

# Cumis Privilege And The Risk Of Waiver: A Policyholder's Perspective

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**Use of *Cumis* counsel in reservation of rights situations makes sense. But watch out for the evidentiary issues.**

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**IT HAPPENS** all the time: an insured is sued and some of the allegations against it might fall outside the scope of its insurance coverage. The policyholder's insurer reserves its rights to deny coverage on the claims that might not be covered. This tends to cast the insurer's defense of the insured in the shadow of possible coverage litigation. One solution exists in the form of independent *Cumis* counsel (independent counsel for an insured that is paid for by an insurer who has reserved its rights), which was established first in *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, 208 Cal. Rptr. 494 (Cal. Ct. App. 1984), and subsequently codified in the California Civil Code. Using *Cumis* counsel helps to address some of the ethical dilemmas posed by an insurer's duty to defend when undertaken in the shadow of possible coverage litigation. But the solution of *Cumis* counsel does not fully clarify what evidentiary treatment ought to apply to independent counsel's work product and attorney-client communications produced in the course of the underlying defense. If a subsequent coverage lawsuit does arise, are there any situations in which such materials may be discoverable by the insurer? Would such materials be discoverable by a third party plaintiff in underlying litigation? In other words, to what extent are such documents

privileged, and under what circumstances can that privilege be waived?

**CUMIS, WASTE MANAGEMENT, AND BEYOND** • Traditionally, a general liability insurer with a duty to defend fulfilled its contractual duties by retaining counsel to represent both the policyholder and the insurer on a joint basis in an underlying action. This approach was based on the notion that both the policyholder and insurer shared the same goal: winning the underlying action.

### **Cumis And Progeny**

In *Cumis*, the California Court of Appeal rejected this theory in situations in which an insurer acts under a reservation of rights. *Cumis*, supra, 208 Cal. Rptr. at 496. The court held that an insurer is required to pay for a policyholder's independent counsel when the insurer reserves the right to challenge coverage at a later date. *Id.* However, when an insurer proceeds under a reservation of rights, a conflict of interest arises between the policyholder and the insurer. *Id.* at 498. By reserving its right to challenge coverage, an insurer creates a possibility that it will act adversely to the policyholder in the future. *Id.* at 506. Such a conflict of interest, the court reasoned, is inconsistent with counsel's joint representation of the policyholder and insurer. *Id.*

Although *Cumis* only concerned the narrow issue of whether an insurer with a duty to defend must pay for independent counsel for a policyholder when the insurer acts under a reservation of rights, the court anticipated some of the potential privilege problems arising from this arrangement. For example, the court noted that joint counsel may be privy to communications from a policyholder that assess the likelihood of coverage—communications that would be of great interest to the insurer in any future coverage litigation. In such a position, joint counsel is “forced to walk an ethical tightrope” by not communicating such relevant information to the insurer, which is also one of his clients. *Id.* at

499. The court did not address specifically, however, whether such communications would be discoverable by the insurer in a future coverage action if the insurer were paying for the policyholder's independent counsel.

### **The Cumis Statute**

In 1987, California enacted California Civil Code section 2860, which codified the holding in *Cumis* and addressed some of the discovery-related issues arising from insurer-provided independent counsel. In particular, section 2860(d) states that “it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action *except privileged materials relevant to coverage disputes*, and timely to inform and consult with the insurer on all matters relating to the action.” (Emphasis added). One could argue that *Cumis* counsel and the insured still may be required to disclose privileged materials that are not relevant to coverage disputes to the insurer, in satisfaction of their obligations under the statute and the cooperation clause. However, at least one court has read this provision to allow the policyholder considerable leeway regarding the information it discloses to its insurer. See *First Pac. Networks, Inc. v. Atl. Mut. Ins. Co.*, 163 F.R.D. 574, 584 (N.D. Cal. 1995).

The statute anticipates that the court may have to decide whether certain documents are privileged: “Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court.” Cal. Civ. Code §2860(d). Furthermore, privileged material that is provided to the insurer is protected under the statute from disclosure to third parties, such as plaintiffs in the underlying litigation: “Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.” *Id.*

Although the *Cumis* statute makes clear that with respect to *Cumis* counsel, privileged materials “relevant to coverage disputes” are not discover-

able in subsequent litigation between the insurer and its insured, section 2860 additionally states that “[c]ounsel shall cooperate fully in the exchange of information that is consistent with each counsel’s ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract.” *Id.* §2860(f). If the duty to cooperate would otherwise require the policyholder or its independent counsel to disclose privileged materials, including “privileged materials relevant to coverage disputes,” does that mean that the cooperation clause in insurance policies amounts to a contractual waiver of the attorney-client privilege? California courts have attempted to answer this question, most notably in *Rockwell International Corporation v. Superior Court*, 32 Cal. Rptr. 2d 153 (Cal. Ct. App. 1994).

### ***Rockwell International***

The California Court of Appeal held in *Rockwell* that “the standard cooperation clause included in every third party liability insurance policy” does not contractually waive the attorney-client privilege and allow discovery of attorney-client communications in an underlying action. *Rockwell*, supra, 32 Cal. Rptr. 2d at 155. Rockwell International Corporation was insured under numerous liability policies, each of which contained a standard cooperation clause. *Id.* The policies also provided that the insurers would reimburse Rockwell for costs, including legal fees. *Id.* When Rockwell was sued for environmental contamination, some of the insurers agreed to defend Rockwell under a reservation of rights, while others declined to defend Rockwell at all. *Id.*

Rockwell sued its insurers for declaratory relief and breach of contract. *Id.* The insurers sought to discover a number of documents relating to the underlying action, some of which concerned communications between Rockwell and its counsel. *Id.* at 156. Rockwell refused to turn those documents

over, citing the attorney-client privilege. *Id.* The insurers sought to compel production, arguing:

“(1) the cooperation clause in the insurance policies abrogated Rockwell’s attorney-client privilege; (2) Rockwell’s decision to sue its carriers placed its conduct “in issue” and thereby waived whatever privilege might otherwise have existed; [and] (3) the carriers’ ‘common interest’ makes it a ‘joint client’ so that Rockwell cannot assert the privilege in this litigation....”

*Id.* In *Rockwell*, the appellate court addressed these three bases for abrogating the attorney-client privilege—the cooperation clause, the “at issue” (or “in issue”) doctrine, and the “common interest” doctrine—in turn. With regard to the cooperation clause, the court found:

- The plain language of the standard cooperation clause in the policies did not require discovery of attorney-client communications;
- The parties did not intend for the cooperation clause to function as a waiver of privilege; and
- Allowing the cooperation clause to trump the attorney-client privilege would be contrary to California public policy, as expressed by California Civil Code section 2860.

*Id.* at 157-58. Thus, the statement in section 2860(f) that nothing in the *Cumis* statute relieves the insured from its duty to cooperate with its insurer does not imply that the insured has the duty to reveal privileged information to its insurer.

The court found similar fault with the insurers’ common interest doctrine argument, noting that the common interest doctrine, under which attorney-client communications are not privileged among the clients, only applies when counsel is retained to represent more than one client jointly. *Id.* at 160. In *Rockwell*’s case, the court found that its attorneys “were retained to represent Rockwell and only Rockwell.” *Id.* Therefore, the court held that the common interest doctrine did not apply.

*Id.* Finally, the court found that Rockwell had not put the disputed attorney-client communications at issue merely by bringing suit against the insurers. *Id.* at 161. The court expressly declined to decide whether the communications were discoverable over the work product doctrine. *Id.* at 162.

### **The Other End Of The Spectrum: Waste Management**

When considering the contours of privilege and waiver in the context of *Cumis*, it is useful to understand what those contours might look like in states that do not recognize any potential conflict of interest between underlying defense counsel and the insurer. Illinois is one such state. On all three points addressed in *Rockwell*—the cooperation clause, the common interest doctrine, and the “at issue” doctrine—the Supreme Court of Illinois, in *Waste Management, Inc. v. International Surplus Lines Insurance Company*, 579 N.E.2d 322 (Ill. 1991), reached diametrically opposite results.

In *Waste Management*, liability insurers denied coverage to a hazardous waste disposal company after the company settled the underlying disputes. *Id.* at 324-25. Both the company and insurers sought declaratory judgments concerning their respective rights under the policies. *Id.* at 324-325. The insurers sought to discover defense counsel’s files in the underlying actions, but the policyholder refused, citing the attorney-client privilege and work product doctrine. *Id.*

In describing the attorney-client privilege, the court noted that “in Illinois, we adhere to a strong policy of encouraging disclosure, with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit.” *Id.* at 327. First, defense counsel’s conduct in the underlying litigation formed “the basis of insurers’ declaratory judgment action and its defense to insureds’ declaratory judgment action.” *Id.* Thus, the court found that the communications sought were discoverable

because they were “at issue” in the litigation between the policyholder and the insurer. *Id.*

Next, the court considered the cooperation clause in the policy. It found that the clause imposed a very broad duty of cooperation on the policyholder, noting that “[a] fair reading of the terms of the contract renders any expectation of attorney-client privilege, under these circumstances, unreasonable.” *Id.* at 192-93. Therefore, the cooperation clause represented a second reason that the attorney-client privilege did not bar discovery of the communications in the underlying lawsuits. *Id.* at 193.

Finally, the court considered the effect of the common interest doctrine on the discoverability of the communications sought. The insurers had neither retained defense counsel for the underlying action nor participated in the defense, but the court found that the policyholder and insurers shared a common interest in defeating or settling the underlying claims. *Id.* That common interest, in combination with the policyholder’s contractual obligations under the cooperation clause, was enough to defeat the policyholder’s claims of attorney-client privilege and permit discovery by the insurers. *Id.* at 329. The court also held that the work product doctrine did not provide a shield against discovery because the materials sought were not prepared in anticipation of the coverage litigation, but rather for the benefit of both the insurer and policyholder in the underlying action. *Id.* at 331. In short, in a coverage dispute under Illinois law, the insured and insurer are deemed to share in the attorney-client privilege and work product protections (relating to documents produced in anticipation of the underlying, rather than coverage, litigation).

This cuts both ways, though—insurers in Illinois also may find that their files are discoverable by insureds in subsequent coverage litigation because of the common interest between the insurer and its insured. In *Western States Insurance Company v. O’Hara*, 828 N.E.2d (Ill. App. Ct. 2005), an au-

tomobile liability insurer sued its insureds and the victims of an accident caused by the insureds, seeking a declaration of no coverage. The defendants sought to compel the insurer to produce its files pertaining to the underlying accident claims. The appellate court held that the insureds were entitled to discover such materials because the common-interest doctrine applied. The work product doctrine did not apply because the material was prepared in support of the insured and insurer's shared interests. But the accident victims were not entitled to the materials, because they at no time shared a common interest with the insurers. The assumed common interest and the existence of a cooperation clause eliminates the insured's protection under the attorney-client privilege and may require discovery of otherwise privileged matters from the underlying action, even when the policyholder retains its own counsel in the underlying dispute. This rule stands in sharp contrast to the rule in California, as announced in *Rockwell*.

### **Remaining States**

California and Illinois represent opposite poles concerning discovery by an insurer (likely in a coverage dispute) of communications between a policyholder and its independent counsel during an underlying action. The California approach appears to be the majority view among other states, particularly with respect to its finding of no common interest.

### **Massachusetts**

For example, in *Dedham-Westwood Water District v. National Union Fire Insurance Company of Pittsburgh*, a Massachusetts court rejected arguments—made by an insurer who had denied coverage—that the cooperation clause, common interest doctrine, and at issue doctrine entitled the insurer to discover communications between the policyholder and its independent counsel during the underlying litigation. *See generally* 2000 WL 33593142 (Mass. Super.

Ct. Feb. 4, 2000). The attorney-client privilege and work product doctrine shielded the communications from discovery. *Id.* at \*5. To allow the insurer to discover the communications would “unfairly give it an opportunity to exploit any internal discussions engaged in between [the policyholder] and its counsel and give it advantages in future litigation.” *Id.* The Massachusetts court declined to follow *Waste Management*, noting that it had been “rejected or criticized on numerous occasions.” *Id.* at \*3.

### **Ohio, Connecticut, Wisconsin, Virginia, Florida, New Jersey, And D.C.**

Similarly, an Ohio court held that there was no “common interest” between an insurer and policyholder when the insurer had neither defended nor indemnified the policyholder. *Owens-Corning Fiberglass Corp. v. Allstate Ins. Co.*, 660 N.E.2d 765, 769 (Ohio Ct. Com. Pl. 1993). Rather than a case involving a common interest, the court noted that the case was “more aptly characterized as an embittered dispute over whether or not insurance coverage applies. The parties could not be more at odds, rendering any reference to a ‘common interest’ somewhat laughable.” *Id.* Thus, the court declined to set the work product doctrine aside on common interest grounds. *Id.* The court did not address the at issue doctrine or cooperation clause as bases for discovery of the communications in the underlying action.

*See also Metro. Life Ins. Co. v. Aetna Cas. & Surety Co.*, 730 A.2d 51, 64 (Conn. 1999) (“[i]t is just this type of maneuvering—refusing to defend an underlying claim, then second-guessing its settlement in an effort to deny coverage—that the disclosure of the relevant documents would encourage”); *State v. Hydrite Chem. Co.*, 582 N.W.2d 411, 422-23 (Wis. Ct. App. 1998) (rejecting *Waste Management* on at issue, cooperation clause, and common interest grounds in coverage action brought by insurer who did not participate in defense of underlying action); *RML Corp. v. Assurance Co. of Am.*, 2002 WL 32075213, at \*7 (Va. Cir. Ct. Oct.

25, 2002) (rejecting common interest and at issue arguments); *E. Air Lines, Inc. v. United States Aviation Underwriters, Inc.*, 716 So. 2d 340, 343-44 (Fla. Dist. Ct. App. 1998) (denying insurers' request to discover communications between a policyholder and counsel on the basis of a cooperation clause and the at issue doctrine and rejecting *Waste Management*); *In re Envtl. Ins. Declaratory Judgment Actions*, 612 A.2d 1338, 1343 (N.J. Super. App. Div. 1992) (material created in underlying action at direction of defense counsel must be produced over work product objections subject to in-camera review, but attorney-client communications or work product containing mental impressions of attorney were privileged from discovery); *Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 937 (D.C. Cir. 1984) (finding that attorney-client communications made after an insurer's and policyholder's interests had diverged were privileged, but not addressing the discoverability of communications made beforehand).

### **North Carolina**

Not every state entirely rejects the concept of a common interest between the insured and the insurer, however. In *Nationwide Mutual Fire Insurance Company v. Bournon*, 617 S.E.2d 40 (N.C. App. 2005), *aff'd per curiam*, 625 S.E.2d 779 (N.C. 2006), a North Carolina court found that under the common interest doctrine, when "an insurance company retains counsel for the benefit of its insured, 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." *Id.* at 47. The court further narrowed this rule, finding that communications unrelated to the defense in the underlying action, or to issues of coverage, are still protected by the attorney-client privilege. *Id.* However, the policyholder had asserted counterclaims against its defense counsel asserting improper representation, which the court held amounted to a waiver of the attorney-client

privilege under the at issue doctrine. *Id.* at 48-49. As a result, the insurer was permitted to discover communications between the policyholder and its counsel in the underlying matter. *Id.* at 49.

### **Delaware And New York**

A Delaware court similarly stated that if counsel is retained to represent both insurer and policyholder, communications with counsel are not privileged. *Hoechst Celanese Corp. v. Nat. Union Fire Ins. Co. of Pittsburgh*, 623 A.2d 1118, 1124 (Del. Super. Ct. 1992). Echoing the Supreme Court of Illinois, the court noted that "[i]n Delaware, although the attorney-client privilege is highly regarded, it is not absolute, and must yield to the interests of justice." *Id.* at 1123. However, in this particular case, the court held that the common interest doctrine did not result in the conclusion that the insurer and the insured shared in the attorney-client privilege because the policyholder's counsel was not actually retained and paid for by the insurers. *Id.* at 1124-25. The court was willing to allow discovery of some attorney-client communications under the work product doctrine. *Id.* at 1127-28. *See also Goldberg v. Am. Home Assur. Co.*, 439 N.Y.S.2d 2,5 (N.Y. App. Div. 1981) ("[W]hen 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. 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").

### **WAIVER AND THE COMMON INTEREST DOCTRINE**

• The cases discussed above address the discoverability of privileged communications between an insured and its independent counsel in a subsequent coverage action between the insured and its insurer. In states such as California, which

find no common interest between the insured and the insurer, and no contractual requirement in the form of the cooperation clause in the insurance policy, it is clear that the attorney-client privilege and work product protections are not waived as between the policyholder and its insurance company. But when faced with the situation in which *Cumis* counsel would be provided—that is, when the insurance company has reserved its rights to deny coverage—policyholders often desire to provide to their insurers privileged information about the underlying litigation, including work product and attorney-client communications from their defense counsel, in order to demonstrate to the insurer why the claim truly is covered. If the insured in such a situation provides privileged information to its insurer for review, has it thereby waived the attorney-client privilege as to all documents concerning the same subject matter, such that the insurer can use them against the insured in subsequent coverage litigation? Similarly, if the insured waives the privilege with respect to the insurer for a given document or class of documents, will that waiver be deemed to extend to the third parties, including other insurers and plaintiffs in underlying litigation? Case law on these questions is sparse, but policyholders and their counsel should always consider the risk of waiver when providing materials to their insurance carrier.

### **Voluntary Provision Of Materials And Potential Waiver**

Paradoxically, Illinois law, as expressed in the *Waste Management* decision—what might be called the “anti-*Cumis*” position—provides some of the clearest guidance on how to proceed in this situation. The shared common interest between insurer and insured means that the insured could not assert privilege in the first place as to privileged documents from defense of the underlying claim. Illinois courts would also likely reject a third party’s attempts to discover materials provided by an

insured to its insurer on the ground that the third party (such as a plaintiff in underlying litigation) did not share a common interest. *See, e.g., Western States Insurance Company v. O’Hara*, supra, 828 N.E.2d at 849-50 (2005). However, there is also the risk that if the plaintiff seeks these documents in litigation in another state, that state will apply its own law. *See, e.g., Urban Outfitters, Inc. v. DPIC Cos., Inc.*, 203 F.R.D. 376, 378-79 (N.D. Ill. 2001) (applying Illinois law of attorney-client privilege to resolve discovery dispute over documents generated in the context of the defense of a lawsuit in Michigan).

In *Cumis* states, such as California, the voluntary provision of privileged materials to a party not entitled to view those materials more clearly suggests a waiver of the privilege. If the insured is deemed to have voluntarily waived a privilege, it will understandably be interested in ensuring that the waiver does not extend beyond the limited purpose and audience for which the information is provided.

### **Limiting The Scope Of Potential Waiver**

The *Cumis* statute itself provides some assistance to policyholders with respect to a limitation of any waiver, for it expressly states that “[a]ny information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.” Cal. Civ. Code §2860(d). In *First Pacific Networks, Inc. v. Atl. Mutual Insurance Company*, 163 F.R.D. 574, 584 (N.D. Cal. 1995) (applying California law regarding attorney-client privilege and federal law regarding the work product doctrine), a federal court interpreted this language to mean that information between the insured and its *Cumis* counsel that was privileged at the time it was created and then was communicated to the insurer, who provided *Cumis* counsel, was not discoverable by another insurer. In so holding, the court noted:

“The extent of the insured’s power to control disclosure of some privileged communications, without risking waiver, is most visible in the fact that Cali-

California law seems to permit an insured to pick and choose which of the insured's otherwise privileged communications it will share with a carrier funding a defense under a reservation of rights—and to do such picking and choosing without waiving the right to prevent its carrier from having access to other privileged communications—even communications on the same subjects. *See* Cal. Civ. Code §2860(d). The fact that California law appears to give insureds such broad power (in *Cumis* situations) over which privileged communications (if any) to share with one carrier lends some support to an inference that California law would permit an insured to share some privileged communications with one carrier without thereby waiving the insured's power to decide whether or not to share those same communications with another carrier.”

*Id.* at 584. To the extent the information that the insured had provided to the insurer funding its *Cumis* counsel was not privileged at the time it was made, however, that information was discoverable. *Id.* at 581. In a state that recognizes the concept of *Cumis* counsel, but does not have statutory provisions or precedent limiting the scope of waiver, the fact that the insurer and insured do not share a common interest heightens the risk of waiver for privileged documents that the insured provides to its insurer. *See, e.g., Go Med. Indus. Pty., Ltd. v. C.R. Bard, Inc.*, 1998 WL 1632525, at \*3 (D. Conn. Aug. 14, 1998) (allowing plaintiffs in patent infringement action to discover communications between defendant policyholder and its insurer, because insured and insurer did not share common interest in protecting policyholder's patent); *In re Pfizer Inc. Secs. Lit.*, 1993 WL 561125, at \*8 (S.D.N.Y., Dec. 23, 1993) (disclosure by insured to insurer waived attorney-client privilege).

### Confidentiality Agreements

Some policyholders attempt to address waiver concerns by entering into a confidentiality agree-

ment before providing any privileged or potentially privileged information to an insurer who has reserved rights or has not yet accepted coverage. However, at least one federal court in California (outside the *Cumis* context) has held that a signed “joint defense agreement” was ineffective to prevent waiver of work product protections that otherwise would have attached to letters that a defense counsel wrote to the defendant's liability insurer. (In those letters, counsel provided candid factual and legal analysis in an effort to persuade the insurer to contribute to settlement.) *In re Imperial Corp. of America*, 167 F.R.D. 447, 451-57 (S.D. Cal. 1995), *aff'd*, 92 F.3d 1503 (9th Cir. 1996). As a result, plaintiffs in the underlying litigation were allowed to discover the documents. *Id.* at 457. *Imperial Corp.* leaves policyholders in the lurch: the insured is deemed sufficiently adversarial to have waived the privilege if it reveals information to an insurer who, through no fault of the insured, has not yet decided to accept coverage; yet at the same time, the policyholder has policy obligations and an understandable interest in persuading its insurer to recognize its end of the bargain. The price of caution should not have to be the coverage for which one has dutifully paid premiums. Yet the risk exists that in certain situations, it may be just that.

**CONCLUSION** • The concept of *Cumis* counsel has appeal because of the ethical obligations associated with the tri-partite relationship. However, the evidentiary aspect—the preservation of privilege between two of the three interested parties (the insured and defense counsel), and the risk that in providing information to the third party (the insurer), the insured will have waived that privilege—presents perhaps the most significant practical challenge for the policyholder. Insureds facing a potential coverage battle with their insurers should proceed with caution.

## PRACTICE CHECKLIST FOR Cumis Privilege And The Risk Of Waiver: A Policyholder's Perspective

- In *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, 208 Cal. Rptr. 494 (Cal. Ct. App. 1984), the California Court of Appeal held that an insurer is required to pay for a policyholder's independent counsel when the insurer reserves the right to challenge coverage at a later date because the reservation of rights creates a possibility that the insurer will act adversely to the policyholder in the future.
- The *Cumis* court anticipated some of the potential privilege problems arising from this arrangement. (For example, joint counsel may be privy to communications from a policyholder that assesses the likelihood of coverage.)
- California Civil Code section 2860 codified the holding in *Cumis* and addressed some of the discovery-related issues arising from insurer-provided independent counsel. In particular, section 2860(d) states that "it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action *except privileged materials relevant to coverage disputes*, and timely to inform and consult with the insurer on all matters relating to the action." (Emphasis added).
- The Second District Court of Appeal held in *Rockwell International Corporation v. Superior Court*, 26 Cal. App. 4th 1255, 1259 (1994), that "the standard cooperation clause included in every third party liability policy" does not contractually waive the attorney-client privilege and allow discovery of attorney-client communications in an underlying action.
- On all three points addressed in *Rockwell*—the cooperation clause, the common interest doctrine, and the "at issue" doctrine—the Supreme Court of Illinois in *Waste Management, Inc. v. International Surplus Lines Insurance Company*, 144 Ill. 2d 178 (1991), reached diametrically opposite results. In a coverage dispute under Illinois law, the insured and insurer are deemed to share in the attorney-client privilege and work product protections (relating to documents produced in anticipation of the underlying, rather than coverage, litigation).
- The California approach appears to be the majority view among other states, particularly with respect to its finding of no common interest:

\_\_\_ *In Dedham-Westwood Water District v. National Union Fire Insurance Company of Pittsburgh*, No. Civ. A. 96-00044, 2000 WL 33593142 (Mass. Super. Feb. 4, 2000), a Massachusetts court rejected arguments that the cooperation clause, common interest doctrine, and at issue doctrine entitled the insurer to discover communications between the policyholder and its independent counsel during the underlying litigation;

\_\_\_ An Ohio court held that there was no "common interest" between an insurer and policyholder where the insurer had neither defended nor indemnified the policyholder. *Owens-Corning Fiberglass Corp. v. Allstate Ins. Co.*, 660 N.E.2d 765, 769 (Ohio Com. Pl. 1993);

\_\_\_ Courts in Connecticut, Wisconsin, Virginia, Florida, New Jersey, and D.C. have reached similar conclusions.

- However, not every state entirely rejects the concept of a common interest between the insured and the insurer:

\_\_\_ In *Nationwide Mutual Fire Insurance Company v. Burlon*, 617 S.E.2d 40, 47 (N.C. App. 2005), a North Carolina court found that under the common interest doctrine, when “an insurance company retains counsel for the benefit of its insured, 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;”

\_\_\_ A Delaware court stated that if counsel is retained to represent both insurer and policyholder, communications with counsel are not privileged. *Hoechst Celanese Corp. v. Nat. Union Fire Ins. Co. of Pittsburgh*, 623 A.2d 1118, 1124 (Del. Super. 1992);

\_\_\_ A New York court noted that when any insured and its insurer initially have a common interest in defending an action against the insured, “there is a possibility that those communications might play a role in a subsequent action between the insured and his insurer.” *Goldberg v. Am. Home Assur. Co.* 435 N.Y.S. 2d 2, 5 (N.Y. App. Div 1981).

- In states that limit the discoverability of communications between a policyholder and its defense counsel, the insured must be particularly careful when considering whether to provide information to its insurer that may be privileged, lest such disclosure be deemed a waiver of privilege. For example, in a state that recognizes the concept of *Cumis* counsel but does not have statutory provisions or precedent limiting the scope of waiver, the fact that the insurer and insured do not share a common interest heightens the risk of waiver for privileged documents that the insured provides to its insurer. *See, e.g., Go Medical Indus. Pty., Ltd. v. C.R. Bard, Inc.*, No. 3:95MC522(DJS), 1998 WL 1632525 at \*3 (D. Conn. Aug. 14, 1998) (allowing plaintiffs in *patent* infringement action to discover communications between defendant policyholder and its insurer, because insured and insurer did not share common interest in protecting policyholder’s patent); *In re Pfizer Inc. Secs. Lit.*, No. 90 Civ. 1260(SS), 1993 WL 561125 at \*8 (S.D.N.Y., Dec. 23, 1993) (disclosure by insured to insurer waived attorney-client privilege).
- Some policyholders attempt to address waiver concerns by entering into a confidentiality agreement before providing any privileged or potentially privileged information to an insurer who has reserved rights or has not yet accepted coverage. However, at least one federal court in California (outside the *Cumis* context) has held that a signed “joint defense agreement” was ineffective to prevent waiver of work product protections that otherwise would have attached to letters that a defense counsel wrote to the defendant’s liability insurer. (In those letters, counsel provided candid factual and legal analysis in an effort to persuade the insurer to contribute to settlement.) *Imperial Corp. v. Shields*, 167 F.R.D. 447, 451-57 (S.D. Cal. 1995).

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