Tobacco Co SA Limited 1953 1 SA 66 (T) at 73 E*:

"When a case for litigation has not started, but is only contemplated, and is contemplated by a Defendant who necessarily cannot know if it will happen, he may often be in the state of mind that he will place the reports he collected in contemplation of litigation before his attorney "if necessary". The meaning of those words can, I think only be, "if the litigation which is contemplated might happen did happen". The use of the words perhaps casts some reality of the contemplation of litigation but it does not to my mind otherwise destroy the privilege."

The *Drakensburg Sun* judgment is also important for clarifying the requirement that it is not the contemplation of the person who is mandated to obtain statements to provide a report which is relevant. What is important is the contemplation of the party to the action. Accordingly the purpose for which the document is created doesn't necessarily fall to be ascertained by reference to the intention of its actual composer. See for example *Guinness Peat Properties Limited and Others v Fitzroy Robinson Partnership (A firm) 1987 2 ALL ER 716 (CA)* and *Grant v Downs (1976) 135 CLR 674*. The latter judgment refers to the intention of the author "or of the person or authority under whose direction, whether particular or general, it has been produced or brought into existence."

Negotiations Privilege

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

Reports of insurance assessors, internal claims evaluation documents, an insurer's claims file, communications between the insurer and co-insurers / reinsurers, communications between the insurer and its agents (brokers, intermediaries, underwriting managers and assessors), communications between insured and insurer, and reports of experts are examples of documents that may be sought.

2. <u>As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance-related documents?</u>

No special rules of privilege apply to insurance litigation. In the context of South African insurance litigation, for all practical purposes, only documents falling within any of the negotiations, legal advice or litigation privilege (described in response 1 above) are subject to protection.

Insurance-related documents and communications that are not privileged will fall to be produced under subpoena or discovered in the ordinary course of litigation, to the extent they are relevant to issues arising in the dispute.

The South African discovery process provides for a broad exchange of all relevant documents sought to be relied upon at trial. Privileged documents must be described as part of a separate schedule to a discovery affidavit, but do not have to be disclosed.

Where a party believes that inadequate discovery of insurance-related documents has been made by the other side or obtained by subpoena, such documents may specifically be requested on notice to the other side, subject to considerations of relevance and privilege.

3. <u>What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?</u>

a Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

As a general rule, confidential communications between Insureds and Insurers are not privileged. Similarly, confessions made by an insured in claim documents to an insurer are generally not privileged, (although confessions do have special rules).

Privilege may attach where the communications are made by an insured to insurer solely for the purpose of obtaining professional legal advice, in contemplation of anticipated or pending litigation. See the general discussion in 1 above.

An initial report by an insured to its insurer that it has been involved in an accident, giving details, will not be privileged if it was not made at a time when the occurrence was considered and the report made, because litigation was then contemplated. See for example *Saven v AA Mutual Insurance Association Co. Limited* 1952 1 SA 110 (C).

Where the requirements for litigation privilege are met it is not necessary that the document was actually placed before the legal advisor as long as there was an intention to do so.

Likewise, as long as a purpose was to lay the document before a legal advisor, it does not matter if there was another purpose in making the communication. So for example, where documentation is prepared in contemplation of litigation and for the purposes of seeking legal advice, but is also provided to the insurer for the purposes of the insured complying with its notification obligations under a liability policy, the privilege will not be lost.

Information obtained by an agent for the purposes of being placed before a legal advisor will also be privileged provided the communication is made with the primary purpose of being brought to the attention of the legal advisor so that the legal advisor may provide advice on it, and providing litigation is contemplated.

Communications to or from in-house legal advisors of an insurer are dealt with in paragraph 4 below.

Communications falling outside the scope of legal professional privilege are not protected from disclosure to third parties.

b. Are there doctrines, such as joint client, joint defence, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

No. These doctrines do not apply in South African law.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

See iv below

ii. The Insurer provides a defense pursuant to a reservation of rights?

See iv below

iii. The Insurer has denied coverage?

See iv below

iv. The policy provides only a duty to indemnify and not a duty to defend?

The manner in which privilege is applied is no different in any one of the scenarios referred to. Practically it may be easier for an insured to claim litigation privilege in circumstances where the defence has been provided pursuant to the reservation of rights or denial of coverage. It is more likely in those circumstances that there is, objectively, a contemplation of litigation and certain documents may in those circumstances have been created by the insurer for the purposes of obtaining legal advice and in contemplation of litigation. See Cathkin Park Hotel (Pty) Ltd and Another v S M Goldstein and Co (Pty) Ltd (Unreported) 1997 (W).

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

South African courts see very little litigation between insurers and reinsurers, or third party claims against reinsurers. Even less frequent are privilege challenges to insurer/reinsurer communication.

If such a dispute arises it is most likely to do so in circumstances:

i. Where the insurer is insolvent and the insured then seeks a reinsurance payment;

ii. Of a subrogated defence where the insured defendant becomes insolvent and a third party claimant then seeks to proceed directly against the insurer for an indemnity via the relevant legislation;

iii. If the insured sues the insurer and asks for communications with the insurer.

4. <u>Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?</u>

In *Mohammed v President of the Republic of South Africa & Others 2001 2 SA 1145 (C)*, the court considered whether legal professional privilege can attach to advice given by a qualified lawyer not in private practice. The court said that "*legal professional privilege can lawfully be claimed in respect of confidential communication between Government and its salaried legal advisors when they amount to the equivalent of an independent advisor's confidential advice.*"

The usual approach of the South African courts is that in respect of legal advisors, only communications made strictly for the purpose of obtaining legal advice in their capacity as legal advisor (and not in an executive, commercial or managerial capacity) will be capable of being privileged. In situations where communications by an in-house legal advisor relate to a function other than providing legal advice, or include information unrelated to legal advice contained in the same communication, privilege may not attach to the communication. This is settled law.

Prudence would dictate that an in-house lawyer who has a dual-function (an executive as well as a legal role) should avoid including communications relating to the executive role in a document relating to the legal role because the resulting confusion could lead to the privilege being lost.

It is only legal professionals whose advice is privileged. This should be borne in mind where a legal department consists of lawyers and other professional advisers.

There is no reported decision of any dispute arising in respect of a privilege claim involving either in-house counsel of insured or the insurer.

5. <u>Is there a concept of litigation privilege and, if so, how can it protect insurance related document?</u>

See 1 above.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

An insurer cannot compel an insured to disclose privileged communications to the insurer.

Once a communication is privileged, it remains privileged. The privilege is for the benefit of the client and it does not matter what the nature of subsequent proceedings may be.

Where the insurer is entitled to enforce, in the name of the insured, the insured's rights against third parties, the insured is, however, subject to a duty to report details of the claim and a duty of co-operation which may extend to disclosure of those privileged documents necessary to deal with a subrogated claim. Failure to provide the appropriate documents may constitute breach of the insured's claim-reporting or co-operation obligations and result in a damages claim against the insured (or a rejection of the claim for indemnity in appropriate circumstances).

A claims co-operation clause in the policy may, on an appropriate wording, constitute a waiver of any legal professional privilege. See 7 below.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

Privilege may only be waived by the client, acting, if necessary, through the client's legal advisor.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

Yes. Privilege may be waived expressly, or by implication.

A client's intention to waive privilege may be inferred when the privileged communication is relied upon by the client in proceedings, or when there is an element of publication that warrants an inference that a privileged party no longer regards the contents of a communication as being privileged. Reference to part of a privileged document may lead to the obligation to disclose the whole document.

But see, for example, the refusal to grant access to a witness statement sought on the basis that the statement was referred to in a diagram handed into evidence. See *Peacock v SA Eagle Insurance Co. Limited 1991 3 All SA 602 (C)*.

Policy terms may contain an express or implied waiver of privilege of legal professional privilege in favour of the insurer.

c. Can privilege be waived inadvertently?

Harksen v Attorney-General, Cape and Others 1999 1 SA 718 (C) held that in order to constitute a waiver of legal professional privilege, the privilege holder must have full knowledge of their right, and must have conducted themselves in such a way that, objectively speaking, it can be inferred that they intended to abandon those rights.

The guiding principles in assessing whether a waiver has occurred are intention, fairness and consistency between the perceived disclosure and the disclosing party's prior maintenance of confidentiality.

Waiver may be imputed where in the circumstances, fairness requires a South African court to conclude that the privilege was abandoned, regardless of the holder's alleged intention (*S v Tandwa and Others **2008 1 SACR 613** (SCA)*).

d. Bad Faith Actions

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

No.

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

No.

8. What are the best practices for maintaining privilege in the insurance context?

Marking a document as privileged or routinely recording on a document that it is intended for the purpose of seeking legal advice does not automatically allow privilege to be claimed where there is no definite purpose to create and submit the document to a legal adviser for the purpose of obtaining legal advice. Where there is a legitimate contemplation of litigation and an intention to submit the document for the purposes of obtaining legal advice, it is useful to mark the document "*privileged – prepared in contemplation of the*

litigation for the purposes of seeking legal advice" at the very least, to avoid inadvertent disclosure of what may be a privileged document.

Good faith communication for the purposes of settling a dispute can be marked "*without prejudice*". That too, at the very least, serves the purpose of limiting the risk of inadvertent disclosure of the communication.

Communications made to an insurer or the insurer's agent such as an assessor or broker in order to pursue a contractual claim under a contract of insurance, for example a claim form, are not privileged.

The *Cathkin Park Hotel* case shows the value of an early assessment of an insurance claim and the benefit of having agents who are constantly aware of the insurer's right of subrogation and the potential for a subrogated claim or defence.

It is extremely useful to have a knowledgeable person make an immediate on-site assessment of an insurance claim against the insured or by the insured against the insurer and to discuss the need to appoint experts to assist in obtaining evidence and providing reports in order to obtain legal advice in relation to a claim that will be disputed. It is most useful if the discussions are documented and the decisions taken are formally recorded. It is even better if the appointment of investigators and experts and the instructions are done on the advice or at the request of an attorney.

It is preferable that a suitably senior person is involved in the discussions and makes the decisions referred to and gives the appropriate instructions as controlling mind of the legal entity.

Retain, separately if possible, all documents that can be used to claim legal professional privilege in due course, including the documents which show the privileged circumstances.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance-related documents are protected by confidentiality/privacy rules/laws?

Yes. Privilege is a legal concept that attaches as a matter of law, whereas a confidentiality or privacy agreement arises out of the common law and constitutional right to privacy of communications or out of contract. The attachment of privilege is limited to the circumstances described above.

Mere agreement between parties that documents will be regarded as private or confidential does not preclude South African courts from requiring the disclosure of a document that is relevant to a matter forming the subject of litigation.

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1. How do privilege issues arise in insurance disputes?

General Overview Discovery System in Korea

A broad discovery system does not exist in Korean civil procedure. However, parties may apply to courts for an order to produce evidentiary documents or an order to testify. Privilege issues may arise when a party refuses to produce documents or testify based on grounds of privileges prescribed in the law.

The Korean Civil Procedure Act (the "Civil Procedure Act") sets out different grounds of privilege. A witness may refuse to testify, among others, on the ground that his (or her) testimony is related to such matters that may be self-incriminating (including matters that incriminate his or her relatives and guardians). Also, certain professionals including lawyers, certified public accountants, doctors and pharmacists are granted rights to refuse to testify when they are examined on matters falling under the confidentiality of their professional functions. A witness may also refuse to testify if he or she is examined on matters falling under his or her technical or professional confidentiality (i.e., business secrets). A party may refuse to produce documents on the same grounds and on an additional ground that a document was prepared for the private use of its holder.

Some question the effectiveness of the court's order for document production due to weak enforcement of the system (e.g., those who refuse the court's order for document production are subject to a small fine).

Privilege in Insurance Context

In the insurance context, an insurer should not disclose the insured's private information and certain actuaries should maintain confidentiality of matters relating to their professional functions. Also, a person engaged in a financial institution, including insurance companies, may refuse to testify about information relating to financial transactions (but note that financial transactions are subject to a court's order of document production).

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

We are of the view that privilege may be asserted over (1) documents pertaining to insured's tender of defense to insurer, (2) statements made by the insured to its insurer regarding underlying event/occurrence/accident, (3) the insurer's claim file, including internal analysis of the claim and coverage, (4) communications from a ceding insurer to its reinsurers, including loss reports and (5) insurers' and reinsurers' reserve information. Documents in categories (1), (2) and (3) could be the types of documents particularly sought in disputes with an insurer which would give rise to privilege issues.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

When a party applies to a court for an order to produce evidentiary documents, the court may deny such request if the party does not specifically identify the document and/or the holder.

3. What types of relationships in the insurance context may be subject to the attorney client/solicitor-client relationship?

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

Such communications are not protected from third parties by the attorney-client/solicitor-client privilege.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

There is no doctrine separately labeled as joint client, joint defense or common interest. But the Korean Attorneys Act provides that an attorney (including those who were attorneys) shall not disclose confidential information acquired while acting as an attorney. We believe that under certain circumstances, such provision may be broadly interpreted to cover all three doctrines.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

ii. The Insurer provides a defense pursuant to a reservation of rights?

iii. The Insurer has denied coverage?

iv. The policy provides only a duty to indemnify and not a duty to defend?

Privilege is not applied in a different manner under above four circumstances.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

Same grounds of privilege apply to the communications between insurer and reinsurer.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

Although there are some discussions among members of the legal community about the issue of whether confidential information acquired by in-house counsel,[1] in their professional capacity is protected, the law is not settled on this issue. Those who disagree on extending application of the privilege base their argument on the ground that in-house counsel occupy the position of an employee, whereas the privilege is presumed on the agency relation with his or her client. In this regard, we are of the opinion that one must examine specific working conditions of an in-house counsel, such as the degree of independence and discretion he or she enjoys and the compensation structure compared to other members of the company, to determine whether his or her relationship with the company is closer to an employment relationship or to an agent relationship.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

There is no concept separately labeled as litigation privilege (e.g., the Work Product Protection). But because the Korean Attorneys Act obligates attorneys (including those who were attorneys) not to disclose confidential information acquired during his or her professional function, litigation related materials may be protected under certain circumstances.

[1] For avoidance of doubt, while there is a number of foreign licensed attorneys working within Korean law firms and as in-house counsels, the term "attorney" referred to in the relevant laws discussed herein means those admitted to and registered with the Korean Bar Association. Thus, the attorney privilege discussed herein does not apply to those not registered with the Korean Bar Association.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

Where a liability insurance claim is filed against an insurer, the insured is obligated under the Korean Commercial Code to cooperate with the insurer's requests for disclosure of otherwise privileged/protected information to the insurer.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

In principle, the person who benefits from confidentiality of the information has the authority to waive the privilege. But sometimes the person who benefits from the confidentiality may differ from the person who holds the information. Under certain circumstances, we are of the opinion that the person who holds the information may also be viewed as having the authority to waive privilege, but they could be subject to claims (e.g., based on unauthorized waiver) from the person who benefits from confidentiality of the information.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

Yes, privilege can be waived indirectly by putting privileged communications "at issue" in a dispute.

c. Can privilege be waived inadvertently?

Yes, privilege can be waived inadvertently.

d. Bad Faith Actions

Bad Faith Actions do not exist in Korea.

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

Not applicable.

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

Not applicable.

8. What are the best practices for maintaining privilege in the insurance context?

Grounds of privilege are limited to those prescribed in the applicable laws. Thus, parties may not arbitrarily create grounds of privilege, for example by agreements. But labeling related documents "privileged and confidential" may help maintaining privilege in the insurance context.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

There are overlaps between the two in that many of the grounds of privilege pertain to confidentiality and privacy (e.g., business secrets, insured's private information, etc.). At the same time, we can distinguish the two in that a confidential communication may not necessarily be privileged (e.g., information relating to financial transactions is confidential but is subject to court's order of document production).

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1. How do privilege issues arise in insurance disputes?

Privilege issues could arise in insurance disputes basically in three situations:

a) Where claims are brought by the Insured against its Insurer.

b) Where claims are brought by a third party plaintiff against the Insured and its Insurer, namely in civil liability cases where the injured third party is entitled by law to sue the Insurer directly and/or the Insured and causer of the injury or damage.

c) Where claims are brought by the Insurer against its Reinsurer.

As a general rule, under Spanish law, there is no attorney-client privilege and/or the work product protection as such. Instead, there is a lawyer's duty of confidentiality and professional secrecy which can produce the same effects in certain circumstances.

All communications and documents are, in principle, subject to disclosure in court if the requirements set forth in the Commerce Code and the Civil Procedure Act 1/2000 (hereinafter "CPA") are met. Documents held by third parties (the Insured would be a third party to the Reinsurance contract and the third party plaintiff would be a third party to either the Insurer, the Insured and the Reinsurer) could be subject to disclosure if the court understands that they are essential for the adjudication of the controversy (Article 330, CPA).

Lawyers, however, are subject to a duty of confidentiality in connection with certain communications and documents.

They are bound to keep secret any contacts with the opponent's lawyers. This duty is extended to any information passed by the opponent (the other party). Lawyers are also prevented from filing or revealing in court the letters, communications or notes received from the opponent's lawyer, or settlement proposals, save express permission of the other party. Also, if a lawyer is required to testify in court he or she must disclose his or her confidentiality duty and the court will resolve under the law (in all likelihood releasing him or her from his duty to testify). The lawyer breaching these rules may be subject to a variety of penalties, even criminal. In contrast to lawyers, it should be noted that parties attending negotiations meetings are not required to keep secret these talks.

Evidence submitted in breach of the foregoing rules would be unlawful and subject to be struck off the record. Under article 287 of the CPA, it can be struck off if the court understands that the evidence has been originated or obtained in breach of fundamental rights recognised by the Spanish Constitution. Amongst others, the rights breached could be the right to privacy (Article 18, Constitution) and the right to due process of law (Article 24, Constitution).

Furthermore, court documents and/or documents produced in litigation, are only open to the parties and whoever may prove a legitimate interest in having access to the records (Article 234.2 Judiciary Power Organic Act 1985).

It follows that there is a fundamental difference between the party's position and the lawyer's position. Documents held by the party are in principle subject to disclosure, whilst documents produced and/or held by lawyers may fall within the scope of the duty of confidentiality and secrecy to which the lawyer is subject.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

Accounting documents may be a significant area. The general principle is that the accounts of merchants are secret, save as otherwise provided in the law. Disclosure or general inspections of the books, correspondence and other documents of merchants may only be ordered by the court on its own motion or at the request of a party, in certain cases such as universal succession, temporary receivership or bankruptcies, winding up of companies and when the partners or employees are entitled to examine them directly (Article 32, Commerce Code).

In any event, outside of those specific cases, disclosure of the books and documents of merchants may be ordered when the person to whom they belong has an interest or liability in the matter in which disclosure is sought. The inspection shall be limited exclusively to the points that are related to the matter concerned and shall be performed on the merchant's premises, and the appropriate measures must be taken for due conservation and custody of the books and documents. Exceptionally, the court may require that the books be brought to it, provided that the entries to be examined are duly identified (Article 327, CPA).

In relation to communications or documents between lawyers, please see above.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

A party's ability to obtain access to insurance related documents is subject to the general commercial and procedural rules (e.g., Code of Commerce and CPA) which have been described generally in our answer to Question 1 and are described in more detail below. There are no special rules for insurance related documents.

U.S.-style pre-trial discovery is not allowed in Spain nor are so called "fishing expeditions". Prior to litigation, however, the party intending to sue may apply for certain preliminary evidentiary enquiries ("diligencias preliminares"). This preliminary proceeding is allowed for preparing the subsequent lawsuit by making available to the claimant certain documents, namely and strictly limited to wills, corporate documents, and accounting (only for shareholders or partners), insurance policies, matters related to patents, trademarks, copyrights or facts related to unfair competition. In addition to these cases which specifically involve documents, testimony may be required over facts related to capacity, representation or legal standing for being sued or to seek disclosure of documents proving that capacity, representation or legal standing. If the party required to exhibit the documents would refuse without fair cause to deliver them, the court may order the entrance in the place where the documents are supposed to be, taking the documents and depositing them in the court at the disposal of the party (Article 261 CPA).

The preliminary enquiries are frequently used to have liability insurance policies disclosed, in the event of claims brought by third parties.

Parties disclose to their opponents in the pleadings phase only those documents they rely on. They can be required, however, to disclose any other documents they may have in their possession subject to certain requirements (Article 328 CPA). The document, however, should be related to the subject matter of the proceeding. When applying for disclosure, the party is obliged to attach a copy of the document or, if not available, to identify as far as possible its contents. The party refusing to comply with an order of disclosure of documents may be subject to possible criminal penalties for contempt of court. In addition, the judge has two courses of action: (i) to accept, taking into account the remaining evidence gathered, the copy filed by the proposing party or the party's version of the contents of the documents or (ii) to request the party once again to produce the document, provided that the features of the document make it necessary to see it and taking into consideration the other evidence produced by the parties and the position and allegations of the party that proposed such evidence (Article 329 CPA).

As a general rule, third parties may only be obliged to disclose documents when requested by any of the parties and the court would understand that the knowledge of the document may be essential for adjudicating the matter (Article 330 CPA). In this event, the court would summon the third party to determine whether it has any objection to disclose the evidence requested. The third party has the option to appear personally to show the documents and let the court make copies or request that a court official appears and makes the copy without taking the document away from the records. However, in practice, third parties send copies of the documents requested by post or a statement informing that they do not have the document.

Governmental agencies or corporations always have the duty to disclose the requested information, save that it would be classified as confidential or secret, in which case they should inform the court in writing about the reasons for non-disclosure.

3. What types of relationships in the insurance context may be subject to the attorney-client/ solicitor-client relationship?

The attorney-client relationship in the insurance context is similar to the attorney-client relationship in any other legal context.

The common law attorney-client privilege is a relative equivalent in our jurisdiction to the professional secrecy, which is a fundamental principle of the Administration of Justice which materialises in a lawyer's right not to testify and a lawyer's duty not to disclose the confidential information of his client.

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

Generally, no. Please see our answer to Question 1.

Consequently, any contacts whether verbally or in writing between an Insured and its Insurer would be subject to disclosure at the request of the third party provided the applicable legal requirements are met.

b. Are there doctrines, such as joint client, joint defence, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

There are no doctrines such as joint client, joint defence or common interest in our jurisdiction entailing the effect of preventing disclosure of the communications to third parties suing the Insured/Insurer.

In any event, regard must always be had to the Personal Data Protection Act in case such documents contain information of a personal and private nature which generally cannot be disclosed unless authorised by the court.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

ii. The Insurer provides a defence pursuant to a reservation of rights?

[Same answer to both questions]

Protection from disclosure of communications between the Insured and the Insurer to a third party will not differ in either event. In both events, as said in our answer to Question 1, these communications are subject to disclosure if the requirements set forth in the relevant commercial and procedural rules are met.

iii. The Insurer has denied coverage?

No difference as explained above.

iv. The policy provides only a duty to indemnify and not a duty to defend?

No difference as explained above.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

Third parties to the Reinsurance contract -- the Insured litigating against the Insurer and a third party plaintiff litigating against the Insured and/or the Insurer -- may wish to obtain that information. In principle, any contacts whether verbally or in writing between an Insurer and its Reinsurer would be subject to disclosure if, as said above, the requirements set forth in the commercial and procedural rules are met.

It should be noted that neither the Insured nor the third party plaintiff has a direct right of claim against the Reinsurer. Indeed, under Article 78 of the Insurance Contract Act 1980 (hereinafter "ICA") the third parties to the Reinsurance contract such as the Insured, policyholder, beneficiaries or any other third party (e.g., the injured party in a loss covered by a third party liability insurance) have no relation with, and therefore no claim against, the Reinsurer. This should not mean that information may not be sought from the Reinsurer under the applicable rules.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

Pursuant to the provisions of Article 27.4 of the General Statute of the Spanish Legal Profession, law may also be practised under an employment relationship. Accordingly, an in-house counsel is subject to the same rights and obligations as an external counsel, including the right (and the duty) of confidentiality and secrecy of communications. From that perspective, there is no difference between in-house counsel and external counsel.

The Spanish rules seems to differ from the decision of the European Court of Justice on the Azko Nobel case, which found that privilege can only arise in external counsel communications, defined as those not employed by its client under an employment relationship. Therefore, under Akzo Nobel, communications between an In-house counsel and the directors of a company are not protected from third parties and those documents are subject to disclosure.

Considering the peculiar meaning of privilege under Spanish law (limited to the confidentiality duty and secrecy imposed on lawyers), that decision appears to be inconsistent with Spanish rules in this regard.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

As mentioned, there are no express rules governing "privileged" or "without prejudice" documents or communications, as may be the case in common law jurisdictions.

Confidentiality of information exchanged between lawyers and clients is established in the Judiciary Power Organic Act, the Dentology Code and in the General Statute of the Spanish Legal Profession.

The Judiciary Power Organic Act provides that lawyers must keep confidential all the facts or information acquired as a result of their professional activity and cannot be required to testify with regard to such facts or information.

Professional secrecy and confidentiality are duties imposed on the lawyer, as well as rights. A lawyer is obliged to keep secret the facts that he/she may come across during his/her professional practice and he/she cannot be obliged to declare about them. Consequently, even when summoned to

declare in a suit, he/she can exercise the right to remain silent.

The duty of professional secrecy also includes the confidences and proposals of the client, those of the opponent, and of colleagues. A lawyer cannot file in Court and turn over to his client the letters, notes or communications received from the opponent's lawyer, unless express authorization of the opponent's lawyer.

The Criminal Code punishes the lawyer that breaches this duty with imprisonment from one to four years, a fine of twelve to twenty-four months and disqualification for the practice of law for two to six years. Notwithstanding, Article 416.2 of Criminal Procedure Act exempts lawyers from the duty to testify.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

The question assumes there is privileged information. As explained above, "Privileged" has a limited meaning in Spain.

Under Article 16 of ICA, the Insured has the duty to provide all information available on the circumstances and consequences of the loss. The breach of this duty with gross negligence or bad faith on the part of the Insured would release the Insurer from its obligation to indemnify.

The law says: all information on the circumstances and consequences (financial) of the loss. A legal opinion of the lawyer to his client (the Insured) on the loss and its consequences would probably not be included in this requirement, unless the contract is concerned with so called large risks in which the parties can depart from the otherwise mandatory provisions of ICA and agree as they wish, and the parties would have agreed to disclose that information (which rarely or ever happens). The lawyer would not be required to disclose the communication unless authorized by his/her client.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

Taking into account that "privilege" in the Spanish sense centres on the lawyer's duty of confidentiality and professional secrecy, the client can authorise its lawyer to disclose any relevant information (with qualifications) and also the opponent's lawyer can do the same in connection with conversations, negotiations, exchange of documents, etc. held with that other lawyer.

The Governing Board of the local law society may, in exceptional cases in which the required preservation of the professional secrecy would cause irreparable harm or flagrant injustice, advise the lawyer in order to guide and identify alternative ways to resolve the dispute by weighing the legal interests in conflict.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

If, for example, the issue centres on a so called "privileged" document and the lawyer files it as evidence, it is clear that he or she would no longer be able to claim confidentiality. However, the hypothesis is quite unrealistic since communications between lawyers and clients generally contain legal assessment of past facts and recommendations but do not provide evidence of such facts.

c. Can privilege be waived inadvertently?

Assuming there would be "privilege" or better considering Spanish-style privilege, waiver of any rights or privileges to be valid, must be clear, explicit, precise and unambiguous, as held in the Decision of the Supreme Court of December 3, 2008 [RJ 2008/34]. Waiver of actions arising out of fraudulent or bad faith acts are null and void.

Further, the waiver of any rights shall only be valid when such waiver does not contradict the public interest or public policy or cause a detriment to third parties pursuant to the provisions of Article 6.2 of the Civil Code.

An interesting question is, what happens if the lawyer files the confidential documents in breach of his/her professional duty? Irrespective of the disciplinary measures that could be adopted against the lawyer in question, would that document be admitted as evidence? As said above, such evidence could be struck only if it would have been obtained in breach of fundamental rights.

d. Bad Faith Actions

Bad faith denials of insurance claims or frivolous litigation by the Insurer against its Insured's claims can have serious consequences.

In the first case, failure to pay or the negligent delay in paying will result in the Insurer paying a special interest which is punitive in nature since it is unrelated to the actual market cost of money. The amount will be calculated at the annual legal interest rate increased by 50 percent for each of the first two years payment is in arrears and at no less than 20% per year thereafter. To be released from

the punitive interest, the Insurer must prove that there were justified causes that prevented it from settling the Insured's claim earlier. Case law has set out very stringent requirements which are very difficult to meet.

In the second case, there is a decision where the Supreme Court required the Insurer to pay the claim exceeding the policy limit. Indeed, the Decision of the Supreme Court of May 2, 1998 [RJ 1998/3463] found that the Insurer had unfairly hindered and delayed litigation and thus payment of the indemnity, while damages to the property had aggravated. Consequently, the Insurer was ordered to pay the full indemnity beyond the limits of the policy.

Please note that these are contractual actions, not tort actions.

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

No, because the duty is imposed on the Insurer's coverage counsel.

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

The same answer.

8. <u>What are the best practices for maintaining privilege in the insurance context?</u>

Always taking into consideration the peculiar meaning of "privilege" under Spanish law, the main best practices for maintaining "privilege" (actually, the professional secrecy and confidentiality of communications) in the insurance sector are the following:

- Any correspondence between counsel and client should be labeled or marked "strictly confidential: not subject to disclosure without approval" or similar warning. The "without prejudice" statement has no real meaning in Spain, unless it is explained in full.

- Insurance policies must contain a well drafted confidentiality clause.

- Contracts or claims settlement negotiations should be conducted preferably by lawyers whether in-house or external who are subject to the duty of confidentiality and therefore legally unable to disclose them.

- On many occasions due to the insurance industry ways and dynamics it will not be possible to avoid the parties' direct involvement. Remember that communications whether orally or in writing between the parties are subject to disclosure. You can consider signing a confidentiality agreement and a penalty for breach of the agreement. Although this agreement will not prevent the disclosure of such communications in court, the penalty could be a deterrent.

- A reminder on the initial communication with the opponent's lawyer of the confidentiality duty and the scope of it.

- The lawyer must enforce surveillance and control means in his own practice to avoid information leaks.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules?

As said above, there is no attorney-client privilege as such in Spain. Rather, the emphasis has been laid on the lawyer through a number of legal duties and rights which the lawyer has to meet in the first place. The end result, however, can be quite similar.

Accordingly, communications between counsel and the other numerous players in the insurance arena (Insureds, beneficiaries, policyholders, third party plaintiffs, Insurers, Reinsurers, retrocessionaires, brokers, etc.) will be protected from disclosure by the lawyer's duty of confidentiality and secrecy. However, direct communications between the parties themselves are not subject to confidentiality and can be disclosed if the commercial and procedural requirements are met.

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1. How do privilege issues arise in insurance disputes?

Under Swedish law, there are no general rules regulating privileged information in insurance disputes. Furthermore, broad discovery, as a part of pre-trial litigation in the US and elsewhere, is not available under Swedish law. Nevertheless, parties to a dispute may ask each other questions and for access to relevant documents under the proceedings leading up to the main hearing. If a party is denied access to the requested documents on a voluntarily basis, the requesting party may seek recourse from a court or arbitral tribunal to issue an order for document production (*Sw.edition*). Hence, even if questions can be asked and requests can be made, the Swedish regulation on discovery has a varying approach, compared to some common law jurisdictions that base their rules for discovery on a policy of mutual disclosure.

The Swedish Insurance Contract Act regulates the relationship between Insurer and Insured. However, no provision under the act specifically regulates privileged or confidential information between Insurer and Insured.[1] Instead, the Swedish Insurance Business Act, which regulates the operation of the Insurance business, includes two specific provisions regarding confidentiality. First, the Insurer may not disclose any information regarding the Insured's genetic information. Second, the Insurer may not disclose certain personal data regarding deposits made to the insurance for a future beneficiary. In the absence of legislation, confidentiality issues between Insurer and Insured are mainly regulated through the applicable insurance contract.

Under the Swedish Code of Judicial Procedure, a party to a litigated dispute may ask the court to order anyone to produce written documents (including electronically stored information), if the documents are assumed to be of relevance as evidence (*Sw. edition*). However, it should be noted that a court might reject such a request if, for example, the documents in question are privileged or contain trade secrets.

Under the Swedish Arbitration Act, an arbitral tribunal can order anyone to produce documents as evidence. However, such order is not enforceable and therefore the requesting party may ask the arbitral tribunal for permission to bring such a request before a court. The court's decision may be enforced with the assistance of the Swedish Enforcement Authority.

As noted above, pre-trial discovery and so-called "fishing expeditions" are generally not permitted under Swedish law. However, there is an exception to this general rule. A request for document production under certain circumstances may be brought before the court even though a court proceeding has not yet been initiated. Such request requires a risk that the evidence could otherwise be forfeited or be very difficult to produce at a later stage of the proceeding. Case law on this issue is sparse, but an appellate court has held that a request for document production cannot be granted prior to initiated court proceedings if the requesting party's only reason for the request is to gather documents that may help to substantiate the basis of a claim. The court rejected the request stating that the objective of the requesting party was not primarily to gather evidence for the claim, but rather to establish what had taken place at a certain meeting.[2]

Although the relationship between the Insurer and Insured is mainly stipulated through an insurance contract, the parties cannot contractually bar a court from issuing an order for document production in a dispute between them or against a third party.

The Swedish Code of Judicial Procedure provides protection for privileged information between attorney and client. Information can only be deemed privileged if it is presented to a member of the Swedish Bar Association, *i.e*. an *advokat,* or employees of the advokat. This privilege applies to all types of information and documentation and is not limited in time. The Swedish Bar Association may decide on disciplinary actions if an advokat fails to comply with privileged information under the Swedish Bar Association's Code of Professional Conduct.

It should be noted that under the Freedom of Press Act, all documents received by a Swedish governmental authority (including courts) are deemed to be official documents and thereby accessible. Hence, anyone can request a copy of documents submitted to a governmental authority, which as mentioned, includes courts. However, access to information may be limited under the Swedish Information and Official Secrets Act if, as a main rule, disclosure of the document can be assumed to cause damage to an individual or a business which is not proportional to the requesting party's interest of receiving a copy of the document.

[1] By 1 July 2011, the Swedish Insurance Contract Act will be amended to include some protection for privacy issues, see section 6 below.

[2] Appellate Court Case, RH 1993:162.

The effect of documents becoming public when submitted to a court must also be taken into consideration in arbitral proceedings when bringing a request for document production before a court. In order to maintain the confidentiality of the document(s), along with the dispute, a party should request that the produced documents be submitted directly to the arbitral tribunal instead of the court. This will ensure that the documents do not become official documents and thereby available to the public as described above.

Sweden, as well as in Europe at large, has a strong protection for personal data. Failure to comply with the Swedish Personal Data Act may result in fines, damages or criminal penalties. In an insurance context personal data issues may be relevant when document production is requested as well as in connection with inspections. For example, re-insurance contracts often allow the Reinsurer to inspect the books of the Insurer as well as other documentation. If the Reinsurer requests information that contains personal data (which is often the case), such information may only be transferred in accordance with the Personal Data Act.

Any kind of information that directly or indirectly may be referred to a natural person who is alive constitutes personal data under the Personal Data Act. This includes, *inter alia*, personal identity numbers, e-mail addresses, employment numbers (hereinafter "Personal Data"). Anonymous data, from which it is possible to indirectly identify a private individual, is also included under the definition. The Personal Data Act applies to all processing of personal data by a company established in Sweden, including transfer and disclosure to a third party

Personal Data may be processed only if the individual to whom the Personal Data relates has consented to the processing or if the processing is necessary in order to *inter alia* satisfy a legal obligation of the processor or to satisfy a purpose that concerns a justified interest on the part of the processor or on the part of a third party to whom the Personal Data is transferred or disclosed, provided this interest outweighs the registered person's interest in protection against violation of personal integrity.

The Personal Data Act singles out a certain kind of Personal Data for which specific regulations apply due to its sensitive nature. The Personal Data Act defines such sensitive personal data as data that discloses race or ethnic origin, political opinions, religious or philosophical convictions, membership of trade unions and data relating to health or sexual life ("Sensitive Personal Data"). As a general rule, it is prohibited to process Sensitive Personal Data without an explicit consent from the Registered Person. However, there are exceptions to this main rule. Consequently, the prohibition does not *inter alia* apply:

- if the processing is necessary in order to protect vital interests of the registered person or someone else and the registered person cannot provide his consent; or

- if the processing is necessary to establish, exercise or defend legal claims.

Document production of documents located in Sweden (either physically or electronically) which implicate cross border transfer of the documents gives rise to certain specific issues.

Sweden has ratified the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. However, Sweden has made a reservation in regards to Article 23 and declared that so-called Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries will not be executed.[3] Further, Swedish courts may assist in the taking of evidence under the European Union Council Regulation (EC) No. 1206/2001of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

When transferring Personal Data outside the European Economic Area one must consider that such transfer may be prohibited by the Personal Data Act if the level of protection, with regard to the processing of Personal Data, is not satisfying in the country to which the Personal Data is transferred.[4] This can be resolved through the use of certain standard contract clauses issued by the European Commission or approval by the relevant data protection authorities. If Personal Data is transferred to the US, where the level of protection is generally deemed to be insufficient, the issue may be resolved by the receiving company simply by adopting the so-called Safe Harbour Rules.

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[3] The Swedish Government has clarified that it understands "*Letters of Request issued for the purpose of pre-trial discovery of documents*" as including any Letter of Request which requires a person to (a) state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power, or

(b) produce any documents other than particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power.

[4] Sweden has not introduced so called *blocking statues*, such as for example France, i.e. general laws restricting cross border discovery of information intended for disclosure in foreign jurisdictions.

There have been cases in which affiliates of multinational companies have been caught between the conflicting demands of disclosure obligations in certain jurisdictions and Swedish data protection requirements (which is similar to all jurisdictions within the EU). Companies may be under significant pressure to produce documents and materials (including items stored electronically) in relation to litigation and law enforcement investigations brought in for example the US. If the material that is required contains Personal Data, and specifically Sensitive Personal Data, the company may not have the right to disclose the documents and may also be prevented from transferring the information to the US.

a. What type of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

As noted above, a party to a litigation or arbitration may ask the court or arbitral tribunal to issue an order for document production under the Code of Judicial Procedure or the Arbitration Act respectively. The general rule is that anybody, even a non-party, may be ordered to produce a written document that is assumed to be of importance. However, a suspect in a criminal case, or anyone related to the suspect, is exempted from the obligation to produce documents. Further, neither a party, nor any person related to him, is obliged to produce written communications between them or between such related persons.

Moreover, pursuant to the Code of Judicial Procedure, certain categories of persons are exempted from an obligation to disclose evidence if the content is such that the person cannot be heard as a witness thereto. This applies to, *inter alia*, attorneys, medical doctors and psychologists. Personal notes are also exempted unless an extraordinary reason exists.

Before ordering the production of written documents, the requested individual is permitted to state his or her view. The court may combine its decision on production of evidence with a penalty of a fine. The person presenting the documents has a right to receive compensation for the costs and inconvenience incurred. The compensation is paid by the party requesting the disclosure.

A party may also request a court to issue on order for document production of official documents. Documents deemed confidential under the Swedish Information and Official Secrets Act and documents concerning for example trade secrets can nevertheless be exempted.

To be able to legally enforce an order for document production, the documents requested must be somewhat identified. For example, all documents related to a well defined circumstance or all documents of a certain type limited to a specific time period (*e.g.* board minutes) may be requested. This requirement is based on the fact that it would be difficult to decide whether the disclosing party has fulfilled its obligation. Furthermore, it would also be impossible for the Swedish Enforcement Authority to enforce the decision if it is not clear what documents the order comprise.

2. <u>As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party´s ability to obtain access to insurance related documents?</u>

There is no general rule limiting a party's ability to obtain access to insurance related objects. However, as set out in section 1 above, there are generally applicable regulations that limit a party's ability to access documentation.

3. <u>What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?</u>

a. Are communications between Insured and Insurer protected from third parties by the attorney-client/solicitor-client privilege?

No. Only information exchanged between a client and an advokat is protected under the advokat-client privilege in Sweden and this privilege does not apply to communication between Insured and Insurer. The confidentiality of information in the insurance context is contractually regulated by the wording of the insurance contract.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communication from discovery/disclosure to third parties in insurance disputes?

Such doctrines do not exist under Swedish law.

c. Is privilege applied in a different manner where

i. The Insurer has agreed to defend the Insured without reservations of rights?

No. However, such an agreement could be contractually binding between the parties.

ii. The Insurer provides a defense pursuant to a reservation of rights?

See answer to (c)(i) above.

iii. The Insurer has denied coverage?

Privilege is not applied differently under these circumstances.

iv. The policy provides only a duty to indemnify and not a duty to defend?

See answer to (c)(iii) above.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

The privilege solely depends on the agreement between the Insurer and Reinsurer. However, such an agreement does not bar the court from rendering an order for document production in a dispute, see section 1 a above. Furthermore, as described in section 1 above, inspections and document production relating to re-insurance disputes may sometimes also raise privilege issues in regards to Personal Data.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

An in-house counsel is not considered to be within an advokat-client relationship with its employer as the in-house counsel is not an external professional and independent in relation the employer. This is consistent with ECJs decision as of 14 September 2010 against *Akzo Nobel.*

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

The advokat-client privilege applies to an advokat and all related documents drawn up by such professional is privileged.

As set out in section 1 a. above, the general rule is that anyone can be ordered by a court to produce any document that can be assumed to be of importance as evidence. However, a document drawn up, after the initiation of a dispute, is presumed to have no evidential value and does not qualify for an order of discovery. It is therefore unlikely that a party would be successful if requesting an order for document production of such document.

It should be noted, that exceptions to this general rule do exist in case law. In one case, the Insured brought a dispute before the district court claiming a right to insurance indemnification due to a traffic accident. The Insured asked the district court to issue an order for document production of the Insurer's written proposal for settlement of the claim sent to the Swedish Road Traffic Injuries Commission. The Insurer opposed this request. However, the district court found that the document requested was of importance as evidence and ordered the Insurer to produce it. The Insurer appealed the decision unsuccessfully. The Insurer claimed that the document in question was not to be shared with the Insured as an Insurer might propose to pay indemnification to a higher amount than discussed with the Swedish Road Traffic Injuries Commission. To uphold a uniform personal claims adjustment the Insurer usually pays insurance indemnification in accordance with the Swedish Road Traffic Injuries Commission's recommendation. The Insurer argued that the Insured would be confused if informed of the fact that the Insurer (in certain cases) initially was prepared to indemnify a higher amount. Hence, the Insurer claimed that the document in question was of no importance as evidence. However, the appellate court found the document to be of importance as evidence and decided in favour of the Insured. It is debated whether this decision has any value as a precedent since the circumstances of the case were rather specific.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

As mentioned in section 1 a. above, an Insurer in a dispute may ask the court to issue an order for document production against the Insured regardless of whether the Insured is party to the dispute at hand. Upon such request by the Insurer, the court must then determine whether the required documents are privileged or confidential.

The insurance contract stipulates on a contractual basis the confidential undertakings between the Insured and Insurer. The insurance contract is binding between the parties, but an Insurer might not, under the Insurance Contract Law, be bound to uphold the contract if an Insured acted fraudulently or in bad faith and did not provide accurate and demanded information when signing the contract.

As the Insurer-Insured relationship is contractually regulated the Insurer can demand certain information of the future Insured before signing the insurance contract. However, by 1 July 2011, the protection for privacy issues will become improved under the Swedish law. The possibility to request access to medical records will for example be limited. The Insurer will only be able to require access to an individual's medical information when it is deemed necessary and not, as today, more or less in all applications.

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

As a general rule, only the privileged party can waive the privileged information. Hence, a client is authorized to waive the advokat-client privilege under the Swedish Code of Judicial Procedure.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

Privileged information will become official information if it is presented in court. However, under the Swedish Code of Judicial Procedure the court can order that the information should be kept confidential.

c. Can privilege be waived inadvertently?

If information qualified as a "trade secret" is disclosed in the public domain it most likely would not continue to be deemed as confidential.

d. Bad Faith Actions

Although there is a duty of loyalty between the Insurer and Insured, no damages in addition to contract damages can be sought even if the Insured acted in bad faith. The US concept of "bad faith actions" does not exist under Swedish law. In this context it should be noted that the Insurer may decide not to compensate an Insured who is responsible for the event that causes the damages. Further, if the insured acted with gross negligence or aggravated the outcome, the Insurer may reduce the insurance indemnification. The same applies for business insurances. The Insurer may also for business insurances, and under certain circumstances for private insurances, regulate in the Insurance contract that negligence may result in reduced insurance indemnification.

8. What are the best practices for maintaining privilege in insurance context?

There are no specific rules regulating privileged information in the insurance context under Swedish law. Instead, the best way to ensure privileged information in this context is to specify the details governing confidential information in the terms of the Insurance contract and condition this with a penalty of a fine.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

As mentioned above, there are no specific rules governing privileged information in the insurance context. However, information held by a Swedish Governmental Authority may be confidential under the Swedish Information and Official Secrets Act, in respect of personal or financial interests. The advokat-client privilege applies to all communication between the advokat and client.

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1. How do privilege issues arise in insurance disputes?

The concept of pre-trial discovery proceedings is not known to Swiss law or procedure, something that Switzerland has in common with many other civil law jurisdictions. To the extent that issues or privilege against disclosure do arise, therefore, they are different both in quality and in timing (they do so at a much later stage in the proceedings) from similar issues than in common law countries.

Prior to any discussion concerning insurance related privilege issues, one should first understand the concepts used in Swiss legal proceedings in general.

In Swiss legal proceedings each party first presents its factual and legal arguments to the court and offers its evidence (such as expert opinions, witnesses and documents). The competent court then ascertains which of the facts are disputed and, in the main hearing, the evidence offered by the parties will be taken by the court[1]. Any request of one party that the opposing party or a third party should produce documents is, thus, used for evidentiary purposes only. The same principle applies to witnesses who may have the right to refuse to cooperate. The parties are, in principle, not permitted to make requests to collect their information before they prepare their depositions.

The concept of the precautionary taking of evidence does exist, but is, apart from some minor exceptions, only permitted where the applicant furnishes plausible proof that evidence is endangered or that it has an interest worthy of protection[2]. A typical example is the taking the testimony of a witness who is ill and may die before the main hearing takes place.

If the party who bears the burden of proof is of the opinion that any insurance related document may support their claim, it may request such evidence in one of their submissions upon the merits. Although the Swiss Code of Civil Procedure provides a duty to cooperate for both litigants and third parties, such duty applies to a fairly late stage in the proceedings[3]. It does not help one party collect the relevant information in order to prepare its briefs upon the merits and "fishing expeditions" prior to the submission of briefs are not allowed. Furthermore, if one party submits a request that the other party or a third party should produce particular documents, the requesting party needs to show, *prima facie*, that the documents asked for are in the possession of the relevant party and are of some relevance for proving the disputed fact[4]. Whether or not such document is of relevance is in a fairly wide discretion of the court and, compared to other jurisdictions, in general narrow.

If the requesting party clears that hurdle and the court grants its request, issues of privilege can arise in relation to the following persons: Litigants and third parties must decline cooperation where such would fulfil the criminal offence of divulging secrets in the meaning of Art. 321 of the Penal Code ("**PC**"), with the exception of auditors[5]. These persons are attorneys, notaries, clergy, medical doctors and their auxiliary persons. Furthermore, a third party (i.e. not a litigant) must decline cooperation

- in establishing facts entrusted to it as an official or in its official capacity as member of an authority or in the exercise of its office[6];
- where it would have to testify with regard to facts learned while acting as ombudsman or mediator[7]; and
- in establishing the identity of an author or of the contents and sources of information where engaged as journalist[8].
- Other persons (litigants or third parties) privy to secrets that are also protected by law (such as bankers[9]) can refuse to cooperate if they show, *prima facie,* that the interest in maintaining secrecy overrides the interest in discovering the truth[10].

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1 Art. 231 of the Swiss Code of Civil Procedure („**CCP**").

2 Art. 158 CCP.

3 The relevant Art. 160 (1) reads as follows: "The parties and third parties have a duty to cooperate in the taking of evidence." Although Switzerland has four official languages the English version of the provisions cited in this chapter is a private translation and taken from the book Berti (ed.), Texto Schweizerische ZIvilprozessordnung, Basel 2009.

4 BSK ZPO-Schmid, Art. 160 N 29.

5 Art. 163 (1) (b) and Art. 166 (1) (b) CCP.

6 Art. 163 (1) (c) CCP.

7 Art. 166 (1) (d) CCP.

8 Art. 166 (1) (e) CCP.

9 Art. 47 of the Federal Act on Banks.

10 Art. 163 (2) and 166 (2) CCP.

Although the parties themselves (if they do not belong to any of the above mentioned group of persons) and their internal files are not protected by any rules concerning privilege they may invoke other legitimate interest to avoid the production of internal documents (e.g. the interests of one party not to disclose its own business secrets and that their personal rights and their constitutional right of having a fair trial are observed). The relevant provision in that respect is Art. 156 CCP which reads:

"If taking evidence puts at risk interests worthy of protection of a party or a third party, particularly their business secrets, the court orders the necessary measures."

If there are no suitable protective measures, the courts usually do not take such evidence at all[11].

Having set out the general principles in Switzerland in insurance related cases the client-attorney privilege and the privilege of medical doctors are the most relevant privileges. As explained above, however, the production of documents is, compared to some other jurisdictions, fairly limited and it is, even without privilege issues, difficult to succeed with requests to obtain documents from the opposing or third parties (see the below discussion in more detail).

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

i) Insured's tender of defense to an Insurer

There is no comparable document that is used in Switzerland.

ii) statements made by the Insured to its Insurer

Such a statement would normally not be considered to have passed the relevance test as they can often be incomplete or be designed to accentuate certain facts so as to minimise the chances of loss of coverage.

iii) Insurer's claim file, including internal analysis of claim and coverage

Files or documents produced for internal purposes or use are normally protected from disclosure.

iv) communications from a ceding Insurer to its Reinsurers including loss reports

These would not be considered relevant in a dispute between an insurer and its insured.

v) Insurers' and reinsurers' reserve information

Such information is not considered to be relevant here in Switzerland. It is internal information and is protected as being commercially confidential.

vi) Insurance policy

The existence or the content of an insurance policy is not considered to be relevant to the question of liability

vii) Others?

Communications between the insurer and the reinsurer, the claims file and reserve information are all considered to have no relevance to the insured's claim.

2. <u>As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?</u>

Apart from the above comments given in response to the question at 1 above, there are no other rules that would further limit the access to insurance related documents. The general rules apply.

In international arbitral procedures with seat in Switzerland similar rules to those in state court proceedings should be applied. It is not possible to be definitive in this respect, though, as more often than not, more than one foreign jurisdiction is involved and the applicable rules of procedure may vary. However, Art. 184 of the Swiss Act on International Private Law ("PILA") provides that in international arbitral procedures the arbitral tribunal shall itself take evidence and, where the assistance of the state is required for taking evidence, the arbitral tribunal may request the assistance of the judge at the arbitral tribunal's seat. If such assistance is required (because, e.g., one witness refuses to testify for privilege reasons), the judge would then have to apply Swiss law. If Swiss law would allow a privilege against responding to the request, the competent judge will not be able to compel the interrogated witness to testify.

Similar provisions apply to national arbitration[12].

11 BSK ZPO-Guyan Art. 156 N 6.

12 Art. 375 CCP.

3. What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

Communications between Insureds and Insurers are protected from third parties by the attorney-client privilege. The relevant provision is Art. 160 (b) CCP which reads:

"The parties and third parties have a duty to cooperate in the taking of evidence. In particular, they must:

[...]

b. produce documents; with the exception of correspondence between counsel relating to the professional representation of a litigant or a third party;

[...]."

It is of no relevance where the correspondence is stored. It is also privileged if it is held by the client or third parties and it is not relevant whether or not the correspondence is related to the subject matter. The term "correspondence" is interpreted extensively and covers also memoranda and file notes[13].

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

No, but it is not necessary to rely on such doctrines here, given the approach of the law to disclosure obligations. An attempt to obtain the correspondence passing between joint-defendants, for instance, would not be allowed on the grounds of the parties' rights to a fair trial, even if it were found to be relevant.

c. Is privilege applied in a different manner where:

i) The Insurer has agreed to defend the Insured without reservation of rights?

No.

ii) The Insurer provides a defense pursuant to a reservation of rights?

No.

iii) The Insurer has denied coverage?

No.

iv) The policy provides only a duty to indemnify and not a duty to defend?

No.

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

As stated above, in most cases they will not, because other principles, such as the right to a fair trial, business confidentiality, and relevance will be applied.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

In-House Counsel are in principle not privileged person, neither by Art. 321 PC nor Art. 160 to 166 CCP, nor the Penal Code.

Their testimony (similar to pure internal documents), however, would in most cases be regarded as business secrets, which would in most cases not have to be disclosed. In-house counsel usually assert that they are also protected by Art. 162 and 273 PC. Art. 162 PC provides that, whoever divulges a manufacturing or business secret that he or she is bound to keep pursuant to a legal or contractual obligation, shall be punished with imprisonment or a fine.

Where in-house counsel give testimony in Swiss proceedings as a third party they could refuse to cooperate based on Art. 166 (1) (a) CCP which reads:

"A third party can refuse to cooperate:

a. in establishing facts that would expose it or a close person within the meaning of Article 165 to the risk of penal investigation or civil liability;"

In proceedings taking place abroad, in-house counsel may, further, raise the argument that they could be punished for economic intelligence service pursuant to Art. 273 PC, if they give testimony about internal aspects of their employer. The article states in sections 2 and 3 that, whoever makes a manufacturing or business secret accessible to a foreign official agency, a foreign organization, a private enterprise, or their agents, shall be punished with imprisonment or a fine.

13 BSK ZPO-Schmid, Art. 160 N 17.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

There is no litigation privilege in Switzerland as such. This does not mean, however, that documentation that would be protected by such a privilege in other jurisdictions would have to be disclosed here. There is a relatively limited obligation to disclose documentation, which is effective only with regards evidence relevant to a case rather than the development of arguments, for instance, and the protection afforded by concepts such as business confidentiality, documents produced for internal use only and the right to a fair trial.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

No, such compulsion is not possible.

7. How can privilege be waived in insurance disputes?

Privilege in insurance disputes can be waived in the same way as in the case of disputes in general: the person whose confidential information it is can waive it. One needs to be careful, however, not to confuse an obligation not to make disclosure (that of the Attorney, for instance) with the right not to disclose.

a) Who has the authority to waive privilege?

Only the person whose confidential information it is. The Regulator for lawyers, which can principally release a lawyer of his or her duty of confidentiality, is not entitled to do this in disputes. Art 160 CCP is strict in this case.

b) Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

In general, no, and an example is unknown to us.

c) Can privilege be waived inadvertently?

No.

d) Bad Faith Actions

While the obligation to act in good faith exists, bad faith actions, particularly in the American sense do not exist in Switzerland.

8. What are the best practices for maintaining privilege in the insurance context?

In Switzerland the process of discovery is such that by its nature it will be less necessary to consider such questions than in some other jurisdictions. Since there is no privilege afforded by in-house counsel and since that may lead to difficulties in international disputes, by such disputes it is recommended that external, independent lawyers should be involved and all documentation should be kept by them.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

In Switzerland we do not draw the same distinctions or lay the same emphasis on them when they are drawn. We differentiate confidential information the disclosure of which may amount to a breach of contract from information the disclosure of which would also be sanctionable under the Penal Code or other criminal law provisions in other acts (such as Article 47 of the Federal Act on Banks, for example).

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1. How do privilege issues arise in insurance disputes?

There is no concept in Taiwan similar to attorney-client privilege and/or work product protection. However, pursuant to Article 182 of the Taiwan Code of Criminal Procedure, a witness who is or was a medical doctor, pharmacist, obstetrician, clergy, lawyer, defense attorney, notary public, accountant, or one who is or was an assistant of one of such persons and who because of his occupation has learned confidential matters relating to another may refuse to testify when he or she is questioned unless the permission of such other person is obtained.

With respect to civil proceedings, pursuant to Article 307 of the Taiwan Code of Civil Procedure, a witness may refuse to testify where the witness is to be examined with regard to a matter which he or she is obliged to keep confidential in the course of performing his or her official duties or conducting business. Based on this provision, and the fact that the Attorneys Law of Taiwan, an enacted statute, specifically requires attorneys generally to maintain the confidences of their clients, lawyers may be able to refuse to testify in civil proceedings, which can also be interpreted as a kind of privilege against disclosure.

The foregoing is in effect a type of privilege against disclosure. Some scholars have asserted that such privilege against disclosure is equivalent to "attorney-client privilege". Because the foregoing applies to bearing witness in court and does not specifically extend to work-product, some scholars have advocated that the law needs to be clarified to extend to cover work product. However, those scholars' positions have not been acknowledged or adopted by the courts.

In practice, because Taiwan does not have a body of laws or rules concerning discovery and evidentiary procedures and it is common for the parties to assert privilege based on client confidentiality, it is up to each judge (or judicial panel) to decide whether to require the relevant disclosure.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

There is no concept in Taiwan similar to discovery which requires one party to produce documents requested from the other party. However, pursuant to the Taiwan Code of Civil Procedure, a document must be produced when it is identified to be introduced as documentary evidence. In the event the document identified to be introduced as documentary evidence is in the opposing party's possession, a party must request the court to order the opposing party to produce that document. A party has the duty to provide the following documents in a civil proceeding:

(1) Documents to which such party has made reference in the course of the litigation;

(2) Documents which the opposing party may require the delivery or an inspection thereof pursuant to applicable law;

(3) Documents which are created in the interests of the opposing party;

(4) Commercial accounting books; and

(5) Documents which are created regarding matters relating to the action.

A party may refuse to produce a document provided in the fifth subparagraph of the preceding paragraph if it involves the privacy or business secret of a party or a third party and the resulting disclosure may result in material injury to such party or third party. In order to determine whether the party has a justifiable reason to refuse the production of the document, the court, if necessary, may order the party to produce the document and examine it in private. Therefore, in practice, it is up to each judge (or judicial panel) to decide whether to require the relevant disclosure and more importantly to set a deadline for such disclosure (if any deadline is set at all). It is common for parties to assert confidentiality on most or all business documents to be viewed by only the relevant judge (or judicial panel).

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

As mentioned above, Taiwan does not have a body of laws or rules concerning discovery and evidentiary procedures. A party in civil proceedings may request the court to order the opposing party to produce documents (including insurance related documents). A party has the duty to provide documents in the civil procedure as described above in response to the question at 1(a) above, unless the document involves the privacy or business secret of a party or a third party and the resulting disclosure may result in material injury to such party or third party, in which case the party may refuse to provide such document. Notwithstanding the foregoing, the court, if necessary, may still order the party to produce the document and examine it in private.

For documents identified to be introduced as documentary evidence which are in a third party's possession (such as a medical report), a party may request the court either to order such third party to produce such document or to designate a period of time within which the party who intends to introduce it as evidence shall produce such document. In the event the court considers that the disputed fact is material and that the motion is just, it may order the third party to produce the document or to designate a period of time within which the party who intends to introduce it as evidence shall produce such document. Similar to the documents in the opposing party's possession, a third party has the duty to produce such documents, except where a document involves the privacy or business secret of a party or a third party and the resulting disclosure may result in material injury to such party or third party. The court, if necessary, may still order the party to produce the document and examine it in private. Furthermore, if a third party disobeys an order to produce documents without giving a justifiable reason, the court may impose a fine not exceeding NTD 30,000; where necessary, the court may also order compulsory measures to be taken.

3. <u>What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?</u>

There is no concept of attorney-client/solicitor-client privilege in Taiwan.

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

No, there is no such protection available in Taiwan.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

Not applicable.

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

Not applicable

ii. The Insurer provides a defense pursuant to a reservation of rights?

Not applicable

iii. The Insurer has denied coverage?

Not applicable

iv. The policy provides only a duty to indemnify and not a duty to defend?

Not applicable

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

Not applicable.

4. <u>Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?</u>
Not applicable.

5. <u>Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?</u>

There is no litigation privilege in Taiwan. However, under the Taiwan Code of Civil Procedure and Criminal Procedure, there are certain restrictions limiting a party's ability to obtain access to testimony and certain evidence (including insurance related documents). See the comments given in response to the question at 1(a) above for further discussion of this issue.

6. <u>Can an Insurer compel an Insured to disclose privileged communications to the Insurer?</u>

Not applicable

7. <u>How can privilege be waived in insurance disputes?</u>

Not applicable. There is no concept of privilege to be waived in Taiwan. As for confidentiality, as mentioned above, if a document involves the privacy or business secret of a party or a third party and the resulting disclosure may result in material injury to such party or third party, the party may refuse to provide such document. In general, a person may waive his or her own confidential information.

a. Who has the authority to waive privilege?

In general, a person may waive his or her own confidential information.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

Not applicable.

c. Can privilege be waived inadvertently?

Not applicable.

d. Bad Faith Actions

Not applicable.

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

8. What are the best practices for maintaining privilege in the insurance context?

Not applicable.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

Not applicable.

Although Taiwan does not have a concept of privilege, a party in civil litigation proceedings may attempt to protect insurance related materials from disclosure based on confidentiality if such insurance related materials involve the privacy or business secret of a party or a third party and the resulting disclosure may result in material injury to such party or third party as discussed above. However, the court in civil proceedings, if necessary, may order the party to provide the document and examine it in private.

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United Arab Emirates

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1. How do privilege issues arise in insurance disputes?

In the United Arab Emirates (UAE), there are few provisions in the codified law which specifically deal with privilege and confidentiality in civil litigation, which would also cover insurance litigation. Accordingly, in the UAE one has to look at this topic more by reference to what parties to a dispute may submit in evidence, and the courts can order to be disclosed, and to regard the residual categories of documents as falling within the category of privileged or confidential documents (or that they are at least 'unobtainable' to a petitioning party).

There is no system of formal disclosure in civil proceedings under the UAE Civil Procedure Code (Federal Law No. 11 of 1992) and so there are no general obligations of disclosure on either party to litigation as understood in common law countries. Parties are free to disclose to the court the documents on which they rely to support their case. There is no obligation to disclose any documents that do not support that party's case, or that would support the other side's case. As a consequence, issues of privilege rarely (if ever) arise in litigation, including insurance litigation in the UAE.

(a) What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

As outlined above, there is no system of disclosure in the UAE and so the Insured or Insurer would not usually be compelled to disclose any particular documents. However, any documents that would generally be regarded as subject to 'privilege' in a common law jurisdiction, which are in the possession of another party, can be produced in litigation by that party without sanction.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

For the reasons given above, a party's access to the other side's insurance related documents would usually be very limited, unless they have the documents in their possession (even if obtained during settlement discussions).

However, in cases of a more technical nature (such as construction, accounting or insurance disputes), an expert will often be appointed to assist the Court in determining the technical issues of case. If the Court does appoint an expert then he or she will usually review the pleadings and documents, meet with the parties and their representatives and conduct an investigation into the parties' claims and defences. It is important to note that the expert has wide powers to request inspection of documents, including those which a party would not otherwise wish to disclose (though lawyer-client communications would remain privileged). However, there is no real sanction against a party who refuses to produce a document when requested by the expert, other than the risk of a potential negative inference being drawn.

With respect to arbitration, there are a number of arbitration centres in the UAE, one example of which being the Dubai International Arbitration Centre (DIAC). Pursuant to Article 27 of the DIAC Rules, the Tribunal has the power (at the request of one of the parties or of its own accord) to order a party to produce documents or other evidence within the time limits stipulated. Arguably the Tribunal could not compel the party to provide the Tribunal with privileged communications or documents and again, the only sanction for non-compliance appears to be the ability of the Tribunal to draw such inferences as it considers appropriate. The parties are, however, free to adopt their own arbitration rules.

In light of the limited circumstances in which one can compel the production of a document, a party will sometimes resort to the criminal law in order to obtain documents to which it might not otherwise gain access. The relevant laws are the Penal Code (Federal Law No. 3 of 1987) or the Penal Procedures Law (Federal Law No. 35 of 1992). Certain actions have both criminal and civil consequences, meaning that a potential civil law plaintiff can often obtain the benefit of the powers of search and seizure contained in the criminal law by filing a criminal complaint to discover documents that might not otherwise be produced by his or her opponent in litigation. However, in our view, it would be unlikely that a criminal case could be brought in the context of a standard insurance dispute.

A large number of international insurance companies in Dubai are based in a specific financial free zone known as the Dubai International Financial Centre (DIFC), and so may stipulate in their contracts that the DIFC Courts have jurisdiction in the event of a dispute. Whilst there is no specific DIFC legislation dealing with privilege, given its common law background and also the fact that its Rules are based upon the English Civil Procedure Rules, it seems likely that the DIFC Court would fall back on the English legal principles of privilege. However, for the purposes of this

survey, we have answered the questions on the basis of a dispute within the UAE, rather than within the jurisdiction of the DIFC free zone.

3. What types of relationships in the insurance context may be subject to the attorney-client/solicitor-client relationship?

(a) Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

In the UAE privilege does not extend to relationships other than lawyer-client relationships (see paragraph 4 below for a description of this form of privilege), and so strictly speaking communications between an Insured and the Insurer are unlikely to fall into this category. However as there is no formal system of disclosure in the UAE, the Insured or Insurer cannot usually be compelled to disclose any particular documents, and so such communications would usually remain confidential, unless the third party had managed to come into possession of it, as discussed in further detail at 7(a) below.

(b) Are there doctrines, such as joint client, joint defence, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

See answer to 3(a) above.

(c) Is privilege applied in a different manner where:

(i) The Insurer has agreed to defend the Insured without reservation of rights?

(ii) The Insurer provides a defence pursuant to a reservation of rights?

(iii) The Insurer has denied coverage?

(iv) The policy provides only a duty to indemnify and not a duty to defend?

See answer to 3(a) above.

(d) How do privilege issues arise regarding Insurer/Reinsurer communications?

See answer to 3(a) above.

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

Since there is no general obligation of disclosure, documents passing between in-house counsel and his or her employers or colleagues will not ordinarily be compelled to be disclosed in any litigation.

The Legal Profession Law (Federal Law No. 23 of 1991) deals briefly with a lawyer's obligation of secrecy and the exceptions to the rule of client confidentiality. Pursuant to Article 42, a lawyer "…may not divulge any secret entrusted to him or of which he has come to know through his profession unless exposing it would prevent a crime". Article 44 provides that "no investigation or interrogation of a lawyer or search of his office for matters related to his work may be carried out without the knowledge of the Public Prosecutor." Article 45 states that "the office of the lawyer or its contents that are necessary for the practice of his profession may not be subject to impounding."

Further, Article 77 of the Penal Procedures Law provides that "a member of the Public Prosecution may not seize papers and documents in the possession of the culprit's lawyer, which were delivered to him by the culprit for performing the mission entrusted to him, nor the case correspondence reciprocally exchanged between them."

However, it is unclear whether, as a matter of UAE law, the Legal Profession Law would extend to cover in-house counsel. Although we are not aware of any incident where the position of an in-house counsel has been tested, our view is that the Legal Profession Law was designed to apply to external counsel and so would not necessarily apply to the same degree to in-house counsel.

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

Generally, as discussed above, there is no obligation to disclose a document of this nature. However, where a document is created by an independent third party at the request of the lawyer to assist the lawyer in the preparation of his or her client's defence (for example a loss adjuster asked to prepare a report which is then addressed to the Insurer's lawyer), production of that report could not be compelled in the proceedings for which it was prepared or, given the private nature of the exchanges between the lawyer and the loss adjuster, in any future litigation.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

It is unlikely in the UAE that an Insurer would be able to compel an Insured to disclose privileged communications to the Insurer, unless the Insured

has inadvertently waived privilege as discussed in further detail below.

Whilst in the course of legal proceedings the Insurer could theoretically request the Court to make an order for specific disclosure under Article 18 of the Law of Proof (Federal Law No. 10 of 1992), the grounds on which such an application can be made are very limited, namely that (1) the law allows that he be required to present or submit them; (2) if it is a joint document between himself and the other side (i.e. it is a document in which there is a common interest or if it establishes reciprocal rights and obligations); or (3) if the other side bases its case on it.

However, UAE law does provide for a third party to be 'introduced' to proceedings in order to oblige him or her to present a document in his or her possession (Article 20 of the Law of Proof). Again, the grounds on which such an application can be made are limited since one of the three conditions of Article 18 will have to be met. Having said that, it is relatively common for Insurers to be joined to the proceedings by the Insured when the Insured is involved in proceedings brought by a third party, and the Insured is seeking an indemnity from Insurers in respect of any judgment against it.

7. How can privilege be waived in insurance disputes?

(a) Who has the authority to waive privilege?

It is possible to argue that, with a few exceptions, everything in the UAE is privileged unless it is produced by the party wishing to rely upon it. However, once any document is produced, be it by the lawyer or by the party asserting privilege, or more commonly by the opposing party who has come into possession of the document, any 'privilege' will be lost. Once a party is in possession of any document, it seems not to matter how he or she came into such possession, and production of the document in litigation cannot be prevented or objected to.

(b) Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

See 7(a) above.

(c) Can privilege be waived inadvertently?

A mistake often made by parties unfamiliar with the UAE system is to enter into 'without prejudice' correspondence believing that it will be afforded the same privileged status as such correspondence would be in the UK, for example. However, in UAE litigation, there is no concept of 'without prejudice' correspondence in the sense of such correspondence being privileged from production.

Any admissions made in such 'without prejudice' correspondence can subsequently be used against the admitting party and such correspondence or documents produced on an 'without prejudice' basis to the other side can be produced to the court.

If a document is inadvertently disclosed by a party or its lawyer, there is subsequently no opportunity to claim that it was disclosed inadvertently; that the party wishes to claim privilege for it; and that the party to whom it was disclosed ought not to be able to rely upon it. Once the document has been revealed, it can be relied upon by one's opponent.

(d) Bad faith actions

Not known to exist in the UAE.

8. What are the best practices for maintaining privilege in the insurance context?

With few exceptions, a party can choose what it wishes to produce, but it is nevertheless important to ensure that the other side does not inadvertently gain access to privileged documents.

It is usually good practice to mark privileged documents as 'privileged and confidential' and where sensitive information needs to be communicated other than between lawyer and client then best practice would be to do so orally. Parties in litigation should also take care as to what they disclose in the course of proceedings so as to avoid waiving privilege in an otherwise privileged document.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

In the UAE, arguably only lawyer-client communications could be categorised as 'privileged' in the strict sense of the term, whilst all other insurance related documents could theoretically be classed as confidential or private. In terms of the impact of categorising documents as either privileged or confidential, there is not a marked distinction in the way such documents would be treated, given the lack of disclosure obligations in UAE litigation and the limited rights to seek specific disclosure.

However, it is important to remember that even if a party considers a particular document to be

confidential, if the other side has a copy of it, there is little prospect of successfully claiming that the party to whom it was disclosed ought not to be able to rely upon it.

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Introduction

There are at least two things that set the United States apart from most other jurisdictions with respect to litigating insurance disputes: the large number of different laws that may govern a dispute, and the breadth of discovery allowed in litigation.

A. Potential Application of Numerous State Laws And Federal Law

Each of the fifty states and the District of Columbia have their own substantive laws that may apply to a litigated dispute. Each state has a separate regime for regulating insurance, its own substantive law relating to questions of privilege, and its own choice of law rules for determining which state's law will apply to a dispute that involves more than one jurisdiction. Cases litigated in federal court are founded on one of two types of jurisdiction: "federal question" jurisdiction (involving a federal statute or the federal constitution), or "diversity jurisdiction" (where the parties are from different jurisdictions). In federal cases based on diversity jurisdiction, courts apply state substantive law. Federal Rule of Evidence 501 provides that state law will also govern questions of privilege in diversity cases.[2] Because most insurance disputes in federal court arise under diversity jurisdiction, there is little federal common law on privilege issues in insurance disputes. As a result, although it is possible to discuss general principles relating to privilege in insurance disputes, states' laws differ, sometimes significantly. It is, therefore, necessary to analyze the specific substantive law of each state whose law may apply to a particular case. Attached at Appendix A is a chart that provides a brief summary of the law from each state and the District of Columbia regarding a few of the more salient issues relating to privilege in insurance disputes.[3]

B. Breadth of Discovery

Parties in civil litigation in the United States are allowed to conduct broad pre-trial discovery of other parties to the litigation and of third parties. The breadth of discovery in civil litigation (as opposed to criminal proceedings) is generally limited only by relevance, proportionality, and privilege. Federal Rule of Civil Procedure 26(b)(1) sets forth the scope of discovery in federal cases, which is similarly broad in state court proceedings:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know 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.

Discovery can take the form of requests for documents, written questions (interrogatories), live testimony (depositions), and requests to admit facts.

C. The Attorney-Client Privilege

The attorney-client privilege is the oldest of the testimonial privileges. It protects communications made between privileged persons (*i.e.*, attorney, client or agent), in confidence, for the purpose of obtaining or providing legal assistance for the client.[4] Once established, the privilege is absolute and in most jurisdictions survives even the death of an individual client. However, the privilege can easily be lost through waiver. Waiver occurs by disclosing a privileged communication outside of the protected circle of client and lawyer, or by making privileged communications "at issue" in litigation. The common law rule is that waiver of a privileged communication waives privilege not only regarding that communication, but with respect to the entire subject matter of the communication. (Subject matter is a fluid concept that often leaves a court significant discretion to define the scope of the subject matter narrowly or broadly.) Federal Rule of Evidence 502, which was enacted in September 2008, significantly limits this harsh rule with respect

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[1]The authors wish to thank the following Jenner & Block attorneys who contributed to the 50-state survey attached at Appendix A: Anne M. Alexander, Sabrina Guenther, Daniel A. Johnson, Eamon Kelly, Brienne M. Letourneau, Zachary M. LeVasseur, Michaelene R. Martin, Michael F. Otto, Matthew S. Riley, Adam C.G. Ringguth, Jennifer S. Senior, Nangah N. Tabah, and Matthew A. Wlodarcyk.

[2]Note: as discussed below, the work product doctrine is procedural, not substantive, and is governed by federal law in all federal court litigation.

[3]Due to its condensed, summary nature, Appendix A provides only a starting point for analyzing privilege issues in insurance disputes.

[4]For a detailed discussion of the attorney-client privilege, *see* DAVID M. GREENWALD, ROBERT R. STAUFFER, AND ERIN R. SCHRANTZ, *TESTIMONIAL PRIVILEGES*(2011) (ThomsonReuters) at Chapter 1.

to disclosures to a federal office or agency or in connection with a federal proceeding. Some states have enacted similar rules.

D. The Joint Defense Privilege

When two parties are represented by the same lawyer, the co-clients may share communications with their common lawyer without destroying privilege as to third parties. The joint defense privilege only applies where the parties seek representation for legal purposes; joint consultations with an attorney for business or other purposes are not protected. Although privileged as to third parties, communications made by co-clients to their joint lawyer generally are not privileged as to each other in subsequent litigation between the co-clients.

E. The Common Interest Doctrine

The common interest doctrine, which is related to the joint defense privilege, is an extension of the attorney-client privilege. The common interest doctrine allows parties to share otherwise privileged communications with third parties without waiving the privilege. The common interest doctrine applies where parties are represented by different lawyers, and where the parties share common legal interests and pursue a common legal strategy. The common interest must be a legal interest, and not merely a business interest. Some jurisdictions require the parties' legal interests to be identical; other jurisdictions allow the parties to have some adverse interests so long as the communications at issue relate to a common legal interest. The common interest doctrine does not itself confer privilege over a communication, but rather permits the sharing of already privileged material without causing waiver. At its broadest, the common interest doctrine allows one client, agent or attorney to communicate with another commonly interested client, agent or attorney. However, some jurisdictions require that a lawyer be involved in the communications for the doctrine to apply. Although communications covered by the common interest doctrine are protected from discovery as to third parties, subsequent litigation among the common interest group waives the privilege with respect to communications actually shared, unless the parties have agreed otherwise. In most cases, the common interest doctrine is a permissive doctrine. That is, a party *may* share privileged information without waiving privilege as to third parties, but there is *no requirement* that a party do so. As discussed below, in the insurance context, a small minority of courts have transformed the common interest doctrine into an affirmative obligation to disclose privileged information. (This approach has been criticized and rejected in many jurisdictions.)

F. The Work Product Doctrine

Unlike the attorney-client privilege, which is grounded in substantive law, the work product doctrine is a procedural doctrine based on procedural rule. Therefore, Federal Rule of Civil Procedure 26, which codifies the rule, applies in federal proceedings. States have adopted their own rules, and most but not all track the federal rule. Whereas the attorney-client privilege is an absolute privilege, the work product doctrine provides only a qualified protection from discovery.[5]

As set forth in Fed. R. Civ. Pro. 26(b)(3)(A-B), the work product doctrine protects documents or tangible things prepared by a party or a party's representative (including a party's lawyer) in anticipation of litigation or for trial. (Although not set forth in the rule, based on the common law origin of the doctrine, courts apply the doctrine to "intangible" work product, such as oral communications, that otherwise satisfy the rule.) There are two types of work product: "opinion" work product, which reflects mental impressions, conclusions, opinions or theories of a party's counsel or other representative concerning the litigation, and "ordinary" work product, which is work product that is not opinion work product. In order to discover ordinary work product, a party must meet a heavy burden of demonstrating that it has a "substantial need" for the materials to prepare its case, and that it cannot, without "undue hardship," obtain their substantial equivalent by other means. The standard for discovering "opinion" work product is even higher. Courts require at least a showing of "extraordinary need." Some jurisdictions provide absolute or close to absolute protection for opinion work product.

1. <u>How do privilege issues arise in insurance disputes?</u>

Privilege issues may arise in first party actions or in third party actions. Although jurisdictions do not define these terms uniformly, for the purposes of this memorandum, they will be defined as follows: A "first party" action is a coverage dispute between an insured and its insurer arising from property or other non-liability insurance that covers the insured itself. A "third party" action is a dispute that arises from a third party claimant's dispute with the insured. A third party action includes litigation between an insured and a third party claimant, coverage disputes between the insured and insurer arising from a third party claim, or a dispute directly between a third party and the insurer.

[5]For a detailed discussion of the work product doctrine, *see* DAVID M. GREENWALD, ROBERT R. STAUFFER, AND ERIN R. SCHRANTZ, *TESTIMONIAL PRIVILEGES* (2011) (ThomsonReuters) at Chapter 2.

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

In a first party action, the insured may seek, for example, the insurer's claim file, claims information relating to unrelated third parties, reinsurance contracts that may respond to the claim, or communications between the insurer and its reinsurers. The insurer in a first party action may seek, for example, reports by the insured's consultants regarding the claim at issue.

In a third party action, a third party claimant may seek, for example, communications between the insured and its insurer, including statements taken by the insurer while investigating the claim. The purpose of such a request is to discover admissions made by the insured, or inconsistencies in the insured's story, or statements from other occurrence witnesses. In a third party action, the insured may seek, for example, the insurer's claim file, claims information relating to unrelated third parties, or communications between an insurer and its reinsurers. The insurer in a third party action may seek, for example, defense counsel's time records and invoices, defense counsel's opinion letters/memoranda regarding the underlying action, or reports by the insured's consultants regarding the underlying action.

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

As discussed above, broad pre-trial discovery is the norm in the United States, and privilege issues frequently arise in all types of litigation, including insurance disputes. The litigation system in the United States generally allows for the discovery of any relevant information, unless it is otherwise protected by a testimonial privilege, such as the attorney-client privilege, or other protection, such as the work product protection. Because broad discovery is fundamental to the U.S. litigation system, privileges and protections are narrowly construed. However, as discussed below, both the attorney-client privilege and the work product protection may protect at least some insurance related materials from discovery.

3. What types of relationships in the insurance context may be subject to the attorney-client/solicitor client relationship?

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client privilege?

There is no insurer-insured privilege, as such, under federal common law.[6] However, where an insured communicates with its insurer for the express purpose of seeking legal advice with respect to a specific claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case, "the law would exalt form over substance if it were to deny application of the attorney-client privilege."[7]

Many state jurisdictions protect insurer-insured communications in certain circumstances. As Appendix A summarizes, there is a high degree of variability among those state jurisdictions that have addressed the issue (and even among the courts within jurisdictions that have addressed the issue),[8] and some jurisdictions have not addressed the question.[9] The discussion in this memorandum, therefore, is at a very high level of generality, and by way of example only. Careful review of the specific jurisdictions' laws that may apply to a specific circumstance is necessary to determine whether the attorney-client privilege may apply to specific insured-insurer communications.

There are three rationales that some jurisdictions apply to extend the attorney-client privilege to encompass insured-insurer communications and thereby protect insurer-insured communications from discovery by third parties: (1) the "agency" doctrine, (2) the joint defense privilege, and (3) the common interest doctrine. Courts often do not clearly differentiate among these doctrines, and may use one or more of them interchangeably. They are discussed separately here for clarity.

Where an insured communicates with an insurer that has a duty to defend, many jurisdictions will consider the insurer a communicating agent of the insured or of defense counsel. That is, where the insurer is the gateway to obtaining counsel for the insured under a liability policy, the courts may deem communications from the insured, such as an initial report or statement of circumstances giving rise to a duty to defend, as for the purpose of obtaining counsel and therefore privileged. As reflected in Appendix A, some jurisdictions require counsel to

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[6] *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.,*5 F.3d 1508, 1514 (D.C. Cir. 1993) ("Federal courts have never recognized an insured-insurer privilege as such.")

[7] *Id.,*5 F.3d at 1515.

[8] *Compare, e.g.,* App. A at Illinois and Missouri, which provide relatively broad protection for insurer-insured communications where the insurer has a duty to defend; *with* Michigan, which protects insurer-insured communications only in very narrow circumstances.

[9] *See, e.g.,* App. A at Maine, Rhode Island, South Carolina, Utah.

be involved at the time of the communication for the privilege to apply. In these jurisdictions, statements taken from insureds during the normal course of investigating a claim, but before an attorney is engaged, are not considered within the attorney-client privilege.[10] Other jurisdictions may apply the attorney-client privilege to these communication even before an attorney is engaged, so long as the purpose of the communication was for the purpose of obtaining defense counsel.[11]

Where an insurer has a duty to defend and engages counsel on behalf of both the insured and the insurer, the joint defense privilege may protect insured-insurer communications. Again, some jurisdictions require counsel to be involved at the time of the communication for the privilege to apply, and others do not. Where a joint client relationship exists, communications between the insurer or the insured with joint counsel are generally privileged with respect to third parties, but generally are not privileged as to the insurer and the insured in a subsequent dispute between the joint clients. There are variations among jurisdictions even on this issue regarding whether statements made by an insured to joint defense counsel, which are adverse to coverage, may be discovered by the insurer in a subsequent dispute with the insured.

The third doctrine that may extend the attorney-client privilege to insurer-insured communications is the common interest doctrine. The common interest doctrine may apply where, although the insurer and the insured are not represented by joint counsel, a court determines that the insured and insurer have a common legal interest in the successful defense of an underlying claim. Under this doctrine, the insured may convey otherwise privileged information to the insurer, for example defense counsel opinions, without waiving the privilege as to third parties. Illinois is an example of a jurisdiction that considers insured and insurer to share a common interest in defending an underlying claim, even where the insurer has reserved its rights, or the insured and insurer are engaged in coverage litigation.[12] As discussed in Section 7, below, this approach has been criticized particularly where an insurer attempts to use the common interest doctrine to compel an insured to produce otherwise privileged information to the insurer in a coverage dispute.

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

See response to 4.A., above.

c. Is privilege applied in a different manner where

i. The Insurer has agreed to defend the Insured without reservation of rights?

The clearest case for application of the doctrines discussed in 4.A., above, is where an insurer, with a duty to defend, agrees to defend the insured and engages counsel for the insured.

ii. The Insurer provides a defense pursuant to a reservation of rights?

Where an insurer issues a reservation of rights, application of the doctrines discussed in 4.A., above, may be more problematic. However, many jurisdictions could apply the attorney-client privilege so long as the insurer engaged defense counsel on behalf of the insured, or if the insurer and insured otherwise continued to pursue a common legal strategy with respect to the defense of the underlying claim. Courts may consider a reservation of rights as creating a divergence of interests between the insured and the insurer, thereby making the common interest doctrine inapplicable.

iii. The Insurer has denied coverage?

Where an insurer has denied coverage, most jurisdictions would refuse to apply either the joint defense privilege or the common interest doctrine. However, some jurisdictions may protect communications made by the insured to the insurer for the purpose of obtaining counsel, even if the insurer subsequently decides to deny coverage. Illinois, however, applies the common interest doctrine even where a liability insurer denies coverage.

iv. The policy provides only a duty to indemnify and not a duty to defend?

The vast majority of courts that have addressed the issue of insured-insurer communications have done so in the context of liability insurance in which the insurer has both a duty to defend and a duty to indemnify. The logic of the common interest doctrine should be applicable even where the insurer has only a duty to indemnify, because the insured and insurer have a common legal interest in achieving a successful outcome in underlying third party litigation. However, the few courts that have

[10] *See, e.g.,* App. A at Hawaii.

[11] *See, e.g.,* App. A. at California, New York.

[12] *Waste Mgt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill.2d 178, 579 N.E.2d 322 (1991).

addressed this issue have reached different outcomes.[13]

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

Insureds sometimes seek discovery of reinsurance contracts that may respond in the event of a judgment against an insurer, or communications between the insurer and its reinsurers, for example, insurer's loss reports or other claims reports to its reinsurers. Most jurisdictions do not have decided case law on this issue. In cases addressing insureds' requests for such information, the courts often find that this information, particularly anything beyond the reinsurance contracts themselves, are not relevant, and therefore deny the request. In those cases where the courts find such discovery relevant, the courts are split on whether communications between insurers and reinsurers should be considered privileged.

Several courts have applied the common interest doctrine to insurer-reinsurer communications, holding that the insurer and reinsurer share a common legal interest in achieving a successful outcome in an underlying coverage dispute between the insured and the insurer.[14] Other courts have refused to apply the common interest doctrine to insurer-reinsurer communications.[15]

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

In the United States, where in-house counsel acts in a legal capacity, in-house counsel will be treated as an attorney for the purposes of the attorney-client privilege. Because in-house counsel often has both legal and business roles, courts often require that in-house counsel make a "clear showing" that communications were made for a legal rather than a business purpose.[16]

In the insurance context, the business versus legal issue may arise where counsel, either in-house or external, is involved in claims adjusting. In general, where an attorney performs the role of a claims adjuster, and does not provide legal advice, related communications are not privileged.[17]

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

As discussed in 1.F., above, the work product doctrine may provide a qualified immunity from discovery for insurance related materials. The work product protection applies to documents prepared by a party or a party's representatives (*e.g.*, counsel) in anticipation of litigation or for trial. As numerous cases cited in Appendix A indicate, the courts are not at all uniform in determining where the insurer's "ordinary business" of claims adjusting ends and preparation for or anticipation of litigation begins. Although some materials in an insurer's claim file may be protected by the work product doctrine, where a court draws this line can have a significant effect on the actual scope of the protection.

It is important to consider the work product protection separately from the attorney-client privilege. Although the same document may be immune from discovery under both doctrines, often only one or the other will apply to a particular document. In addition, because the grounds for waiver of the two doctrines is different, the work

[13] *Compare, e.g., Kingsway Fin. Servs. V. PricewaterhouseCoopers LLC*, 2008 WL 4452134 (S.D. N.Y. Oct. 2, 2008) (common interest doctrine applied where insurer had only indemnity obligation); *with Go Med. Indus. Pty., Ltd. v. C.R. Bard, Inc.,*1998 WL 1632525, at *3 (D. Conn. 1998), *rev'd in part on other grounds*, 250 F.3d 763 (Fed. Cir. 2000) ("An insurer's contractual obligation to pay its insured's litigation expenses does not, by itself, create a common interest between the insurer and the insured that is sufficient to warrant application of the common interest rule of the attorney-client privilege.").

[14] *See, e.g., Employers Reins. Corp. v. Laurier Indemn. Co.,*2006 WL 532113 (M.D. Fla. 2006) (communications between insurer and reinsurer protected by common interest doctrine, unless their interests actually, rather than hypothetically, diverge); *Minn. Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co.*, 183 F.R.D. 627 (N.D. Ill. 1999) (no waiver of privilege where insurer provided documents to reinsurer intending and expecting confidentiality and protection from common adversaries).

[15] *See, e.g., The Regence Group v. TIG Spec. Ins. Co.*, 2010 WL 476646, at *2-3 (D. Or. 2010) (no privilege over documents exchanged by insurer with reinsurer where insurer engaged in two contested arbitrations with reinsurer); *Reliance Ins. Co. v. Am. Lintex Corp.*, 2001 WL 604080 (S.D. N.Y. 2001) (although commercial interests coincided, there was no "unity of interest" where insurer and reinsurer did not share same counsel or coordinate legal strategy).

[16] *See, e.g., In re Vioxx Prod. Liab. Litig.*, 501 F. Supp.2d 789 (E.D. La. 2007).

[17] *See, e.g., Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 701 n.4 (S. Dak. 2011); *Flagstar Bank v. Fed. Ins. Co.*, 2006 WL 6651780 at *4 (E.D. Mich. 2006); *St. Paul Reins. Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 641-42 (N.D. Iowa 2000); *Chicago Meat Proc., Inc. v. Mid-Century Ins. Co.*, 1996 WL 172148 (N.D. Ill. 1996).

product protection may continue to apply even where the attorney-client privilege has been waived. The attorney-client privilege is generally waived when a privileged communication is disclosed to a third party who is not within the attorney-client relationship. However, the work product protection is more robust. The work product protection is not generally waived unless work product is disclosed to a litigation adversary or to someone who makes it substantially likely that the work product will be disclosed to an adversary (a "conduit"). Therefore, for example, where an insurer shares a document with its reinsurer, a court may find waiver of the attorney-client privilege, but not work product protections.

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

In most jurisdictions, an insurer may not compel an insured to disclose otherwise privileged information to the insurer. (*See* discussion in 1.D., above, regarding use of otherwise privileged communications in a joint-client situation.) However, a small minority of jurisdictions do allow insurers to obtain otherwise privileged information from their insureds.

In *Waste Mgt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill.2d 178 (1991), the Illinois Supreme Court upheld an order in a coverage dispute compelling an insured to produce its attorney's files from the underlying third party action. The court based its decision on the duty of the insured to cooperate with the insurer, and on the application of the common interest doctrine. The court held that the insured was required to provide otherwise privileged material to its insurer, even where the insurer had declined coverage and was litigating with the insured. This approach transforms the normally *permissive* common interest doctrine into a tool that can be used *offensively* by an insurer to obtain otherwise privileged information.

Not surprisingly, the *Waste Management* approach has been broadly criticized and rejected by courts in many jurisdictions.[18] Many courts have rejected this approach on the basis of a lack of common interest between insurer and insured.[19] Other courts have rejected the proposition that cooperation clauses could require the production of privileged materials.[20]

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

In general, the holder of the privilege or one acting with authority on behalf of the holder may waive privilege.

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

A party may waive privilege by putting privileged communications "at issue" in litigation. An example would be where an insurer asserts reliance on advice of counsel as an affirmative defense to an allegation of bad faith claims handling. Courts often state that the holder of privilege may not use privilege both "as sword and as shield." To the extent that a party interjects their own privileged communications into litigation, the party generally waives privilege with respect to all privileged communications on the same subject matter ("subject matter waiver").

As reflected in the cases cited in Appendix A, jurisdictions are divided regarding whether an insurer's mere assertion of good faith investigation or claims handling puts privileged communications "at issue." Some courts hold that asserting a good faith affirmative defense is sufficient to waive privilege,[21] while other courts find waiver only if it appears that an insurer intends to rely on privileged communications in the case.[22]

Although a detailed discussion is beyond the scope of this memorandum, it is important to note that courts apply two general approaches to "at issue" waiver, one broader (the "relevance" standard) and one narrower (the "reliance" standard).[23] Appendix A includes decisions from several jurisdictions that address "at issue" waiver in the insurance context.

[18] *See, e.g., Eastern Air Lines, Inc. v. U.S. Aviation Underwriters, Inc.*, 716 So.2d 340 (Fla. Dist. App. Ct. 3d Dist. 1998); *Rockwell Int'l Corp. v. Superior Court*, 29 Cal.App.4th 1255, 32 Cal. Rptr.2d 153 (2d Dist. 1994); *North River Ins. Co. v. Philadelphia Reins. Corp.*, 797 F. Supp. 363 (D. N.J. 1992).

[19] *See, e.g., North River Ins. Co. v. Columbia Cas. Co.*, 1995 WL 5792 (S.D. N.Y. 1995); *First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co.*, 163 F.R.D. 574, 578-79 (N.D. Cal. 1995); *Int'l Ins. Co. v. Newmont Min. Corp.*, 800 F. Supp. 1195, 1196-97 (S.D. N.Y. 1992).

[20] *See, e.g., Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 416-17 (D. Del. 1992); *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381, 386-87 (D. Minn. 1992).

[21] *See, e.g.,* App. A at South Carolina.

[22] *See, e.g.,* App. A at Arizona, California, Idaho, Indiana, Pennsylvania, South Dakota.

[23] *Compare generally Hearn v. Rhey*, 68 F.R.D. 574 (E.D. Wash. 1975) (broader "relevance" standard), *with In re Erie County*, 546 F.3d 222 (2d Cir. 2008) (narrower "reliance" standard).

c. Can privilege be waived inadvertently?

Privilege may be waived inadvertently. Inadvertent waiver in federal proceedings is governed by Fed. R. Evid. 502(b). In general, courts will find waiver where a party or its counsel has failed to exercise reasonable steps to prevent disclosure of privileged material, or has failed to take reasonable steps to rectify an inadvertent disclosure.

d. Bad Faith Actions

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

Many U.S. jurisdictions recognize either common law and/or statutory causes of action for an insurer's bad faith failure to pay an insurance claim, settle a third party claims, or in handling an insurance claim. As reflected in Appendix A, states apply significantly different rules with respect to whether otherwise privileged material may be discovered in a bad faith action. Many jurisdictions take the position that the mere allegation of bad faith does not result in waiver of the insurer's privileges or protections, and require that the insured or third party set forth at least "prima facie" case of bad faith or other showing.[24] Florida is an example of a state in which discovery of privileged and protected material has been addressed in detail by the state's highest court.[25] Some jurisdictions take the position that an insured bringing a bad faith action has "substantial need" for and could not without "undue hardship" obtain relevant information in the insurer's claim file, thereby overcoming the insurer's work product protection.[26] Courts often review otherwise privileged/protected documents *in camera* before ruling that there has been a waiver of privilege.[27]

8. <u>What are the best practices for maintaining privilege in the insurance context?</u>

Where a third party action is pending or threatened against an insured, the most important "practice" is for both the insured and the insurer carefully to balance the needs of the insurance relationship with risk of waiving privilege over sensitive information that may be sought by the underlying third party. Although an insurer may wish to have perfect information, that is not necessary either to assess coverage or provide assistance to the insured. And although an insured may wish to provide as little information as possible to the insurer, the insurer is in need of at least a reasonable amount of information to assess coverage, assist its insured, and monitor the underlying exposure, for itself and its reinsurers. If both the insured and the insurer take a reasonable approach to requests for information, it will make it easier for the insured to provide what the insurer really needs, while minimizing the risk of waiver. With this as a backdrop, the following are some practical suggestions that may minimize the risk of waiver where sensitive information is exchanged between insured and insurer or insurer and reinsurer:

- Enter into a Joint Defense/Common Interest Agreement. The agreement should identify the common legal interest being pursued, and set forth the details regarding how the parties will keep information confidential. Although a written agreement is not necessary to invoke the joint defense/common interest doctrines, courts find such agreements helpful as contemporaneous evidence of common legal interest and strategy.

- If possible, do not exchange information that is protected by either the attorney-client privilege or the work product doctrine. The "facts" are not privileged and it may be possible to provide non-privileged/non-protected information that will provide the information needed by the insurer or reinsurer.

- Where possible, disclose protected work product rather than attorney-client privileged material. As discussed above, with respect to potential waiver, the work product protection is more robust than the attorney-client privilege.

[24] *See, e.g.,* App. A at Alaska, Arkansas, Connecticut, Indiana, New Jersey, North Carolina, Ohio.

[25] *See Allstate Indemn. Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005) (discussing scope of discovery of otherwise protected work product in bad faith litigation); *Genovese v. Provident Life and Accident Ins. Co.*, ---So.3d---, 2011 WL 903988 (Fla. Mar. 17, 2011) (restricting *Ruiz* to work product and not applying *Ruiz* approach to attorney-client privilege).

[26] *See, e.g.,* App. A at Arizona, Florida, Georgia, Indiana, Louisiana, Oklahoma.

[27] *See, e.g.,* App. A at Connecticut, Louisiana, Ohio.

- Label documents clearly as privileged and/or protected, as appropriate.
- Limit distribution of privileged or protected information, disclosing it only to those with a need to know.
- If disclosure of privileged or protected information will take place in a federal proceeding, carefully consider taking advantage of the protections afforded by Fed. R. Evid. 502(d) through a protective order prior to disclosure.

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?

There is a difference between privilege and confidentiality/privacy. For example, there are detailed restrictions on the disclosure of personal medical information in the Health Insurance Portability & Accountability Act of 1996 (HIPAA), the Health Information Technology for Economic Clinical Health Act, and their attendant regulations.

Although confidentiality/privacy generally, or statutory restrictions on treatment of personal information, are not testimonial privileges, courts may take these issues into account when managing discovery. For example, it is common for the parties to request that the court enter a protective order that provides for heightened protection of confidential and proprietary information produced in litigation. Depending on the degree of sensitivity of the information, the court may agree that materials designated as "confidential" may only be filed with the court under seal, or even that highly sensitive documents be reviewed by "attorneys eyes only." Courts are given broad discretion to control the litigation in proceedings before them, and they are generally willing to consider reasonable measures tailored to the particular needs of a case. Because there is a fundamental understanding that, except in exceptional circumstances, proceedings in court will be public, it is often difficult to protect confidential and proprietary information that must actually be used at trial to prove or defend a claim. However, as a practical matter, this difficulty does not occur frequently. First, the majority of cases settle before trial. Second, even if a case should go to trial, the actual evidence introduced will only be a small fraction of the information produced during discovery. Third, if confidential information must be used as evidence, the parties may agree to use redacted versions of documents to prevent disclosure of particularly sensitive information. And fourth, the sensitivity of confidential and proprietary data often decreases with time. Because it often takes years for a lawsuit to progress to trial, there may be less of a concern about the confidential information by the time that the trial actually takes place.

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ARE COMMUNICATIONS/WORK PRODUCT BETWEEN INSURED AND INSURER PRIVILEGED/ PROTECTED AS TO THIRD PARTIES?	ARE INSURED'S OR INSURER'S COMMUNICATIONS OR WORK PRODUCT PRIVILEGED/PROTECTED AS TO THE OTHER?	WHEN DOES AN INSURED OR INSURER WAIVE PRIVILEGE OR WORK PRODUCT PROTECTION (e.g., JOINT CLIENT, BAD FAITH, AT ISSUE)?	ARE CLAIMS FILES PRIVILEGED/PROTECTED AS BETWEEN INSURED AND INSURER OR THIRD PARTIES?
Insured's statement to insurer is protected work product when taken in anticipation of litigation with third party. *See Ex parte Flowers*, 991 So. 2d 218, 226 (2008) (statement taken prior to third party suit but after insurer was aware third party had retained an attorney); *Ex parte Nationwide Mut. Fire Ins. Co.*, 898 So. 2d 720, 723-24 (2004) (at time of statement insurer believed third party would bring litigation against insured); *Ex parte Norfolk Southern Rwy.*, 897 So. 2d 290, 295 (2004) (same).	No privilege as to communications or work product of counsel that represented both the insured and the insurer. *See Nationwide Mut. Ins. Co. v. Smith*, 194 So. 2d 505, 508-09 (1967) (insured and insurer represented by same counsel in underlying case and insured sought to use against insurer report filed by such counsel). *See also* Ala. R. Evid. 502(d)(5) (general rule regarding no privilege in action between or among joint clients). There is protection from disclosure when documents are prepared in anticipation of litigation between insured and insurer. *See Ex parte Bozeman*, 420 So. 2d 89, 90 (1982) (work product protection afforded to documents prepared by insurer after it learned insured had retained attorney or after insured had filed suit against insurer).	No privilege as to communications or work product of counsel that represented both the insured and the insurer. *See Nationwide Mut. Ins. Co. v. Smith*, 194 So. 2d 505, 508-09 (1967). Privilege is waived by placing the actual content of attorney-client communications in issue such that that the information is actually required for resolution. *Ex parte State Farm Fire & Cas. Co.*, 794 So. 2d 368, 375 (2001). However, in a bad faith action between an insured an its insurer, placing in issue the reasonableness of the insured's attorneys fees in defending an underlying action did not *per se* waive privilege. *See id.* at 371-72, 376 (actual content of privileged communications had not been placed in issue).	Claims files are protected from disclosure as to third parties when prepared in anticipation of litigation with a third party. *See, e.g., Ex parte Flowers*, 991 So. 2d 218, 226 (2008) (work product). Claims files are protected from disclosure to insured when prepared in anticipation of litigation with insured. *See Ex parte Bozeman*, 420 So. 2d 89, 90 (1982) (work product documents prepared by insurer after it learned insured had retained attorney or after insured had filed suit against insurer).

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Statements made by an insured to an insurer are not protected by the attorney-client privilege unless it can be shown that the insurer, in receiving such communications, was acting at the express direction of counsel for the insured. *Langdon v. Champion*, 752 P.2d 999, 1000-01, 1004 (1988) (under Alaska R. Evid. 503, insurer is not representative of insured but may be representative of attorney for insured).	The Official Commentary to Alaska Rule of Evidence 503(a)(4) states that "it is clear that no privilege is available when a statement is being sought in a controversy between the insured, or one claiming under the insured, and the insurance company." Where an insured and insurer are joint clients represented by the same attorney, privilege will not apply between them as to the subject matter of the engagement. *See* Alaska R. Evid. 503(d)(5) (general exception to privilege in controversy between joint clients). However, where there is an adversarial relationship with respect to insurance coverage issues, the joint client exception does not apply. *Central Constr. Co. v. Home Indem. Co.*, 794 P.2d 595, 597 (1990) (stating finding of special master adopted by lower court); *cf. CHI of Alaska, Inc. v. Employers' Reinsurance Corp.*, 844 P.2d 1113, 1121 (1993) (one basis supporting insured's right to independent counsel when insurer reserves rights was to prevent insurer from gaining access to confidential or privileged information that it could later use to its advantage in coverage litigation); *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 291 (1980) (same).	Services sought by an insurer from an attorney in aid of a bad faith breach of a duty are not protected by the attorney-client privilege. *Central Constr. Co. v. Home Indem. Co.*, 794 P.2d 595, 598 (1990) (*in camera* review of documents appropriate where insurer accepted tender of defense but then belatedly issued reservation of rights letter and failed to communicate with insured in defending claim); *United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28, 32, 36 (1974) (insurer's privilege waived where insured both alleged bad faith refusal of insurer to pay valid claim and also demonstrated *prima facie* case of bad faith refusal).	Materials contained in an insurer's files will be conclusively presumed to have been compiled in the ordinary course of business, and, therefore, are discoverable by third parties, absent a showing that they were prepared at the request or under the supervision of the insured's attorney. *Langdon v. Champion*, 752 P.2d 999, 1007 (1988) (prior to such attorney involvement, materials held by insurers are subject to discovery without regard to work product restrictions).

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Insured's statement to its insurer to be transmitted to an attorney retained by the insurer to defend the insured is not privileged when made to comply with a provision of the insurance policy requiring the insured to cooperate and fully inform its insurer as a condition of coverage. *Butler v. Doyle*, 544 P.2d 204, 207 (1975) (decided in context where insurer had right to review and consider such statement for any legitimate purpose connected with business of insurer, including use of statement for purposes adverse to insured); *see also State v. Super. Ct., Co. of Pima*, 586 P.2d 1313, 1316 (Ariz. Ct. App. 1978) (stating that under *Butler*, Arizona Supreme Court rejected agency relationship between insured and insurer for privilege purposes). Insured's statement to its insurer is protected work product under Arizona R. Civ. P. 26(b)(3) where the insurer retains an attorney to represent the insured, that is, where the insurer is acting as a representative for the insured. *Butler*, 544 P.2d at 206 (interpreting Rule 26(b)(3) but finding showing of substantial need and undue hardship had been made by third party to overcome work product protection).	Portions of an insurer's claims file prepared by the insurer in anticipation of litigation with its insured can be protected work product. *See* claims file column; *Brown v. Super. Ct., Maricopa Co.*, 670 P.2d 725, 730-35 (1983) (not addressing attorney-client privilege). While not addressing the question directly, the Arizona Supreme court has found an insurer's privilege waived as to its insureds in the bad faith context, thus implying absent waiver the insurer would have been permitted to assert privilege against its insureds. *See* next column discussion of *State Farm Mut. Auto Co. v. Lee*, 13 P.2d 1169 (2000).	Insurer's work product protection waived where the insured alleges bad faith failure to pay a claim. *Brown v. Super. Ct., Maricopa Co.*, 670 P.2d 725, 734-35 (1983) (Insured had shown substantial need and undue hardship, including as to opinion work product, where the reasons insurer denied claim or manner in which it dealt with it were central issues; court considered insurer's mental impressions, strategy, and opinions to be at issue). However, the mere filing of a bad faith action, the denial of bad faith, or the affirmative claim of good faith by an insurer does not constitute an implied waiver of the attorney-client privilege. Rather, the insured must show that the insurer made factual assertions in defense of a claim which incorporated, expressly or implicitly, the advice and judgment of its counsel. *State Farm Mut. Auto Co. v. Lee*, 13 P.2d 1169, 1177-79 (2000) (For example, "[w]hen a litigant seeks to establish its mental state by asserting that it acted after investigating the law and reached 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.").	Portions of a claims file are protected by the work product doctrine insofar as they are prepared in anticipation of litigation and the party seeking discovery does not have substantial need for those materials or would not suffer undue hardship as a result of being barred from accessing them. *Brown v. Super. Ct., Maricopa Co.*, 670 P.2d 725, 730-35 (1983) (Portions of claim file not afforded work product protection when created prior to insurer anticipating litigation with insured and as part of routine claims investigation; however, portions of claims file afforded work product protection when created in preparation of litigation upon insurer's denial of insured's claim and reservation of rights, subject to disclosure upon showing of substantial need and undue hardship.).

ARE COMMUNICATIONS/WORK PRODUCT BETWEEN INSURED AND INSURER PRIVILEGED/ PROTECTED AS TO THIRD PARTIES?	ARE INSURED'S OR INSURER'S COMMUNICATIONS OR WORK PRODUCT PRIVILEGED/PROTECTED AS TO THE OTHER?	WHEN DOES AN INSURED OR INSURER WAIVE PRIVILEGE OR WORK PRODUCT PROTECTION (e.g., JOINT CLIENT, BAD FAITH, AT ISSUE)?	ARE CLAIMS FILES PRIVILEGED/PROTECTED AS BETWEEN INSURED AND INSURER OR THIRD PARTIES?
Communications made by insureds at the request of and to inform an attorney hired by the insurer to defend the insureds for the purpose of facilitating rendition of legal services to both the insureds and the insurer are privileged. *Courteau v. St. Paul Fire & Marine Ins. Co*., 821 S.W.2d 45, 48 (1991); *see also Holt v. McCastlain*, 182 S.W.3d 112, 114- 118 (2004) (privilege applied to communications between expert, insured, and attorneys hired by insurer to represent insured); *Schipp v. General Motors Corp*., 457 F. Supp. 2d 917, 922-23 (E.D. Ark. 2006) (Under Arkansas law, including Arkansas R. Evid. 502, insured's statement to insurer was protected by attorney-client privilege; when insured gave her statement, it was clear claims would be made against her and that she would call upon her insurer to defend those claims, and thus insured was entitled to expect that her insurer would engage counsel to represent her, and to view her insurer as her representative for purposes of obtaining legal services).	An insured has been denied access to portions of his insurer's claims file as to his insurance claim based on work product protection. *Parker v. Southern Farm Bureau Cas. Ins. Co*., 935 S.W.2d 556, 561 (1996) (certain documents prepared by insurer after insured threatened suit were prepared in anticipation of litigation).	An insured's mere allegations of bad faith is not enough to waive an insurer's work product protection over claims files. *Parker v. Southern Farm Bureau Cas. Ins. Co*., 935 S.W.2d 556, 561 (1996) (denying insured access to portions of claims files where insured did not explain how such documents were relevant to his bad faith claim or how he would be prejudiced without them).	An insured has been denied access to portions of his insurer's claims file as to his insurance claim based on work product protection. *Parker v. Southern Farm Bureau Cas. Ins. Co*., 935 S.W.2d 556, 561 (1996) (certain documents prepared by insurer after insured threatened suit were prepared in anticipation of litigation). Portions of a claims file generated between the date the insurer opened the claim and the date it mediated the claim with its insured were not prepared in anticipation of litigation and thus were discoverable. *Buchanan v. Farmers Ins. Co.*, 2003 WL 25552980 (Ark. Cir. Sept. 12, 2003) (Trial Order).

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An insured's communications to its insurer concerning an event that may be the basis of a covered claim is privileged as between attorney and client if the policy requires the insurer to defend the insured and the communication is intended to assist the attorney in doing so. *Soltani-Rastegar v. Superior Court*, 208 Cal. App. 3d 424, 427-28 (Cal. Ct. App. 1989) (statement made by insured to insurer is protected from disclosure to third parties even if potential litigation is only threat on horizon and attorney had not yet been selected to defend insured), citing *Travelers Ins. Co. v. Superior Court*, 143 Cal. App. 3d 436 (Cal. Ct. App. 1983). Where an insured is represented by independent "*Cumis*" counsel, not all communications between the insurer (paying for the insured's defense under a reservations of rights) on the one hand and the insured or the insured's *Cumis* counsel on the other hand are protected from disclosure to third parties. *First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co.*, 163 F.R.D. 574, 578-82 (N.D. Cal. 1995) (interpreting California law). However, disclosure to such insurer of communications between the insured and its *Cumis* counsel that were privileged at the time they were made does not waive the privilege as to any other party. *Id.* at 583-84, citing Cal. Civ. Code § 2860.	Where an insurer has a duty to defend but has issued a reservations of rights and its insured has hired independent "*Cumis*" counsel to represent the insured in the underlying litigation, communications made between the insured and its *Cumis* counsel and not shared with the insurer or any other third party are protected from disclosure. *First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co.*, 163 F.R.D. 574, 577, 583-84 (N.D. Cal. 1995) (interpreting California law). Where an insured is represented by *Cumis* counsel, California Civil Code § 2860 imposes a duty to disclose to the insurer all relevant, non-privileged information regarding a liability claim and its defense. Where an insured and insurer are joint clients represented by the same attorney, privilege does not apply between them as to communications made in the course of that relationship. *See* next column.	Joint clients of a shared attorney may not assert privilege as to communications made in the course of that relationship in subsequent litigation between each other. Cal. Evid. Code § 962; *Glacier Gen. Assurance Co. v. Superior Court*, 95 Cal. App. 3d 836, 841 (Cal. Ct. App. 1979) (communications need not be made in the presence of both insured and insurer but must be about a matter of "common interest"). But waiver of privilege by one client to the joint client relationship does not waive the privilege as to the other joint client. Cal. Evid. Code § 912; *American Mut. Liab. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 591, 595 (Cal. Ct. App. 1974) (waiver by insured did not waive privilege as to insurer). The privilege may be impliedly waived if a party (i) has placed in issue the decisions, conclusions, and mental state of its attorney who will be called as a witness to prove such matter or (ii) has deliberately injected the advice of counsel into a case. *Transamerica Title Ins. Co. v. Superior Court*, 199 Cal. App. 3d 1047, 1053 (Cal. Ct. App. 1987) (but insurer does not waive privilege where it is not defending itself on basis of advice of counsel); *Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal. App. 3d 467, 474-75 (Cal. Ct. App. 1984) (no waiver where insurer does not defend based on mere fact of counsel's advice).	Claims files are not privileged *per se*, but information within the file that is otherwise privileged is protected from discovery. *2,022 Ranch v. Superior Court*, 113 Cal. App. 4th 1377, 1396-97 (Cal. Ct. App. 2003). In determining whether claims files are privileged, courts apply a dominant purpose test to determine whether communications in the claims file were made for transmittal to an attorney in the course of professional employment. *Travelers Ins. Co. v. Superior Court*, 143 Cal. App. 3d 436, 452 (Cal. Ct. App. 1983). While courts had applied this test to each communication in the file, the California Supreme Court has stated that the proper procedure is first to determine the dominant purpose of the relationship between the insurer and its attorneys, i.e., is it one of attorney-client or one of claims adjuster-insurer. *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 739-40 (2009). Where an attorney is retained by an insurer to investigate a claim and make a coverage determination, that is "a classic example of a client seeking legal advice from an attorney." *Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal. App. 3d 467, 475-76 (Cal. Ct. App. 1984) (distinguishing situation where attorney was acting as business agent).

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Communications between an insured and its insurer are privileged as to third-parties where the insurer acts as an agent for the insured and an attorney-client relationship between the insurer and its attorney exists for the specific case at the time the communications are made. *See Kay Labs., Inc. v. Dist. Court*, 653 P.2d 721, 722-23 & n.3 (1982); *Bellmann v. Dist. Court*, 531 P.2d 632, 633-34 (1975) (insured's statements to insurer were privileged where insurer was contractually obligated to defend insured and insured delegated selection of an attorney and conduct of the defense to insurer, but limited by *Kay Labs*). In order to protect documents from disclosure to third parties on the ground of work product, the insurer must show that the documents in question were prepared in order to defend against a specific claim and that a lawsuit over that claim had already been filed or was imminent. *Lazar v. Riggs*, 79 P.3d 105, 108 (2003) (merely demonstrating that claims adjuster conducted an investigation to determine whether claim falls within its insured's coverage is not sufficient).	One federal court, ostensibly applying Colorado law, held that an insured could not withhold either attorney-client privileged information or work product relating to the underlying claim from its insurer where the insurer shared a common interest in the defense of the underlying claims, the coverage dispute had yet to be decided, and the insured did not demonstrate that it had an expectation that information would be concealed from its insurer. However, the insured could assert privilege over communications relating to insurance coverage. *Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co.*, 142 F.R.D. 471, 476, 478 (D. Colo. 1992) (magistrate judge) (ostensibly applying Colorado law but citing federal law in support). No Colorado state court has addressed this issue, or cited the *Metro* decision in the context of an insurance dispute. The work product doctrine would protect reports and statements compiled under the direction of an insured's attorney for use in specific litigation about to be filed, but would not protect an attorney or claims adjuster's compilation of reports and statements made while investigating a claim. *Hawkins v. Dist. Court*, 638 P.2d 1372, 1379 (1982) (in latter case, the presumption of ordinary business activity would apply); *see also Lazar v. Riggs*, 79 P.3d 105, 108 (2003) (as with third party claims, insurance investigations are not presumptively conducted in anticipation of litigation but are part of insurer's ordinary business).	A party impliedly waives the attorney-client privilege when he places a claim or defense at issue, and the document or information in question has a direct bearing on that claim or defense. *Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co.*, 142 F.R.D. 471, 477 (D. Colo. 1992) (applying Colorado law and finding waiver by insured seeking defense and indemnification from insurer); *see also Johnson v. Liberty Mut. Fire Ins. Co.*, 653 F. Supp. 2d 1133, 1135-37 (D. Colo. 2009) (under Colorado law insureds waived privilege by asserting in their complaint that insurer's bad faith affected insureds' settlement decision).	An insured's incident report drafted on a form provided by its insurance adjuster was found not to be protected work product and thus discoverable by third parties. *Kay Labs., Inc. v. Dist. Court*, 653 P.2d 721, 722 (1982) (insured failed to show report was prepared to defend specific claim, and evidence indicated report was routinely generated). Under the *Hawkins* case, the work product doctrine would protect reports and statements in an insurer's claims file compiled under the direction of an insured's attorney for use in specific litigation about to be filed, but would not protect an attorney's or claims adjuster's compilation of reports and statements made while investigating a claim as a routine business activity. *Hawkins v. Dist. Court*, 638 P.2d 1372, 1379 (1982); *see also Nat'l Farmers Union Property & Cas. Co. v. Dist. Court*, 718 P.2d 1044, 1048 (1986) (Attorney's memorandum was ordinary business record of insurer because attorney was performing the same function as a claims adjuster and litigation was not imminent. It was only after insurer denied claim that litigation arose.).

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Communications between an insured and its insurer may be privileged where the insurer receives the insured's communications at the express direction of counsel for the insured. *See Niemtiz v Town of Barkhamsted*, 2007 WL 4571131, at *1-2 (Conn. Super. Ct. Nov. 5, 2007) (holding communication was not privileged because it was obtained by insurer with the attorney's consent rather than at her direction); *Fenton v. Shillelagh Corp.*, 1995 WL 785014 (Conn. Super. Ct. Dec. 26, 1995) (holding communication was privileged because it was taken at direction of attorney for insured). Two unpublished trial court opinions suggest that an insured's disclosure of privileged information to the insurer before a coverage dispute arises may remain privileged as to third parties. *Royal Indemn.*, 2007 WL 610783, *1), citing *Carrier Corp. v. Home Ins. Co.*, 1992 WL 139778 (Conn. Super. Ct. June 12, 1992) (note: *Carrier* was called into question by the *Metro. Life* decision discussed in the next column). A statement taken by an insurer's claims adjuster has been found not to be protected work product because there was no attorney involvement. *Jacques v. Cassidy*, 257 A.2d 29, 33 (Conn. Super. Ct. 1969).	An insured and its insurer do not share a common interest in the characterization of claims or in the settlement of such claims – and thus communications would be privileged as to one another – even where the insurer retains an attorney to defend the insured. *See Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 64-65 (1999) (insured's counsel's only allegiance is to insured). In addition, an insurer's and its insured's interests become conflicted as soon as the insurer declines to cover a claim. *Id.* at 65 (where insurer had not yet agreed to defend insured and claims involved allegations not covered by insurance, it was reasonable for insured to expect its communications to its attorney were confidential as to insurer).	For at issue waiver to apply, the insurer or insured must specifically plead reliance on an attorney's advice as an element of a defense, and such reliance must be integral to the outcome. Even where reliance on legal advice is a significant motivating factor in a party's conduct, the privilege will not be pierced unless the party intends to use the advice upon which it relied to prove the ultimate claim. *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 60-61 (1999) (Insured's allegation that it made a "reasonable settlement" in agreement with the relevant policy does not by itself waive the privilege. In order to waive privilege, party alleging reasonable settlement must intend to rely on privileged communications to prove that such settlement was reasonable.). An allegation of bad faith made by an insured against its insurer entitles the insured to an *in camera* review of privileged documents following a *prima facie* showing on the basis of nonprivileged materials that "(1) the insurer acted in bad faith and (2) the insurer sought the advice of its attorneys in order to conceal or facilitate its bad faith conduct." *Hutchinson v. Farm Family Cas. Ins. Co.*, 867 A.2d 1, 8 (2005) (insurer's mere denial does not waive privilege, but defense of routine claim handling does).	Decisions support an insured's access to its insurer's claims file in the bad faith context. *See, e.g., O'Leary v. Travelers Prop. Cas. Co.*, 2001 Conn. Super. LEXIS 984, at *2-*8 (Conn. Super. Ct. Apr. 5, 2001) (in bad faith action, ordering production of work product documents and *in camera* review of privileged documents in claims file); *Bartolomeo v. Nationwide Mut. Fire Ins. Co.*, 2000 Conn. Super. LEXIS 97, at *2-*3 (Conn. Super. Ct. Jan. 5, 2000) (where insured alleged insurer's bad faith, insured granted access to complete claims file). The fact that an attorney became involved in the investigation of an insured's claim does not, of itself, protect communications from that attorney to the client unless those communications are linked to the giving of legal advice. O*'Leary*, 2001 Conn. Super. LEXIS 984, at *4. *See also Reichold Chem. Inc. v. Hartford Accident & Indem. Co.*, 2000 Conn. Super. LEXIS 2164, at *11 (Conn. Super. Ct. Aug. 15, 2000) (work product protection may apply to documents generated by attorney in function of legal counsel but not in function of claims adjuster).

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Statements given to an insurance adjuster by the insured prior to intercession of legal counsel and not guided in any way by an attorney or by one charged with preparing litigation are discoverable. *Conley v. Graybeal*, 315 A.2d 609, 610 (Del. Super. Ct. 1974) (documents and statements were prepared by insurance adjuster in regular course of investigation and not at the direction of an attorney).	Communication made by an insured to its attorney in an underlying action where insurers are paying defense costs are not privileged as to those insurers, but once the insured reasonably suspects coverage issues might arise, communications from that point forward are privileged. *Hoechst Celanese Corp v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 A.2d 1118, 1122-23 (Del. Super. Ct. 1992) (applied to work product as well – work product generated after insured reasonably suspected coverage dispute might arise was generated in anticipation of coverage litigation and was protected absent substantial need). Where an insured and insurer are joint clients represented by the same attorney, privilege does not apply between them as to matters of "common interest." *See* next column.	The weight of authority supports that where an attorney represents both an insured and an insurer, communications by either party will not be privileged as to the other, even if their interests later diverge. *Hoechst Celanese Corp v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 A.2d 1118, 1123-24 (Del. Super. Ct. 1992) (labeling this the "common interest" or "joint client" exception); *see also* Delaware R. Evid. § 502(d)(6). An insurer's denial of coverage does not completely vitiate such common interest. *Id.* at 1124. However, for this exception to apply, the parties must be, or have been, joint clients of the same counsel, retained or consulted in common; common interest standing alone is insufficient. *Id.* Privilege is waived where an insured brings suit requiring an examination of the conduct of the insured and its counsel. *Id.* at 1125. Where an insured sues an insurer for bad faith, the claim does not waive the insurer's privilege; however, privilege is waived where the insurer makes factual assertions in defense of such claim which incorporate the advice and judgment of counsel. *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259, 263 (1995) (court also found insurer's assertion of proper claim handling made insured's need for work product in claim file "overwhelming," however, *in camera* review required before production of opinion work product would be compelled by court); *see also Clausen v. Nat'l Grange Mut. Ins. Co.*, 730 A.2d 133, 140-44 (1997).	The Delaware Supreme Court has made clear that in the context of a bad faith action brought by an insured against its insurer, the insurer's claims file may be protected as privileged or work product absent the requirements for waiver. *Clausen v. Nat'l Grange Mut. Ins. Co.*, 730 A.2d 133, 140-44 (1997). Where an attorney for the insurer is acting in his professional capacity as an attorney rather than merely as a claims handler, communications in the insurer's claim file are privileged in a dispute between the insured and its insurer. *Continental Cas. Co. v. Gen. Battery Corp.*, 1994 WL 682320, at *4 (Del. Super. Ct. Nov. 16, 1994) (while not deciding the issue, the court also stated work product protection would apply to documents generated after insurer anticipated coverage litigation); *see also Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 5197, at *6, *9 (Del. Super. Ct. Jan. 5, 1989) (claims analyst's notes made after insurer sent reservation of rights letter were protected work product).

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The District of Columbia appears to have no relevant law. Under federal law applied by D.C. federal courts, there is no general privilege for communications between insureds and insurers as against third parties. *See Gottlieb v. Bresler*, 24 F.R.D. 371, 372 (D.D.C. 1959) (A "communication received by a liability insurance company from one of its insured concerning a matter covered by the insurance policy is not a privileged communication. It is not in the same class as a communication to an attorney. The law does not recognize any privilege of insurance companies. Neither is such a letter the 'work product' of a lawyer ...."). However, where an insured communicates with its insurer for the express purpose of seeking legal advice with respect to a claim, or for purposes of aiding an insurer-provided attorney in preparing a specific legal case, such communication is privileged. *See Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993) (applying federal law) (but otherwise rejecting any "sweeping general notion that there is an attorney-client privilege in insured-insurer communications").	The District of Columbia appears to have no relevant law. Under federal law applied by D.C. federal courts, if jointly represented, an insurer and its insured generally cannot assert privilege as against each other regarding communications made to their joint attorney in scope of the representation. But, if the attorney has undertaken independent representation of either an insurer or an insured on a different matter, then privilege attaches to confidential communications even if the communications are made while they are jointly represented in an ongoing suit. *See Eureka Investment Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 936-37 (D.C. Cir. 1984) (noting D.C. had no relevant law but that in such instances D.C. courts draw freely from other jurisdictions and Wigmore's evidence treatise); *see also Athridge v. Aetna Cas. and Sur. Co.*, 184 F.R.D. 181, 186-87 (D.D.C. 1998) ("If one lawyer represents two persons or entities, neither can claim an attorney-client privilege when, having fallen out one sues the other and demands to know what the other said to the lawyer when she was representing both of them. This principle has been applied when an insurance company retains counsel who represents the insured.").	*See* discussion in prior column as to the joint client exception. The comments to the D.C. Rules of Professional Conduct explain that attorney-client privilege will not protect communications between commonly represented clients and their attorney. D.C. Rules of Prof. Conduct, Rule 1.7 cmt. 15. Attorney-client privilege is waived in an insured's bad faith suit against its insurer where the insurer asserts reliance on the advice of counsel as a material element of its defense, and fairness favors finding waiver under the circumstances. *Wender v. United Serv. Auto. Assoc.*, 434 A.2d 1372, 1374 (D.C. 1981) (Privilege is impliedly waived where: "(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.").	The District of Columbia appears to have no relevant law. Under federal law applied by one D.C. federal court, the court concluded that privilege did not protect an insurer's claims files from discovery by an assignee of its insured. *Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181, 188 (D.D.C. 1998) (claims file, generated by insurer's employees, was not communicated to attorney, let alone confidentially and for purpose of seeking legal advice). Another D.C. federal court applying federal work product doctrine concluded that an insurer's claims file was not protected from disclosure to a third party. *American Nat'l Red Cross v. Vinton Roofing Co.*, 629 F. Supp. 2d 5, 7-8 (D.D.C. 2009) (information was gathered during the normal course of business, and nearly a full year before commencement of third party litigation).

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In Florida, communications between an insured and insurer are protected by the attorney-client privilege where the insurer has an obligation to defend. *Vann v. State*, 85 So. 2d 133, 138 (Fla. 1956). "[A] report or other communication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him." *Id. See also Grand Union Co. v. Patrick*, 247 So. 2d 474, 475 (Fla. 3d DCA 1971); *Staton v. Allied Chain Link Fence Co.*, 418 So. 2d 404, 405 (Fla. 2d DCA 1982). The attorney-client privilege may also protect an insurer's examination of the insured (under oath). *Reynolds v. State*, 963 So. 2d 908, 910-11 (Fla. Dist. Ct. App. 2007) (allowing defendant to assert Fifth Amendment privilege despite making prior statement to her insurer). Statements taken by the insurer from the insured during the course of insurer's investigation of a claim is protected work product. *New Life Acres, Inc. v. Strickland*, 436 So. 2d 391, (Fla. 5th DCA 1983), *citing Vann v. State*, 85 So. 2d 133 (Fla. 1956).	When an insurer has a duty to defend an insured, the insurer has a fiduciary duty to the insured. *Doe v. Allstate Ins. Co.*, 635 So. 2d 371, 374 (Fla. 1995). When an insurer undertakes its defense obligations and hires defense counsel for the insured, certain interests of the insured and insurer merge, and the common interest doctrine bars assertion of the attorney-client privilege over either parties' communications with defense counsel in a subsequent dispute between them. *Liberty Mutual Ins. Co. v. Kaufman*, 885 So. 2d 905, 909 (Fla. 3d DCA 2004); *Springer v. United Servs. Auto. Ass'n.*, 846 So. 2d 1234, 1235 (Fla. 5th DCA 2003) ("communications between insured and his counsel [hired by the insurer] that pertain to the common interest held by the insured and the insurer – *i.e.*, the defense of the claim – are available to the insurer and this right of access would continue even if their interests become adverse. . . . [but] communications concerning matters not pertaining to the defense or resolution of the liability case may be privileged."); *Fortune Ins. Co. v. Greene*, 775 So. 2d 338, 339 (Fla. 2d DCA 2000) ("insurer's fiduciary relationship with the insured dates back to the time the claim is made" and documents from that time are not privileged between insured and insurer, but documents "generated to assist in [the insurer's] defense" of the bad faith claim are exempt from discovery).	*See* discussion in prior column regarding rule where insured is represented by counsel retained by insurer. Discussion of Florida's complex and well developed law regarding common law and statutory bad faith actions is beyond this summary. Florida law allows common law claims for bad faith where the underlying claim involved a third party (third party claims), and statutory claims for bad faith for both third party claims and where the underlying claim was a first party claim by the insured. In a bad faith action, a third party or the insured may discover otherwise protected work product in the insurer's file as follows: "all materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages. . . . Further, all such materials prepared after resolution of the underlying disputed matter and initiation of the bad faith action may be subject to production upon a showing of good cause or pursuant to an order of the court following an *in camera* inspection." *Allstate Indemn. Co. v. Ruiz*, 899 So. 2d 1121, 1129-30 (Fla. 2005). In *Genovese v. Provident Life and Accident Ins. Co.*, ---So.3d---, 2011 WL 903988 (Fla. Mar. 17, 2011), the Florida Supreme Court clarified that the rule set forth in *Ruiz* applies only to protected work product and not to materials protected by the attorney-client privilege. The court in *Genovese* noted that its decision was not intended "to undermine any statutory or judicially	*See* the prior column for scope of discovery of insurer's claims files in bad faith actions. Outside the context of bad faith actions, a third party claimant may not discover an insurer's claim file because the claim file is the insurer's work product. *Scottsdale Ins. Co. v. Camara de Comercio Latino-Americano de Los Estados Unidos, Inc.*, 813 So. 2d 250, 252 (Fla. 3d DCA 2002). *See also Gov't Empl. Ins. Co. v. Rodriguez*, 960 So. 2d 794, 795-96 (Fla. 3d DCA 2007) (third party not entitled to discover insurer's general claims handling procedures in coverage action); *Seminole Cas. Ins. Co. v. Mastromines*, 6 So. 3d 1256 (Fla. 2d DCA 2009) (claims file not discoverable in first party coverage action); *State Farm Fire and Cas. Co. v. Valido*, 662 So. 2d 1012 (Fla. 3d DCA 1995) (same); *Illinois Nat'l Ins. Co. v. Bolen*, 997 So. 2d 1194 (Fla. 5th DCA 2008) ("[A]n insurer's claim file constitutes work-product and is not subject to discovery until the insurer's obligation to provide coverage is determined."). Florida courts allow insurers to assert work product over claims investigation material, even where prepared before a formal claim is filed. *Florida Cyprus Gardens, Inc. v. Murphy*, 471 So. 2d 203, 206 (Fla. 2d DCA 1985); *Winn-Dixie Stores, Inc. v. NaRutis*, 435 So. 2d 307 (Fla. 5th DCA 1983). *See also Sligar v. Tucker*, 267 So. 2d 54 (Fla. 4th DCA 1972) (hospital "incident report" prepared on a standard form and submitted to liability insurer was privileged from third party discovery).

		created waiver or exception to the privilege," such as the "at issue" doctrine, where the discovery of attorney-client privileged communications between an insurer and its counsel is permitted "where the insurer raises the advice of its counsel as a defense in the action and the communication is necessary to establish the defense." 2011 WL 903988, at *4,*citing Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So. 2d 504, 510 (Fla. 2d DCA 2006). Where a party simultaneously files both a coverage action and a bad faith action, "certain documentation may not be available for discovery until after resolution of the underlying matter." *Ruiz*, 899 So. 2d at 1130, *citing Old Republic Nat'l Ins. Co. v. Home American Credit, Inc.*, 844 So. 2d 818, 819 (Fla. 5th DCA 2003) (party not entitled to discovery of insurer's claim file in an action for insurance benefits combined with bad faith until the insurer's obligation to provide coverage has been established). In a bad faith action brought by a third party against an insurer, a third party may not discover attorney-client privileged communications between insured and insurer in the absence of waiver of privilege by the insured. *Progressive Ins. Co. v. Scome*, 975 So. 2d 461, 465 (Fla. 2d DCA 2007).	

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Where insurer hires counsel to defend the insured, there is an attorney-client relationship between the insurer and counsel. Therefore, communications between counsel and the insurer are privileged as to third parties. *Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663, 670-71 (N.D. Ga. 2008) (applying Georgia law). Attorney-client privilege does not apply to communications between the insured and the attorney for the insurer where the insurer disclaims coverage and refuses to defend. *Dixie Mfg. Co. v. Ricks*, 112 S.E. 370, 373 (1922); *see also Go Med. Indus. Pty., Ltd. v. C.R. Bard, Inc.*, 1995 WL 60582, at *3 (N.D. Ga. July 6, 1995) (citing no Georgia state law but finding no common interest privilege between insured and insurer where each had their own counsel and insurer did not control insured's defense and allowing third party discovery of insured/insurer communications). Courts have found an insured's statement to an adjuster hired by the insurer in anticipation of litigation to be protected work product. *See, e.g., Sturgill v. Garrison*, 464 S.E.2d 902, 902-03 (Ga. Ct. App. 1995).	Written reports of an insurer's claims agent relating to the issues being litigated is work product protected from disclosure to the administrator of the insured's estate. *Georgia Int'l Life Ins. Co. v. Boney*, 228 S.E.2d 731, 736 (Ga. Ct. App. 1976). While interpreting federal work product protection in a Georgia bad faith action, a court has adopted a rule that claims files generally do not constitute work product in the early stages of investigation, when the insurance company is primarily concerned with how to handle the claim; however, once litigation is imminent, the investigation is made in anticipation of litigation and the claims file is protected work product. The court explained that work product protection for material in a claims file begins at the non-fixed point between the early stages of claim investigation and when the insurer's activity shifts from mere claims evaluation to a strong anticipation of litigation. *Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663, 668 (N.D. Ga. 2008).	Under Georgia bad faith law, the contents of the insurer's claims file is relevant. *Underwriters Ins. Co. v. Atlanta Gas Light Co.*, 248 F.R.D. 663, 666-70 (N.D. Ga. 2008) (applying federal work product law in finding waiver of work product protection over contents of claim file, except as to attorney mental impressions).	An insurer has been ordered to produce its entire claims file to an additional insured, sans correspondence between the insurer and the insurer's counsel. *International Indem. Co. v. Saia Motor Freight Line, Inc.*, 478 S.E.2d 776, 778 (Ga. Ct. App. 1996) (affirming order). Written reports of an insurer's claims agent relating to the issues being litigated is work product protected from disclosure to the administrator of the insured's estate. *Georgia Int'l Life Ins. Co. v. Boney*, 228 S.E.2d 731, 736 (Ga. Ct. App. 1976). If an insurer takes statements from its insureds as a routine matter in all accident cases, those statements generally are not work product; however, if at the time of taking such statements the insurer is aware adversarial action is forthcoming, such statements are protected work product. *See Lowe's of Ga., Inc. v. Webb*, 350 S.E.2d 292, 293-94 (Ga. Ct. App. 1986) (third party action).

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Communications between an insured and insurer are not privileged as to third parties where the communications are made in the course of an initial investigation by the insurer before litigation commences and are not requested by or taken under the guidance of counsel. *DiCenzo v. Izawa*, 723 P.2d 171, 176 (1986) (relying on Haw. R. Evid. 503 and also stating that such decision does not carry a suggestion that all statements made by an insured to its insurer are not within the attorney-client privilege).	Counsel retained by an insurer to defend its insured in an underlying action solely represents the insured if a conflict arises between the insured and insurer, and in such situation is precluded from sharing with the insurer privileged information received in the representation of the insured. *Finley v. Home Ins. Co.*, 975 P.2d 1145, 1151-56 (1998) (relying on Hawaii Rules of Professional Conduct). Thus, where an insurer has a duty to defend an insured but has issued a reservation of rights, the insured is the only client of counsel retained by the insurer to defend the insured. *Id.* at 1156.	Hawaii case law does not appear to have addressed this issue.	In an unpublished decision, a court held that letters between employees of an insurer regarding potential damages were not privileged as to a third party where the letters were written in the ordinary course of business nearly a year before the third party filed a claim, and neither the insured nor insurer had retained counsel to defend itself against the third party. *State Farm Mut. Auto. Ins. Co. v. Pacific Waste, Inc.*, 144 P.3d 596 (Haw. Ct. App. 2006) (unpublished disposition). Such letters also were not protected work product where at the time the letters were written the insured had not retained counsel, nor did it know a third party lawsuit would be filed. *Id*

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The Idaho Supreme Court has held that a defendant's statement to his employer's insurance adjuster concerning an accident in which he was involved was protected work product and thus not discoverable by a third party. *Dabestani v. Bellus*, 961 P.2d 633, 636 (1998).	Idaho Rule of Evidence 502(d) outlines exceptions to the attorney-client privilege. These include communications relevant to a "matter of common interest between or among two or more clients," made by a joint client to a common attorney, "when offered in an action between or among any of the clients." IRE 502(d)(5); *see also United Heritage Prop. & Cas. Co. v. Farmers Alliance Mut. Ins. Co.*, 2011 WL 781249, *3 (D. Idaho Mar. 1, 2011) (noting that no Idaho court had yet applied this exception, but that treatises analyzing nearly identical proposed federal rule concluded that joint clients exception was "specifically designed to apply to first party bad faith actions between an insured and an insurer" where the attorney is retained by insurer to defend insured).	Under the crime fraud exception of Idaho Rule of Evidence § 502(d)(1), discovery of an insurer's privileged documents requires a showing by a preponderance of the evidence that the insurer retained and/or enabled its attorney to commit a fraud; *in camera* review of such documents requires a lesser showing of a "factual basis adequate to support a good faith belief by a reasonable person" that *in camera* review of the documents would be necessary to determine whether the crime fraud exception applied. *United Heritage Property & Cas. Co. v. Farmers Alliance Mut. Ins. Co.*, 2011 WL 781249, *4 (D. Idaho Mar. 1, 2011). As to bad faith specifically, the Idaho Supreme Court has held that communications between an insurer and its attorney were not discoverable despite the insured's bad faith claim where there was no indication in the record that the insurer put privileged communications into evidence. *Vaught v. Dairyland Ins. Co.*, 956 P.2d 674, 680 (1998).	One federal court, applying Idaho law, ordered an *in camera* review to determine whether claims adjuster case notes and correspondence between claims adjusters and insurance counsel were protected by the attorney-client privilege in the context of a bad faith action by an assignee of the insured. *United Heritage Prop. & Cas. Co. v. Farmers Alliance Mut. Ins. Co.*, 2011 WL 781249, *2, *4 (D. Idaho Mar. 1, 2011). Following *in camera* review, the court held that the documents were protected by the attorney-client privilege because they were communications between the insurer's attorneys and the insurer's adjusters for the purpose of obtaining legal advice about a specific dispute that was clearly heading to litigation and later did end up in litigation. *United Heritage Prop & Cas. Co. v. Farmers Alliance Mut. Ins. Co.*, 2011 WL 1059679, *1 (D. Idaho Mar. 23, 2011).

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Statements made by an insured to its insurer are protected by the attorney-client privilege where the insurer has a duty to defend the insured. *People v. Ryan*, 30 Ill.2d 456, 461, 197 N.E.2d 15, 17 (1964); *Baylaender v. Method*, 230 Ill. App. 3d 610, 623, 594 N.E.2d 1317, 1325 (1st Dist. 1992); *Urban Outfitters, Inc. v. DPIC Cos., Inc.*, 203 F.R.D. 376, 379 (N.D. Ill. 2001) (applying Illinois law). Where an insurer insures both adversaries in litigation, and has a duty to defend both parties, statements made by the insureds to the insurer are not privileged as to the adversary, at least where the insureds were aware that they were both insured by the same insurer. *Monier v. Chamberlain*, 35 Ill. 2d 351, 358, 221 N.E.2d 410 (1966).	An insured may not assert either the attorney-client privilege or work product protection against its insurer regarding an underlying third party action, even where the insurer has reserved its rights, or initiated a declaratory judgment action against its insured. *Waste Mgt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 579 NE.2d 322 (1991) (initial opinion, and supplemental opinion upon denial of rehearing) (ordering production of litigation files to insurer). This rule results from two principles: (1) an insured has a duty to cooperate with the insurer; and (2) the insured's defense of the underlying litigation, even with counsel hired directly by the insured, is for a common interest with the insurer. The *Waste Management* decision has been criticized and rejected by many other jurisdictions. *See, e.g., North River Ins. Co. v. Philadelphia Reins. Corp.*, 797 F. Supp. 363 (D.N.J. 1992); *Rockwell Int'l Corp. v. Superior Court*, 26 Cal. App. 4th 1255, 32 Cal. Rptr. 2d 153 (2d Dist. 1994); *Eastern Air Lines, Inc. v. U.S. Aviation Underwriters, Inc.*, 716 So.2d 340 (Fla. 3d DCA 1998). The common interest doctrine articulated in *Waste Management*, however, does not require disclosure of otherwise privileged communications with counsel relating to coverage issues. *See Illinois Emasco Ins. Co. v. Nationwide Mut. Inc. Co.*, 393 Ill. App. 3d 782, 789, 913 N.E.2d 1102, 1108 (1st Dist. 2009). *But see Western States Ins.* Co. v. O'Hara, 357 Ill. App. 3d 509, 517, 828 N.E.2d 842, 848-49 (4th Dist. 2005) (compelling insurer to produce communications with insurer's coverage counsel).	There is not much Illinois case law on this issue, perhaps because of the breadth of the *Waste Management* decision. In *Western States Ins. Co. v. O'Hara*, 828 N.E.2d 842, 851 (4th Dist. 2005), the court held that an insurer's filing of a declaratory judgment action seeking a declaration that its limits were exhausted required a finding that the insurer had acted in good faith when settling related claims, thereby putting its good faith "at issue," and waiving privilege over the insurer's communications with counsel who represented the insurer with respect to the settlements and any related work product.	There are two conflicting appellate court decisions regarding whether an insured may discover an insurer's communications with coverage counsel. *See* discussion regarding *Illinois Emasco* and *Western States* in second column. *See also Country Life Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 2005 WL 3690565 (C.D. Ill. 2005) (suggesting insurer's communications with counsel prior to denying coverage would not be privileged under Illinois law, and holding that work product protection under Federal Rule of Civil Procedure 26 did not attach until after insurer decided to deny coverage and actually notified the insured). Where attorney performs role of claims adjuster/investigator, and does not render legal assistance, communications are not privileged. (*See, e.g.*, *Chicago Meat Processors, Inc. v. Mid-Century Ins. Co.*, 1996 WL 172148 (N.D. Ill. 1996) (applying Illinois law).

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Indiana recognizes a privilege for communications between insureds and insurers as to third parties where "the policy of insurance requires the insurer to defend claims against the insured" and the communications are "concerning an occurrence which may be made the basis of a claim by a third party." *Richey v. Chappell*, 594 N.E.2d 443, 447 (1992) (statement was privileged because, where insurer is required to defend insured and insured has duty to cooperate, insurer acts as agent of attorney in gathering information for defense of insured). Documents or tangible items prepared by an insurer are protected work product under Indiana Trial Rule 26(b)(3) from disclosure to a third party if it "can fairly be said" that they were "prepared or obtained because of the prospect of litigation and not, even though litigation may already be a prospect, because they were generated as part of the insurer's regular operating procedure." *Pioneer Lumber, Inc. v. Bartels*, 673 N.E.2d 12, 16 (Ind. Ct. App. 1996).	Communications between an insurer and its attorney that relate to an insured's claim and which occur prior to the time the insurer has accepted its obligations under the insured's policy are protected by the attorney-client privilege as against the insured. *Hartford Fin. Servs. Group Inc. v. Lake Cnty. Park & Recreation Bd.*, 717 N.E.2d 1232, 1235-36 (Ind. Ct. App. 1999) (where attorney was engaged to represent the insurer in order to investigate the claim and make a coverage determination under the policy). The entirety of an insurer's claim file is not usually prepared in anticipation of litigation with its insured and thus is not protected work product from an insured when the insurer has a duty to investigate and evaluate with respect to a claim by its insured. If the insurer argues it acted in anticipation of litigation before it formally denied the claim, it bears the burden of proof on that issue. *Burr v. United Farm Bureau Mut. Ins. Co.*, 560 N.E.2d 1250, 1254-55 (Ind. Ct. App. 1990) (insurer's consultation with attorney during investigation "is an important factor which generally weighs in favor of finding a work-product privilege").	A case involving bad faith failure to settle requires the insured to know the substance of the insurer's investigation, the information available and used to make a decision and the evaluations and advice relied upon for the decision. *Burr v. United Farm Bureau Mut. Ins. Co.*, 560 N.E.2d 1250, 1255 (Ind. Ct. App. 1990). But an insurer's mere denial of bad faith does not waive attorney-client privilege and does not invoke the "at issue" exception to privilege. *Allstate Ins. Co. v. Clancy*, 936 N.E.2d 272, 278 (Ind. Ct. App. 2010) (nor is a good faith defense by insurer alone sufficient to waive). Instead, there must be an affirmative act that places the insurer's reliance upon the advice of the attorney at issue. *Id.*; *see also Hartford Fin. Servs. Group Inc. v. Lake Cnty. Park & Recreation Bd.*, 717 N.E.2d 1232, 1237 (Ind. Ct. App. 1999).	*See* discussion of *Burr* decision in prior column; *see also Hartford Fin. Servs. Group Inc. v. Lake Cnty. Park & Recreation Brd.*, 717 N.E.2d 1232, 1237 (Ind. Ct. App. 1999) (attorney-client communications in claims file not discoverable in first party bad faith action, at least while underlying claim has not been resolved); *Cigna-INA/Aetna v. Hagerman-Shambaugh*, 473 N.E.2d 1033, 1039 (Ind. Ct. App. 1985) (affirmed production of documents related to "facts and communications involved in the underwriting and coverage determinations of the insurance policy in question," because there was no indication that documents were prepared in anticipation of litigation as opposed to during claim evaluation). An insurer's files have been treated as protected work-product against third parties. *See Newton v. Yates*, 353 N.E.2d 485, 489-97 (Ind. Ct. App. 1976). Indiana law distinguishes between an attorney providing legal advice regarding coverage from an attorney retained to act as an outside claims adjuster. *Irving Materials, Inc. v. Zurich Am. Ins. Co.*, 2007 WL 4616917, at *4 (S.D. Ind. Dec. 28, 2007) (former is privileged, latter is not).

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When the same attorney acts for two parties in a matter of "common interest," the communications are privileged from third persons in the controversy but not in a subsequent controversy between the two parties. *Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633, 639 (2004) (underinsured motorist coverage action following subrogation matter in which insured and insurer were represented by same counsel).	When the same attorney acts for two parties in a matter of "common interest," the communications are privileged from third persons in the controversy but not in a subsequent controversy between the two parties. *Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633, 639 (2004); *Henke v. Iowa Home Mut. Cas. Co.*, 249 Iowa 614, 620-21 (1958) (joint client exception to attorney-client privilege applies where attorney hired by insurer defends insured under terms of insurance policy). But where the insured and insurer are in an adverse position from the outset, the joint client exception does not apply and communications are privileged as to the other. *See Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684 (1995), abrogated on other grounds by *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38 (2004).	*See* joint client exception between insurer and insurer discussed in the prior column. There is an implied waiver where the client has placed in issue a communication which goes to the heart of the claim in controversy. *See Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684-85 (1995) (insurer designating attorney as expert witness constitutes an implied waiver), abrogated on other grounds by *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38 (2004).	Documents in a claim file are not privileged as between an insured and insurer during the time they were represented by the same attorney. *Henke v. Iowa Home Mut. Cas. Co.*, 249 Iowa 614, 624 (1958). In a third party action, a routine investigation of an accident by a liability insurer is conducted in anticipation of litigation; even though litigation may not be imminent, where the primary purpose of the investigation is to be prepared to defend a third party claim. *Ashmead v. Harris*, 336 N.W.2d 197, 201 (1983). Attorney-client privilege does not apply where an attorney acts only as a claims adjuster or investigator and generates materials in the ordinary cause of an insurer's business of claims investigation. *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 641-42 (N.D. Iowa 2000) (interpreting Iowa law). In an action by an insured, documents generated after the insurer has denied the insured's claims are distinct from documents generated before such denial and are protected work product. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 686-88 (1995) (collecting cases), Note: In a non-insurance case, the Iowa Supreme Court rejected its prior use of the "primary purpose" test and adopted the broader "because of" test for determining whether documents were prepared in anticipation of litigation. *See Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 48 (2004).

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An insured's statements to the claims adjuster for her insurer has been found not privileged. *Alseike v. Miller*, 412 P.2d 1007, 1017 (1966) (Liability insurer functioned in independent role such that statements obtained by it from its insured were not communications of a client to its attorney; it appeared insured retained its own counsel rather than counsel retained by insurer.), superseded by statute on other grounds, *Brown v. Keil*, 580 P.2d 867 (1978). Where the insurer has a duty to defend the insured, the insured and insurer have a "common interest" in securing legal advice related to the same matter, and where communications are made to advance their shared interest in securing legal advice on that common matter, common interest protects communications from disclosure to third parties. *Sawyer v. Sw. Airlines*, 2002 WL 31928442, at *2-*4 (D. Kan. Dec. 23, 2002) (applying Kansas law but noting that no Kansas court had recognized common interest doctrine as a distinct privilege). The nature of the interest must be identical, not similar, and be legal, not solely commercial. *Id.* As to work product, statements taken by a claims adjuster from its insured and not under the supervision of an attorney acting in the role of attorney in preparation for trial are not protected work product. *Alseike*, 412 P.2d at 1016-17.	Under the general attorney-client privilege statute, privilege does not extend to a communication relevant to a matter of "common interest" between two or more clients if made by any of them to a lawyer whom they have retained in common when offered in an action between any of such clients. Kan. Stat. Ann. § 60-426(b)(5). As pertains to insurance, such a joint client situation may be limited to the context where an insurer and insured are co-defendants. *See Sawyer v. Sw. Airlines*, 2002 WL 31928442, at *3 n.13 (D. Kan. Dec. 23, 2002) (applying Kansas law).	Kansas case law does not appear to have addressed this issue.	Where none of the essentials of the attorney-client privilege are present, statements in a claims file are not protected from disclosure to third parties. *Alseike v. Miller*, 412 P.2d 1007, 1017 (1966) (even where claims adjuster is an attorney or takes statements at the direction of an attorney), superseded by statute on other grounds, *Brown v. Keil*, 580 P.2d 867 (1978). In order to be protected work product, the claims file materials must be prepared in preparation for trial and not for investigation. *Id.* The initial investigation of a potential claim, made by an insurer prior to the commencement of litigation, and not requested by or made under the guidance of counsel, is made in the ordinary course of business and not in anticipation of litigation or for trial. *Henry Enter., Inc. v. Smith*, 592 P.2d 915, 920 (1979); *see also Indep. Mfg. Co. v. McGraw-Edison Co.*, 637 P.2d 431, 435 (Kan. Ct. App. 1981). But where the initial investigation or claim file materials were prepared at the request of counsel, and such counsel was retained to protect the interests of the insured, work product protection applies. *Heany v. Nibbelink*, 932 P.2d 1046, 1050 (Kan. Ct. App. 1997) (protecting claims file materials prepared at the request of counsel from production to third party).

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Communications between an insured and her insurer concerning an event that may give rise to a claim are generally protected by the attorney-client privilege if the policy requires the insured's cooperation and the insurer is required to provide counsel. *Asbury v. Beerbower*, 589 S.W.2d 216, 216-17 (1979) (privileged applied to statement made by insured to insurer after third party had retained counsel but before counsel had been retained for insured and before third party had filed suit). The insured may properly assume that such communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured. *Id.* at 217; *see also Commonwealth v. Melear*, 638 S.W.2d 290, 291(Ky. Ct. App. 1982) (approving of rule in both civil and criminal contexts).	When an insurer has hired counsel to represent the insured in the underlying litigation and counsel represents both the insured and the insurer, the insurer can use communications between the insured and counsel in subsequent litigation against the insured. *Pennsylvania Cas. Co. v. Elkins*, 70 F. Supp. 155, 157 (E.D. Ky. 1947) (applying Kentucky law in situation where insured had made statements to insurer before any litigation arose out of accident with third party); *see also* Ky. R. Evid. 503(d)(6) (general privilege rule).	In an action brought by a third party assignee of the insured's rights against an insurer for bad faith refusal to settle, work product did not protect against the production of the insurer's documents and material pertaining to any negotiations or offers of settlement. *Terrell v. W. Cas. & Sur. Co.*, 427 S.W.2d 825, 828 (Ky. Ct. App. 1968) (such documents and material had been prepared for underlying suit – which had been terminated – and not for current bad faith suit).	Not specifically addressed by courts, but the principles discussed in prior columns would apply to claims files.

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A federal court applying Louisiana law denied an additional insured discovery of communications between the named insured and its insurer and held: (1) privilege is not waived where an insured communicates to the insurer through a broker, at least where the broker is involved in the defense of the underlying case and/or acts as a conduit for communications; (2) disclosure of privileged information by the broker to excess insurers did not waive privilege, because the excess insurers share common legal interests with the primary insurer; and (3) the insurer had standing to assert the insured's privilege as a representative of the insured. *See Exxon Corp. v. St. Paul Fire & Marine Ins.*, 903 F. Supp. 1007, 1009-10 (E.D. La. 1995).	In suits between an insurer and an insured, communications made by an insured to an insurer's counsel during a period of joint representation are not privileged as between the insured and insurer, at least where the issue to which the communications relate concern matters of the legal representation of the insured. *Brasseaux v. Girouard*, 214 So.2d 401, 410 (La. Ct. App. 1968). Where an attorney is hired to represent both the insured and insurer, the attorney's opinion work product is discoverable by the insured. *Hodges v. Southern Farm Bureau Cas. Ins. Co.*, 433 So.2d 125, 132 (1983).	Where an insured sues his insurer for bad faith, work product documents are discoverable where nonproduction would unfairly prejudice the insured in preparing his claim against the insurer. *Hodges v. Southern Farm Bureau Cas. Ins. Co.*, 433 So.2d 125, 130-31 (1983). In addition, an insured's claim that his insurer arbitrarily and capriciously refused to pay his claims brings into question the insurer's actions in evaluating the insured's claim, thus requiring *in camera* inspection of the insurer's claims file *McHugh v. Chastant*, 503 So.2d 791, 794 (La. App. 3d 1987) (protected work product materials may be discoverable in such case).	In a bad faith action brought by a third party against an insurer, it is appropriate for a court to order an *in camera* inspection of an insurer's claims file to determine what otherwise protected work product should be produced to the third party based on substantial need and unfair prejudice to the third party. *Lehmann v. American Home Southern Ins. Co.*, 615 So. 2d 923, 926 (La. Ct. App. 1993) (claim file was relevant to allegations of arbitrary and capricious refusal of insurer to settle claim). In an action brought by an insured against his insurer, the insurer's claims file is not automatically protected in its entirety as a matter created in anticipation of litigation; it is not created in anticipation of litigation simply because it is compiled after an accident has occurred and, therefore, at a time when litigation must be considered a possibility. *McHugh v. Chastant*, 503 So.2d 791, 793 (La. App. 3d 1987) (ordering *in camera* inspection of claims file).

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Maine appears to have no relevant case law regarding attorney-client privilege in the insurance context. Work product doctrine protects from third party discovery statements given by an employee of an insured to its insurer when given in anticipation of litigation. *See Showers v. Bangor Hydro Electric*, 2002 WL 33944689 (Me. Super. Apr. 4, 2002).	Where an insured and an insurer were jointly represented by counsel in underlying litigation, the insurer cannot assert privilege against insured in subsequent litigation between them. *Gagne v. Ralph Pill Electric Supply Co.*, 114 F.R.D. 22, 26 (D. Me. 1987) (dicta based on Maine law); *see also* Maine R. Evid. 502(d)(5) (there is no privilege "[a]s to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients").	Where a third party brings a fraud action against an insurer, and argues that the crime/fraud exception defeats the insurer's privilege, the third party has the burden of making a *prima facie* case of crime or fraud. *Gagne v. Ralph Pill Electric Supply Co.*, 114 F.R.D. 22, 25 (D. Me. 1987) (under Maine law, showing of mere negligence is not enough; bad faith discussed as to work product protection but in context of federal law).	The Supreme Judicial Court of Maine has held that work product protection may begin as early as the beginning of an investigation by an insurer's claims adjuster because "one of the routine functions of a claims adjuster in investigating an accident is to prepare for possible litigation." *Harriman v. Maddocks*, 518 A.2d 1027, 1034 (1986) (stated in the context of third party action). The court noted that this analysis "will almost always result in a preliminary finding that the claims file documents were prepared in anticipation of litigation." *Id.* (but as with all protected work product, claims file may nevertheless be discoverable upon showing of particularized need). Federal courts in Maine applying the federal work product doctrine follow a different approach. *See S.D. Warren Co. v. Eastern Electric Corp.*, 201 F.R.D. 280, 285 (D. Me. 2001) (unless and until insurer can demonstrate that it reasonably considered claim to be more likely than not headed for litigation, natural inference is that documents in its claims file that predate that realization were prepared in ordinary course of business and are not protected).

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There is no *per se* rule that all insured communications to its liability or indemnity insurer are privileged based on an assumption that all such communications are for use by an insurer-appointed attorney; rather, communications between an insurer and insured are subject to attorney-client privilege if "the dominant purpose of the communication was for the insured's defense" and "the insured had a reasonable expectation of confidentiality." *Cutchin v. State*, 792 A.2d 359, 366 (Md. Ct. Spec. App. 2002) (no privilege where insured retained own counsel, communication to adjuster was made for any and all uses by insurer, and adjuster was not acting as agent of insured or any attorney). The court limited its holding to the liability or indemnity insurance context. *Id.* at 364 n.3 ("We do not address the applicability of the privilege to communications by an insured to insurers other than those providing liability or indemnity coverage. The applicability of the privilege in those situations is severely limited, if applicable at all, because there is generally no duty to defend and provide counsel to the insured.").	Maryland appears to have no relevant case law.	In the at issue context, Maryland courts find an implied waiver of the attorney-client privilege where (1) assertion of the privilege is the result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party puts the protected information at issue by making it relevant to the case; and (3) application of the privilege would deny the opposing party access to information vital to its defense. *Parler & Wobber v. Miles & Stockbridge, P.C.*, 756 A.2d 526, 542, 545-46 (2000) (case is not insurance specific).	Maryland appears to have no relevant case law.

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There is no general privilege that protects insured-insurer communications. *Grover v. Rand*, 1997 WL 33472306, at *1 (Mass. Sup. Ct. 1997) ("[T]here is no suggestion in any decided Massachusetts case that a conversation between an insurer – even an insurer with an obligation to defend – and the insured is, without more, covered by the attorney-client privilege, even if that conversation occurs after the insured has been notified of a claim;" however, such communications could be privileged if insurer were working directly for and under the direction of an attorney). Where counsel jointly represents an insured and an insurer, counsel does not waive attorney-client privilege or work product protection by sharing confidential information with a co-client. *Rhodes v. AIG Domestic Claims, Inc.*, 2006 WL 307911, at *9 (Mass. Sup. Ct. Jan. 27, 2006). Similarly, where parties share a common legal interest and strategy, disclosure of privileged information between the parties' counsel will not waive the attorney-client privilege. *Id.* at *10. Until litigation has been threatened or commenced, the evaluation of facts by claims investigators and claims agents is performed in the "ordinary line of business and duty," not in anticipation of litigation and, therefore, is not protected work product. *Rhodes*, 2006 WL 307911, at *4; *see also Schoenstein v. Schilling*, 2009 Mass. Super. LEXIS 236 (Mass. Sup. Ct. 2009) (adjuster's investigation report and insured's recorded statement made immediately after accident, but more than a year before claim was filed, were not protected work product).	Where an insurer disclaims coverage and an insured is represented by separate counsel, in a coverage action, an insured may withhold documents from an insurer demonstrated to be within the attorney-client privilege or work product doctrine. *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 144 F.R.D. 600 (D. Mass. 1992) (applying Massachusetts law). Although Massachusetts appellate courts have not addressed the issue, a trial court has rejected Illinois' *Waste Management* approach and held that where an insurer disclaims coverage, it may not compel production of an insured's attorney-client privileged information based on either the common interest doctrine or a general cooperation clause in the policy. *Dedham-Westwood Water Dist. v. Nat'l. Union Fire Ins. Co. of Pittsburgh*, 2000 WL 33593142 (Mass. Sup. Ct. Feb. 4, 2000).	Merely alleging that an insurer committed unfair or deceptive trade or settlement practices does not waive an insured's privilege over documents related to the underlying litigation and settlement; "at issue" waiver occurs where an insured relies on advice of counsel or intends to offer testimony of its counsel. *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 144 F.R.D. 600 , 604 (D. Mass. 1992); *see also Dedham-Westwood Water Dist. v. Nat'l. Union Fire Ins. Co. of Pittsburgh*, 2000 WL 33593142 , at *4 (Mass. Sup. Ct. Feb. 4, 2000) (denying insurer's motion to compel insured to produce privileged information, and articulating standard for "at issue" waiver in coverage actions).	No blanket automatic privilege attaches to an insured's claims file in its entirety; the insurer bears the burden of demonstrating which specific materials are privileged or protected as work product. *Rodriguez v. Alvelo*, 2009 WL 2438328, at *4 (Mass. App. Ct. July 29, 2009).

ARE COMMUNICATIONS/WORK PRODUCT BETWEEN INSURED AND INSURER PRIVILEGED/ PROTECTED AS TO THIRD PARTIES?	ARE INSURED'S OR INSURER'S COMMUNICATIONS OR WORK PRODUCT PRIVILEGED/PROTECTED AS TO THE OTHER?	WHEN DOES AN INSURED OR INSURER WAIVE PRIVILEGE OR WORK PRODUCT PROTECTION (e.g., JOINT CLIENT, BAD FAITH, AT ISSUE)?	ARE CLAIMS FILES PRIVILEGED/PROTECTED AS BETWEEN INSURED AND INSURER OR THIRD PARTIES?
The general rule is that there is no privilege between an insurer and the attorney retained by the insurer to represent the insured. *Koster v. June's Trucking, Inc.*, 625 N.W.2d 82, 84 (Mich. Ct. App. 2001), citing *Kirschner v. Process Design Assocs., Inc.,* 592 N.W.2d 707, 711 (1999); *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.,* 496 N.W.2d 373, 378 (Mich. Ct. App. 1992); *see also Wilson v. Borchard*, 122 N.W.2d 57, 60 (1963) (statements given to insurer by insured are not privileged absent showing of relationship between insured's counsel and his insurer); *but see Taylor v. Temple & Cutler*, 192 F.R.D. 552, 561, 565 (E.D. Mich. 1999) (under Michigan law, insured's statements to insurer who would provide legal representation for insured were protected by attorney-client privilege). However, when an insurer hires an attorney to defend an insured, statements from the insured to the attorney are privileged as to third parties where the statements were intended as a confidential communication to the attorney for the purpose of rendering legal advice. *Co-Jo, Inc. v. Strand*, 572 N.W.2d 251, 253 (Mich. Ct. App. 1997). Documents in an insurer's claims file that are prepared in anticipation of litigation may be subject to work product protection as to third parties, and a court should conduct an *in camera* inspection to determine whether work product protection applies. *Koster*, 625 N.W.2d at 87.	Michigan appears to have no relevant case law. However, under the *Koster* decision discussed in the prior column, "The attorney's sole loyalty and duty is owed to the client [insured], not to the insurer." *Koster v. June's Trucking, Inc.*, 625 N.W.2d 82, 84 (Mich. Ct. App. 2001), citing *Kirschner v. Process Design Assocs., Inc.,* 592 N.W.2d 707, 711 (1999). That ruling would support an insured's assertion of privilege as against an insurer.	The Michigan Supreme Court adopted the following balancing test for "at issue" waiver: Privilege ends at the point where the defendant can show that the plaintiff's claim, and the probable defenses thereto, are enmeshed in important evidence that will be unavailable to the defendant if the privilege prevails. *Howe v. Detroit Free Press*, 487 N.W.2d 374, 382 (1992) (in context of statutory privilege of probation reports), quoting *Greater Newburyport Clamshell Alliance v. Public Serv. Co. of New Hampshire*, 838 F.2d 137 (1st Cir. 1988).	Documents in an insurer's claims file that are prepared in anticipation of litigation may be subject to work product protection. *Koster v. June's Trucking, Inc.*, 625 N.W.2d 82, 87 (Mich. Ct. App. 2001) (third party action). As such, when discovery of a claims file is sought, the trial court should conduct an *in camera* inspection of the documents to determine if they were prepared in anticipation of litigation. *Id.* "Communications by attorneys acting as insurance claims investigators, rather than as attorneys, are not protected by the attorney-client privilege." *Flagstar Bank v. Fed. Ins. Co.*, 2006 WL 6651780, at * 4 (E.D. Mich. Aug. 21, 2006) (purportedly applying Michigan law of attorney-client privilege but citing federal cases).

ARE COMMUNICATIONS/WORK PRODUCT BETWEEN INSURED AND INSURER PRIVILEGED/ PROTECTED AS TO THIRD PARTIES?	ARE INSURED'S OR INSURER'S COMMUNICATIONS OR WORK PRODUCT PRIVILEGED/PROTECTED AS TO THE OTHER?	WHEN DOES AN INSURED OR INSURER WAIVE PRIVILEGE OR WORK PRODUCT PROTECTION (e.g., JOINT CLIENT, BAD FAITH, AT ISSUE)?	ARE CLAIMS FILES PRIVILEGED/PROTECTED AS BETWEEN INSURED AND INSURER OR THIRD PARTIES?
For a statement made by an insured to a representative of the insurer to be privileged, it must be established that such statement was made in confidence and for exclusive use in preparation of the defense of the insured. *State v. Anderson*, 78 N.W.2d 320, 326 (1956); *see also Sprader v. Mueller*, 130 N.W.2d 147, 152-53 (1964) (statement made by insured to her insurer at the request of her counsel was presumably attorney-client privileged, but privilege was waived); *Brown v. Saint Paul City Ry. Co.,* 62 N.W.2d 688, 697-98, 701-02 (1954) (while privilege extends to communication prepared by agent or employee whether it was given directly to attorney by client or his agent or employee, report prepared pursuant to an established routine, for purposes other than preparing for litigation, was not privileged or protected work product). While pre-litigation reports prepared by claim adjusters are not always discoverable, a party asserting that a report was prepared in anticipation of litigation must show why the report was different from other investigative reports taken by a claims adjuster in assessing liability and policy coverage. *Conroy v. Mendakota Ins. Co*., 2009 WL 1806742 (Minn. D. Ct. May 7, 2009).	A federal district court applying Minnesota law rejected the Illinois *Waste Management* application of the common interest doctrine and held that a cooperation clause in a policy does not vitiate the insured's attorney-client privilege where the insured and the insurer are not jointly represented. *Bituminous Cas. Corp. v. Tonka Corp*., 140 F.R.D. 381, 386-87 (D. Minn. 1992) (absent showing that parties intended language of cooperation clauses of insurance policies to work waiver of attorney-client privilege, court declined to find contractual waiver of privilege).	While no Minnesota court appears to have addressed this in the insurance context, to the extent a joint client situation applies between an insurer and insured, there may be an exception to privilege. *See Opus Corp. v. Int'l Business Machines Corp*., 956 F. Supp. 1503, 1506 (D. Minn. 1996) (applying Minnesota law) ("When an attorney acts for two different clients who each have a common interest, communications of either party to the attorney are not necessarily privileged in subsequent litigation between the two clients."); *see also Bituminous* decision discussion in prior column.	Claims file materials are discoverable unless the party demonstrates they were prepared in anticipation of litigation. *See Conroy v. Mendakota Ins. Co*., 2009 WL 1806742 (Minn. D. Ct. May 7, 2009) (in third party action, while pre-litigation reports prepared by claim adjusters are not always discoverable, party asserting that report was prepared in anticipation of litigation must show why report was different from every other investigative report taken by claims adjusters in assessing liability and policy coverage); *see also* discussion of *Brown* decision in prior column.

ARE COMMUNICATIONS/WORK PRODUCT BETWEEN INSURED AND INSURER PRIVILEGED/ PROTECTED AS TO THIRD PARTIES?	ARE INSURED'S OR INSURER'S COMMUNICATIONS OR WORK PRODUCT PRIVILEGED/PROTECTED AS TO THE OTHER?	WHEN DOES AN INSURED OR INSURER WAIVE PRIVILEGE OR WORK PRODUCT PROTECTION (e.g., JOINT CLIENT, BAD FAITH, AT ISSUE)?	ARE CLAIMS FILES PRIVILEGED/PROTECTED AS BETWEEN INSURED AND INSURER OR THIRD PARTIES?
Mississippi case law does not appear to have addressed this issue as to the attorney-client privilege. The work product doctrine applies where material in an insurer's claims file has been prepared in anticipation of litigation. *See Haynes v. Anderson*, 597 So.2d 615, 619 (1992) (fact specific test regarding nature of documents and factual situation).	An insured may discover its own claims file from an insurer, but the insurer may withhold privileged documents and work product. *See Sessoms v. Allstate Ins. Co.*, 634 So.2d 516, 521-22 (1994) (affirming trial court's decision, after *in camera* inspection, to allow insurer to withhold privileged information and work product from insured when producing claims file to insured).	An insurer may compel an insured to produce its communications with counsel from the underlying litigation when the insured places the communications at issue in a claim against the insurer. *See Liberty Mutual Ins. Co. v. Tedford*, 644 F. Supp. 2d 753, 760-63 (N.D. Miss. 2009) (applying Mississippi privilege law). Privilege is waived where a party voluntarily injects into a litigated case a material issue which requires ultimate disclosure by the attorney of the information ordinarily protected by privilege. *Id.* at 760 (insured put privileged communications at issue by alleging it did not understand its right to obtain independent counsel and was not informed of conflict with insurer).	Material in an insurer's claim file is privileged as to third parties if prepared in anticipation of litigation. *Haynes v. Anderson*, 597 So.2d 615, 618-19 (1992) (litigation can be anticipated prior to third party complaint being filed). Protection extends to material assembled by an insurance adjuster even if not an attorney because insurance representatives are protected by Mississippi's work product rule. *Id.* at 618. The court in *Haynes* adopted a case-by-case approach to determining whether material in a claims file is protected work product. The court considers: (1) the nature of the documents; (2) the nature of the litigation; (3) the nature of the investigation; (4) the relationship between the parties; and (5) other facts "peculiar to the case." *Id*. at 619. An insurer may withhold from the insured privileged documents and work product in an insured's claims file. *See Sessoms v. Allstate Ins. Co.*, 634 So.2d 516, 521-22 (1994).

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Missouri recognizes an insured-insurer privilege as an extension of the attorney-client privilege where: (1) the insurer has a duty to defend; (2) the communication is intended to secure legal representation or intended to be transmitted to defense counsel. *State ex rel. Cain v. Barker*, 540 S.W.2d 50 (Mo. 1976); *State ex rel. Day v. Patterson*, 773 S.W.2d 224, 227 (Mo. Ct. App. E.D. 1989); *Enke v. Anderson*, 733 S.W.2d 462, 468-69 (Mo. Ct. App. S.D. 1987); *May Dept. Stores Co. v. Ryan*, 699 S.W.2d 134, 136 (Mo. Ct. App. E.D. 1985). However, statements made by an insured to its property insurer regarding a first party claim are not privileged. *Brantley v. Sears Roebuck & Co.*, 959 S.W.2d 927 (Mo. Ct. App. E.D. 1998); *State ex rel. J.E. Dunn Const. Co. v. Sprinkle*, 650 S.W.2d 707, 710 (Mo. Ct. App. W.D. 1983).	Communications between an insured and defense counsel retained for the insured by the insurer are not privileged in a dispute between them. *Truck Ins. Exchange v. Hunt*, 590 S.W.2d 425, 432 (Mo. Ct. App. S.D. 1979); *State ex rel. State Farm Mut. Auto Ins. Co. v. Keet*, 644 S.W.2d 654, 655 (Mo. Ct. App. S.D. 1982).	Missouri courts do not appear to have addressed the issue of waiver in bad faith cases. *See* the preceding column regarding the joint client doctrine.	Under Missouri law, an insured is allowed free and open access to the claims file of its liability insurer. *Grewell v. State Farm Mut. Auto. Insur. Co., Inc.*, 102 S.W.3d 33, 36-37 (Mo. 2003); *Keet*, 644 S.W.2d at 655-56 (insured entitled to discovery of communications between insurer and attorney retained by insurer to represent insured). Some case law supports an insurer withholding privileged materials in its claim file regarding first party coverage. *State ex rel. Safeco Nat'l Ins. Co. of Am. v. Rauch*, 849 S.W.2d 632, 634-35 (Mo. Ct. App. E.D. 1993) (regarding insured's uninsured motorist's claim).

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Where an insurer hires counsel for an insured, absent a conflict of interest, counsel represents both insurer and insured, and communications between counsel and the insurer are privileged as to third parties. *State v. Second Judicial Dist. Court*, 783 P.2d 911, 913 (1989) (applying privilege in third party bad faith case); *accord Baker v. CNA Ins. Co.*, 123 F.R.D. 322, 325-26 (D. Mont. 1988) (applying Montana law); *but see In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures*, 2 P.3d 806 (2000) (in distinguishing *State v. Second Judicial Dist. Court*, and not overruling it, court held that counsel hired by insurer represents only insured for the purposes of determining proper conduct as to the Rules of Professional Conduct). [The *Rules* decision may undermine the rationale for the holding in *State*.] Work product disclosed to an insurer by an insured in anticipation of litigation may be protected by the work product doctrine. *Clark v. Norris*, 734 P.2d 182, 186 (1987) (statement made by insured to insurer after litigation process had been initiated by third party claims was protected by work product doctrine).	Where an insurer and an insured do not share common counsel, communications between an insurer and its counsel are privileged as to an insured. *Palmer v. Farmers Ins. Exchange*, 861 P.2d 895, 905-06 (1993) (first party bad faith action).	Federal courts applying Montana law have held that, in a first party bad faith action, the insured may discover its insurer's entire claims file relating to the underlying claim. *Silva v. Fire Ins. Exchange*, 112 F.R.D. 699 (D. Mont. 1986); *Bergeson v. Nat'l Sur. Corp.*, 112 F.R.D. 692 (D. Mont. 1986) (holding that underlying insurance claim must be resolved before insured will be given access to otherwise privileged portions of claims file). Where an insurer and an insured do not share counsel, communications between an insurer and counsel remain privileged in a subsequent first party bad faith action. *Palmer v. Farmers Ins. Exchange*, 861 P.2d 895, 905-06 (1993) (uninsured motorist underlying claim in which insurer and insured were adverse from outset of case). Communications between an insurer and counsel remain privileged in a third party bad faith action. *State v. Second Judicial District*, 783 P.2d 911-16 (1989); *see also Walters v. State Farm Mut. Auto Ins. Co.*, 141 F.R.D. 307, 309 (D. Mont. 1990) (under Montana and federal law, in third party bad faith action, third party may discover otherwise protected work product in insurer's claim file, including opinion work product, but may not discover attorney-client privileged material).	*See* previous column.

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A report or other communication made by an insured to his liability insurer concerning an event which may be made the basis of a claim against the insured covered by the policy is a privileged communication, as between attorney and client, if the policy requires the insurer to defend the insured through its attorney, and the communication is intended for the information or assistance of the attorney in so defending the insured. *Brakhage v. Graff*, 206 N.W.2d 45, 47-48 (1973) (that communication was made to insurer's non-attorney claims representative before counsel was retained to defend the claim was not controlling as privilege extended to the claims representative as agent of counsel, because the statement was intended for use by defense counsel); *see also Shahan v. Hilker*, 488 N.W.2d 577, 581 (1992) (same, quoting *Brakhage*, and remanding for determination whether statement given by insured to her insurance adjuster was privileged).	Nebraska case law does not appear to have addressed this issue.	Nebraska case law does not appear to have addressed this issue.	The Nebraska Supreme Court has found that an insured's statements to its insurer's claims representative are privileged where the claims representative acts as an agent of an attorney hired by the insurer to defend the insured. *Brakhage v. Graff*, 206 N.W.2d 45, 47-48 (1973). The Nebraska Supreme Court has affirmed a trial court order to disclose claims information regarding other claims involving similar circumstances to a third party's claim where the insured failed to make the required showing (*a prima facie* case) that privilege or work product protection applied to the requested materials. *Greenwalt v. Wal-Mart Stores, Inc.*, 567 N.W.2d 560, 564, 566-67 (1997).

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An insured's statement to its insurer is privileged only if the statement is taken by the insurer at the "express direction" of the insured's counsel. *Ballard v. Eighth Judicial Dist. Court*, 787 P.2d 406, 407-08 (1990) (finding insured's statement to insurer was not privileged when not taken at the direction of counsel). In addition, counsel retained by an insurer to represent its insured represents both the insurer and the insured in the absence of a conflict. *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 152 P.3d 737, 739, 741-42 (2007) (adopting majority rule where insured is primary client but counsel has duties to insurer as well). The court noted that in prior decisions the court presumed that an insurer could assert attorney-client and work product privileges against third party discovery requests for documents prepared during representation of an insured. *Id.* at 742 &n.18. As to work product protection, materials resulting from an insurer's investigation are not made "in anticipation of litigation" unless the insurer's investigation has been performed at the request of an attorney. *Ballard*, 787 P.2d at 407 (finding insured's statement to her insurer was not protected work product – even when made after insurer learned third party had retained counsel – because statement was not taken at the request of attorney).	In *Nevada Yellow Cab* (*see* discussion in prior column), the Nevada Supreme Court adopted the majority rule that defense counsel jointly represents both the insured and the insurer, absent a conflict. *See also Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 152 P.3d 737, 739, 741-42 (2007). Courts applying Nevada law have not addressed the issue of privilege in a subsequent dispute between insured and insurer, including whether joint counsel who has a "primary" duty to the insured must disclose communications to the insurer. One federal court applying Nevada privilege law found that confidential communications between an insurer's coverage counsel and the insurer's independent adjuster for purposes of providing legal advice or to obtain information in order to render legal advice to the insurer are entitled to protection under the attorney-client privilege. *See Residential Constructors, LLC v. ACE Prop. & Cas. Ins. Co.*, 2006 WL 3149362, at *15 (D. Nev. Nov. 1, 2006) (in the context of insurer's investigation and denial of coverage under property policy).	Nevada case law does not appear to have addressed this issue.	Materials resulting from an insurer's investigation are not made "in anticipation of litigation" unless the insurer's investigation has been performed at the request of an attorney. *Ballard v. Eighth Judicial Dist. Court*, 787 P.2d 406, 407 (1990) (stated in context of third party action); *California State Auto Ass'n Inter-Ins. Bureau v. Eighth Judicial Dist. Court*, 788 P.2d 1367, 1368 (1990) (stated in context of first party action to obtain insurer's claims file).

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The New Hampshire Supreme Court has not addressed the issue. A federal court applying New Hampshire law refused to recognize a privilege between an insured and an insurance claims investigator. *Klonski v. Mahlab*, 953 F. Supp. 425, 432 (D. N.H. 1996).	Where an insured and an insurer are jointly represented, they may not assert privilege against the other in a dispute between themselves. *Dumas v. State Farm Mut. Auto. Ins. Co.*, 274 A.2d 781, 784 (1971).	New Hampshire case law does not appear to have addressed this issue.	New Hampshire case law does not appear to have addressed this issue.

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Communications between an insurer and an insured are privileged "only where the communications were in fact made to the [insurer] for the dominant purpose of the defense of the insured by the attorney and where confidentiality was the reasonable expectation of the insured." *State v. Pavin*, 494 A.2d 834, 837-38 (App. Div. 1985) (no privilege where insured's communication to insurance adjuster was made before litigation or third party claim commenced and where no evidence indicated adjuster was acting on behalf of attorney retained by insurer). "The attorney-client privilege should be inapplicable unless and until the interrogation of the insured has occurred at the direction of the attorney assigned to the insured." *Pfender v. Torres*, 765 A.2d 208, 214 (App. Div. 2001). As to work product, the "statement of a party to his insurer is not protected from discovery, at least to the extent that it consists of statements describing the accident." *Pfender*, 765 A.2d at 216 (remanding case with instructions for *in camera* review so that court could ensure that opinion work product would not be disclosed). Another appellate court has adopted a case-by-case approach to an insured's statements to its insurer. *See Medford v. Duggan*, 732 A.2d 533, 536-37 (App. Div. 1999) (work product protection applies if dominant purpose in obtaining statement is because of potential for litigation).	"There is no dispute that as a fundamental proposition a defense lawyer is counsel to both the insurer and the insured." *Gray v. Commercial Union Ins. Co*, 468 A.2d 721, 725 (App. Div. 1983) (in context where liability insurer retained counsel to defend insured), citing *Lieberman v. Employers Ins. of Wausau*, 419 A.2d 417 (1980). "Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter." N.J.R. Evid. 504(2); N.J. Stat. Ann. 2A:84A-20(2); *see also Longo v. Am. Policyholders' Ins. Co.*, 436 A.2d 577, 580 (App. Div. 1981) (granting insured access to insurer documents). However, such exception only applies when the insured and insurer have employed a lawyer to act for them in common. *In re Environmental Ins. Declaratory Judgment Actions*, 612 A.2d 1338, 1342-43 (App. Div. 1992) (rejecting Illinois *Waste Management* approach and holding that neither cooperation clause nor common interest privilege applied where insurer refused to defend insured). Even where an insurer has denied coverage, the cooperation clause may compel production of work product of an insured's separate attorney upon an insurer showing substantial need and undue hardship. *Id.* at 1343 (but protecting mental impressions and legal opinions).	An insured's filing of a declaratory judgment action against its insurer that puts the insured's conduct in the underlying litigation at issue may waive privilege and work product protection. *In re Environmental Ins. Declaratory Judgment Actions*, 612 A.2d 1338, 1343-44 (App. Div. 1992) (ordering *in camera* review). "The attorney-client shield may be pierced when confidential communications are made a material issue by virtue of the allegations in the pleadings and where such information cannot be secured from any less intrusive source." *Id.* at 1343. In predicting New Jersey law, a federal court in New Jersey found that there is no *per se* waiver of an insurer's privilege when an insured brings a bad faith action; rather, the court endorses a case-by-case approach to waiver. *Spiniello Cos. v. Hartford Ins. Co*, 2008 WL 2775643, at *6 (D.N.J. July 14, 2008); *see also Allstate N.J. Ins. Co. v. Humphrey*, 2008 WL 382666, at *4 (App. Div. Feb. 14, 2008) (insured's bad faith claim entitled it to access portions of insurer's file).	In the bad faith context, a federal court in New Jersey applying New Jersey law found certain documents in an insurer's claims file to be privileged and not discoverable by the insured. *Spiniello Cos. v. Hartford Ins. Co*, 2008 WL 2775643, at *1-*5 (D.N.J. July 14, 2008) (in context where first party property insurer denied coverage). A New Jersey court has granted an insured access to the claims file created by its liability insurer where the insurer retained an attorney to represent the insured and insurer jointly. *Longo v. Am. Policyholders' Ins. Co.*, 436 A.2d 577, 580 (App. Div. 1981).

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New Mexico case law does not appear to have addressed the issue. As with many states, the general work product statute provides protection for documents "prepared in anticipation of litigation" by a party or that party's representative, including its insurer. N.M. R. Ann. Rule 1-026(B)(5).	New Mexico case law does not appear to have addressed the issue.	As to "at issue waiver" generally, the advice of counsel is placed at issue where the client asserts a claim or defense and attempts to prove that claim or defense by disclosing or describing an attorney-client communication. *S.F. Pacific Gold Corp. v. United Nuclear Corp.*, 175 P.3d 309, 320 (N.M. Ct. App. 1997) (must show direct use of privileged materials is anticipated because holder of privilege must use materials at some point in order to prevail); *see also Public Service Co. of New Mexico v. Lyons*, 10 P.3d 166, 173 (N.M. Ct. App. 2000) (same).	New Mexico case law does not appear to have addressed the issue.

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In the case of liability insurance, attorney-client privilege may apply to communications made by insured to insurer either before or after suit is filed by a third party, and either before or after an attorney has been formally selected by the insurer to represent its insured; where insurer has duty to hire defense counsel, insurer acts as attorney's agent in communicating with insured. *Hollien v. Kaye*, 87 N.Y.S.2d 782, 785-86 (N.Y. Sup. Ct. 1949) (insured's statements to insurer were intended as communication to attorney ultimately to be retained for insured by insurer acting as insured's agent). However, merely because a communication is between an insurer and its insured does not render it privileged. *Calabro v. Stone*, 225 F.R.D. 96, 98 (E.D.N.Y. 2004) (under New York law, no attorney-client privilege applied where insured had not shown that communication at issue was for purpose of obtaining legal advice nor that it was intended to persuade insurer to retain counsel to defend insured nor that it was made with expectation of confidentiality); *see also Bras v. Atlas*, 545 N.Y.S.2d 723, 724 (N.Y. App. Div. 1989) (privilege does not apply where correspondence was initiated by insurer to ascertain scope of coverage and to investigate claim, and neither counsel nor any agent of counsel participated); *See also Aiena v. Olsen*, 194 F.R.D. 134, 136 n.8 (S.D.N.Y. 2000) (pursuant to New York's *Kendel-Feingold* doctrine, privilege extends to "statements intended as a communication . . . to the attorney ultimately to be retained for [the insured] by the [liability insurance] carrier, under their contract." However, court rejected assertion of privilege as to third party where insured and insurer were always in conflict, and	"When an attorney acts for two different parties having a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties." *Goldberg v. Am. Home Assurance Co.*, 439 N.Y.S.2d 2, 5 (N.Y. App. Div. 1981). "This is especially the case where an insured and his insurer initially have a common interest in defending an action against the former, and there is a possibility that those communications might play a role in a subsequent action between the insured and his insurer." *Id ;see also Liberty Mut. Ins. Co. v. Engels*, 244 N.Y.S.2d 983 (N.Y. App. Div. 1963) (attorney is counsel for insured and insurer); *Guide One Spec. Mut. Ins. Co. v. Cong. Bais Yisroel*, 381 F. Supp. 2d 267 (S.D.N.Y. 2005) (applying New York law) (communications between insured and counsel supplied by insurer not privileged in action between insured and insurer). In the first party insurance context, a court has permitted an insured to take testimony of experts hired by the insurer to investigate fire damaged property, finding work product protection did not apply. *Ogden v. Allstate Ins. Co.*, 447 NYS 2d 667, 669-71 (N.Y. Sup. Ct. 1982) (collecting cases both finding work product protection applied and that it did not, and distinguishing liability insurance context). Information concerning investigations conducted and reports prepared in connection therewith prior to the insurer's rejection of an insured's claim are subject to production. *Id.* at 670.	As to the joint client situation, *see* the prior column discussing when privilege does not apply. "Materials prepared by an insurer in contemplation of defending a claim against an insured are not privileged in subsequent litigation by the insured against the insurer respecting the insurer's handling of the claim. Indeed, where, as here, it is alleged that the insurer has breached a duty to its insured, the insurer may not use the attorney-client or work product privilege to shield from disclosure material relevant to the insured's bad faith action." *Woodson v. Am. Transit Ins. Co.*, 720 N.Y.S.2d 467, 468 (N.Y. App. 2001). In an action between an excess insurer and a primary insurer regarding settlement of an underlying claim, the primary insurer was entitled to depose the attorney who represented the excess insurer in connection with the negotiation and settlement of the lawsuit upon which the action was based, since the excess insurer had "affirmatively placed in issue its attorney's knowledge of facts or communications which might tend to prove bad faith" on the part of the primary insurer. *Am. Reliance Ins. Co. v. Nat'l Gen.*, 539 N.Y.S.2d 1004, 1004 (App. Div. 1989).	As regarding liability insurance, "once an accident has arisen there is little or nothing that the insurer or its employees do with respect to an accident report except in contemplation and in preparation for eventual litigation or for a settlement which may avoid the necessity of litigation. In this connection, therefore, it is immaterial whether attorneys have actually been assigned or employed by the insurer to represent the insured in the settlement or defense of the claim. For parallel reasons it is immaterial whether the action based on the claim has been begun or not." *Kandel v. Tocher*, 256 N.Y.S.2d 898, 900 (N.Y. App. Div. 1965). However, where the purpose of a report is not limited to, or even predominantly that of, preparing for a litigation risk but rather to prevent future accidents, discipline careless employees, or, generally, to increase the economy and efficiency of the operation, protection from disclosure does not apply. *Id.* (distinguishing situation where insurance other than liability insurance was at issue). When an attorney investigates a claim on behalf of an insured, the court should inquire into the capacity in which he was acting for his client in order to determine whether attorney-client privilege or work product applies. *Brunswick v. Aetna Cas. & Sur. Co.*, 269 N.Y.S.2d 30, 34 (N.Y. Sup. Ct. 1966); *see also Harris v. Processed Wood*, 455 N.Y.S.2d 411, 412-13 (N.Y. App. Div. 1982) (statements made to adjuster that were intended to be used for defense and settlement of claims were materials prepared for litigation rather than reports made in regular course of business).

communications from insured were for purpose of obtaining independent counsel, and posturing for future coverage litigation.); *Amer. Spec. Risk Ins. Co. v. Greyhound Dial Corp.*, 1995 WL 442151, at *3 (S.D.N.Y. 1995) (applying New York law) (privilege extends to disclosure by an insured to its insurer regarding "facts required to show potential liability of the insured" prior to the insurer acknowledging a duty to defend, on the theory that "such disclosure should be deemed in pursuit of legal representation"). An insurer's statement to his liability insurer, who had a duty to defend the insured, and an accident report generated by the insurer has been protected as work product and exempt from disclosure subject to a showing of undue hardship. *Kandel v. Tocher*, 256 N.Y.S.2d 898, 899-901 (N.Y. App. Div. 1965) (automobile liability insurance has as its purpose the defense and settlement of claims made against the insured because of the insured's liability). The court also stated that such material might be protected under the attorney-client privilege. *Id.* at 901-02 ("in a proper case, a court might conclude that the privilege arises in advance of the assignment or actual employment of an attorney by the insurer to represent its insured").			*See also* discussion in prior columns, including the *Ogden* case.

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A federal court in North Carolina, predicting North Carolina privilege law, found that attorney-client privilege does not cover an insured's statement made to an insurance adjuster, not in the presence or at the request of counsel, and before an attorney-client relationship exists. *Phillips v. Dallas Carriers Corp.*, 133 F.R.D. 475, 479-80 (M.D.N.C. 1990) (attorney-client relationship must first exist before communications could be privileged).	The "common interest or joint client doctrine" applies to the context of insurance litigation. Therefore, where an insurer retains counsel for the benefit of its insured, counsel represents both the insurer and the insured, and "those communications related to the representation and directed to the retained attorney by the insured are not privileged as between the insurer and the insured." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 617 S.E.2d 40, 47 (N.C. App. 2005), *aff'd per curiam*, 625 S.E.2d 779 (2006). However, "the attorney-client privilege still attaches to those communications unrelated to the defense of the underlying action, as well as those communications regarding issues adverse between the insurer and the insured." *Id.* (including issues of insurance coverage). Thus, some communications in counsel's files may be privileged from disclosure to the insured. *Id.* at 48 (communications unrelated to the underlying action or insured's bad faith claims, communications regarding coverage issues made prior to insured's bad faith claims, and communications unrelated to conduct forming basis of insured's bad faith claims); *see also Evans v. United Servs. Auto. Ass'n*, 541 S.E.2d 782, 790-91 (N.C. App. 2001) (discussed in subsequent column).	Where an insured counterclaims against his insurer based on alleged improper representation of the insured by counsel retained by the insurer, the insured waives privilege as to his communications with such counsel that are relevant to his counterclaims, even if unrelated to the underlying action and involving issues of insurance coverage. *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 617 S.E.2d 40, 47-48 (N.C. App. 2005) (insured's allegations that counsel retained by insurer negligently defended insured in underlying action and negligently failed to resolve claims constituted waiver of attorney-client privilege, even as to coverage issues), *aff'd per curiam*, 625 S.E.2d 779 (2006); *see also Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653, 658 (M.D.N.C. 1995) (Insured must demonstrate a *prima facie* case of bad faith to be permitted to rummage through insurer's claim file; apparently applying federal law but possibly predicting state law.). While in the context of an action between a primary and excess insurer, a federal court in North Carolina applying North Carolina law stated that merely suing an insurer does not put attorney advice at issue. *Ohio Cas. Ins. Co. v. Firemen's Ins. Co.*, 2008 WL 413847, at *2 (E.D.N.C. Feb. 13, 2008).	One North Carolina appellate court has followed a case-by-case approach to determining whether an insurer's claims file is protected work product when sought by an insured. *Evans v. United Servs. Auto. Ass'n*, 541 S.E.2d 782, 790 (N.C. App. 2001) (affirming production of claim diary entries). The court stated that "documents prepared before an insurance company denies a claim generally will not be afforded work product protection." *Id.* (material prepared in course of investigatory process is not normally entitled to protection, even in case of catastrophic injury, prior to decision on coverage). However, if the insurer can demonstrate that it anticipated litigation prior to the denial of a claim, work product protection may apply. *Id.* The same court made clear that "an insurance company and its counsel may not avail themselves of the protection afforded by the attorney-client privilege if the attorney was not acting as a legal advisor when the communication was made." *Id.* at 791 (affirming production of certain claims memos and withholding of other claims memos generated by insurer's claims counsel or directed to such counsel).

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North Dakota case law does not appear to have addressed the issue.	North Dakota case law does not appear to have addressed the issue.	A federal court in North Dakota, applying North Dakota law, exempted privileged documents in an insurer's underwriting file from its order to produce documents relevant to the insured's bad faith claim. *Williston Basin Interstate Pipeline Co. v. Factory Mut. Ins. Co.*, 270 F.R.D. 456, 464 (D.N.D. 2010).	A federal court in North Dakota, applying North Dakota privilege law, ordered an insurer to produce to its insured certain claims files regarding claims from other insureds but relevant to the insured's bad faith action. *Williston Basin Interstate Pipeline Co. v. Factory Mut. Ins. Co.*, 270 F.R.D. 456, 467 (D.N.D. 2010). In so doing, the court exempted production of attorney-client privileged documents. *Id.* The court expressed skepticism that documents in such claims files would be protected work product and ordered *in camera* review of any documents over which the insurer claimed work product protection. *Id.* at 467-68.

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The Ohio Supreme Court has held "[w]here an insurer receives a report from its insured concerning a casualty covered by its policy of insurance, such report becomes the property of the insurer and subject to its complete control; and, when the insurer transmits it to its counsel for the purpose of preparing a defense against a possible law suit growing out of such casualty, such report constitutes a communication from client to attorney and is privileged against production and disclosure." *In re Klemann*, 5 N.E.2d 492, 492 (1936). An Ohio appellate court found that where an insurer hires a claims adjuster, an insured's statements made to the adjuster and the adjuster's reports that later are given to the insurer, who in turn gives those statements and reports to an attorney defending the insured, are protected by the attorney-client privilege. *Breach v. Turner*, 712 N.E.2d 776, 781 (Ohio Ct. App. 1998) (also finding "good cause" exception to work product protection not applicable due to finding of privilege); *see also Novak v. Studebaker*, 2009 WL 3199536, at *4 (Ohio Ct. App. Oct. 7, 2009) (quoting *Klemann* but finding no privilege where insured failed to demonstrate statement given to his insurer was made in anticipation of litigation or was prepared at direction of an attorney).	Where an insurer appoints counsel to defend an insured under a liability policy for negligence, and the insured later sues its insurer seeking communications between the insurer and appointed counsel, privilege does not apply to such communications. *See Netzley v. Nationwide Mut. Ins. Co.*, 296 N.E.2d 550, 561-62 (Ohio Ct. App. 1971). The court held that the insured and insurer were both clients of the retained attorney, thus creating an exception to privilege. *Id.* ("There being such a degree of common interest in any information or legal advice concerning such negligence action, a demand for any such communications by one of the parties upon another in a subsequent action between the parties should have been supported and approved by the trial court.").	Under Ohio statutory law, there is an exception to attorney-client privilege if the client is an insurance company in a bad faith action. *See* Ohio R.C. § 2317.02(A)(2) (communications by insurer to attorney or by attorney to insurer related to bad faith by insurer are subject to *in camera* inspection upon *prima facie* showing of bad faith). The Ohio Supreme Court has held that "in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage." *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154, 158 (2001) (at that point claims file also would not contain work product); *see also Garg v. State Auto. Mut. Ins. Co.*, 800 N.E.2d 757, 761-63 (Ohio Ct. App. 2003) (explicitly extending reasoning of *Boone* to work product); *Unklesbay v. Fenwick*, 855 N.E.2d 516, 521 (Ohio Ct. App. 2006) (extending reasoning of *Boone* to bad faith processing, evaluating, or refusing to pay claim regardless of whether insurer denied coverage). Such exception, however, may not apply to the entire claims file. *See Fenwick*, 855 N.E.2d at 522-23.	Under the circumstances presented in the *Breech* case discussed in the prior column, claims files materials such as statements by the insured and investigation reports, are privileged as to third parties. *See Breech v. Turner*, 712 N.E.2d 776, 780-81 (Ohio Ct. App. 1998). In the context of bad faith, see the discussion in the prior column applicable to claims files.

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The Oklahoma Supreme Court has not decided this issue. "We expressly do not determine whether a liability insurer with a duty to defend possesses an attorney-client relationship with its insured, or whether any documents in [the insurer's] claims file are protected from discovery by an attorney-client privilege or subject to application of the work product doctrine." *Scott v. Peterson*, 126 P.3d 1232, 1234, 1240 (2005) (but assuming for purposes of decision that insured's relationship with its liability insurer with duty to defend insured was an attorney-client relationship). The court in *Scott* denied an insured's assertion of privilege over its insurer's entire claim file sought by a third party where the insured failed to show that all communications in the file satisfied the general attorney-client privilege statute. *Id.* at 1234-36 (also discussing required work product showing).	The Oklahoma Supreme Court has held that an insurer was required to produce to the insured a factual witness statement taken by the insurer's attorney during investigation of a loss and prior to the insurer's denial of coverage. *Hall v. Goodwin*, 775 P.2d 291, 292, 295-96 (1989) (document was produced in ordinary course of business rather than in anticipation of litigation). The Oklahoma Supreme Court also has suggested in an action by an insured against his insurer that, in certain circumstances, insurer documents could be protected work product. *See Heffron v. District Court Oklahoma County*, 77 P.3d 1069, 1079 (2003) (whether insurer's investigatory documents were prepared in anticipation of litigation depends upon facts of each case). An Oklahoma appellate court has found documents relating to communications between an insurer and its attorneys concerning the insured's lawsuit against the insurer and generated after that lawsuit was filed to be privileged from discovery by the insured. *Sims v. Travelers Ins. Co.*, 16 P.3d 468, 471 (Okla. Civ. App. 2000); *see also Roesler v. TIG Ins. Co.*, 2007 WL 2981366, at *9 (10th Cir. 2007) (under Oklahoma law, coverage opinions of insurer's lawyers at time of rescission of professional liability policy were privileged communications as they were in response to insurer's request for professional advice, and thus, were protected by attorney-client privilege from disclosure to insured).	Where the insured alleged bad faith, the Oklahoma Supreme Court ordered an insurer to produce a statement to its insured even if such statement was ordinary work product. *Hall v. Goodwin*, 775 P.2d 291, 296 (1989) (insured's bad faith allegation was sufficient to show good cause for substantial need of statement taken by insurer's attorney).	The Oklahoma Supreme Court has declined to find a claims file privileged or protected work product in its entirely when sought by a third party. *Scott v. Peterson*, 126 P.3d 1232, 1234-36 (2005) (insured failed to show that claims file must necessarily contain only items that were prepared in anticipation of litigation or for trial or contained only mental impressions, conclusions, opinions, or legal theories of attorney or other representative of party concerning litigation). Whether an insurer's investigatory documents were prepared in anticipation of litigation depends upon the facts of each case. *Heffron v. District Court Oklahoma County*, 77 P.3d 1069, 1079 (2003) (Because "a central part of the business of insurance companies is to investigate claims, review them and decide whether or not to pay, documents prepared in the ordinary course of business by the insurer, its employees and agents in regard to such endeavors cannot automatically be deemed to have been generated in anticipation of litigation merely because litigation may be deemed a contingency.").

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Oregon case law does not appear to have addressed this issue.	An Oregon appellate court held that it was proper for insured to withhold from insurer, on grounds of attorney-client privilege or work product, the files of the insured's attorney relating to the insured's coverage action against the insurer. *Stumpf v. Cont'l Cas. Co.*, 794 P.2d 1228, 1234 (Or. Ct. App. 1990) (also protecting documents relating to insured's assignment agreement with third parties).	Where an insured and its assigns sued an insurer for bad faith, an Oregon appellate court held that the insured did not waive privilege over the files of its attorney relating to the insured's coverage action against the insurer. *Stumpf v. Cont'l Cas. Co.*, 794 P.2d 1228, 1234 (Or. Ct. App. 1990) (also protecting documents relating to insured's assignment agreement with third parties).	Investigative reports prepared by or for an insurer may be prepared in anticipation of litigation – and thus protected work product – or prepared in the ordinary course of business – and thus unprotected –depending on the purpose of the investigation disclosed by the evidence. *United Pacific Ins. Co. v. Trachsel*, 731 P.2d 1059, 1061 (Or. Ct. App. 1987) (finding investigative report was protected work produced when prepared after insurer's denial of claim was likely).

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When an insurer hires an attorney to defend its insured in a third party action, the insured and the insurer are both clients of the attorney until such time as a conflict arises. *Graziani v. OneBeacon Ins. Inc.*, 2007 WL 5077409 (Ct. Com. Pl. 2007) (stating Pennsylvania courts have not squarely decided this issue, and collecting cases). A standard questionnaire which was prepared by an insurer and sent to its insured with instructions to complete it was a privileged communication where the insurer directed the insured to forward the completed questionnaire to defense counsel engaged by the insurer to defend the insured. *Smith v. St. Luke's Hosp.*, 1984 WL 2632 (Ct. Com. Pl. 1984) ("where two or more persons employ the same attorney in a controversy with a third person or persons, communications made in reference thereto are privileged as against the common adversary"). The court distinguished communications directly between an insured and insurer without counsel's participation, which had been held not to be privileged. *Id.* The court found that the disclosure by counsel of the questionnaire to the insurer did not waive privilege because the insurer and insured could be considered joint clients of counsel. *Id.* The court in *St. Luke's* found the questionnaire was not protected work product. Materials prepared in anticipation of litigation or for trial are discoverable except to the extent they contain mental impressions, conclusions, or opinions of an attorney or a client's representative. *Id.* at 62-63.	An insured is entitled to the entire file of its liability insurer who hired counsel to defend the insured. *Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C. 5th 242, 2007 WL 5077409 (Ct. Com. Pl. 2007) ("The rule for years has been that, if the attorney represented both parties to the transaction, . . . no communications in relation to the common business are privileged in favor or against either, but only against a common adversary.") (quotation marks omitted); *see also Smith v. St. Luke's Hosp.*, 40 Pa. D. & C.3d 54, 60, 1984 WL 2632 (Ct. Com. Pl. 1984) (while not deciding the issue, the court stated "where two or more persons employ the same attorney in a controversy with third persons, communications made in reference thereto are not privileged as between the parties themselves, should they become adversaries"). The *Graziani* court also ruled that the insurer could not assert work product protection regarding claims files pertaining to the underlying litigation and not to the present bad faith and fraud litigation: work product protection only applies "to the litigation of the claims for which the impressions, conclusions, and opinions were made." *Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C. 5th 242, 2007 WL 5077409 (Ct. Com. Pl. 2007) (applying this rule as against both insured and third parties), citing *Mueller v. Nationwide Mutual Ins. Co.*, 31 Pa. D. & C. 4th 23, 1996 WL 910155 (Ct. Com. Pl. 1996).	A third party is entitled to an insurer's claims file when the insurer sought advice of counsel in furtherance of the commission of criminal or fraudulent activity. *Graziani v. OneBeacon Ins. Inc.*, 2 Pa. D. & C. 5th 242, 2007 WL 5077409 (Ct. Com. Pl. 2007) (ordering *in camera* review). An insurer's defense that it acted in good faith does not waive the attorney-client privilege if such defense is not based on communications from counsel; however, if an insurer raises as a defense to a bad faith claim that it relied upon advice of counsel, the privilege is waived as to any communications between the insurer and its counsel regarding the underlying claims upon which the bad faith claim is based. *Mueller v. Nationwide Mutual Ins. Co.*, 31 Pa. D. & C. 4th 23, 32, 1996 WL 910155 (Ct. Com. Pl. 1996). Merely asserting claims or defenses involving state of mind are not enough to waive privilege. *Id.* at 33. In addition, a party does not automatically waive the attorney-client privilege by making its state of mind an issue in the case; rather, the party must inject the privileged material into the case. *Id.* at 36, 39. Work product protection is waived in a bad faith action alleging insurers' refusal to enter a reasonable settlement offer, where the insurers alleged that they acted in good faith in handling the suit and refusing to settle. *Birth Center v. St. Paul Cos.*, 727 A.2d 1144, 1165-66 (Pa. Super. 1999) (quoting explanatory note to Pa. R. Civ. P. 4003.3), overruled in part on other grounds, *Mishoe v. Erie Ins. Co.*, 824 A.2d 1153 (2003).	*See* discussion in prior columns.

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Rhode Island case law does not appear to have addressed this issue as to attorney-client privilege. As to work product, the Rhode Island Supreme Court has protected witness statements taken by an insurer's investigators from production to third parties, though the court acknowledged this would not extend to documents generated in the ordinary course of business. *Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d 84, 88-90 (1978) ("when an insured reports to his insurer that he has been involved in an incident involving another person, the insurer can reasonably anticipate that some action will be taken by the other party. The seeds of prospective litigation have been sown, and the prudent party, anticipating this fact, will begin to prepare his case); *see also Johnson v. C.G. Sargeant's Sons Corp*., 1979 WL 200311, at *3 (R.I. Super. Ct. Feb. 13, 1979) (work product protection over document generated at request of insured's independent attorney was not waived when disclosed to insurer who had "common interest").	The Rhode Island Supreme Court has denied an insured access to the files of her insurer on work product grounds where the requested documents were prepared at least seven months after the insured claimed coverage from her insurer and after the insured had demanded arbitration against her insurer. *Penn. Gen. Ins. Co. v. Becton*, 475 A.2d 1032, 1036-37 (1984) ("Although this time element is not the sole criteria for evaluating the discoverability of documents, there is no showing in this case that any of these documents were prepared in the ordinary course of business other than in response to the threat of litigation.").	In Rhode Island, bad faith actions must be tried separately from breach of contract actions, therefore, an insurer is not required to produce its claims file until the breach-of-contract claim has been resolved, "[o]therwise, privileged material may be disclosed which would jeopardize the insurance company's defense." *Bartlett v. John Hancock Mut. Life Ins. Co*., 538 A.2d 997, 1001 (1988) (when both claims are brought simultaneously, insurer is entitled to qualified work product protection during breach-of-contract action regarding all materials in claim file that insurer can demonstrate were prepared in anticipation of litigation), abrogated on other grounds *Skaling v. Aetna Ins. Co*. 799 A.2d 997, 1010 (2002) (this provides insurer with significant procedural protections, including nondisclosure of its file until completion of breach of contract action). In *Skaling*, the Rhode Island Supreme Court also noted that an insurer cannot assert attorney-client privilege and defend on the ground that it relied upon its attorney's advice when it denied its insured's claim. *Id.* at 1002 n.2.	*See* prior column discussion of *Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d 84 (1978).

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South Carolina case law does not appear to have addressed the issue as to attorney-client privilege. However, one South Carolina appellate court has ruled that there was no attorney-client privilege as between an underinsured motorist carrier and an underinsured motorist. *See Crawford v. Henderson*, 589 S.E.2d 204 (S.C. App. 2003) (insurance contract was between carrier and separate insured, not underinsured motorist). In so ruling, the court stated in order to enjoy the privilege, "the person asserting the privilege must show that the relationship between the parties was that of attorney and client," and for the communication to be protected, it must have occurred "in confidence with an attorney for the purpose of obtaining legal advice." *Id.* at 207 (further discussing how interests of carrier and underinsured motorist were separate and distinct). One federal court in South Carolina, applying and predicting South Carolina law as to attorney-client privilege, stated that "when the same attorney acts for two parties having a common interest and each party communicates with him ... [the] communications are clearly privileged at the instance of a third party." *Joe Gibson's Auto World, Inc. v. Zurich Am. Ins. Co.*, 2010 WL 5136151, at *5 (Bkrtcy. D. S.C. Jul. 30, 2010).	A federal court in South Carolina, applying and predicting South Carolina law, found that where an insurer retained an attorney to represent the insured, the insurer could not assert attorney-client privilege against the insured as to the insurer's communications with the attorney. *Joe Gibson's Auto World, Inc. v. Zurich Am. Ins. Co.*, 2010 WL 5136151, at *4 (Bkrtcy. D. S.C. Jul. 30, 2010). The court found that a "common interest" or "joint client" relationship applied, such that when the same attorney acts for two parties having a common interest and each party communicates with the attorney, such communications are not privileged in a controversy between the two parties. *Id.* at *5 (interests need not be entirely congruent, and mere fact that each party subsequently hired separate legal counsel does not mean common interest or joint client relationship has ended). However, the common interest or joint client doctrine does not preclude all communications from claims of privilege by another party to that relationship – the privilege still attaches regarding communications unrelated to the defense of the underlying claims and to issues adverse between the insurer and the insured. *Id.* at *7.	A federal court in South Carolina, applying and predicting South Carolina law, ruled that "there is no per se waiver of the attorney client privilege simply by [an insured] making allegations of bad faith. However, if [an insurer] voluntarily injects an issue in the case, whether legal or factual, the insurer voluntary waives, explicitly or impliedly, the attorney-client privilege." *City of Myrtle Beach v. United Nat. Ins. Co.*, 2010 WL 3420044, at *5 (D.S.C. Aug. 27, 2010) (voluntarily injecting issue is not limited to asserting advice of counsel as an affirmative defense, rather party's assertion of new position of law or fact may be basis for waiver). The court held that an insurer waived attorney-client privilege where it asserted defenses to the insured's bad faith claim, including a defense that the insurer had acted in good faith, that injected into the case issues of law and fact contained in otherwise privileged documents. *Id.* at *7.	*See* prior columns for general principles.

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"The South Dakota Supreme Court has not addressed the extent to which communications between an insured and an insurer are protected by the attorney-client privilege." *Lamar Adver. of S.D., Inc. v. Kay*, 267 F.R.D. 568, 578 (D.S.D. 2010). In *Lamar*, the court predicted the South Dakota state courts would find that an insurer was a representative of its insured, thus triggering the attorney-client privilege, where the insurer was authorized to obtain legal services on behalf of the insured, and the insurer did in fact do so. *Id.* at 581. The court held that communications between the insurer and the insured's attorney, made in furtherance of the attorney's legal representation of the insured, were protected by attorney-client privilege under S.D. Codified Laws § 19-13-3(1). *Id.* The court did not rule on whether communications between the insurer and its insured (as opposed to the insured's attorney) were attorney-client privileged, finding that even if privilege applied, the insured had not demonstrated that such communications with its insurer were confidential communications for the dominant purpose of providing its own defense. *Id.* at 579-80.	The South Dakota Supreme Court has stated that in the context of liability insurance, where the insured brings a bad faith action, the insurer may not invoke the attorney-client privilege to prevent its insured from obtaining communications with the attorney the insured hired to represent their joint interests. *Bertelsen v. Allstate Ins. Co.*, 2011 WL 1320525, at *13 (Apr. 6, 2011) (citing S.D. Codified Laws § 19-13-5(5)) . However, where the insurer provides first party insurance to pay benefits directly to an insured, the insured and insurer are adversaries, and attorney-client privilege protects an insurer's communications with its own attorney. *Id.*	*See* the prior column for a discussion of an exception to attorney-client privilege in the joint client context. The defense of advice of counsel does not waive the attorney-client privilege with respect to all communications between client and attorney concerning the transaction for which the attorney's advice was sought; rather, the attorney-client privilege is waived only to the extent necessary to reveal the advice given by the attorney that is placed in issue by the defense of advice of counsel. *Kaarup v. St. Paul Fire & Marine Ins. Co.*, 436 N.W.2d 17, 21 (1989) (insurer waived privilege over attorney advice as to foreclosure but not over separate advice as to collection on a promissory note). The court also applied such waiver to attorney work product, including opinion work product. *Id.* at 22. However, a denial of bad faith or an assertion of good faith alone is not an implied waiver of the privilege. *Bertelsen v. Allstate Ins. Co.*, 2011 WL 1320525, at *15 (Apr. 6, 2011) (remanding for determination whether insurer waived privileged in first party bad faith action by expressly or impliedly interjecting advice of counsel as part of defense of good faith).	A federal court sitting in South Dakota and applying South Dakota law has found that attorney-client privilege does not apply to an insurer's claims file sought by a third party where the claims file was generated before the third party filed suit, before the insured had retained an attorney, and did not contain confidential communications made with the purpose of facilitating legal services. *Lamar Adver. of S.D., Inc. v. Kay*, 267 F.R.D. 568, 575 (D.S.D. 2010). "[W]here an insurer unequivocally delegates its initial claims function and relies *exclusively* upon outside counsel to conduct the investigation and determination of coverage, the attorney-client privilege does not protect such communications." *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 701 n.4 (2011) (in context of bad faith action), quoting *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 771 N.W.2d 623, 638 (2009). "When attorneys act as claims adjusters, their communications to clients and impressions about the facts are treated as the ordinary business of claims investigation, which is outside the scope of the attorney-client privilege." *Id.*

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A Tennessee appellate court held that where a liability insurer hired an attorney to represent an insured in defending an underlying action, the attorney is the attorney for the insured. "Thus, correspondence from the attorney to the insurance company and from the insurance company to the attorney is controlled by the attorney-client privilege between the insured and its attorney." *Blaylock & Brown Constr., Inc. v. AIU Ins. Co.*, 796 S.W.2d 146, 155 (Tenn. Ct. App. 1990) (discovery dispute between insured and insurer). In an unreported Tennessee appellate court decision, the court held that insureds' communications to an attorney retained by the insurer were not privileged as to third parties where the attorney represented the insurer in investigating coverage, the statements were made by the insureds after they had retained their own counsel, and the attorney for the insurer made clear that he represented the insurer and not the insureds. *Gibson v. Richardson*, 2003 WL 135054, at *4 (Tenn. Ct. App. 2003). The court also found that the common interest doctrine did not apply. "Under the common interest doctrine, participants in a joint defense may 'communicate among themselves and with their attorneys on matters of common legal interest for the purpose of coordinating their joint legal strategy.'" *Id.* at *5. However, common interest did not apply where the insureds were required to give statements to the insurer's attorney so that the insurer could determine whether coverage existed. *Id.* (also finding no work product protection).	In a Tennessee appellate court decision, the court found that, where the insurer retained defense counsel for the insured, the insured was entitled to discover communications between the insurer and defense counsel. *Blaylock & Brown Constr., Inc. v. AIU Ins. Co.*, 796 S.W.2d 146, 155 (Tenn. Ct. App. 1990) (insurer conceded insured was entitled to such correspondence). When an insurer hires an attorney to defend the insured, the attorney represents the insured. "Then, correspondence from the attorney to the insurance company and from the insurance company to the attorney is controlled by the attorney-client privilege between the insured and its attorney." *Id*.	While made in an unreported case not involving insurance, a Tennessee appellate court cited with approval non-Tennessee cases for the proposition that "[i]n bad faith cases against insurance companies some courts have allowed the discovery of opinion work product where 'mental impressions are at issue in the case and the need for the material is compelling.'" *Cannon v. Garner*, 1995 WL 705210, at *2 (Tenn. Ct. App. Dec. 8, 1995) (ruling there was an exception to work product protection where activities of counsel were directly at issue).	*See* discussion of the *Blaylock* case in prior column. Tennessee state courts do not appear otherwise to have addressed the issue. Federal courts in Tennessee have addressed work product protection of claims files under federal law. See *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009); *Cowie v. State Farm Fire & Cas. Co.*, 2007 WL 2077619, at *2 (E.D. Tenn. July 17, 2007).

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The Texas Supreme Court has held that communications between an insured and its liability insurer are not protected by the attorney-client privilege if the communications occur before an attorney-client relationship has been established. *In re Ford Motor Co.*, 988 S.W.2d 714, 718-19 (1998). However, lower appellate court decisions decided after *In re Ford* have held that communications between insureds and their insurers are privileged as to third parties, pursuant to Texas R. Evid. 503. *See In re Arden*, 2004 WL 576064, at *3 (Tex. App. El Paso Mar. 24, 2004) (insured's statement to insurer's claims adjuster was privileged because adjuster took statement in capacity as insured's representative for purpose of obtaining and facilitating insured's legal representation); *In re Fontenot*, 13 S.W.3d 111, 113-14 (Tex. App. Fort Worth 2000) (where liability insurer had duty to obtain and facilitate legal representation for insured, letter and claim form sent by insured to insurer and counsel were privileged because insurer was representative of insured). The court in *In re Ford* held that the work product protection did not apply to the insured's claim file, because there was no evidence, as required by then existing rule, that the claim file materials were prepared at the direction of or for the use of counsel. 988 S.W.2d at 719. However, subsequently Texas R. Civ. P. 192.5 became effective, providing broader protection, including for materials prepared in anticipation of litigation by a party or that party's representative, including its insurer.	*See* discussion of the *In re Texas Farmers Insurance Exchange* decision in the fourth column regarding attorney-client privilege and work product protection in first party insurance context. An unpublished decision of a federal court sitting in Texas and applying Texas law discussed the common interest doctrine in a dispute between an insurer and insured as to liability insurance, but did not decide whether the doctrine was recognized under Texas law. *Fugro-McClelland Marine Geosciences, Inc. v. Steadfast Ins. Co.*, 2008 WL 5273304 (S.D. Tex. Dec. 19, 2008) (insurer sought production of an insured's communications with its separate defense counsel in an underlying action, claiming that it had a common interest in the underlying case with the insured). The court stated "when a lawyer represents two clients in a matter of common interest, the privilege cannot be claimed by one against the other in subsequent litigation between the two clients." *Id.* at *1 (citing Texas R. Evid. 503(d)(5)). However, the court rejected application of the common interest doctrine to compel the insured to produce communications with insured's separate counsel. 2008 WL 5273304 at *3-4 (rejecting *Waste Management* approach).	To the extent a joint client situation applies between an insurer and insured, the joint client exception to privilege could apply. *See* discussion in prior column. A third party's mere allegation of bad faith does not waive an insurer's privileges. *See Humphreys v. Caldwell*, 888 S.W.2d 469, 741 & n.1 (1994) (insurer's claim file was protected work product but insurer failed to show it was attorney-client privileged). Texas courts recognize "offensive use" waiver of the attorney-client privilege. For such waiver to apply, (1) the party asserting the privilege must seek affirmative relief, (2) the privileged information sought must in all probability be "outcome determinative" of the cause of action asserted (mere relevance is insufficient), and (3) disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993) (finding reinsurer did not assert affirmative relief by filing declaratory judgment action as to reinsurance proceeds and rights of original insureds); *see also Fugro-McClelland Marine Geosciences, Inc. v. Steadfast Ins. Co.*, 2008 WL 5273304, at *4 (S.D. Tex. Dec. 19, 2008) (holding under Texas law that insured seeking affirmative relief from insurer did not waive privilege under "offensive use" doctrine where insurer failed to show that insured's privileged documents were "in all probability outcome determinative").	When an attorney hired by the insurer acts as a claims investigator rather than an attorney, communications made in that capacity are not privileged. *In re Texas Farmers Ins. Exchange*, 990 S.W.2d 337, 341 (Tex. App. Texarkana 1999) (if investigator demonstrates that he communicated to insurer while acting in his professional capacity as an attorney, such communications would be subject to the attorney-client privilege). Work product protection can apply where an attorney has acted as an investigator, so long as the work product is prepared in anticipation of litigation. *Id.* The court concluded that work product protection did not apply to the claims file until the insurer denied the insured's claim. *Id.* at 342-43. However, circumstances could justify finding work product protection applied prior to a claim denial. *Id.* ("When an insurer seeks to shield its investigation from discovery as having been prepared in anticipation of litigation as the primary purpose of the investigation, we would expect it to detail and justify its emphasis on litigation rather than claim settlement."). This decision concerned first party insurance. *See also* discussion in previous columns.

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Utah case law does not appear to have addressed this issue as to attorney-client privilege. As to work product, the Utah Supreme Court has stated that Utah Rule of Civil Procedure 26(b)(4) "acknowledges that materials prepared by a party's insurance company ('insurer') are protected from discovery if they are prepared in anticipation of litigation." The rule does not require that the materials be prepared by an attorney to qualify for such protection. *Askew v. Hardman*, 918 P.2d 469, 473 (1996) (*see* further discussion of case in column on claims files).	Utah case law does not appear to have addressed the issue.	Utah case law does not appear to have addressed the issue.	Where a third party sought an insurer's claims file, the Utah Supreme Court adopted a case-by-case approach to determining whether the claims file was generated in anticipation of litigation and thus protected work product. *Askew v. Hardman*, 918 P.2d 469, 474 (1996) (claim file protected from discovery by third party claimant where contemporaneous correspondence and adjuster's affidavit demonstrated insurer anticipated litigation). The court noted that "[d]ocuments obtained by an insurer where its own insured is the claimant against it (first party claim) may well be treated differently from documents obtained by an insurer from its insured where the potential claimant is a third party." *Id.*.; *see also Green v. Louder*, 29 P.3d 638, 648-49 (2001) (upholding work product protection over insurer's letter to insured sought by third party).

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A federal court sitting in Vermont and applying Vermont law regarding attorney-client privilege stated that an insurer may be able to assert privilege over the files of an attorney retained by the insurer to defend the insured as well as communications between the insurer and such attorney when sought by a third party. *In re Lynch*, 1998 WL 908950, at *2 (Bkrtcy. D. Vt. Dec. 17, 1998) (but not deciding the issue).	A federal court sitting in Vermont and applying Vermont law regarding attorney-client privilege has held that where insured and insurer are jointly represented by defense counsel, the insurer may not assert privilege over communications with defense counsel in subsequent litigation against the insured. *In re Lynch*, 1998 WL 908950, at *2 (Bkrtcy. D. Vt. Dec. 17, 1998). The court noted that Vermont Rule of Evidence 502(d)(5) provides an exception to the attorney-client privilege in a "joint client" situation. *Id.* (finding insured and insurer were joint clients of same attorney regarding underlying litigation and privilege did not apply as between them as to communications made during the pendency of the underlying litigation even though their interests were now adverse). *Id.* A federal court, ostensibly applying Vermont law, rejected an insurer's offensive use of the common interest doctrine, denying insurer access to insured's communications with its separate defense counsel: "where there is an adversarial relationship between an insured and insurer as to whether coverage exists, the parties have never shared the same counsel or litigation strategy and the documents at issue were prepared in an atmosphere of uncertainty as to the scope of any identity of interest shared by the parties, a common interest, at this time, does not exist beyond the formal designations of insured and insurer." *Vermont Gas Sys., Inc. v. United States Fidelity & Guaranty Co*., 151 F.R.D. 268, 277 (D. Vt. 1993) (applying Vermont law as to attorney-client privilege but citing only federal cases).	*See* prior column regarding the joint client or common interest exception to privilege. A federal court sitting in Vermont and applying Vermont law as to attorney-client privilege has addressed the scope of "at issue" waiver in the insurance context; however, in so doing it cited only federal cases. *See Vermont Gas Sys., Inc. v. United States Fidelity & Guar. Co*., 151 F.R.D. 268, 276-77 (D. Vt. 1993) (Where issue between insured and insurer concerned whether proper notice was provided, there was no waiver of insured's privilege simply by filing a declaratory judgment action; rather, waiver may apply if insured attempted to prove notice based on privileged documents.).	Vermont case law does not appear to have addressed this issue.

ARE COMMUNICATIONS/WORK PRODUCT BETWEEN INSURED AND INSURER PRIVILEGED/ PROTECTED AS TO THIRD PARTIES?	ARE INSURED'S OR INSURER'S COMMUNICATIONS OR WORK PRODUCT PRIVILEGED/PROTECTED AS TO THE OTHER?	WHEN DOES AN INSURED OR INSURER WAIVE PRIVILEGE OR WORK PRODUCT PROTECTION (e.g., JOINT CLIENT, BAD FAITH, AT ISSUE)?	ARE CLAIMS FILES PRIVILEGED/PROTECTED AS BETWEEN INSURED AND INSURER OR THIRD PARTIES?
In an unpublished decision, a Virginia circuit court, the court held that the attorney-client privilege extended to an insurer's communication with the insured and the insured's counsel. *Petter v. Acevedo*, 1993 WL 945900, at *1 (Va. Cir. Ct. Feb. 26, 1993). "The weight of authority supports such an extension, and the policy reasons for the privilege support its extension to communications made by an insured to his carrier, if the carrier is required by contract to defend him and the information conveyed is intended to assist counsel in defending the insured." *Id.* (but finding fraud exception to privilege applied). As to the scope of work product protection, Virginia authorities are divided. *See Veney v. Duke*, 2005 WL 3476760, at *1 (Va. Cir. Ct. Oct. 26, 2005) (collecting cases). An unpublished decision from a Virginia circuit court adopted a case-by-case approach to determine whether documents prepared by an insurer during claims investigation are protected work product. *Lopez v. Woolever*, 2003 WL 21728845, at *4 (Va. Cir. Ct. June 25, 2003) (holding insurer's investigation of third party's claims history where third party was involved in accident with insured was prepared in anticipation of litigation and thus protected; there was no evidence that insurer would have investigated third party's claims history but for insured's accident). However, the court stated that Virginia courts are not uniform in such an approach. *Id.* at *2-*4 (*see* further discussion in claims file column).	Virginia case law does not appear to have addressed the issue as to attorney-client privilege. As to work product protection, Virginia authorities are divided on the issue. *See* discussion in last column.	In the bad faith context, in an unpublished opinion, a Virginia circuit court held that where the opinions and impressions of the insurer's agents and attorneys are directly at issue in determining whether the insurer acted in bad faith, attorney-client privilege and work product protection are not available. *Luthman v. Geico*, 1996 WL 1065625, at *2 (Va. Cir. Ct. Oct. 16, 1996). As to the "at issue" doctrine, that same court held that because the insurer asserted the advice of counsel as a defense to a bad faith claim, the information sought pertaining to the insurer's attorney's mental impressions and opinions was no longer protected by the attorney-client privilege and was therefore discoverable. *Id; see also Sayre Enters. v. Allstate Ins. Co*., 2006 WL 3613286, at *4 (W.D. Va. Dec. 11, 2006) (applying Virginia law) (insurer's general pleading that its actions were reasonable, appropriate, and legal does not put advice of counsel at issue).	The Virginia Supreme Court has not decided the scope of work product protection for claims files. *Wood v. Barnhill*, 2000 WL 33258787, at *1 (Va. Cir. Ct. May 23, 2000) (absent showing to contrary, statements made to insurer prior to litigation are not subject to work product protection); *see also Veney v. Duke*, 2005 WL 3476760, at *1 (Va. Cir. Ct. Oct. 26, 2005) (collecting cases). One Virginia circuit court discussed the split in Virginia decisions regarding whether an insurer's investigation files should be considered protected work product. *Lopez v. Woolever*, 2003 WL 21728845, at *2-*4 (Va. Cir. Ct. June 25, 2003). The court observed that some courts apply a bright-line rule excluding an insurer's investigation from work product protection unless an attorney is involved. Other courts apply a bright-line rule granting work product protection to all materials prepared by an insurer in its investigation. *Id.* Still other courts adopt a case-by-case approach. *Id.* Some courts also draw distinctions between first party and third party insurance, rejecting work product protection more readily in a first party situation where the insurer is obligated to investigate the insured's claim. *Id.* Ultimately, the court in *Lopez* decided that a case-by-case analysis is required to determine whether the doctrine applies. *Id.* at *4. No privilege attaches when an attorney performs investigative work in the capacity of a claims adjustor rather than an attorney. *Schwarz & Schwarz of Va. LLC v. Certain Underwriters at Lloyd's London*, 2009 WL 1043929, at *4 (W.D. Va. 2009) (applying Virginia law).

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A Washington appellate court held that an insured's statement to his liability insurer, who had a duty to defend the insured, was not attorney-client privileged because (1) the statement was not made by or at the direction of any attorney; (2) there was nothing in the record to indicate an intent on the part of the insured that he was consulting with an attorney for the purpose of obtaining legal advice; (3) there was no pending litigation; and (4) the insurer conceivably had interests other than protecting the rights of the insured. *Heidenbrink v. Moriwaki*, 695 P.2d 1109, 1112 (Wash. Ct. App. 1984) (statement made to insurance investigator shortly after accident), *rev'd on other grounds*, 706 P.2d 212 (1985) (reversing on work product grounds but not addressing attorney-client privilege). The Washington Supreme Court has held that an insured's statement to his liability insurer, who was obligated to retain counsel to defend the insured, was protected work product. *Heidenbrink v. Moriwaki*, 706 P.2d 212, 217 (1985). The court rejected bright line rules and considered the specific parties involved and the expectations and intent of those parties. *Id.* at 216. "If the statement were made directly to the selected attorney, it would obviously have been made in anticipation of litigation. The contractual obligation between insured and insurer mandates extension of this protection to statements made by an insured to his insurance company." *Id.* at 217; *see also Harris v. Drake*, 99 P.3d 872, 875-76 (2004) (requiring close examination of relationship between insurer and insured).	Washington case law has addressed the attorney-client privilege between insured and insurer in the bad faith context and regarding claims files. *See* next two columns; *see also Lexington Ins. Co. v. Swanson*, 240 F.R.D. 662, 666-67, 669, 671 (W.D. Wash. 2007) (Under Washington law, insurer could not withhold from insured's assignee documents based on privilege if those documents were generated in defending the insured in the underlying action. However, privilege may extend to communications between insurer and its separate coverage counsel).	"[I]t is a well-established principle in bad faith actions brought by an insured against an insurer under the terms of an insurance contract that communications between the insurer and the attorney are not privileged with respect to the insured." *Barry v. USAA*, 989 P.2d 1172, 1175-76 (Wash. Ct. App. 1999). However, the court found an underinsured motorist claim situation adversarial and thus fell outside this traditional rule. *Id.* (privilege applied absent application of the fraud exception). As to work product, the *Barry* court stated "the nature of the issues in a bad faith insurance action automatically establishes substantial need for discovery of certain materials in the claims file." *Id.* at 1177. Another Washington appellate court has stated that the rule is different in first party insurance cases. An insurer has a right to assert the attorney-client privilege against its insured in a first party insurance claim for bad faith absent a showing of an established exception to the privilege applies, such as fraud. *Cedell v. Farmers Ins. Co. of Wash.*, 237 P.3d 309, 311-14 (Wash. Ct. App. 2010) (regarding insurer's claims file). "An insurance company does not lose attorney-client privilege protection simply because its litigation opponent raises an issue where advice of counsel may be relevant." *Id.* at 314. As for the civil fraud exception, generally an insured must present a *prima facie* showing of bad faith tantamount to civil fraud. *Id.*	"An insurance company may not hire an attorney as a claims adjuster just to fall within the attorney client privilege. A claims adjuster's conduct is not privileged simply because the claims adjuster happens to be a lawyer." *Cedell v. Farmers Ins. Co. of Wash.*, 237 P.3d 309, 314 (Wash. Ct. App. 2010) (ruling that only information, investigation, and advice that insurer's attorney gave to insurer in his capacity as an attorney was subject to privilege as against the insured in a bad faith case). There is no work product immunity for documents in an insurer's claims file generated in the ordinary course of business. *Barry v. USAA*, 989 P.2d 1172, 1177 (Wash. Ct. App. 1999). Rather, to determine whether particular materials in a claims file were prepared in anticipation of litigation or in the regular course of business, the court must look to the specific parties involved and the expectations of those parties. *Id.* (remanding for *in camera* review).

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Privileged communications between an insured and insured's counsel remain privileged even if shared with insured's liability insurer. *Med. Assurance of W. Va. v. Recht*, 583 S.E.2d 80, 89 (2003) (third-party bad faith claim where insured had not executed a release of insured's claim file). An insurer's investigator who takes a statement from an insured to assist the insurer's attorney in defending a possible claim against the insured is among those considered a representative of the attorney for purposes of the attorney-client privilege. *Id*. at 88. *But see Morton Int'l, Inc. v. Liberty Mut. Ins. Co.*, 1995 WL 868455, at *2 (W. Va. Cir. Ct., Sept. 5, 1995) ("This Court will not extend the attorney-client privilege or attorney work product exception to communications with non-attorney insurers."); *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 536, 539-40 (N.D. W.Va. 2000) (under West Virginia law, transcript of insured's statement to non-attorney employee of insurer within month of accident was not attorney-client privileged because it was not made to an attorney). Work product protection over insured's counsel's work product is not negated simply because documents were received and/or reviewed by the insurer; rather, West Virginia R. Civ. P. 26(b)(3) specifically provides that documents prepared in anticipation of litigation or by or for a party's representative, "including the party's ... insurer[,]" are discoverable only upon the proper showing. *Recht*, 583 S.E.2d at 90-91 (a report from insured to insurer is protected work product as are statements obtained by insurer's investigators).	The Supreme Court of Appeals of West Virginia has not ruled on whether attorney-client privilege can be asserted by the insurer in a subsequent coverage action where defense counsel was hired by the insurer. *Cf. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 370, 508 S.E.2d 75, 87, n. 17 (1998) (declining to rule on right of insured to access insurer's claim file in first party bad faith action, and noting that rule may be different where insured alleges bad faith in settling third party claim versus bad faith refusal to pay first-party claim). Communications between an insurer and counsel it retained to advise on coverage issues after the insured filed suit against it are privileged as against the insured. *State ex rel. U.S. Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 442-43, 460 S.E.2d 677, 688-89 (1995) (regarding first party property insurance). Whether an investigation report prepared by an attorney hired by the insurer to conduct a factual investigation will be attorney-client privileged depends on whether the attorney was hired as an attorney or solely as an investigator. *Id.* at 689-91.	Insured's filing of a related first party bad faith action does not automatically result in a waiver of the insurer's attorney-client privilege or work product protection. *State ex rel. Allstate Ins. Co. v. Madden*, 601 S.E.2d 25, 29, 34, 36 (2004) (decided in context of first party bad faith claim but not addressing situation where excess judgment is entered against insured). While the insured may waive privilege in a bad faith action by placing into issue the advice of insurer-provided counsel, the insurer may nevertheless rely upon the privilege to shield evidence from disclosure if it can establish the satisfaction of the privilege's requisite elements. *Id.* at 34; *see also U.S. Fid. & Guar. Co. v. Canady*, 460 S.E.2d 677, 688 & n.16 (1995) (Advice is not in issue merely because it is relevant, or merely because it may have some affect on state of mind. Rather client must take affirmative action to assert a defense and attempt to prove that defense with privileged communications). To the extent the attorney-client privilege and the work product doctrine protect communications between a client and counsel in a first party bad faith action, the crime fraud exception may operate to require disclosure of such communications made in furtherance of a crime or fraud. *Madden*, 601 S.E.2d at 39. Where insured has not given a release to a third party, a third party bad faith action does not waive the insured's attorney-client privilege even upon allegations that the third party needs to determine whether the insurer acted in good faith. *Recht*, 583 S.E.2d 80, 93-94.	*See* discussion in previous columns, particularly the *Recht* decision. In *Recht*, the court declined to make attorney-client privileged communications in an insurer's claims file subject to discovery upon a showing of substantial need. *Recht*, 583 S.E.2d at 91-92. This was the case even where a third party brought bad faith claims against the insurer. *Id.* In *Canady,* the court refused to adopt a *per se* rule treating ordinary investigative employees, who hold licenses to practice law, as attorneys for purposes of the attorney-client privilege. *Canady*, 460 S.E.2d at 690 (1995) ("In the insurance industry context, [such rule] would shield from discovery documents that otherwise would not be entitled to any protection if written by an employee who holds no law license but who performs the same investigation and duties."). An insurer may assert "quasi attorney-client privilege" to communications in the insured's file in a third party bad faith action even where an insured has signed a release of his claim file. 'All communications in an insured's claim file generated on and after the filing date of a third party's complaint against an insured, are presumptively quasi attorney-client privileged communications. The quasi attorney-client privilege belongs to the insurer, not the insured, and may be waived only by the insurer.'" *Horkulic v. Galloway*, 665 S.E.2d 284, 296-97 (2008), quoting *State ex rel. Allstate v. Gaughan*, 508 S.E.2d 75, 89-90 (1998). The quasi-attorney client privilege is limited to a situation where an insured has signed a release of his claim file to a third party litigant. *Recht*, 583 S.E.2d at 91 n.8-9.

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The Supreme Court of Wisconsin has held that a written statement given by an insured to insurer's adjuster before any counsel had been assigned by the insurer to advise or defend the insured, and ten months before any suit had been filed, was not privileged. *Jacobi v. Podevels*, 127 N.W.2d 73, 75-76 (1964), overruling *Wojciechowski v. Baron*, 80 N.W.2d 434 (1957). The court stated that had counsel been assigned at the time the statement was made, a claim of privilege or work product could more reasonably be made. *Id.* at 75; *see also Kurz v. Collins*, 95 N.W.2d 365, 371 (1959) (third party plaintiff could compel insurer to produce insured's statements for purpose of impeaching insured as witness at trial); *Fort Howard Paper Co. v. Affiliated F.M. Ins. Co.*, 64 F.R.D. 694, 696 (E.D. Wis. 1974) (under Wisconsin law, insured's statement to liability insurer's investigator was not privileged nor was it protected work product even though investigator may have functioned under the direction of attorney designated by insurer to represent insured); *but see Nevin v. St. Paul Fire & Marine Ins. Co.*, 522 N.W.2d 36, 1994 WL 318330, at *3-4 (Wis. Ct. App. July 7, 1994) (report generated by insured for benefit of attorney at attorney's direction was privileged even if first shared with liability insurer). Insured's statement to his insurer made before an attorney was retained to represent the insured was protected work product where litigation was imminent. *Smith v. Ramharter*, 353 N.W.2d 843 (Wis. Ct. App. 1984).	There is no separate common interest exception to attorney-client privilege between insured and insurer; rather, the "common interest" exception to privilege at Wisconsin Stat. Ann. § 905.03(4)(e) may apply. *State v. Hydrite Chem. Co.*, 582 N.W.2d 411, 421-22 (Wis. Ct. App. 1998) (not deciding separate issue of whether there is a common interest exception to work product protection). Under that exception, the communication must be made to an attorney retained or consulted in common by two or more clients. *Id.* (concluding that common interest exception did not apply between insured and insurer when insured's attorney was not retained or consulted in common by insurer). *See also Hoffman v. Labutzke*, 289 N.W. 652, 657 (1940) (where same attorney defended both insured and insurer, insured's statement to attorney was not privileged as against insurer). As to work product, in a disability insurance case, work product protected investigator reports made at the direction of the insurer's attorney and statements taken by the attorney from non-party witnesses. *Dudek v. Circuit Court for Milwaukee Cnty.*, 150 N.W.2d 387, 406-07 (1967); *see also Hydrite*, 582 N.W.2d at 415-16 (notes of insured's separately retained attorney of interviews with the insured's employees were work product but did not contain mental impression of attorney and were discoverable due to the insurers' substantial need and undue hardship).	Regarding the common interest exception to the attorney-client privilege, *see* the prior column discussion. Wisconsin courts have applied a restrictive view of the "at issue" doctrine. "Under the restrictive view, the attorney-client privilege is waived when the privilege holder attempts to prove a claim or defense by disclosing or describing an attorney-client communication." *State v. Hydrite Chem. Co.*, 582 N.W.2d 411, 418 (Wis. Ct. App. 1998) (concluding this is consistent with Wisconsin's statutory attorney-client privilege at Wisconsin Stat. Ann. § 905.03). Thus, where an insured did not use or intend to use any privileged communication to prove its case against its insurer, there was no waiver of attorney-client privilege. *Id.* at 419. *See also Herget v. Northwestern Mut. Life Ins. Co.*, 487 N.W.2d 660, 1992 WL 191224, at *1-*2 (Wis. Ct. App. May 12, 1992) (insurer's statement that it had conducted research into whether public policy precluded recovery did not waive privilege over legal memorandum generated by insurer's in-house counsel in insured's bad faith action).	Work product protection extends to statements taken by a non-attorney, such as investigators, at an attorney's direction, but production may be ordered upon a showing of good cause; such showing of good cause is less demanding where a non-attorney is involved. *Dudek v. Circuit Court for Milwaukee Cnty.*, 150 N.W.2d 387, 406-07 (1967) (reports provided to insurer's attorney by investigators were protected work product). However, an insured's routine report to his insurer which report happens to find its way into the files of the insurer's attorney is not protected work product. *Id.* at 405. While the "work product rule does not, by its terms, extend to claims managers, some of the factors [supporting the rule] are applicable to claims personnel due to the peculiarly quasi-legal nature of the function they perform. This is so because much of the investigation and research engaged in by claims personnel is done with an eye towards litigation – either in actual preparation therefore, or in an effort to evaluate the necessity thereof." *Shelby Mut. Ins. Co. v. Circuit Court for Milwaukee Cnty.*, 228 N.W.2d 16, 163-64 (1975) (holding insurer's claims managers need not disclose names of non-testifying expert consultants absent showing of special need or hardship). *See also* discussion in previous columns.

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The Wyoming Supreme Court has held that an insured's statements and reports provided to his insurer were protected by the attorney-client privilege when such information was furnished to the insurer in full expectation that it was being furnished to an agent of the attorney who would defend the insured. *Thomas v. Harrison*, 634 P.2d 328, 334 (1981) ("the prime purpose for which one purchases liability insurance is to acquire protection against liability for the covered occurrences"). The court stated such a holding was in line with the majority view among courts from other jurisdictions. *Id.* As to work product, the decision in *Thomas* also found an insured's statements and reports furnished to his insurer were prepared in anticipation of litigation or for trial by or for the insured or by or for the insured's representative, including his attorney, consultant, surety, indemnitor, insurer or agent, as designated in Rule 26(b)(3) of the Wyoming Rules of Civil Procedure. *Id.* at 331.	Wyoming case law does not appear to have addressed the issue.	While not deciding the issue, in the context of a bad faith refusal to defend action brought by an insured against its insurer, the Wyoming Supreme Court remanded to the district court for a determination of whether the insured could access the insurer's claims file. *See First Wyoming Bank, N.A., Jackson Hole v. Continental Ins. Co.*, 860 P.2d 1064, 1088, 1091 n.10 (1993) (collecting cases from other jurisdictions regarding privilege and work product in the insurance context), *vacated in part on rehearing on other grounds*, 860 P.2d 1094 (1993). Outside of the insurance context, the Wyoming Supreme Court has stated generally that there is an exception to attorney-client privilege "when the same attorney represents two clients who share information on a matter of common interest." *Oil, Chemical & Atomic Workers Intern. Union v. Sinclair Oil Corp.*, 748 P.2d 283, 290 (1987).	The Wyoming Supreme Court has recognized the existence of this issue in disputes between insurers and insureds but has not decided it. *See First Wyoming Bank, N.A., Jackson Hole v. Continental Ins. Co.*, 860 P.2d 1064, 1091 n.10 (1993) ("One of the critical determinates in first party cases is the date when the privilege-work product preclusion of discovery commences, e.g., date of accident or insured coverage issue creating event, when claim denial is made, or finally, whenever suit is filed by the insurer or against the insurer.").

Template

This template, accompanied by explanations of the purpose of each question, was sent to contributors to the project in March 2011. Responses were received in May, followed by an editing process that was carried out in close cooperation with the contributors and concluded in early August with the publication of this report.

1. How do privilege issues arise in insurance disputes?

a. What types of documents may be sought in disputes with an Insurer which would give rise to privilege issues?

2. As a practical matter, does your jurisdiction's litigation or arbitration procedure/rules limit a party's ability to obtain access to insurance related documents?

3. What types of relationships in the insurance context may be subject to the attorney-client/ solicitor-client relationship?

a. Are communications between Insureds and Insurers protected from third parties by the attorney-client/solicitor-client privilege?

b. Are there doctrines, such as joint client, joint defense, common interest, or other doctrines that may protect Insured/Insurer communications from discovery/disclosure to third parties in insurance disputes?

c. Is privilege applied in a different manner where:

i. The Insurer has agreed to defend the Insured without reservation of rights?

ii. The Insurer provides a defense pursuant to a reservation of rights?

iii. The Insurer has denied coverage?

iv. The policy provides only a duty to indemnify and not a duty to defend?

d. How do privilege issues arise regarding Insurer/Reinsurer communications?

4. Privilege and Internal/In-House/Employed Counsel: How does this issue arise in insurance disputes?

5. Is there a concept of litigation privilege and, if so, how can it protect insurance related documents?

6. Can an Insurer compel an Insured to disclose privileged communications to the Insurer?

7. How can privilege be waived in insurance disputes?

a. Who has the authority to waive privilege?

b. Can privilege be waived indirectly, for example, by putting privileged communications "at issue" in a dispute?

c. Can privilege be waived inadvertently?

d. Bad Faith Actions

1. Does an Insured's allegation of bad faith claims handling or refusal to pay an insurance claim affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

2. Does an Insurer's assertion of good faith investigation or good faith claims handling affect an Insurer's ability to assert privilege over claims files and/or communications with the Insurer's coverage counsel?

8. What are the best practices for maintaining privilege in the insurance context?

9. Is there a difference between privilege and confidentiality/privacy? If so, what types of insurance related documents are protected by confidentiality/privacy rules/laws?