JOHNSON&BELL

PRIVILEGE AND THE WORK PRODUCT DOCTRINE

The issue of the production of claim documents in the possession of an insured and whether they are discoverable by an insurer when that insurer has denied coverage and filed a declaratory judgment action seeking a ruling that they have no duty to defend or indemnify often arises. This memorandum discusses the impact of the Waste Management case and subsequent rulings on this important issue – particularly in Illinois.

***Waste Management Inc. v. Intl. Surplus Lines Ins. Co.*, 144 Ill. 2d 178 (Illinois, 1991).**

(1) Attorney Client Privilege.

(a) The holding of *Waste Management*, as to the ACP claim, was heavily dependent on a cooperation clause in the insurance contract:

"The cooperation clause in this case imposes upon insureds the duty to assist insurers in the conduct of suits and in enforcing any right to contribution or indemnity against persons potentially liable to insureds. Further, the policy provides that insurers are entitled to conduct any claim, in the name of insureds, for indemnity or damages against persons, and that insureds "shall give all such information and assistance as the insurers may reasonably require." (at 191)

. . . .

"A fair reading of the terms of the contract renders any expectation of attorney-client privilege, under these circumstances, unreasonable. We conclude that the element of confidentiality is wanting and, therefore, the attorney-client privilege does not apply to bar discovery of the communications in the underlying lawsuits." (at 193)

(b) The broader part of the holding, which I think hurts us, was the Court's adoption of the "common interest doctrine."

"Evidence scholars have variously stated that under the common interest doctrine, when an attorney acts for two different parties who each have a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties. (citations omitted). This is especially so 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. Clearly, here both insurers and insureds had a common interest either in defeating or settling the claim against insureds in the Miller litigation. We believe that the communication by insureds with defense counsel is of a kind reasonably calculated to protect or to further those common interests. (at 193)

. . . .

"[W]e believe that the doctrine may properly be applied where the attorney, though neither retained by nor in direct communication with the insurer, acts for the mutual benefit of both the insured and the insurer."

(2) Work Product Doctrine.

(c) The *Waste Management* court held the work product doctrine was not available to the insureds on the following rationale:

"In the typical case, material is generated in preparation for trial against an adversary who may seek disclosure of his opponent's work product. Here, the sought-after materials were, in the first instance, prepared for the mutual benefit of insureds and insurers against a third-party adversary. Insurers were not the adversary from whom the attorney's trial strategies and opinions required protection. Insurers and insureds have only become adversarial since the termination of the primary litigation. While the work-product materials, had they been requested by the third-party opponent in the underlying lawsuit, would have been entitled to protection, that same protection is not warranted here. This, we firmly believe, was not the situation contemplated by *Hickman* and Rule 201(b)(2)." (at 197)

(d) Further, the court shot down the insureds argument that the insurers could have got the sought after information elsewhere:

"Insurers maintain that at issue here is, *inter alia,* whether certain clean-up costs in the Miller action were covered by the EIL policies, and why certain parties were brought in for contribution and others released**.** Insureds take the position that the information requested by insurers may be gleaned from objective facts, contained outside the contents of defense counsel's files. We disagree. Part of what insurers seek to discover is in fact the mental impressions and case assessment of defense counsel. We can think of no source, outside the files, where this information might be obtained. The sought-after information will be dispositive of the issues presented in the declaratory action. Therefore, we hold that the opinion work-product materials are subject to disclosure." (at 199)

(3) "At Issue" Exception to Work Product Doctrine.

(e) The *Waste Management* Court went on to hold that the "at issue" exception to the work product applied regardless.

"Even assuming, *arguendo,* that the work-product rule has application here, the material would nonetheless be subject to disclosure. There are emerging, in the Federal decisional law, certain exceptions to "absolute immunity" of opinion work product. One such exception, the "at issue" exception, permits discovery of work product where the sought-after material is either the basis of the lawsuit or the defense thereof."

. . . .

"Application of the exception, on this set of facts, would defeat any claim of work-product protection. Here, as in *Truck Insurance Exchange,* insureds seek to have insurers pay for their defense counsel's services while at the same time claiming that insurers have no right to examine

counsel's files. We think that even the seemingly impenetrable work-product doctrine would not permit such unfairness and potential injustice. We hold, where, as in the underlying litigation, an attorney represents the common interests of two or more clients whose relationship subsequently becomes adverse, and, in a subsequent action, the work product of the attorney is at issue, Rule 201(b)(2) (134 Ill.2d R. 201(b)(2)) is not available to bar discovery by one of the original parties." (at 199, 200)

***Sharp v. Trans Union LLC.*, 364 Ill. App. 3d 64 (1st Dist. App. 2006).**

Facts: Trans Union was being sued by FTC and other parties for violation of the FCRA. In response, Trans Union purchased professional liability insurance from Plaintiff. 14 more suits followed. Sharp sought declaratory judgment that the 14 additional suits weren't covered under the policy. During discovery, Sharp sought all documents related to the pre- and post-policy lawsuits, and all documents related to the drafting and negotiation of the policy. Trans Union refused to turn over a number of these documents, citing the attorney-client privilege and the work product doctrine. The Underwriters claimed that the attorney-client privilege and the work product doctrine were inapplicable to the documents in question under the supreme court's holding in Waste Management.

Issue: Did the holding of *Waste Management* require the insured to produce documents created *prior* to the inception of the insurance policy at issue?

Holding: "Unlike the documents at issue in *Waste Management*, the documents in question here were created prior to the inception of the policy; nevertheless, we find the supreme court's decision in that case to be instructive. The broad policies articulated by the supreme court in *Waste Management* are equally applicable to our interpretation of the insurance contract at issue here. Our application of principles of contract interpretation and the policies articulated in *Waste Management* reveals that the parties' manuscripted insurance policy was negotiated and written to require the disclosure of Trans Union's general counsel's knowledge, work product, and communications regarding the pre-policy litigation." (at 72)

Rationale: The *Trans Union* court, like in *Waste Management*, pointed to the broad cooperation agreement in the insurance policy, an exclusionary provision in the policy, and Illinois public policy favoring broad disclosure of information between insured and insurer.

"Exclusion (g) of the policy, read together with the policy's cooperation clause, requires that items communicated by or to Trans Union's general counsel relating to the FTC proceedings or the pre-policy suits be turned over. The language of exclusion (g) is not ambiguous. The only possible meaning of it, or intent behind it, is to exclude from coverage any claim based upon an act, error, violation, or omission that Trans Union's general counsel knew could be the basis of a future claim. Exclusion (g) thus protects the Underwriters from insuring a known loss. (citation omitted). The policy effectively defines known losses in terms of the general counsel's knowledge by excluding errors and omissions that Trans Union's general counsel knew might be the basis of a future claim.

The only way to determine whether Trans Union's general counsel knew that a particular act might be the basis of a claim would be to look at the general counsel's legal reasoning and analysis of that act. Further, as noted above, the broad cooperation clause of the policy requires Trans Union to cooperate "in all investigations, including investigations regarding coverage." (at 72, 73)

"Reading the specific language of the cooperation clause together with exclusion (g), we find that Trans Union agreed to share the legal reasoning and analysis of its general counsel regarding whether there might be future claims based on its sale of target marketing information with the Underwriters in a coverage investigation. Although such information may be privileged because it is legal advice given by the general counsel to the corporation about whether its actions could result in liability (see, *e.g., Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 584 (2000)), Trans Union, in agreeing to a policy with such particular language, has agreed to share this information with the Underwriters under these circumstances." *Id.*

***Motorola Solutions Inc. v. Zurich Ins. Co*., 83 N.E.3d 1063 (Ill. App. 1st Dist. 2017).**

In *Motorola* the court analyzed *Waste Management*, as well as *Sharpe*, and found the case distinguishable on a number of factors.

Facts: The instant appeal arises from a discovery dispute between plaintiff Motorola Solutions, Inc., and defendants Zurich Insurance Company (Zurich) and Associated Indemnity Corporation (Associated) concerning the production of documents that plaintiff claims are privileged. The parties are engaged in insurance coverage litigation, stemming from several underlying personal injury actions in which claims were asserted against plaintiff. Plaintiff filed a motion for summary judgment with respect to Zurich's duty to defend one of the actions and the trial court stayed briefing on the motion to permit limited discovery concerning a late notice defense asserted by defendants. As part of discovery, defendants sought the production of several documents that plaintiff claimed were privileged. The trial court ordered plaintiff to turn over the documents, and plaintiff refused. The trial court then held plaintiff in friendly civil contempt to permit plaintiff to appeal. (at 1066)

Documents Sought

(1) [D]ocuments pertaining to plaintiff's clean room safety program (CRSP documents). According to plaintiff, "[plaintiff], as a prudent company also operating in that manufacturing sector, engaged counsel and formed a working group to conduct an analysis of [plaintiff's] practices in and risks arising from its clean rooms." This was known as plaintiff's "Clean Room Safety Program." The efforts of the program resulted in the creation of the CRSP documents in 1996, reports prepared by, or at the direction of, plaintiff's outside counsel. These CRSP documents had been sought by defendants since discovery began in the coverage litigation, with plaintiff withholding the documents on the basis of both the attorney-client privilege and the work product doctrine. (at 1068).

(2) The second category of documents sought by defendants concerned plaintiff's 2003 sale of its semiconductor manufacturing business to a new entity, Freescale Semiconductor, Inc. In the course of that sale, plaintiff was required to file a United States Securities and Exchange Commission Form S–1 Registration Statement (S–1 documents). The form contains a section entitled "Risk Factors," which informs potential investors about "significant risk factors currently known and unique to" the seller of the securities. *Id.*

Holding: Reversed trial court's holding requiring production of the documents.

Rationale:

Distinguished from Waste Management.

"In the case at bar, we agree with plaintiff that *Waste Management* does not encompass the situation present in the instant case, as *Waste Management* involved a factual scenario in which the insurers were seeking documents from the litigation for which the insureds were seeking indemnification. By contrast, in the case at bar, defendants have not sought the files from the litigation in the underlying clean room cases; instead, they are seeking files that were created years prior to any litigation. The difference this distinction makes becomes apparent when examining the cooperation clause of the Zurich policy, which Zurich claims is "virtually identical" to the one at issue in *Waste Management*. The cooperation clause requires plaintiff to "cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured ***." In *Waste Management*, this clause applied to the files the insurers sought, as they were files that concerned the conduct of the suits and the enforcement of rights of contribution or indemnity. By contrast, nothing in this cooperation clause touches on the disclosure of the contents of plaintiff's CRSP documents, which were created by different attorneys over a decade before any lawsuit was filed. It is thus unclear how the reports created under the CRSP would assist defendants in "making settlements, in the conduct of suits, [or] in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured."
(at 1073)

The duty to cooperate is not boundless. It must remain tied to the language of the cooperation clause itself. Here, the cooperation clause requires plaintiff to "cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured." Defendants have not explained how either the CRSP documents or the S–1 documents would "assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured." Instead, defendants are seeking the documents to determine whether they can defeat plaintiff's request for coverage as a result of a late notice. Consequently, we cannot find that *Waste Management* encompasses the situation in the case at bar with respect to the cooperation clause contained in the insurance policy. (at 1076)

Distinguished from Sharp.

In the case at bar, as noted, the insurance policy at issue is significantly different than that present in *Sharp*. The policy itself does not define a "known loss" in terms of plaintiff's general counsel's knowledge, nor does the cooperation clause expressly require plaintiff's cooperation in investigations of coverage questions. Defendants do not even acknowledge the extremely different language of the policies in the two cases, despite the fact that the *Sharp* court expressly relied on the policy's language in finding that disclosure was required. Furthermore, as plaintiff notes, the coverage issue in *Sharp* was the "known loss" exclusion, while the issue in the instant case was whether there was a timely notice of occurrence. Accordingly, we find *Sharp* of limited usefulness to the instant case.

The takeaway is that the sought after documents may have to be produced depending on the type and nature of the documents requested as well as an analysis of the cooperation clause of the policy.

If you have questions or would like more information, please contact:

Glenn F. Fencl
Shareholder
Johnson & Bell, Ltd.
312-984-0
fenclg@jbltd.com