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Insurance Bad Faith

Who Is Entitled To The Claims File?

by
John J. Pappas
and
Janice C. Buchman

Butler Pappas Weihmuller Katz Craig LLP

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Commentary

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[Editor's Note: John J. Pappas and Janice C. Buchman are with the law firm of Butler Pappas Weihmuller Katz Craig LLP, which has offices in Tampa, Chicago, Charlotte, Philadelphia, Mobile, Tallahassee, and Miami. Mr. Pappas and Ms. Buchman are experienced trial and appellate lawyers in the firm's Coverage and Extra-Contractual Departments. Any commentary or opinions do not reflect the opinions of Butler Pappas or Mealey's. *Copyright © 2013 by the authors. Responses are welcome.]*

Introduction

The United States Supreme Court has recognized the "attorney-client privilege" as "one of the oldest recognized privileges for confidential communications," the purpose of which is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[1] The "work product doctrine," which was established more than sixty years ago by the United States Supreme Court in the seminal case of *Hickman v. Taylor*,[2] protects an attorney's litigation preparation materials from discovery, as opposed to communications to a client.[3] Yet the application of the "attorney-client privilege" and "work product doctrine" continues to be a source of confusion and disagreement. The recent decision by a Georgia federal court in *Camacho v. Nationwide Mutual Insurance Company*[4] illustrates why the application of the "attorney-client privilege" and "work product doctrine" to the insurer's claims file in the context of a third-party "bad faith" claim can be particularly confusing. Note, the issue is not defense counsel's file, to which the insured is entitled to full access.

In *Camacho* Plaintiffs brought suit against Seung C. Park's insurer alleging it negligently and in "bad faith" failed to settle claims against its own insured in the underlying wrongful death suit.[5] After entry of a judgment in excess of his policy limits, Mr. Park, the insured, assigned to claimants his claims for negligence and "bad faith" failure to settle against his own insurer. The agreement by which Park assigned his claims contained a waiver of his attorney-client privilege and work product protection.[6]

Armed with this "assignment agreement," the claimants became the Plaintiffs in the "bad-faith" suit against the insurer, and sought discovery of the insurer's claims files. Specifically, Plaintiffs, standing in the shoes of the insured, requested the insurer's entire claims file relating to their own claims for damages against the insured, up through and including the date when Plaintiffs' excess judgment against the insured became final. Plaintiffs specifically sought production of internal documents and computer file entries, as well as communications between the insurer and the "outside litigation counsel" (meaning the attorney and law firm retained by the insurer to represent the insured in the underlying litigation) as well as between the insurer and its "in-house 'claims counsel.' "[7] The Plaintiffs, standing in the shoes of the insured, apparently sought more than the insured's own defense counsel had in its file.

In response to Plaintiffs' request for the insurer's *complete* claim file (including communications with its in-house "claims counsel" as well as communications with defense counsel) relating to the Plaintiffs' tort claims against the insured, the insurer objected to producing

certain of the materials contained in its own claims file, on the basis of both the "attorney-client privilege" and the "work product doctrine." It also objected on the basis of relevancy, claiming that some of the requested materials were "outside the relevant time frame for establishing bad faith on the part of" the insurer.[8]

Insurance 'Bad-Faith' Claims

A "third-party bad-faith" action concerns a case in which an insured sues his own liability insurance company for "bad-faith" concerning a claim, typically for failing to settle a claim or providing a defense.[9] The Plaintiffs are entitled to all the file materials in possession of defense counsel. Nothing defense counsel has should be denied his own client, the insured, who assigned such rights to Plaintiffs (Claimants). As the authors of this commentary have previously stated in *"The Begrudged 'Insurance Bad-Faith-Suit' Exception to the Attorney-Client Privilege*:"

> [A] third-party claim from inception has a fiduciary relationship between the insured and the insurer and the mutually acceptable defense counsel. The insurer and defense counsel are contractually and ethically obligated to defend the insured and represent the insured in such a defense. None of the communications defense counsel has with the insurer can ever be protected as privileged from the insured. This is because a mutually acceptable defense counsel is first and foremost the attorney for the insured. After all, it is the insured who defense counsel is defending. Everything that attorney knows, certainly his or her legal opinions and recommendations, the insured is entitled to receive, and, indeed, should receive. In a third-party triumvirate relationship all defense counsel's opinions and mental impressions are for the benefit of the insured. The "client" in such a relationship is from the onset the insured. All this the insured is entitled to pursuant to a liability carrier's "duty-to-defend" the insured.[10]

Based on the nature of a dispute between an insured and its liability carrier, as well as the considerations articulated by the courts, it is most certainly understandable why the claim file from the underlying litigation, for which the liability carrier is providing a defense, would be the subject of discovery in a "bad-faith" litigation. Not only is it calculated to lead to the discovery of admissible evidence, but this defense claim file, to which the insured already had full access, was created for the benefit of the insured.[11]

These same principles apply to *Camacho*, to the extent of communications between the insurer and defense counsel regarding the defense of the insured in the underlying action, whether such communications are contained in defense counsel's file, or in the insurer's file. Even though Plaintiffs in *Camacho* were not "the insured," the assignment by the insured of his claims against his own insurer allowed Plaintiffs to stand in the insured's shoes in the "bad faith" litigation against his insurer. The Second Circuit federal court, in *Pinto v. Allstate Ins. Co.*,[12] described such assignments of the insured's "bad faith" claim to the plaintiff in the underlying personal injury or wrongful death suit as "the ordinary mechanism for pursuing such claim against the insurer, usually in exchange for a covenant not to execute on the judgment."[13]

On the other hand, however, the third-party claim files maintained by the liability carrier contain documents that the insured (Plaintiffs) may not be entitled to obtain. For instance, if there is a legal opinion from another lawyer on the issue of coverage, never given to the insured or its defense counsel, neither the insured, nor Plaintiffs standing in the insured's shoes by way of an assignment agreement, should be entitled to such document. Similarly, communications between the insurer and its in-house counsel, to the extent not shared with defense counsel, could also be documents that the insured (Plaintiffs) may not be entitled to obtain. Such documents were clearly not created for the benefit of the insured.

Attorney-Client Privilege

The court in *Camacho* correctly noted that, in this diversity case, issues of privilege are controlled by substantive state law.[14] The "work-product" doctrine, however, is procedural, and, therefore, controlled by federal law.[15]

Applying Georgia substantive law, and responding to Plaintiffs' assertion that "no 'attorney-client privilege' exists when an attorney represents both the insurer

and the insured,"[16] the federal court in *Camacho* noted the purpose of the "attorney-client privilege," stating:

> The purpose of the attorney-client privilege is to protect and benefit the client by securing the client's confidence in the secrecy of the communication, thereby increasing the freedom of consultation so the attorney will act with full understanding of the matter in which he or she is employed. In Georgia, the attorney-client privilege is to be narrowly construed. Inasmuch as the exercise of the attorney-client privilege results in the exclusion of evidence, a narrow construction of the privilege comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is the object of all legal investigation.[17]

The *Camacho* court's analysis then shifted to the circumstances under which it is appropriate to "waive"[18] the "attorney-client privilege." The federal court again applying Georgia substantive law stated:

> The attorney-client privilege belongs to the client and the privilege is solely the client's to waive. *Peterson v. Baumwell*, 414 S.E.2d 278, 280 (Ga. App. 1992); *Waldrip v. Head*, 532 S.E.2d 380 (Ga. 2000). Under Georgia law a well-recognized exception to the exclusion of evidence based on attorney-client privilege exists in situations in which the attorney jointly represented two or more clients whose interests subsequently become adverse. *Id.; see, e.g., Spence v. Hamm*, 487 S.E.2d 9 (Ga. App. 1997).
>
>> If two or more persons jointly consult [or retain] an attorney the communications which either makes to the attorney are not privileged in the event of any subsequent litigation between the parties. In such situations it is considered that the attorney does not have an attorney-client relationship with either of the joint parties.
>
> *Id.* (*quoting Gearhart v. Etheridge*, 208 S.E.2d 460 (Ga. 1974)).

Implicit in the *Camacho* court's analysis, including its analysis of the exception to the exclusion of evidence based on the "attorney-client privilege," is the concept that defense counsel retained by the insurer to represent the insured represents *both* the insured and its insurer.

Note that neither the Georgia state court's decision in *Peterson v. Baumwell*[19] nor the other two Georgia cases cited by the *Camacho* court were decided in the context of a third-party triumvirate relationship. For example, in *Peterson*, where two purchasers of real property were jointly represented by an attorney, the court held that communications made by purchasers to their attorney during time that they were jointly represented were admissible and discoverable under the "joint-attorney exception" to the "attorney-client privilege." The *Camacho* court noted, however, that the Georgia state court in *Peterson* relied on a Wisconsin Supreme Court decision, *Hoffman v. Labutzke,*[20] in which the court applied the "joint-attorney" exception in deeming the "attorney-client privilege" "waived" in a situation in which the insurer and insured had been jointly represented before and throughout trial. The Wisconsin Supreme Court reasoned that "when one party consents [to joint representation], his privilege under the statute 'is waived.' " That is, the privilege is held jointly and either party can "waive" it.

The *Camacho* court then stated:

> Although no Georgia court has yet to expressly hold that the privilege vanishes when the same attorney represents both the insurer and the insured under the joint-defense exception, several courts including in Florida, North Carolina, and Iowa have held in the context of a claim for third-party bad faith by an insured against her insurer that the protection of the attorney-client privilege did not apply.[21]

The problem is that the "attorney-client privilege" is neither "waived" nor "vanishes" in the context of a third-party triumvirate relationship where an insurer is obligated by its duty to defend its insured to retain defense counsel for that insured. In this situation, the insurer and defense counsel are contractually and ethically obligated to defend the insured and represent the insured. All defense counsel's opinions and mental impressions are for the benefit of the insured in such a third-party triumvirate relationship. The "client" in such a relationship is from the onset the insured, and

in fact none of the communications defense counsel has with the insurer can ever be protected as privileged from the insured. The insured has full and independent right to defense counsel's file. The insurer may not. Thus, any reference to the "waiver" or "vanishing" of the "attorney-client privilege" in the context of a third-party triumvirate relationship where an insurer is obligated by its duty to defend its insured and retain defense counsel for that insured is a misnomer. The defense counsel's file is created for the benefit of the insured – there is no waiver. The insured is entitled to it by definition. The insurer's expectation that the defense counsel retained by it to represent the insured report to it during the course of the litigation does not mean that the "attorney-client privilege" has either "vanished" or been "waived." No more than if that attorney shares such documents with a paralegal or a consulting expert.

The *Camacho* court also cited to the Supreme Court of Iowa's decision in *Henke v. Iowa Home Mut. Cas. Co.*[22] In *Henke*, the court addressed the "principal issue" of "whether correspondence, reports and communications are confidential and privileged between an insurer and the attorney employed by it to defend an insured in litigation resulting from an automobile accident insofar as it pertains to that litigation."[23] In commenting on the circumstances under which a communication is privileged, the court explained:

> The rule is quite clear that to constitute a privileged communication to an attorney there must be some element of confidence imposed in the attorney himself, and for him to accept that relationship it must be apparent that the transaction or his action in relation thereto is for the mutual benefit of the parties, knowingly and willingly seeking his professional services.
>
> It is true that in most, if not in all, of our previously-decided cases, both parties went together to the attorney for advice and guidance. Defendant vigorously contends that even if insurer and insured were both clients of one attorney in regard to the actions, the confidential nature of their respective communications with the attorney must be respected and be held privileged unless (1) they are made in the presence of the other, or (2) are made with the intent that they be communicated. Such exceptions to the confidential nature of attorney-client communications, if adopted, might be justified as waivers.[24]

The court, however, held that such communications between an insured, its insurer, and the attorney retained by the insurer to represent its insured in the context of a third-party liability matter were not privileged. The *Henke* court seemed to understand that the "waiver" concept did not apply, and provided what it thought to be a "more compelling reason" why the communications were not privileged, stating:

> While there is respectable authority holding that communications between joint clients and their attorney are not privileged on the basis of waiver, we are convinced there is a more compelling reason the general rule prohibiting disclosures of information received in confidence by one of two or more joint clients in regard to a transaction for their *mutual benefit*, is not privileged. *It is simply that if it appears the secret or imparted communication is such that the attorney is under a duty to divulge it for the protection of the others he has undertaken to represent in the involved transaction, then the communication is not privileged. It would be shocking indeed to require an attorney who had assumed such a duty to act for the mutual benefit of both or several parties to be permitted or compelled to withhold vital information affecting the rights of others because it involves the informant.*[25]

The *Henke* court's analysis seems to suggest that the nature of the fiduciary relationship between and insurer and its insured, and the obligation imposed by the liability carrier's "duty-to-defend" the insured, means that the communications between the insurer and the defense counsel it retained to represent the insured are not privileged as to the insured, and that the communications between the insured and its insurer-retained defense counsel are not privileged as to the insurer.

Courts in New Hampshire and South Carolina have similarly focused on "mutual benefit" in explaining why in the context of a later "bad faith" action against an insurer for negligent failure to settle tort claims against

its insureds, the communications between defense counsel and the insured are not protected as attorney-client privileged communications. For example, in *Dumas v. State Farm Mutual Auto Ins. Co.,*[26] the Supreme Court of New Hampshire explained:

> Defendant [liability insurer] argues that such an order invades the privileged communications of the defendant and its counsel. The argument fails to take into account that the attorney it engaged in that case represented both the defendant [liability insurer] and the present plaintiff Dumas [the insured]. '(W)here two parties are represented by the same attorneys for their *mutual benefit*, the communications between the parties are not privileged in later action between such parties or their representatives.'[27]

In *Chitty v. State Farm Mut. Auto. Ins. Co.*,[28] the federal court in South Carolina similarly explained why, in the context of a "third-party" liability excess judgment "bad-faith" insurance claim, the entire file is typically discoverable by the insured," stating:

> The papers and writing which [plaintiff/insured] seeks are not related to or were not prepared by its attorney for the present action between [the liability insurer] and [the plaintiff/insured]. These papers were prepared in a different action at an earlier time when the same attorney represented both [the liability insurer] and [the plaintiff/insured]. It has been held that, where two parties are represented by the same attorneys for their *mutual benefit*, the communications between the parties are not privileged in the later action between such parties or their representatives.[29]

The decisions in *Henke, Chitty*, and *Dumas* did not, however, address the issue of whether either the insurer or insured would be entitled to discover documentation regarding issues adverse between the insurer and the insured, including for example, issues of coverage. Based on the "mutual benefit" rationale and the nature of the third-party triumvirate relationship, as a practical matter, however, if the insurer discloses documentation concerning issues of coverage to defense counsel retained to represent its insured, then its insured is entitled to and will have access to such documentation. If, however, the insurer does not disclose such documentation to defense counsel, then the liability carrier's privilege is not "waived."

This distinction was recognized by the North Carolina state court's decision in *Nationwide Mut. Fire Ins. Co. v. Bourlon*,[30] which was also cited by the *Camacho* court as an example of a jurisdiction in which the protection of the attorney-client privilege does not apply to defense counsel's file.[31] The *Camacho* court found that the North Carolina state court's holding in *Bourlon* was most closely aligned with Georgia law, based on the following "two rationales" found in Georgia law:[32]

> (1) because the attorney-client privilege may result in the exclusion of evidence which is otherwise relevant and material it should be strictly construed to limit it to the purpose for which it exists "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice," and (2) recognition of the common interest or joint client doctrine as an exception to the attorney-client privilege.[33]

The *Camacho* court also highlighted the *Bourlon* court's understanding that not *all* communications between the insured and the insurer-retained defense counsel are "unprivileged," specifically highlighting as one example communications concerning issues of coverage "because the interests of the insurer and its insured with respect to the issue of coverage are always adverse."[34]

The facts of the *Bourlon* case demonstrate the complexities of a tripartite relationship where the fiduciary relationship that existed as a result of the insurer's "duty to defend" obligation does not extend to all claims asserted in the underlying action. In *Bourlon*, the liability insurer had initiated suit seeking a declaratory judgment that it was not required to indemnify the insured for any amounts paid to settle a malicious prosecution claim. The insured counterclaimed with claims for contract, negligence, "bad-faith" refusal to settle, negligent misrepresentation, fraud, breach of fiduciary duty, and unfair or deceptive trade practices. In the underlying action in *Bourlon*, the insurer was providing legal representation for the insured as to all the claimaint's claims except those for malicious prosecution and abuse of

process claims, since those claims were not covered by the policy. In such a case, does the fiduciary relationship that existed as a result of the insurer's "duty to defend" obligation extend to those claims that it deemed were not covered under the policy?

The issue before the *Bourlon* court was whether the insured had properly refused on the basis of attorney-client privilege to answer questions at deposition by the insurer concerning his communications with his insurer-retained defense counsel. Based on its own analysis of the attorney-client relationship under North Carolina law, the *Bourlon* court concluded that "a tripartite attorney-client relationship" existed in which the attorney retained by the insurer to represent the insured "provided 'joint' or 'dual' representation to both" the insurer and its insured, and that "the common interest or joint client doctrine applies to the context of insurance litigation."[35] Accordingly, the *Bourlon* court concluded that since a tripartite attorney-client relationship existed in the instant case, and the insurer retained defense counsel provided "joint" or "dual" representation to both plaintiff and defendant, an attorney-client relationship existed between the insurer and the insurer-retained defense counsel.

The *Bourlon* court also recognized, however, that certain types of communications in this context would *not* be discoverable, stating:

> Nevertheless, we note that application of the common interest or joint client doctrine does not lead to the conclusion that all of the communications between defendant and [defense counsel] were unprivileged. Instead, 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. Specifically, "[c]ommunications that relate to an issue of coverage . . . are not discoverable . . . because the interests of the insurer and its insured with respect to the issue of coverage are always adverse."[36]

Interestingly, in *Bourlon* the insurer argued that, in that particular case, "even those communications unrelated to [the insurer]'s defense of the underlying action and concerning issues of coverage should be discoverable,"[37] on the basis that the insured had alleged in his counterclaims against his insurer that "improper representation by"[38] defense counsel, thereby waiving the privilege covering his communications. The North Carolina appellate court agreed, stating "[t]o the extent [the insured] contends that [defense counsel] negligently defended him in the underlying action and negligently failed to resolve the claims, such allegations constitute a waiver of the attorney-client privilege" and concluding that the insured had waived the "attorney-client" privilege with respect to issues that were "unrelated to the underlying action" and "which involved questions of coverage" posed by the insured to defense counsel.[39] In other words, even as to those claims for which the insurer was not providing a defense, the insured had waived its "attorney-client" privilege because it had claimed that his insurer retained defense counsel had negligently defended him in the underlying action and negligently failed to resolve the claims. Thus, the *Bourlon* court seemed to suggest that it was because the insured had itself made its insurer retained defense counsel conduct an issue that it was deemed to have waived its "attorney-client" privilege as to all its communications.

Notwithstanding, its conclusion that the insured had waived the "attorney-client" privilege, the *Bourlon* court held that the trial court had not erred in its ruling that the insured's defense counsel had breached the "attorney-client privilege" by providing the insurer with the entire file from the underlying action. The court noted that the defense counsel's file "should have been"[40] provided to the trial court for an *in camera* review in order to allow a determination of whether, to the extent of communications made prior to the insured's counterclaims, any of the communications were either unrelated to the underlying action or the insured's counterclaims, regarded coverage issues, or were otherwise unrelated to conduct that was the basis of the insured's counterclaims. Thus, the *Bourlon* court recognized that the defense counsel's file could still contain documents that were privileged as between defense counsel and the insured, and to which the insurer never had access during the underlying action, and to which the insurer should not now be entitled to in the subsequent "third party bad faith" action.

The dissenting opinion in *Bourlon* further highlights the complexities and confusion caused by application

of the "attorney-client privilege" in the context of a third-party bad faith claim on coverage issues. The dissent stated:

> While I recognize North Carolina's "dual representation" of the insured and the insurer by one attorney, dual representation does not include a right of the insurer to privileged communications between the insured and his attorney. Where the interests of the insured and the insurer on indemnity are adverse, the insurer cannot assert the attorney-client privilege against its insured.[41]

Specifically, the dissent disagreed with that portion of the majority's holding that an attorney-client relationship existed between the insurer and defense counsel it retained to represent the insured, that the "attorney-client privilege" between the insured and its counsel is inapplicable to those communications related to the underlying action, and that the insured waived the "attorney-client" privilege.

Concerning the issue of whether an attorney-client relationship existed between the insurer and defense counsel it retained to represent the insured, the dissent quoted from the Rules of Professional Conduct issued by the North Carolina State Bar, highlighting the following:

> The representation of insured and insurer is a dual one, *but the attorney's primary allegiance is to the insured, whose best interest must be served at all times. . . . The attorney should also keep the insured informed of his or her evaluation of the case as well as the assessment of the insurance company, with appropriate advice to the insured with regard to the employment of independent counsel whenever the attorney cannot fully represent his or her interest*. Further, if the attorney reasonably believes that it is in the best interest of the insured to provide him or her with work product directed to the insurer, *such information may be disclosed to the insured without violating any ethical duty to the insurer.*[42]

The dissent also noted that under the Rules of Professional Conduct, the insurer "cannot claim or assert any attorney-client privilege to prevent disclosure to the insured of its [own] communications with [defense counsel], who was under a continuing [duty] to act in [the insured's] "best interests" and to advise [the insured] to employ 'independent counsel.' "[43]

With regard to the dissent's disagreement with the majority's holding (and the insurer's contention) that the "attorney-client privilege" between the insured and its counsel is inapplicable to those communications related to the underlying action, the dissent focused on the fact that the insurer and its insured have "adverse interests that were present from the beginning of the representation." The dissent highlighted the Rules of Professional Conduct issued by the North Carolina State Bar, stating:

> The State Bar has consistently advised counsel that their "primary allegiance" is to the insured, directed the attorney to uphold the insured's "best interests," and required the attorney to advise the insured to retain separate counsel in the event the attorney hired to defend the insured cannot exercise independent "professional judgment" or maintain "the client-lawyer relationship."

It also highlighted the attorney's duty to the insurer and its insured as articulated by the Fourth Circuit federal court and the American Bar Association, quoting from the Fourth Circuit Court's decision in *In re A.H. Robins Co., Inc.*,[44] stating

> It is universally declared that such counsel represents the insured and not the insurer. Repeated opinions issued by the American Bar Association [ABA], as illustrated by ABA Comm. on Ethics and Professional Responsibility, Informal Opinion 1476 (1981) declare: "*When a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client.*" [*Emphasis* in original.] *See also* the following opinions in ABA/BNA Lawyers' Manual on Professional Conduct (1984): Connecticut, Informal Opinion 83–5, at 801:2059; Delaware Opinion 1981–1 at 801:2201; Michigan Opinion CI–866 at 801:4856. *See also Point Pleasant Canoe Rental v. Tinicum Tp.*, 110 F.R.D. 166, 170 (E.D. Pa. 1986); *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 682 P.2d 725, 736 (1984).[45]

The dissent specifically found without merit the insurer's argument that the insured could not consult with

the insurer-retained defense counsel confidentially on his excess exposure liability after the insurer reserved its rights to indemnify within the policy limits.

Unfortunately, the dissenting opinion in *Bourlon*, while highlighting that the "attorney-client privilege" is neither "waived" nor "vanishes" in the context of a third-party triumvirate relationship, does not completely clarify it. Any analysis of whether the "attorney-client privilege" is "waived" or "vanishes" in the context of a third-party triumvirate relationship should start with resolution of the question of whether defense counsel represents the insured, the insurer, or both. The Fourth Circuit's opinion in *In re A.H. Robins Co., Inc.*[46] relying on the American Bar Association informal opinions, stated that "[i]t is universally declared that such counsel represents the insured and not the insurer." Yet the Rules of Professional Conduct issued by the North Carolina State Bar state [t]he representation of insured and insurer is a dual one, *but the attorney's **primary** allegiance is to the insured, whose best interest must be served at all times.*[47]

Who then does the insurer-retained defense counsel represent? If it is a true "tripartite" or triumvirate" relationship, in which the claim file is maintained for the "mutual benefit" of both parties, one would expect the rules for access to file materials to be reciprocal. If an insured is entitled to and have access to all documentation disclosed by *an insurer* to defense counsel retained to represent its insured, then in a true triumvirate relationship, where the file is maintained for the insured's and insurer's mutual benefit, the insurer should be entitled to and have access to all documentation disclosed by *an insured* to defense counsel retained to represent it. If, however, defense counsel represents the insured *and not* the insurer, and the claim file is *not* created for the "mutual benefit" of both parties, then the insurer should not necessarily be entitled to have access to all documentation disclosed by *an insured* to defense counsel retained to represent it.[48]

The *Camacho* court's confusion in referencing the privilege as being "waived" and "vanishes" when the same attorney under the "joint-defense exception" represents both the insurer and the insured is based in part on the suggestion that there can be a waiver of the privilege by the insured when, in fact, there cannot. Where, as was the case in *Peterson*, two parties are actually jointly represented by the attorney, the rationale behind the "joint-defense exception" is different, because the attorney owes the same duties to both clients, and therefore the "waiver" of the "attorney-client privilege" in a dispute between the attorney's two clients is applicable. However, in a third-party "bad faith action," the insurer is not technically the client. In the context of a third-party "bad faith action" between an insured (or as in *Camacho* the claimants as assignees of the insured), and the insurer, the insured waives the "attorney-client privilege" over defense counsel's file but not the liability insurer's claim file.

The triumvirate relationship between liability carrier, insurer, and defense counsel by definition creates a relationship between defense counsel and these two entities for the common purpose of defending the insured. Each and every document received by defense counsel, all information pertinent to that defense, and all work product and opinions prepared by that defense counsel are also created for the benefit of the insured. The insured is entitled to receive and use those materials and information as he wishes. The liability carrier is usually entitled to full access as well although defense counsel may have documents that she initially and correctly withheld from the liability carrier. No one else, however, is entitled to such access. There is no waiver. By definition, the work-product and attorney communications are the joint possession of both the liability carrier and the insured. As the *Bourlon* court noted, this defense counsel should not be providing advice concerning coverage issues, whether for the insured or the insurer, "because the interests of the insurer and its insured with respect to the issue of coverage are always adverse."[49]

Notwithstanding the issues raised by the dissent in *Bourlon*, the court in *Camacho* found, based in large part on the *Bourlon* court's majority opinion, that the "joint defense/common interest" doctrine applied, and that the insurer in *Camacho* could not claim the "attorney-client privilege" to protect disclosure of its communications with defense counsel regarding defense of the insured in the underlying litigation. The *Camacho* court distinguished, however, the insurer's communications with its "in-house claims counsel," on the basis that there was "no presumption that in-house counsel is employed to represent the interests of the insured as

opposed to the insurer."[50] The court ruled these communications protected by the "attorney-client privilege," and thus *not* discoverable by the *Camacho* Plaintiffs. Presumably, these documents contained an analysis of coverage issues and other information adverse to the insured. Notwithstanding the *Camacho* court's confusion about the "waiver" and the "attorney-client privilege," this conclusion is proper in the context of a third-party "bad faith action" between an insured (or as in *Camacho* the claimants as assignees of the insured), and the insurer.

The *Camacho* court also noted that any communications between the insurer's in-house counsel and defense counsel, or any communications between the insurer's representatives and the insurer's in-house counsel in the presence of the insurer's defense counsel, were similarly not protected by the "attorney-client privilege," and were thus discoverable by the *Camacho* Plaintiffs. Again, the insured should be entitled to all communications with its defense counsel.

Work-Product Doctrine

The "work product" protection[51] claim asserted by the insurer in *Camacho* was that "its claims file was created in anticipation of litigation of claims arising out of the car accident that resulted in the death of Stacey Camacho,"[52] and therefore was protected from discovery by the "work product doctrine." The *Camacho* court disagreed, stating:

> Insurance claim files generally do not constitute work product in the early stages of investigation, when the insurance company is primarily concerned with "deciding whether to resist the claim, to reimburse the insured and seek subrogation . . . or to reimburse the insured and forget about the claim thereafter." As the court explained in *Carver*, claim files "straddle both ends of this definition, because it is the ordinary course of business for an insurance company to investigate a claim with an eye toward litigation." Once litigation is imminent, however, the claims investigation file is maintained "in anticipation of litigation" and its contents are protected by the work product doctrine.
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> Where an underlying third party liability claim is involved, the federal courts have generally recognized:
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>> [W]hen a liability insurer investigates a third party claim, the investigation is made in anticipation of claims, which, if denied, likely will lead to litigation. For this reason it is logical to conclude that, while files generated in relation to first party claims are made in the ordinary course of business and are discoverable, files generated during the investigation of third party claims are made in anticipation of litigation and are not discoverable.
>
> However, the insurance claim file may be discoverable in a third party claim for bad faith if the plaintiff can show a "substantial need of the materials" and an inability "without undue hardship" to obtain the materials by other means.[53]

The *Camacho* court cited to *Underwriters Ins. Co. v. Atlanta Gas Light Co.*[54] and *Lett v. State Farm Fire and Cas. Co.*[55] for the proposition that, at the point that litigation is "imminent," "the claims investigation file is maintained 'in anticipation litigation' and its contents are protected by the work product doctrine."[56] The *Camacho* court also specifically cited to the Georgia federal district court's decisions in *Atlanta Gas*[57] (which quoted from *Carver v. Allstate Ins. Co.*[58]) and *Joyner v. Continental Ins. Companies*,[59] for, among others, the proposition that a plaintiff's need for the information contained in an insurer claim file in a "third-party bad faith" claim is "substantial" for the reason that the documents in that file are frequently the only "reliable indication" of whether the insurance company acted in "bad-faith."[60]

In *Underwriters Ins. Co. v. Atlanta Gas Light Co.*,[61] the Georgia federal district court in was presented with a "bad-faith" claim brought by a party claiming status as an additional insured under the insured's liability policy. The insurer in *Atlanta Gas* had provided a defense to both the insured and the additional insured in the underlying tort action, which the parties' settled, having reserved their rights in the settlement agreement to

seek reimbursement from each other. Subsequently, the insurer filed suit seeking a declaratory judgment that it was not obligated to indemnify, provide coverage for, or defend the additional insured in the underlying tort litigation. The additional insured counterclaimed for "bad-faith," seeking reimbursement for its attorney's fees and damages. The court granted summary judgment on the additional insured's counterclaim finding that it qualified as an additional insured, leaving only the "bad-faith" claim remaining.

The additional insured in *Atlanta Gas* sought all of the documents in the insurer's file relating to the underlying tort litigation. In analyzing the question of whether any portion of the claim file from the underlying tort action was protected from disclosure by the "work product" doctrine, the court first evaluated whether any of the documents were prepared "in anticipation of litigation." In this case, determining that it need not answer the question of when the insurer reasonably anticipated litigation, the court found that regardless of when the insurer anticipated litigation against the additional insured, the litigation regarding the underlying tort was "imminent from the moment [the insurer] was notified of the claim."[62] The *Atlanta Gas* court explained:

> Regardless of when [the insurer] anticipated litigation against [the additional insured], litigation surrounding the Henry [tort] claim was imminent from the moment [the insurer] was notified of the claim. [The insurer] was first contacted about the claim by [the additional insured's] lawyer. [The additional insured's] lawyer informed [the insurer] that Ms. Henry had retained counsel to assert a claim against [the additional insured]. [The insurer] was thus initially engaged because of the very prospect of litigation involving the Henry [tort] claim.
>
> In addition, the Henry [tort] claim was a third party claim, seeking payment by [the insured and additional insured] (as an insured and additionally insured respectively). As the federal courts have generally recognized:
>
> > [W]hen a liability insurer investigates a third party claim, the investigation is made in anticipation of claims, which, if denied, likely will lead to litigation. For this reason it is logical to conclude that, while files generated in relation to first party claims are made in the ordinary course of business and are discoverable, files generated during the investigation of third party claims are made in anticipation of litigation and are not discoverable.
>
> The Court thus finds that all of the documents in [the insurer's] claim file were prepared "in anticipation of litigation."[63]

The *Atlanta Gas* court also addressed the question of whether the additional insured could demonstrate a "substantial need of the materials" and an inability "without undue hardship" to obtain the materials by other means.[64] The court in *Atlanta Gas* found that the additional insured's need for the claim file was "substantial,"[65] explaining that:

> A finding of substantial need is especially appropriate once the underlying coverage dispute has been resolved and only a bad faith claim remains. Once the coverage dispute has been resolved, the rationale for maintaining a privilege is diminished, while the same need for information remains.

. . .

> Part of [the additional insured's] theory is that Underwriters misrepresented and failed to share information in its files. The documents in the file are the only reliable indication of whether this occurred. Unlike in *Lett* or *Carver*, where the insured could obtain information through depositions, in this case the accuracy of certain deposition testimony is itself at issue (for example, Mr. Parrish's deposition contradicted his interview statement). To the extent that Underwriters' claim file contains facts that contradict deposition testimony, it would be an undue burden to require [the additional insured] to rely only on the depositions to determine whether Underwriters misrepresented the evidence available to it.

> Moreover, because the underlying coverage dispute has been resolved, there is far less justification for protecting factual information in [the insurer's] files.[66]

The court in *Atlanta Gas* also evaluated whether, "even as to documents for which [the additional insured] can show substantial need, documents containing the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative must" receive additional (if not complete) protection."[67] The *Atlanta Gas* court recognized that courts have taken different approaches to evaluating the extent of protection to be afforded documents that contain mental impressions, conclusions, opinions, or legal theories. Some courts have held that Federal Rule of Civil Procedure 26(b)(3) "creates an absolute bar to discovering the mental impressions of an attorney or their representative,"[68] on the ground that "no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or legal theories."[69] Other courts have held there to be an exception to the strictness of this rule, "particularly in bad-faith cases," where mental impressions are "directly at issue and the need for the material is compelling."[70]

The *Atlanta Gas* court also noted that the literal interpretation of Federal Rule of Civil Procedure 26(b)(3), which the court quoted as stating,

> Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But . . . those materials may be discovered if: . . . the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. If the court orders discovery of those materials, it *must* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. [*Emphasis* supplied by court.]

as well as the interpretation of this Rule by other courts in the circuit, suggested that the Rule 26(b)(3) provides "an absolute bar to discovering the mental impressions of an attorney or representative." Accordingly, for this reason, the *Atlanta Gas* court would allow the insurer to redact any "mental impressions, conclusions, opinions, or legal theories" of its investigators or its attorneys *before* production of the claim file documents to the additional insured.[71]

In another case cited by *Camacho, Joyner v. Cont'l Ins. Co.*,[72] the court noted that, in a "bad faith" action, the claim file documents "would seem to be prime candidates for application of this 'exclusive knowledge of the other party' justification," and further quoted from the Seventh Circuit court's opinion in *Binks Mfg. Co. v. Presto Industries, Inc.*,[73] in which the court stated:

> [P]rudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because* of the prospect of litigation. [*Emphasis* supplied by court.]
>
> The mere contingency that litigation may not result is not determinative. . . . A more or less routine investigation of a possibly resistable claim is not sufficient to immunize an investigative report developed in the ordinary course of business. Some recent cases have suggested the need for establishing an identifiable resolve to litigate prior to the investigative efforts resulting in the report before the work product doctrine becomes applicable. While litigation need not be imminent, the primary motivating purpose behind the creation of a document or investigation must be to aid in possible future litigation.[74]

The *Joyner* court also noted that document could contain a mixture of privileged "mental impressions" and discoverable data when work product contains both discoverable facts and mental processes, an *in camera* investigation prior to production is appropriate to extricate the protected parts.[75]

In *Joyner*, however, the insureds sought production of the insurer's *first-party* claim file in the context of

their suit against their property insurer, not their liability insurer. The insureds in *Joyner* alleged among other claims that their insurer had refused in "bad faith" to make payment to them for their loss caused by fire to their residence. The reason why the insureds in *Joyner* sought production of the insurer's claim file was to discover the basis for the insurer's defense that it was not liable under the insurance contract on the ground that the insureds had intentionally set fire to their residence. Unlike a third-party claim file, however, a first-party claim file is not created for the benefit of the insured.

The *Camacho* court also noted that the court in *Atlanta Gas*[76] had quoted from the Georgia federal district court's decision in *Carver v. Allstate Ins. Co*.[77] Like *Joyner, Carver* involved an insurer's denial of a *first-party* property claim for a fire loss. The *Carver* court also noted that the parties "appear[ed] to assume that the discovery documents in dispute here were 'prepared in anticipation of litigation.' " The *Carver* court articulated the "general rule" for determining when a document is deemed to have been "prepared in anticipation of litigation" as "whether 'the document can fairly be said to have been prepared or obtained because of the prospect of litigation, . . . (and not) in the regular course of business," and explained:

> Paradoxically, insurance company investigating documents straddle both ends of this definition, because it is the ordinary course of business for an insurance company to investigate a claim with an eye toward litigation. Yet a hard and fast rule in either direction would be contrary to various goals of modern discovery practice. To foreclose from discovery all insurance company investigatory reports would unnecessarily hike the expense in proceeding against insurance companies, in violation of Rule 1 of the civil rules, and once again, may render the factfinding process a cat and mouse game. Yet to open for discovery these internal documents may inhibit a claims adjuster from reporting all his thoughts and ideas regarding a claim, because no protection against discovery is afforded documents containing mental impressions not prepared in anticipation of litigation. Investigation reports might then be less reliable in evaluating and disposing of claims and an insurance company's claims evaluation process as a whole might be disrupted. In addition, full discovery may allow a plaintiff proceeding against an insurance company to co-opt "the wits" of his adversary, in contravention of the Hickman doctrine.
>
> Courts, however, have found a solution to this dilemma in the very means by which an insurance company conducts its business. In the early stages of claims investigation, management is primarily concerned not with the contingency of litigation, but with "deciding whether to resist the claim, to reimburse the insured and seek subrogation of the insured's claim against the third party, or to reimburse the insured and forget about the claim thereafter." At some point, however, an insurance company's activity shifts from mere claims evaluation to a strong anticipation of litigation. This is the point where the probability of litigating the claim is substantial and imminent. The point is not fixed, it varies depending on the nature of the claim, and the type of investigation conducted. The decision whether insurance company investigatory documents were "prepared in anticipation of litigation" turns, therefore, on the facts of each case.[78]

Interestingly, the *Carver* court mentioned Rule 1 of the Federal Rules of Civil Procedure,[79] which states:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the *just, speedy, and inexpensive determination* of every action and proceeding. [*Emphasis* supplied.]

The *Carver* court's expressed concern was the expense associated with pursuing litigation *against* an insurance company, and *not* with the expenses imposed upon insurance companies in defending against bad faith suits. The *Carver* court also made no distinction between the type of investigation or the reason for the investigation performed in a first-party context as opposed to a third-party context.

By way of a further explanation of how the "work product" doctrine applies, the *Camacho* court also cited to *Lett v. State Farm Fire and Cas. Co.*[80] for the proposition that "reports prepared after a claim was reassigned from a regular representative to a senior representative, due to the company's suspicion of fraud, were protected by the work product doctrine."[81] Like *Joyner* and *Carver, Lett* involved an insurer's denial of a *first-party* property claim for a fire loss. In *Lett*, the insureds' fire loss was assigned to the insurer's Special Investigation Unit less than three weeks after the loss based on the preliminary findings of the independent cause and origin expert. The court noted that the Special Investigation Unit investigator testified that the investigation had been referred to him "specifically because of the insurance company's suspicion that the plaintiffs were involved in the fire." Based on these facts, the court concluded that the claim file was "prepared in anticipation of litigation" and thus protected from discovery, at a relatively early stage of the claim investigation. The *Lett* court specifically held that "the point at which the probability of litigating the claim was "substantial and imminent" was reached was as of the date of the referral to the insurer's Special Investigation Unit, and that any documents regarding the claim prepared by the insurer's representatives after that point were prepared "in anticipation of litigation."[82]

The *Lett* court then addressed the next question, which was whether the insureds had demonstrated a substantial need for the documents and any undue hardship in obtaining the information. The court also explained that:

> [T]he insurer's bad faith is not determined as of the date of its denial of the insured's claim. Instead, "[t]he question of bad faith must be determined by the defense made at the time of trial." The critical question, then, is "What does the insurer know now, as of the trial?," not "When did the insurer learn it?"[83]

The court also noted that the insureds had failed to demonstrate "the requisite showing of substantial need/undue hardship" to obtain documents prepared in anticipation of litigation, since they "made no showing that facts contained in documents could not be elicited by deposing relevant investigators and witnesses interviewed."[84]

In addition to *Atlanta Gas* and *Joyner*, the *Camacho* court also cited to *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*[85] for the proposition that the investigation reports made before the denial of a claim were not prepared in anticipation of litigation and were therefore discoverable. *Atlanta Coca-Cola*, like *Joyner, Carver* and *Lett*, was *also* decided in the context of a dispute between and insured and its *first-party* insurer. In *Atlanta Coca-Cola*, the insured brought suit against its fidelity insurer relating to the denial its insurance claim for sums allegedly fraudulently taken from vending machines by the insured's employees responsible for servicing the machines in the course of their employment. When the insured sought the identification by way of interrogatories of "documents evidencing defendant insurer's investigation of the claim," the insurer objected on the basis that such documents were subject to Rule 26(b)(3) protection given to trial preparation materials. The court ordered identification of the requested documents, stating:

> [T]he evaluation of claims of its policyholders is the regular, ordinary and principal business of defendant insurance company. Most of such claims result in payment by the defendant; it can hardly be said that the evaluation of a routine claim from a policyholder is undertaken in anticipation of litigation, even though litigation often does result from denial of a claim. The obviously incongruous result of the position urged by defendant would be that the major part of the files of an insurance company would be insulated from discovery.[86]

The analysis of the "work product" doctrine by the courts in *Joyner* and *Carver* make sense in the context of the insurer's first-party claim file, while the analysis in *Lett* and *Atlanta Coca-Cola* appears to confuse the relationship between the insured and insurer in a first-party context. The *Lett* court's focus on what the insurer knows at the time of trial leaves open the possibility that the insurer in a first-party context might have anticipated litigation long before the bad faith action was initiated. Similarly, the *Atlanta Coca-Cola* suggests that all claims are "routine" and therefore the insurer's claim file would never contain mental impressions, conclusions, opinions, or legal theories of an attorney or other representative. But the analysis of whether an insurer's claim file should be protected

from discovery is necessarily different in a first-party context than a third-party context. As we have previously stated in our commentary entitled *"The Begrudged 'Insurance Bad-Faith-Suit' Exception to the Attorney-Client Privilege"*:

> [A] third-party claim from inception has a fiduciary relationship between the insured and the insurer and the mutually acceptable defense counsel. The insurer and defense counsel are contractually and ethically obligated to defend the insured and represent the insured in such a defense. None of the communications defense counsel has with the insurer can ever be protected as privileged from the insured. This is because a mutually acceptable defense counsel is first and foremost the attorney for the insured. After all, it is the insured who defense counsel is defending. Everything that attorney knows, certainly his or her legal opinions and recommendations, the insured is entitled to receive, and, indeed, should receive. In a third-party triumvirate relationship all defense counsel's opinions and mental impressions are for the benefit of the insured. The "client" in such a relationship is from the onset the insured. All this the insured is entitled to pursuant to a liability carrier's "duty-to-defend" the insured.
>
> In a first-party claim there is no "duty-to-defend" the insured and the insurance company's attorney is never representing the insured and never sharing any of their legal analysis, opinions, and mental impressions with the insured. Such written communications were and are kept confidential as maintained only between the insurance company and its legal counsel, clearly never intended to be shared with the insured.[87]

Camacho is not the first court to analyze and apply cases decided in a first-party "bad faith" action in a third-party "bad faith" action. As we discussed in our commentary entitled *Scary Stuff: Insurance Claim Files And Exceptions To The Attorney-Client Privilege,*[88] a federal magistrate in *Minter v. Liberty Mutual Fire Ins. Co.*,[89] which concerned a dispute between the insured and her first-party insurer, relied on case law concerning third-party liability claims file to "justify" production of the "attorney-client" privilege and "work-product" simply because such documents are contained within the "first-party" insurance claim file created on behalf of the insured.[90] We also explained in that commentary that,

> A "first-party bad-faith" action involves a case in which an insured sues *his or her own insurance company* for improper denial of benefits.[91] In a "first-party" context, the relationship between an insured and insurer is that of *debtor and creditor*.[92] A "third-party bad faith" action concerns a case in which an insured sues his own liability insurance company for "bad faith" concerning a claim (typically for failing to settle a claim) which ultimately resulted in a "third-party" judgment against him in excess of the policy limits.[93] In a "third-party" context, the liability of the insurer to its insured arises because of the *fiduciary* relationship that exists between the insured and the insurer. The relationship between an insured and insurer under a "first-party" insurance contract is not, however, a "fiduciary relationship" as it is in a "third-party" context.[94] Viewed in the context of a debtor-creditor relationship versus a fiduciary relationship, it is easy to understand why the claim file created during an insurer's investigation of a "first-party" claim is not the insured's "underlying claim file."[95]

Notwithstanding the *Camacho* court's reliance on decisions analyzing application of the "work product" doctrine in the context of a "first party bad faith claim," the court properly noted that the insured's need for an insurer claim file in a "third-party bad faith" claim is "substantial" for the reason that the documents in that file are frequently the only "reliable indication" of whether the insurance company acted in "bad faith."[96] Based on the nature of a dispute between an insured and its liability carrier, it is certainly understandable why the claim file from the underlying litigation, for which the liability carrier is providing a defense, would be the subject of discovery in a "bad-faith" litigation. Of course, even if the insured (claimant) shows "substantial need" for the liability carrier's

file, this "substantial need," absent waiver, does not pierce the liability carrier's attorney-client privilege.[97]

Ultimately, the *Camacho* court construed Rule 26(b)(3)'s work product protection broadly, requiring production, but permitting the insurer to redact from the claim file documents the mental impressions, conclusions, opinions, or legal theories of counsel and the insurance representatives handling the Plaintiffs' underlying damage claims, and permitting Plaintiffs to conduct depositions of the insurer's insurance representatives regarding the facts it knew and considered in during its investigation and handling of the underlying wrongful death claim. The court stated:

> [I]n an attempt to "walk a fine line" with respect to the protection of privileged information, [the insurer] has painted too broad a stroke over its claims file in asserting that certain information constitutes opinion work product as demonstrated by the following examples. First, [the insurer] seeks to redact as work product portions of its Activity Log . . . despite the fact that [the insurer] did not identify these documents as containing protected work product on its privilege log. Second, [the insurer] attempts to assert work product protection over summaries of some communications between [defense counsel] and its insured, Mr. Park. Third, [the insurer] has attempted to assert the work product privilege over emails and other communications between [defense counsel] and [the insurer] Claims Specialists that do not contain any evidence of [the insurer]'s in-house legal strategies.[98]

Thus, while the *Camacho* court ordered production of the insurer claims file to Plaintiffs, the Court permitted the insurer to redact the mental impressions, conclusions, opinions, or legal theories of counsel and the insurance representatives handling the Plaintiffs' underlying damage claims from the documents. The court also cautioned the insurer to approach the process of redacting the documents "in good faith and to redact only the portions of its claims file necessary to protect against disclosure of its legal strategies in defending the underlying lawsuit," and suggested through its citation to *Joyner* that it would not hesitate to impose sanctions as necessary.

Camacho also recognized, as did *Joyner*, that documents could contain a mixture of privileged "mental impressions" and discoverable data, but specifically noted that "facts" are not protected from discovery. The *Camacho* court stated:

> The Court recognizes that the documents Plaintiffs seek contain a mixture of privileged "mental impressions" and discoverable information. However, "Rule 26(b)(3)'s work product protection 'furnishes no shield against discovery,' by interrogatory and deposition, of the facts that an adverse party's representative has amassed and accumulated in documents prepared for litigation." Therefore, Plaintiffs are entitled to depose [the insurer]'s insurance representatives regarding the facts [the insurer] had knowledge of and considered in its investigation and handling of the Camacho wrongful death claim.[99]

Conclusion

The "attorney-client privilege" is and should be sacrosanct.[100] The defendant-insured is entitled to have everything his or her defense counsel has. The liability carrier should never provide defense counsel anything it does not want the insured to receive. A liability carrier may have an argument that the insured is not entitled to review those documents in its liability claims file that were never shared with either the defense counsel or its insured.

The liability carrier's claim file is generally "work-product" and not discoverable absent the insured showing "substantial need" and an inability to obtain the information by other reasonable means. However, the communications between the liability carrier and its lawyers, not defense counsel, are still protected by the attorney-client privilege. Here the client is the liability carrier, not the insured. Accordingly, a liability carrier should never share with the insured's defense counsel anything it does not want the insured to know, and should create separate "first-party" claim files that contain documents relating to coverage or other "first-party" exposure and obligations, such as "excess judgments."[101] Of course, as a practical matter, in defending against a "bad-faith" case, the liability carrier should seriously consider waiving its

attorney-client privilege and rely, at least in part, upon advice of counsel as a defense.

Endnotes

1. Swidler & Berlin v. United States, 524 U.S. 399, 403, 118 S. Ct. 2081, 141 L. Ed. 2d 379, 384 (1998); Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981).

2. 2012 WL 2430471, at *3 (*citing* Hickman v. Taylor, 329 U.S. 495, 510–514 (1947), and Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure, which "precludes the discovery of 'documents and tangible things that are prepared in anticipation of litigation or for trial by [a party's attorney].' ").

3. As the court in In re Powerhouse Licensing, *LLC*, 441 F.3d 467 (6th Cir. 2006), stated:

   > It is axiomatic that the purpose of the work-product doctrine is to allow an attorney "to assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . to promote justice and to protect [his] clients' interests." . . . Once the party requesting discovery establishes relevance, the objecting party has the burden of showing that the material was "prepared in anticipation of litigation or for trial." If that burden is not met, the court's inquiry ends and the documents must be produced.

   Id. at 473 (citations omitted).

4. 2012 WL 6062029 (N.D. Ga. 2012).

5. It was Plaintiffs' position in this "bad faith" action that on multiple occasions, the insurer knew that "settlement within its [insured's] policy limits was possible, but failed to take sufficient steps to obtain such settlement." The insurer characterized Plaintiffs claims by stating that it had failed to respond to "allegedly 'missed' time limit demand" made by Plaintiffs for the insured's policy limits. *Parties' Joint Briefs on Discovery Issues* dated September 14, 2012.

6. 2012 WL 6062029, at 1.

7. 2012 WL 6062029, at 1.

8. 2012 WL 6062029, at *2. The insurer also sought to withhold the portion of its claim file generated after its rejection of the claimants' offer of settlement concerning the underlying claim against the insured, on the basis that "the relevant time period for demonstrating its alleged bad-faith conduct ends at [the insurer's] initial rejection of Plaintiffs' offer of settlement." 2012 WL 6062029, at *8. The Camacho court pointed out that under Georgia law, courts consider the "totality of the circumstances" in determining whether an insurer has exercised "ordinary care" in deciding whether to settle, including "whether there has been a reasonable valuation of the case and whether, at each stage, rejections of settlement demands were consciously made in terms of deliberative judgment and evaluation, as opposed to rejections based on other or no reasons." The court accordingly ordered the insurer to produce its entire claim file, including documents generated after its rejection of the claimants' offer of settlement. *Id.*

9. Hogan v. Provident Life & Acc. Ins. Co., 2009 WL 2169850, at *4 n.3 (M.D. Fla. 2009) (*citing* Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla.1998)).

10. John J. Pappas, *The Begrudged 'Insurance Bad-Faith-Suit' Exception to the Attorney-Client Privilege*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 22, #26 (May 20, 2008), *citing* John J. Pappas, *Bad Faith Should Be Difficult To Prove*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 19, #22 (March 21, 2006). In this same article, we also explained:

    > In a first-party claim there is no "duty-to-defend" the insured and the insurance company's attorney is never representing the insured and never sharing any of their legal analysis, opinions, and mental impressions with the insured. Such written communications were and are kept confidential as maintained only between the insurance company and its legal counsel, clearly never intended to be shared with the insured

    Id.

11. John J. Pappas and Janice C. Buchman, *'Bad-Faith' Discovery: Claim Files, Training Materials, Personnel*

Files, and the Kitchen Sink, Mealey's Litigation Report: Insurance Bad Faith, Vol. 26, #18 Jan. 31, 2013.

12. 221 F.3d 394 (2d Cir. 2000).

13. 221 F.3d 394, 403 (2d Cir. 2000). Note that assignments of "bad faith" claims are not enforceable in all jurisdictions. For example, in Alabama, the court in Cash v. State Farm Fire & Cas. Co., 125 F. Supp. 2d 474, 477-478 (M.D. Ala. 2000), explained that an insurer's bad faith refusal to pay is considered an intentional tort and a "species of fraud," and that that since tortious conduct is considered intentional, fraudulent, and personal, it cannot be the subject of assignment. *See also* Terrell v. Lawyers Mut. Liab. Ins. Co. of N.C., 131 N.C. App. 655, 507 S.E.2d 923, 926 (N.C. Ct. App. 1998) (court held plaintiff's tortious bad faith claim barred for the reason that "[a]ssignments of personal tort claims are void as against public policy. . . ." (citations omitted)). Jurisdictions such as Georgia, New York, Washington, Pennsylvania, and California allow assignments to third parties of "bad faith" claims. Pinto v. Allstate Ins. Co., 221 F.3d 394 (2d Cir. 2000); Blue Cross & Blue Shield of Ga., Inc. v. Bennett, 223 Ga. App. 291, 477 S.E.2d 442, 444 (Ga. App.1996); Wolfe v. Allstate Property & Cas. Ins. Co., 877 F. Supp. 2d 228 (M.D. Pa. 2012); McLaughlin v. National Union Fire Ins. Co., 23 Cal. App. 4th 1132, 29 Cal. Rptr. 2d 559, 567 (Cal. App. 1994); Planet Ins. Co. v. Wong, 74 Wash. App. 905, 877 P.2d 198, 201 (Wash. App. 1994).

14. 2012 WL 6062029, at *2.

15. 2012 WL 6062029, at *4.

16. 2012 WL 6062029, at *2.

17. 2012 WL 6062029, at *2 (citations omitted).

18. 2012 WL 6062029, at *2.

19. 414 S.E.2d 278, 280 (Ga. App.1992).

20. 289 N.W. 652 (Wisc.1940).

21. 2012 WL 6062029, at *3.

22. 87 N.W.2d 920 (1958).

23. 87 N.W.2d at 922.

24. 87 N.W.2d at 923-924.

25. 87 N.W.2d at 924 (*emphasis* supplied).

26. 111 N.H. 43, 274 A.2d 781 (N.H. 1971).

27. 111 N.H. at 49, 274 A.2d at 784-785 (citations omitted) (*emphasis* supplied).

28. 36 F.R.D. 37 (D.S.C 1964).

29. 36 F.R.D. at 40-41 (D.S.C. 1964) (citations omitted) (*emphasis* supplied).

30. 617 S.E.2d 40 (N.C. Ct. App. 2005).

31. 2012 WL 6062029, at *3.

32. 2012 WL 6062029, at *3.

33. 2012 WL 6062029, at *3.

34. 2012 WL 6062029, at *3 (*quoting* Nationwide Mut. Fire Ins. Co. v. Bourlon, 617 S.E.2d 40, 47 (N.C. Ct. App. 2005)).

35. 617 S.E.2d at 47.

36. 617 S.E.2d at 47 (citation omitted).

37. 617 S.E.2d at 47.

38. 617 S.E.2d at 47.

39. 617 S.E.2d at 48.

40. 617 S.E.2d at 48.

41. 617 S.E.2d at 60-61.

42. 617 S.E.2d at 51 (*emphasis* supplied).

43. 617 S.E.2d at 51.

44. 880 F.2d 709 (4th Cir.1989), *cert. denied*, Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959, 110 S. Ct. 377, 107 L. Ed. 2d 362 (1989).

45. 617 S.E.2d at 57 (*quoting In re* A.H. Robins Co.,. 880 F.2d 709, 751 (4th Cir.1989), *cert. denied*, Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959, 110 S. Ct. 377, 107 L. Ed. 2d 362 (1989).

46. 880 F.2d 709 (4th Cir.1989), *cert. denied*, Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959, 110 S. Ct. 377, 107 L. Ed. 2d 362 (1989).

47. 617 S.E.2d at 51 (emphasis in original).

48. The dissenting opinion in Bourlon also addressed the waiver issue, disagreeing with the majority's opinion that the insured waived his right to the "attorney-client" privilege by alleging in his counterclaims against his insurer that defense counsel negligently defended him in the underlying action. The dissent in Bourlon highlighted the four instances where the privilege is waived, identifying them as follows:

    > (1) "where uncontroverted evidence showed the defendant consulted with his attorney solely to facilitate his surrender, such communication relating to the surrender was not privileged," (2) "when a client alleges ineffective assistance of counsel, the client waives the attorney-client privilege as to the matters relevant to the allegation," (3) "communications are not privileged when made in the presence of a third person not acting as an agent of either party," and (4) "the privilege is not applicable when an attorney testifies regarding the testator's intent to settle a dispute over an estate,". . .

    617 S.E.2d at 57 (citations omitted).The Bourlon dissent also noted the trial court's conclusion that the liability policy itself did not contain any language suggesting that retention by the insurer of counsel for its insured under the policy's duty of defense is a waiver of the "attorney-client" privilege. Regarding the insured's allegations in his counterclaims against his insurer that "improper representation by" (617 S.E.2d at 47) defense counsel, the dissent noted that the insured:

    > (1) made no allegations regarding any misconduct by [defense counsel]; (2) has not asserted any claims against [defense counsel]; and (3) made no adverse allegations against [defense counsel] or even mentioned his name in the counterclaims. During the hearing, defense counsel conceded that the statute of limitations for defendant to assert claims against [defense counsel] had expired. Defendant's counterclaim asserts failure to settle and breach of duty only on the part of [the insurer].

    617 S.E.2d at 58. Accordingly, the dissent noted that that the "attorney-client privilege" protects communications between the insured and his defense counsel during his representation of the insured in the underlying action, and that he would have held that the insured did not waive the privilege.

49. 617 S.E.2d at 47 (*quoting* North River Ins. v. Philadelphia Reinsurance, 797 F. Supp. 363, 367 (D.N.J. 1992)).

50. 2012 WL 6062029, at *3.

51. The "work-product" doctrine protects a lawyer's trial preparation materials from discovery but may be overcome if the party requesting the materials shows it has a "substantial need" for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. Citing to *Hickman v. Taylor*, the Camacho court correctly identified the "work product doctrine" as a "qualified immunity for materials prepared in anticipation of litigation by a party, an attorney, or other representatives of the party." 2012 WL 2430471, at *3-*4 (*citing* Hickman v. Taylor, 329 U.S. 495, 510–514 (1947), and Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure, which "precludes the discovery of 'documents and tangible things that are prepared in anticipation of litigation or for trial by [a party's attorney].' "). One court explained the notion that the "work product" doctrine provides a "qualified immunity" by stating:

    > Commentators have referred to the work product doctrine as more of a qualified immunity than a privilege. 8 Wright & Miller, Federal Practice and Procedure § 2025 at 212. *See also Lott* [*Seaboard S.R., Inc.*, 109 F.R.D. 554, 557 (S.D. Ga. 1985)]. The protection is similar to qualified immunity because the party

> seeking discovery can obtain discovery of certain work product upon a showing of substantial need for the materials and necessity. *See* Fed. R. Civ. P. 26(b)(3).

Shipes v. BIC Corp., 154 F.R.D. 301, 305 (M.D. Ga. 1994) (footnote omitted). The work product doctrine is derived from Federal Rule of Civil Procedure 26(b)(3)(A)(ii).

52. 2012 WL 6062029, at *4.

53. 2012 WL 6062029, at *4-*5 (citations omitted).

54. 248 F.R.D. 663 (N.D. Ga. 2008).

55. 115 F.R.D. 501 (N.D. Ga.1987).

56. 2012 WL 6062029, at *4.

57. 248 F.R.D. 663 (N.D. Ga. 2008).

58. 94 F.R.D. 131 (S.D. Ga. 1982).

59. 101 F.R.D. 414 (S.D. Ga. 1983).

60. 2012 WL 6062029, at *5 (*citing* Underwriters Ins. Co. v. Atlanta Gas Light Co., 248 F.R.D. 663, 669 (N.D .Ga. 2008) and Joyner v. Continental Ins. Companies, 101 F.R.D. 414, 416 (S.D. Ga. 1983)).

61. 248 F.R.D. 663 (N.D. Ga. 2008).

62. 248 F.R.D. at 668.

63. 248 F.R.D. 668-669 (some citations omitted).

64. 2012 WL 6062029, at *4-*5 (citations omitted).

65. 248 F.R.D. at 669.

66. 248 F.R.D. at 668-669 (citations omitted).

67. 248 F.R.D. at 667.

68. 248 F.R.D. at 669.

69. 248 F.R.D. at 669 (*quoting* Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir.1974)).

70. 248 F.R.D. at 669 (*quoting* Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir.1992) and *citing* Brown v. Superior Court, 137 Ariz. 327, 337, 670 P.2d 725, 735 (1983)).

71. 248 F.R.D. at 669.

72. 101 F.R.D. 414, 416 (D.C. Ga. 1983).

73. 709 F.2d 1109, 1118–19 (7th Cir.1983) (quoting Janicker v. George Washington University, 94 F.R.D. 648, 650 (D.D.C.1982)).

74. 709 F.2d 1109, 1118–19 (7th Cir.1983) (citations omitted).

75. 101 F.R.D. 416-417 (citations omitted).

76. 248 F.R.D. 663, 667 (N.D. Ga. 2008).

77. 94 F.R.D. 131 (S.D. Ga. 1982).

78. 94 F.R.D. at 134 (citations omitted).

79. John Pappas, *What Ever Happened to Rule #1?*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 17, #20 Feb. 20, 2004.

80. 115 F.R.D. 501 (N.D. Ga. 1987).

81. 2012 WL 6062029, at *4.

82. 115 F.R.D. at 503.

83. 115 F.R.D. at 503-504 (citations omitted).

84. 115 F.R.D. at 504.

85. 61 F.R.D. 115 (N.D. Ga. 1972).

86. 61 F.R.D. at 118.

87. John J. Pappas, *The Begrudged 'Insurance Bad-Faith-Suit' Exception to the Attorney-Client Privilege*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 22, #26 (May 20, 2008), *citing* John J. Pappas, *Bad Faith Should Be Difficult To Prove*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 19, #22 (March 21, 2006).

88. John J. Pappas, Janice C. Buchman, and Bonnie M. Sack, *Scary Stuff: Insurance Claim Files And Exceptions*

To The Attorney-Client Privilege, Mealey's Litigation Report: Insurance Bad Faith, Vol. 26, #8 Aug. 23, 2012.

89. 2012 WL 2430471 (W.D. Ky.).

90. 2012 WL 2430471, at *2.

91. Hogan v. Provident Life and Accident Ins. Co., 2009 WL 2169850, *4 n.3 (M.D. Fla. 2009) (*citing* Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla.1998)).

92. 2009 WL 2169850, at *5 (*citing, among other cases*, Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla.1998)). A federal court in Smith v. Northwestern Mut. Life Ins. Co. 2011 WL 4336750 (E.D. Wis. 2011), explained why a debtor-creditor relationship exists in the "first-party" context whereas a fiduciary duty exists in the "third-party" context, stating:

> [A]n "insurer owes a duty to exercise good faith in evaluating and negotiating *third party claims* against its insured and may be held liable in tort (commonly referred to as the tort of bad faith) by its insured for a third party judgment in excess of the policy limits in the event it fails to exercise good faith in the performance of its fiduciary obligation." This duty does not extend to [Plaintiff's] first-party claim. "The postulate for this fiduciary relationship is notably absent in claims by an insured against an insurer under policies of property and related types of insurance. Such claims are not controlled by the insurer to the exclusion of the insured nor is the specter of a judgment against an insured in excess of coverage a present danger if an insurer fails to exercise good faith. In first party claims by insureds against insurers under policies affording coverage for loss or damage to property and related types of insurance, the parties occupy a contractually adversary or creditor-debtor status as opposed to standing in a fiduciary relationship."

2011 WL 4336750, at *7 (D.C. Wis. 2011) (*quoting* Duncan v. Andrew County Mut. Ins. Co., 665 S.W.2d 13, 18 (Mo. Ct. App.1983) [*emphasis* in original]). *See also* Pool v. Farm Bureau Town & Country Ins. Co., 311 S.W.3d 895, 907 (Mo. Ct. App. 2010) ("There is no dispute that this was a first party claim by Plaintiffs against their insurer . . . . As a matter of law, the parties' relationship was adversarial, not fiduciary"). In Greene v. Well Care HMO, Inc., 778 So. 2d 1037 (Fla. 4th DCA 2001), a Florida court stated as follows in connection with explaining why, prior to the enactment of Fl. Stat. § 624.155, which is Florida's "bad-faith" statute, first-party bad-faith claims against an insurer were not recognized:

> Before [Florida Statutes] section 624.155 was enacted, first party bad faith claims against an insurer were not recognized. The only relief available on the first party claim was a cause of action for breach of contract, unless the insured could allege an independent tort such as fraud or intentional infliction of emotional distress. . . . These decisions were based in part upon the relationship between the insured and insurer as one of debtor/creditor. On the other hand, Florida common law recognized that where there exists a fiduciary relationship between the parties, such as under the duty to defend under bodily injury liability provisions, and the insurer must exercise good faith in negotiating and effecting a settlement of claims, then a cause of action by the insured for bad faith exists against the insurer. These were called third party bad faith claims.The distinction between the first party claims and third party claims was based upon obligations between the insured and insurer. In the duty to defend and settle, the insurer is acting on the insured's behalf and for his or her benefit. If the insurer refuses to settle in good faith, it could result in additional liability to its insured, when the insured turned over control of settlement to the insurer. However, where the insurer failed to pay a claim of its own insured, the relationship was one of debtor and creditor, and the insured was free to sue its insurer for breach of contract for failure to pay the claim.

778 So. 2d at 1037 (citations omitted). *See also* Industrial Fire & Cas. Ins. Co. v. Romer, 432 So. 2d 66, 68 (Fla. 4th DCA 1983) ("The legal relationship existing between the insured and his insurer on claims for

collision damages or damages caused by uninsured motorists is that of debtor and creditor in which no fiduciary relationship is present. It would be a strange quirk in the law to hold that each time a debtor fails or refuses to pay demands made upon it by a creditor, the debtor would be liable for both compensatory and punitive damages even though his failure or refusal was motivated by spite, malice, or bad faith.").

93. 2009 WL 2169850, at *4 n.3 (M.D. Fla. 2009) (*citing* Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla.1998)).

94. 2009 WL 2169850, at *5 (M.D. Fla. 2009) (*citing* Allstate Ins. Co. v. Douville, 510 So. 2d 1200, 1201 (Fla. 2d DCA 1987)). Indeed, as explained by the Florida Supreme Court in Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla. 1998), because there is no fiduciary relationship between an insurer and insured in the context of a first party insurance claim, a common law insurance "bad-faith" claim, which is the equivalent of a common law breach of fiduciary duty is not recognized under Florida law in this context. Hogan v. Provident Life and Accident Ins. Co., 2009 WL 2169850 (M.D. Fla. 2009).

95. John J. Pappas, Janice C. Buchman, and Bonnie M. Sack, *Scary Stuff: Insurance Claim Files And Exceptions To The Attorney-Client Privilege*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 26, #8 Aug. 23, 2012.

96. 2012 WL 6062029, at *5 (citing Underwriters Ins. Co. v. Atlanta Gas Light Co., 248 F.R.D. 663, 669, (N.D. Ga. 2008) and Joyner v. Continental Ins. Companies, 101 F.R.D. 414, 416 (S.D. Ga. 1983)).

97. *See* John J. Pappas and Janice C. Buchman, *'Bad-Faith' Discovery: Claim Files, Training Materials, Personnel Files, and the Kitchen Sink*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 26, #18 Jan. 31, 2013.

98. 2012 WL 6062029, at *5 (citations omitted).

99. 2012 WL 6062029, at *6 (citations omitted).

100. John J. Pappas, Janice C. Buchman, and Bonnie M. Sack, *Scary Stuff: Insurance Claim Files And Exceptions To The Attorney-Client Privilege*, Mealey's Litigation Report: Insurance Bad Faith, Vol. 26, #8 Aug. 23, 2012.

101. In re Professional Direct Ins. Co., 578 F.3d 432, 439 (6th Cir. 2009). In In re Professional Direct Ins. Co., the federal court considered "[t]he lone issue [of] whether the disputed documents were prepared in anticipation of litigation" (578 F.3d at 438) and explained:

> If a document is prepared in anticipation of litigation, the fact that it also serves an ordinary business purpose does not deprive it of protection, but the burden is on the party claiming protection to show that anticipated litigation was the "driving force behind the preparation of each requested document."

578 F.3d at 439 (citations omitted). ■

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
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