

Invitation or Ambush: The Scope of an Insured's Duty to Cooperate and the Slippery Slope of Information Sharing

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The policyholder's "duty to cooperate" is built into every liability insurance policy—either expressly or through the application of a state's common law. The scope of an insured's duty to cooperate is often difficult to discern, however, in terms of the type and extent of information that the insured should provide as part of the insurer's investigation of the underlying matter for which coverage is being sought. Traditionally, the duty to cooperate was intended to encourage information sharing to allow the insurer to afford the policyholder a comprehensive, informed defense to the underlying claimant's allegations. This article examines the scope of the duty to cooperate and how that duty impacts the insured's obligation to share some reasonable amount of information as part of the insurer's investigation and defense of the underlying claim, noting potential pitfalls and risks that may arise from information sharing.

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INTRODUCTION

Virtually every insurance contract, regardless of type, contains a so-called “cooperation clause”. As the flip side of an insurance carrier’s (or “insurer”) twin duties to defend and indemnify, the insurance policyholder’s (or “insured”) duty to cooperate is intended to align the insurer’s and insured’s interests, promote strategic decision making, efficient resolution, and settlement of litigation. Courts generally have interpreted cooperation clauses, which are typically phrased broadly, to encompass, among other things, information-sharing obligations. Upon the tender of an insurance claim, an insurer is likely to request, pursuant to the cooperation clause, information and documentation regarding the relevant insurance policy or policies—as well as any related or layered policies—the general underlying factual circumstances, the specific event or events that the insured believes triggered coverage, and so forth. The policyholder, however, will face conflicting incentives: On the one hand, if the insurer ultimately agrees that coverage exists, then the parties’ interests will align and information sharing will be in both parties’ interests; if, on the other hand, the insurer later denies coverage, then the insurer could use the information it receives from the insured to defeat coverage in a subsequent declaratory relief action. Moreover, a policyholder may have legitimate concerns about sharing information that is privileged or confidential, lest the policyholder later be deemed to have waived its protections against disclosure of that information as against third parties in an underlying litigation.

Courts have had to address disputes between insureds and insurers over access to information in a variety of postures—for example, when an insurer files a discovery motion to compel its insured to produce information that the insured is claiming as privileged in a coverage dispute, or when an insurer files a declaratory judgment action to deny coverage on the basis of an insured’s alleged failure to cooperate. These disputes raise a number of important doctrinal and procedural questions, and states have answered these questions in a myriad of (often conflicting) ways. This article analyzes an insured’s information-sharing duties arising under a cooperation clause to offer both doctrinal analysis and practical advice to insureds and insurers as to how best to proceed at various points in their relationship and under various coverage scenarios. Unfortunately, an insured’s and insurer’s relationship is likely to be constantly in flux, requiring an insured’s in-house counsel to approach requests for documents and information in a flexible and dynamic manner, looking for opportunities to share information, but aware of the risks inherent to disclosure of evaluative, sensitive, or otherwise confidential materials to a potential adversary.

This article begins with a discussion of the common predicate to an insured’s duty to cooperate: the “cooperation clause.” Because the duty of cooperation is a creature of contract, it is difficult meaningfully to discuss an insured’s duty to cooperate in the abstract, without a specific contract provision in mind. This article therefore examines the case law to identify several high-level guiding principles with respect to the scope of the duty to cooperate. This article then turns to the relevant doctrinal and procedural privileges and protections, and the exceptions thereto, that are relevant to information sharing between insurers and insureds—most notably the attorney-client privilege, the

attorney work product protection, various theories of waiver, the same client rule, the common interest doctrine, and contractual confidentiality agreements. The article then summarizes and discusses the most common information and document requests arising under the duty to cooperate. The article then proceeds to consider an insured's best strategies for responding to information requests under various coverage scenarios. Finally, the article offers a brief analysis of the elements of a stand-alone claim or affirmative defense based on an insured's alleged breach of the duty to cooperate.

I. THE COOPERATION CLAUSE AND THE SCOPE OF THE DUTY

"When an insurer investigates a loss claim, the insured has a duty to cooperate by submitting [information] . . . relevant to the claimed loss."¹ In this context, cooperation generally means that "there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense."² Judge Cardozo was referring to the insured's "defense" of the underlying, third-party action in the *Coleman* case. An insured's duty of cooperation most often arises from a specific cooperation clause and consequently must be interpreted to reflect the parties' intentions. "In instances where a policy does not include such a clause, one has been implied in law."³ Regardless of origin and wording, however, an insured's duty to cooperate will virtually always include providing some information and documents.⁴ Cooperation clauses generally also encompass a duty to provide notice and to forward suit papers. The duty to cooperate serves as a mechanism to facilitate the insured's defense—not a vehicle to deny coverage.

History and Purpose

Cooperation clauses have been a fixture in insurance contracts for decades—if not longer.⁵ Although sometimes lost in the context of specific disputes, as an historical matter, cooperation clauses are intended to serve a truth-serving function. An insured's duty to cooperate allows an insurer to gather information from the insured—who is often

¹ *Miles v. Great N. Ins. Co.*, 671 F. Supp. 2d 231, 238 (D. Mass. 2009).

² *Coleman v. New Amsterdam Cas. Co.*, 160 N.E. 367, 369 (N.Y. 1928).

³ *Couch on Ins.* § 199:3.

⁴ *Couch on Ins.* § 199:37.

⁵ See *The Cooperation Clause in Liability Insurance Policies*, 33 COLUM. L. REV. 1414, 1414 (1933) (noting that "clauses requiring the insured to cooperate with the insurer in defending actions brought against the former are found in virtually all liability insurance policies" and that "the cooperation provision has been comparatively unprovocative of disputes until recent years").

in the best position to provide such information—about a triggering event, occurrence, or claim, while the information is still “fresh.”⁶

Courts often recount that the inclusion of a cooperation clause also serves to protect an insurer from collusion between an insured and an injured party.⁷ But this proposition should not be taken too far. As noted, an insured’s duty to cooperate is concomitant with and mirrored by the insurer’s duties to defend and to indemnify. An insured’s obligations under a cooperation clause therefore do not exist in a vacuum, but instead are intended to encourage the insurer to participate in the defense and resolution of a valid underlying claim, occurrence, or other triggering event.⁸ Courts should be mindful of this purpose when interpreting the scope of cooperation clauses in particular disputes.⁹

In short, as a matter of history and public policy, an insurer should not be permitted recourse to the cooperation clause to generate information solely for the purpose of denying or disclaiming coverage. See *generally* Mauro Rubino-Sammartano and Bianchi Rubino-Sammartano, *The Abrahamson Tools and Further Thoughts*, 3 No. 4 Constr. Law Int’l 12, 12 (2008) (“[T]he main purpose of a cooperation clause is to promote cooperation and not to create numerous possibilities of breaches of contract for non-cooperation.”)

⁶ See, e.g., *Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co.*, 518 F.2d 671, 674 (2d Cir. 1975) (explaining that “[t]he purpose of the Cooperation Clause is to enable the insurer to obtain all knowledge and facts concerning the [event] while the information is fresh”); see also *Westbrook Ins. Co. v. Jeter*, 117 F. Supp. 2d 139, 141 (D. Conn. 2000).

⁷ See, e.g., *Wildrick v. N. River Ins. Co.*, 75 F.3d 432, 436 (8th Cir. 1996).

⁸ See, e.g., *Woznicki v. Geico General Ins. Co.*, 216 Md. App. 712, 732 (Md. Ct. Spec. App. 2014) (“Generally, an insured’s duty to cooperate includes the obligation to make a fair, frank and truthful disclosure to the insurer for the purpose of enabling it to determine whether or not there is a defense [in the underlying litigation], and the obligation, in good faith, both to aid in making every legitimate defense to the claimed liability and to render assistance at trial.” (brackets, internal quotation marks, and citation omitted)); *Tierney v. Safeco Ins. Co. of America*, 216 F. Supp. 590 (D. Or. 1963) (explaining that, as a matter of Oregon law, “courts . . . require the insured to make a full, frank, and truthful disclosure of information for the purpose of enabling the insurer to determine whether there is a genuine defense”). See *generally supra* note 5, at 1419-20 (explaining that insured’s duty to cooperate obligates the insured to help the insurer prepare a “genuine but not a sham defense” and to make available to the insurer information necessary in preparing the case for trial”).

⁹ See, e.g., *Fidelity Nat. Fin. Inc. v. Nat. Union Fire Ins. Co.*, 2014 WL 1393743, 7 (S.D. Cal. 2014) (citing Michael Paul Thomas, et al., *Cal. Civ. Prac. Torts* § 36.11 for the proposition that cooperation clauses require information sharing only for “proper purpose, i.e., to enable the insurer to determine whether it should settle the claim against the insured”); *Estes v. Alaska Ins. Guar. Ass’n*, 774 P.2d 1315, 1318 (Alaska 1989) (“[C]ooperation clauses[, among other things,] should . . . be reviewed on the basis of whether their application in a particular case advances the purpose for which they were included in the policy.”).

The Text

Under most insurance contracts, an insured agrees to cooperate with an insurer in the event of a claim.¹⁰ In other words, an insured's duty to cooperate is a creation of a specific contract, and the terms of the cooperation clause will often be controlling when a court must evaluate information-sharing disputes between insurers and insureds.¹¹

In the event of a dispute as to the meaning of the cooperation clause, a court will first consider whether the clause is ambiguous.¹² In so doing, the court will likely read the clause in the "context of the entire agreement."¹³ If the court finds the clause to be unambiguous, then that will typically be the end of the matter. In practice however, this will rarely be the case; cooperation clauses are often standardized, vaguely phrased, and not carefully delineated or enumerated.¹⁴ And where a court finds that the clause is ambiguous, it may consult, among other things, extrinsic evidence to determine the parties' intent.¹⁵ If the extrinsic evidence does not yield a definitive interpretation, some states follow a default rule of interpretation: New York, for example, interprets the

¹⁰ This is true of various insurance contracts, including commercial general liability policies, general comprehensive liability policies, medical malpractice policies, homeowners policies, professional liability policies, etc. It is also true of both "claims-made" policies and "occurrence" policies. This article analyzes cooperation clauses generally, but insureds and insurers should be aware that courts often cabin discussions to a particular and specific cooperation clause or contract type, especially with respect to notice requirements. See, e.g., *In re Complaint of Settoon Towing, LLC*, 720 F.3d 268, 276 (5th Cir. 2013) ("[W]e have drawn a distinction between occurrence policies, where any notice requirement is subsidiary to the event that triggers coverage, and claims-made policies, where notice itself constitutes the event that triggers coverage, in deciding whether the insurer is required to show prejudice as a result of late notice." (internal quotation marks omitted)); see also *Maplewood Partners v. Indian Harbor Ins. Co.*, 2013 WL 3853388, 40 (S.D. Fla. 2013) (tying analysis to the specific "directors and officers indemnity policy . . . which provides for the reimbursement . . . as to 'claims made'").

¹¹ See, e.g., *SCW West LLC v. Westport Ins. Corp.*, 856 F. Supp. 2d 514, 523–24 (E.D.N.Y. 2012) (explaining that because the critical inquiry—"whether Plaintiff's actions in refusing to cooperate with Westport's request"—is one of contract interpretation, the analysis begins with an examination of the language in the insurance policy"); *Loop Paper Recycling, Inc. v. JC Horizon Ltd.*, 2010 WL 1655254, 8 (N.D. Ill. 2010) ("[C]ourts interpret contracts with the goal of effectuating the parties' intent, giving contract terms their plain and ordinary meaning."); *Streamline Capital, L.L.C. v. Hartford Casualty Ins. Co.*, 2003 WL 22004888, 3 (S.D.N.Y. 2003) ("In New York State, the plain meaning of a clause in an insurance contract is determined according to an objective standard: by looking to the understanding of someone engaged in the insured's line of business." (internal quotation marks omitted)).

¹² See, e.g., *SCW West*, 856 F. Supp. 2d at 524.

¹³ *Id.* at 524–25 (internal quotation marks omitted).

¹⁴ See Nicholas J. Giles, *Rethinking the Cooperation Clause in Standard Liability Insurance Contracts*, 161 U. PA. L. REV. 585, 591 (2013) ("In addition to being heavily standardized, the language of the cooperation clause [in insurance contracts] is quite vague, providing companies with a catch-all assistance provision.").

¹⁵ See, e.g., *Weilbacher v. Progressive Nw. Ins. Co.*, 343 F. App'x 241, 242 (9th Cir. 2009) ("We interpret insurance contracts by looking to 1) the language of the disputed policy provisions; 2) the language of other policy provisions; 3) relevant extrinsic evidence; and 4) case law interpreting similar provisions." (internal quotation marks omitted)).

language “in accordance with the reasonable expectations of the insured when he [or she] entered into the contract.”¹⁶

Typical Duties

As a general matter, particularly with first-party property policies, an insured’s duty to cooperate will always include “both submitting to a reasonably requested examination under oath and producing documents relevant to the claimed loss.”¹⁷ Indeed, “the vast majority of cases to have addressed a cooperation clause in an insurance policy in any jurisdiction focus [sic] on typical failures to cooperate, such as . . . the failure to supply certain documents.”¹⁸ Cooperation clauses also often encompass a duty to provide notice of suit and/or to forward suit papers, although in some contracts these duties are separately covered,¹⁹ or vacated due to settlement between the parties.²⁰

Some courts interpret broadly phrased, general cooperation clauses to be expansive. Under Missouri law, for example, “a multitude of matters other than those specified in the policy might be said to be included under the term ‘cooperate’ depending upon the particular facts in the particular case. . . . [G]eneral cooperation clauses . . . have been interpreted to require the insured to perform acts not explicitly stated in the insurance policy.”²¹ For example, courts have found breaches of the cooperation clause where an insured refused to assist in the preparation of interrogatories;²² where an insured

¹⁶ *SCW West*, 856 F. Supp. 2d at 525; accord *Lexington Ins. Co. v. General Accident Ins. Co. of Am.*, 338 F.3d 42, 47 (1st Cir. 2003) (“If, however, a policy provision is ambiguous, the court may take extrinsic evidence as to intent, and, absent clarification, ordinarily may adopt the interpretation that favors coverage (that is, the reading most beneficial to the insured).”).

¹⁷ *Romano v. Arbella Mut. Ins. Co.*, 429 F. Supp. 2d 202, 208 (D. Mass. 2006); see also *Couch on Ins.* § 199:37 (“[T]he insured is obligated to assist the insurer in its investigation of a claim by submitting to an examination under oath . . . and by producing documents and records requested by the insurer.”).

¹⁸ *SCW West*, 856 F. Supp. 2d at 525.

¹⁹ See, e.g., *Charter Oak Fire Ins. Co. v. Interstate Mechanical, Inc.*, 958 F. Supp. 2d 1188, 1201 (D. Or. 2013) (analyzing cooperation clause that included provision directing insured to “send us copies of any demands, notices, summonses or legal papers received in connection with the claim or ‘suit’”).

²⁰ *Martinez v. ACCC Ins. Co.*, 343 S.W.3d 924, 929 (Tex. App. 2011) (addressing insured’s failure to “provide information” and “to forward legal papers” including a citation and default judgment); *Lafayette Life Ins. Co. v. Arch Ins. Co.*, 784 F. Supp. 2d 1034, 1045 (N.D. Ind. 2011) (interpreting cooperation clause that expressly included a requirement to furnish “pleadings and related papers”); see also *Couch on Ins.* § 199:38 (discussing failure to forward suit papers, where the obligation is contained in the cooperation clause); *Id.* §§ 199:80–199:81 (discussing the application and effect of separate duty to forward suit papers).

²¹ *Medical Protective Co. v. Bubenik*, 594 F.3d 1047, 1052 (8th Cir. 2010) (brackets, citations, and internal quotation marks omitted); see also *SCW West*, 856 F. Supp. 2d at 525 (“[A]lthough a large number of disputes regarding cooperation clauses typically pertain to . . . duties that are explicitly described in the policy, there is no requirement that the agreement contain every single way in which cooperation may be needed . . .”).

²² *Bubenik*, 594 F.3d at 1052.

invoked the Fifth Amendment right not to testify;²³ and where an insured refused to appeal a local government decision at the insurer's request, given that the insurer lacked standing to appeal,²⁴ —even though, in each of the above cited cases, the duty at issue was not expressly identified in the cooperation clause.²⁵

But such an expansive approach does not appear to be the consensus approach, and is, indeed, overly simplistic. Judge Spatt for the District Court of the Eastern District of New York has offered a more critical theoretical framework for interpreting cooperation clauses with respect to duties that are not expressly listed. His approach may be useful when an insurer requests, or attempts to compel, an insured to perform an act not specifically included in the cooperation clause:

Duties that typically fall within the scope of cooperation clauses, whether explicitly mentioned or not, are responsibilities that the insurer must rely upon the insured to accomplish because it is conduct that cannot practically be completed by the insurer. For example, the insurer must have cooperation of the insured to have prompt notice of a claim, because it would be impossible for the insurer to have knowledge of an incident without the insured telling it so. As another example, if the insurer needs to examine the damaged property, it cannot do so without the insured's permission.²⁶

Following this approach, a court would be more likely to interpret a cooperation clause to encompass a duty for which the relevant performance is exclusively in the control of the insured.

Protections and Exceptions Governing Information Sharing

Like any party in litigation, an insured is generally entitled to prevent discovery of certain materials through a variety of doctrines and protections. But by sharing information with its insurer, or even with counsel provided by its insurer, an insured risks later being deemed to have waived these protections, such that the insured will be forced to share those and related materials with the insurer in coverage litigation or with third parties in

²³ *Id.*

²⁴ *SCW West*, 856 F. Supp. 2d, at 527-28.

²⁵ Where an insurer has accepted coverage and is defending, the duty to cooperate often encompasses several other obligations outside of the information-sharing context, including allowing the insurer to control trial defense in terms of selection of counsel and development of trial strategy. See, e.g., *Heubel Materials Handling Co. v. Universal Underwriters Ins. Co.*, 704 F.3d 558, 565 (8th Cir. 2013), *Babcock & Wilcox Co. v. Am. Nuclear Insurers & Mut. Atomic Energy Liab. Underwriters*, 76 A.3d 1, 20 (Pa. Super. Ct. 2013). It may also extend to the concomitant duty not to settle without the insurer's approval. See, e.g., *Charter Oak Fire Ins. Co. v. Interstate Mech., Inc.*, 958 F. Supp. 2d 1188, 1196 (D. Or. 2013); *Maclean Townhomes LLC v. Charter Oak Fire Ins. Co.*, 2008 WL 3311766, 3, 7 (W.D. Wash. 2008).

²⁶ *SWC West*, 856 F. Supp. 2d at 526; see also Edwin W. Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 933 (1942) (“Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectively be done unless both concur in doing it, the construction of the contract is such that each agrees to do all that is necessary to be done on his [or her] part for the carrying out of the thing.” (quoting *Mackay v. Dick*, 6 App. Cas. 251, 263 (H.L. 1881)).

underlying lawsuits. Although these privileges, protections, and their exceptions will be generally familiar to practitioners, a brief summary will provide context for understanding information-sharing disputes between insureds and insurers.

Attorney-Client Privilege

The attorney-client privilege generally protects communications between an attorney and client for the purpose of providing legal advice and analysis.²⁷ The privilege extends to materials created by both client and counsel. Typical examples of materials that fall within this privilege are e-mails between client and attorney regarding a specific legal issue or trial strategy, an attorney memorandum addressing the strengths and weaknesses of the client's position, and a client's request for legal advice on an issue. "The rationale for such privilege is that it encourages clients to fully and completely disclose information to their attorneys in order to allow the attorneys to provide competent legal advice or advocacy, and thereby promote broader public interests in the observance of law and administration of justice."²⁸ The attorney-client privilege is a matter of state law, so a federal court sitting in diversity will consider whether the scope of the privilege covers the relevant document and whether the privilege has been waived by looking to the law of the state in which the court sits.²⁹

Although there is variation on a state-by-state basis, it is generally recognized that the attorney-client privilege should be construed "narrowly," because it obstructs the truth-seeking process.³⁰ Additionally, either the attorney or client can waive the privilege through voluntary or selective disclosure, on the one hand, or by putting the materials "at issue" in litigation.³¹ As a general matter, therefore, a client that shares a document (or the contents of a document) with a third party risks waiving the attorney-client privilege as to that document, and possibly other documents concerning a similar

²⁷ See generally *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

²⁸ See *Maplewood Partners v. Indian Harbor Ins. Co.*, 2013 WL 3853388, 40 (S.D. Fl. 2013) (internal quotation marks omitted).

²⁹ See Fed. R. Civ. P. 501; see also *Maplewood Partners*, 2013 WL 3853388, 25; *Bovis Lend Lease, LMB v. Seasons Contracting Corp.*, 2002 WL 31729693, 3 (S.D.N.Y. 2002).

³⁰ See, e.g., *Lluberres v. Uncommon Productions, LLC*, 663 F.3d 6, 24 (1st Cir. 2011) ("[T]he attorney-client privilege must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth." (internal quotation marks omitted)); *Shaffer v. Am. Med. Ass'n*, 662 F.3d 439, 446 (7th Cir. 2011); *Maplewood Partners*, 2013 WL 3853388, 25.

³¹ See, e.g., *In re Grand Jury Proceedings*, 219 F.3d 175, 182–183 (2d Cir. 2000) (discussing subject matter waiver); *Koumoulis v. Ind. Fin. Marketing Grp., Inc.*, 295 F.R.D. 28, 40 (E.D.N.Y. 2013) (discussing waiver by putting privileged communication "at issue"); *Swift Spendthrift, Ltd v. Alvada Ins., Inc.*, 2013 WL 3815970, 7 (S.D.N.Y. 2013) (discussing waiver through voluntary disclosure of privileged information to third party); *Gruss v. Zwirn*, 2013 WL 3481350, 4 (S.D.N.Y. 2013) (discussing waiver through selective disclosure).

subject matter, in that proceeding—and potentially in related or unrelated subsequent proceedings.³²

There are also two relevant exceptions to these waiver rules in this context. First, courts have fashioned a “joint-client rule,” which allows information sharing between clients represented by the same attorney without waiving privileges and protections as to others.³³ An insured and insurer who are jointly represented by the same attorney generally may share information with each other without waiving attorney-client privilege to third parties.³⁴

Second, according to the “common interest doctrine,” a party is entitled to share privileged information with another without waiving the applicable privilege as to third parties, where the two parties, although not represented by the same counsel, share a common legal interest, and the information is exchanged in pursuit of that interest.³⁵ An insured and insurer whose interests are aligned in litigation—for example, where the insurer is providing counsel to the insured to cover a lawsuit for which the insured has accepted a duty to indemnify—may share information with each other without exposing that information to third parties.

This article is primarily concerned with the common interest doctrine. In discussing this doctrine, it is important to remember that it is an exception to the general waiver rule; it

³² Courts are divided on whether waiver in one proceeding always results in waiver in another related or unrelated proceeding. *C.f.* *Genentech Inc. v. U.S. Int’l Trade Comm’n*, 122 F.3d 1409, 1416 (Fed. Cir. 1997) (“Once the attorney-client privilege has been waived, the privilege is generally lost for all purposes and in all forums.”), *Mine Safety Appliances Co. v. North River Ins. Co.*, 2014 U.S. Dist. LEXIS 42771, 61 (W.D. Pa. Mar. 31, 2014), *In re Myers*, 2013 WL 4067126, 8 (Bankr. N.D. Oh. 2013) (same), *with Gerawan Farming, Inc. v. Townsend & Townsend & Crew LLP*, 2011 WL 4440188, 1-2 (E.D. Cal. 2011) (explaining that plaintiff’s waiver of privilege by bringing malpractice suit against former attorneys did not allow defendants to “share this newly unprivileged information outside of this current litigation”); *United States v. Ballard*, 779 F.2d 287, 292 (5th Cir. Miss. 1986) (holding that an institution of a separate suit against a lawyer is not a waiver of the privilege of all subsequent proceedings, however related or unrelated).

³³ *See, e.g., Maplewood Partners*, 2013 WL 3853388, at 33-41 (analyzing application of joint client rule in the context of information sharing between insurer, insured, and counsel where insurer provided counsel subject to a reservation of rights).

³⁴ *See id.*; *Woodruff v. Am. Family Mut. Ins. Co.*, 291 F.R.D. 239, 243–45 (S.D. Ind. 2013) (rejecting insurer’s efforts to claim attorney-client privilege in coverage dispute with insured as to communications between insurer and counsel retained to represent insured in underlying action).

³⁵ *See e.g., Maplewood Partners*, 2013 WL 3853388, at 41–52 (discussing common legal interest doctrine in context of insurer-insured-counsel relationship); *Fireman’s Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 284 F.R.D. 132, 139–40 (S.D.N.Y. 2012) (discussing common interest doctrine generally, and analyzing the applicability of the doctrine to information sharing between insured and insurer, and between insurer and reinsurers); *Bovis Lend Lease*, 2002 WL 31729693, at 3, 5 (“Courts in this circuit have also applied the ‘common interest rule’ to allow an insurer aligned in interest with the insured to have access to privileged communications between the insured and its counsel, without breach of the privilege.”).

is not itself a privilege or protection.³⁶ Insurers have nonetheless attempted—in some cases, successfully and based on a misguided approach to privilege law—to invoke the common interest doctrine offensively to compel production of insured’s otherwise privileged information during discovery in coverage disputes.³⁷

Attorney Work Product Protection

Federal Rule of Civil Procedure 26(b)(3) protects work product “prepared in anticipation of litigation or for trial by or for a[] party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).”³⁸ The work-product protection is a matter of federal law. The critical question in most cases involving a party’s asserting the work product protection is whether the materials were prepared “in anticipation of litigation”; “courts are not unanimous on the proper test for” answering that question, “Under the test adopted by most circuits, the question is whether the document was created ‘because of’ the anticipated litigation”³⁹; but the Fifth Circuit “requires that anticipation of litigation be the ‘primary motivating purpose’ behind the document’s creation.”⁴⁰ Documents and materials prepared in the regular course of business are not protected, even where they later become relevant to trial strategy.⁴¹ The protection also encompasses work created by nonattorneys—e.g., consultants, experts, and so forth—in anticipation of litigation.⁴²

³⁶ See, e.g., *Miller UK Ltd. v. Caterpillar, Inc.*, 2014 WL 67340, 12 (N.D. Ill. 2014) (“The ‘common interest’ doctrine is not a separate privilege, in and of itself. It is a rule of non-waiver. That is, it is an exception to the general principle that disclosure to a non-privileged party of communications protected by the attorney-client privilege waives the privilege. It allows communications that are already privileged to be shared between parties having a ‘common legal interest’ without a resultant waiver.”); *Bovis Lend Lease*, 2002 WL 31729693, 3, 5 (“The common interest rule, however, does not itself give rise to a separate privilege. Rather it is a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party outside the attorney-client relationship.” (citations and internal quotation marks omitted)).

³⁷ See, e.g., *Maplewood Partners*, 2013 WL 3853388, at 41–52; *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 326–29 (Ill. 1991); *Allianz Ins. Co. v. Guidant Corp.*, 869 N.E.2d 1042, 1060–62 (Ill. App. 2007).

³⁸ Fed. R. Civ. P. 26(b)(3). See generally *Hickman v. Taylor*, 329 U.S. 495 (1947).

³⁹ *United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010).

⁴⁰ *Id.* at 136–37 (collecting cases).

⁴¹ See e.g., *Nationwide Agribusiness Ins. Co. v. Meller Poultry Equip. Inc.*, 2013 WL 4647983, 1 (E.D. Wis. 2013) (explaining that work-product protection is unavailable for documents produced in the regular course of business “regardless of the fact that it was produced after litigation was reasonably anticipated”); *United States v. Phillip Morris USA, Inc.*, 2004 WL 5355972, 27 (D.D.C. 2004) (discussing “general course of business” exception to work-product protection). The work-product protection is broader in scope than the attorney-client privilege. See generally *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982).

⁴² Courts generally treat the question of whether an insurance claim file is work product as fact specific, but the standards of “in anticipation of” are split among jurisdictions. Some court hold that the work

The work-product protection, like the attorney-client privilege, can be waived.⁴³ In this context, too, a party risks waiver by selectively or voluntarily disclosing the material—or by disclosing material concerning a similar subject matter—or by putting the protected material “at issue” in litigation. And, here too, courts have applied the common interest doctrine to allow parties to share work product based on their common legal objectives without waiving the protection as to other parties.⁴⁴ Insurers have attempted to use the common interest doctrine offensively to obtain otherwise protected work product.

Confidentiality Agreements

A confidentiality agreement is a contractual commitment between parties not to disclose shared information to third parties. Often, the parties entering into such an agreement will expressly address how information is to be designated as confidential in the first place, as well as define how materials are to be handled, exchanged, and reproduced, and from whom they must be withheld. And the parties to such an agreement may attempt to preserve privileges and protections for materials that are exchanged inadvertently.

Insureds and insurers can enter into confidentiality agreements to govern their exchanges of information and documents. Such agreements—whether entered into when the insured and insurer are aligned in an underlying litigation or when the insured and insurer are adverse as to coverage but in settlement negotiations—can “provide significant dual benefits by creating . . . a means of preserving the confidentiality of shared information and augmenting the protections of legal privileges and protections.”⁴⁵ Indeed, courts have found that the fact that parties are exchanging information under an express confidentiality agreement can augur against finding that a party waived the

product doctrine only applies if at the time the materials are prepared, the probability of litigating the claim is “substantial and imminent”. See *Jones v. Tauber & Balsler, P.C.*, 503 B.R. 510, 515-16 (N.D. Ga. 2013) (“[I]nsurance investigation documents ‘straddle both ends’ of the work product doctrine definition,” and “the facts of each case must be scrutinized to determine when the primary purpose of an insurance investigation changes” from mere evaluation to an anticipation of litigation.”). Other courts, however, adopt less demanding standards, such as “because of” and “causation” tests. See *In re Grand Jury Subpoena*, 2004 U.S. Dist. LEXIS 4108, 8-9 (D. Mass. 2004).

⁴³ See generally *United States v. Nobles*, 422 U.S. 225 (1975). Unlike the attorney-client privilege, the work product doctrine can be overcome where the materials would be otherwise discoverable and the party seeking production can show substantial need and undue hardship. See Fed. R. Civ. P. 26(b)(3)(i)–(ii). The determination of substantial need and undue hardship is a discretionary determination of the trial judge, and subject to certain exclusions, such as disclosure of mental impressions, conclusions, opinions or legal theories. See *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 401 (Wash. 1985); *Upjohn Co. v. United States*, 449 U.S. 383, 400 (U.S. 1981).

⁴⁴ See *Maplewood Partners*, 2013 WL 3853388, at 56 (explaining that “the ‘common legal interest’ doctrine . . . also has been applied to questions of federal work-product immunity”).

⁴⁵ Scott D. Gilbert & Eric D. Greenberg, *Information Sharing Between Policyholders and Insurers: Pitfalls and Protections* (conference paper, on file with authors).

attorney-client privilege or work-product protections with respect to any of the exchanged documents.⁴⁶

Confidentiality agreements are, however, merely contracts between private parties, and some courts have found that such contractual arrangements do not prevent a finding that a party to such an agreement has nonetheless waived the privileges and protections that would otherwise attach.⁴⁷ Moreover, a party must comply with the requirements and procedures set forth in the confidentiality agreement, for example, by designating documents as “confidential” or “for counsel only,” to present a valid argument against waiver of the privileges and protections attached to the shared documents.⁴⁸

⁴⁶ See, e.g., *Employers Ins. Co. of Wausau v. Skinner*, 2008 WL 4283346, 7-9 (E.D.N.Y. 2008); c.f. *Police & Fire Retirement Sys. of City of Detroit v. Safenet, Inc.*, 2010 WL 935317, 1-2 (S.D.N.Y. 2010) (finding that Safenet’s disclosures of privileged materials to the SEC and U.S. Attorney’s Office “pursuant to confidentiality agreements” did not lead to waiver of the privileges as to third parties). For a discussion of the inter and intra-circuit splits regarding the privileges and protections available to a party that discloses information to an adverse government agency under a confidentiality agreement, see, e.g., *Gruss v. Zwirn*, 2013 WL 3481350, 8-13 (S.D.N.Y. 2013) (citing *Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P.*, 9 F.3d 230, 232 (2d Cir. N.Y. 1993)).

⁴⁷ See *Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, 2004 WL 2375819, 5 (S.D.N.Y. 2004) (explaining that the confidentiality agreement “does not alter the fact” of waiver; “it merely obligates the recipient to comply with the terms” of the agreement (internal quotation marks omitted)).

⁴⁸ *Id.*

II. COMMONLY REQUESTED INFORMATION

Information sharing between an insurer and insured is likely to be a continuous process. Immediately following the submission of a claim, an insurer may initially request only a handful of documents. But the insurer is likely to seek more information over time. While the sharing of factual information may not be problematic, more delicate issues arise when the insurer requests evaluative materials, especially materials prepared or reviewed by counsel defending the underlying action.⁴⁹ An insured's sharing of otherwise privileged or confidential materials with an insurer may be deemed a waiver with respect to the insurer, as well as other parties. And the insured must be aware that, in the event a coverage dispute results in a subsequent litigation, the insurer is almost certain to seek any legal memoranda or analyses generated by defense counsel.

Short-Term, Post-Filing Information Requests

Immediately following the filing of a claim, an insurer is most likely to request the relevant policy (or policies); information, documents, and materials regarding the factual circumstances giving rise to the claim; and relevant legal documents.

To those who do not practice in this area, it might seem surprising that an insurer would need to request a copy of its own insurance policy. But in complex litigation, it may be far from clear which policy is, or which policies are, controlling. Therefore, an insurer will request that the insured provide not only that insurer's policy, but potentially multiple other insurance policies—e.g., where the policyholder may have suffered a “continuous-trigger” injury,⁵⁰ or where the insured has layered insurance coverage.⁵¹ In such cases, the initial request can be incredibly broad, and, to simplify matters and expedite information sharing, insureds and insurers should discuss whether the insurer would be

⁴⁹ See Jean A. O'Hare, *Information Sharing Between Insurance Companies and Policyholders* (conference paper on file with authors).

⁵⁰ See e.g., *U.S. Fidelity & Guar. Co. v. Am. Re-Insurance Co.*, 20 N.Y.3d 407, 426 (N.Y. 2013) (explaining that liability and damages complications arise with respect to “injuries that, like those suffered by people exposed to asbestos, occur gradually, over a period of years in which several liability insurance policies are successively in force”); *Penn. Gen. Ins. Co. v. Park-Ohio Indus.*, 930 N.E.2d 800, 808 (Ohio 2010) (holding that in the context of continuous trigger cases, “when the targeted insurer requests information from the insured regarding other policies that may also cover the claim, the insured has a duty to cooperate with the targeted insurer by identifying those policies; but failure to timely notify a nontargeted insurer of a pending claim . . . makes that insurer's policy inapplicable for contribution to the targeted insurer,” only if the nontargeted insurer can show prejudice).

⁵¹ See, e.g., *Insituform Techs., Inc. v. Am. Home Assurance Co.*, 556 F.3d 274, 278 & n.3 (1st Cir. 2009) (explaining that “[t]he phrase ‘follow form’ refers to the practice, common in excess policies, of having the second-layer coverage follow substantively the primary layer provided by the main insurer,” and further noting that “[v]arious phrases are used to describe second-layer policies, among them ‘umbrella,’ ‘excess’ and ‘follow form’”).

satisfied with a copy of its specific policy, copies of any policies to which that carrier follows form, and a coverage chart indicating the insurers beneath that carrier.⁵²

The insurer is also likely in the short term to seek information and documentation regarding the factual circumstances of the events, claims, or occurrences that the policyholder believes triggered coverage, including possibly requesting that the insured undergo an examination under oath,⁵³ a medical examination,⁵⁴ a property inspection,⁵⁵ or documents relevant to the claim. Even this initial request for documents may encompass evaluative materials subject to either the attorney-client privilege or work product protection, meaning that even an early request may require an insured's counsel to weigh the benefits and risks of disclosure.

Finally, an insurer also may initially request or expect the insured to provide relevant legal papers including complaints, summonses, and attached or related documents. An insured's failure to provide such documents in a timely manner may constitute a material breach of a cooperation clause.⁵⁶ While initially, an insured likely need not furnish more than the complaint and attached documents, over time, an insurer may request periodic updates, for example, in the event that a plaintiff files an amended complaint, that similar cases are filed elsewhere, and so forth.

Pre-Litigation Information Requests

Over time, if it appears that the underlying event, claim, or occurrence is likely to result in litigation between the insured and third parties, the insurer is likely to request more information, including (additional) evaluative materials and, eventually, legal bills for any representation that the insurer provides, even subject to a reservation of rights.

In response to such requests, an insured must make a careful determination of what evaluative materials to share with the insurer. The insurer will couch these requests in terms of its abilities to determine whether coverage is appropriate, to assess the strengths and weaknesses of the insured's position against third parties, and to craft a litigation strategy. But, as discussed, there are several risks associated with disclosing these materials. The insurer may rely on such evaluative materials subsequently to deny coverage. Moreover, an insured's sharing of otherwise privileged or confidential materials with an insurer may be deemed to be a waiver of privileges and protections as to the insurer, as well as other parties. In weighing the benefits and risks associated

⁵² See Jean A. O'Hare, *supra*.

⁵³ See *e.g.*, *Romano*, 429 F. Supp. 2d at 208.

⁵⁴ See, *e.g.*, *Curran*, 83 So. 3d 793 (Fl. Dist. Ct. App. 2011).

⁵⁵ See *e.g.*, *EDM Office Servs., Inc. v. Hartford Lloyd's Ins. Co.*, 2012 WL 2744738, 2 (S.D. Tex. 2012); *Coconut Key Homeowners Ass'n, Inc. v. Lexington Ins. Co.* 649 F. Supp. 2d 1363, (S.D. Fl. 2009) (collecting cases for proposition that an inspection clause should be treated as a cooperation clause).

⁵⁶ See, *e.g.*, *Vale v. Vt. Mut. Ins. Grp.*, 977 N.Y.S.2d 117 (N.Y. App. Div. 3d Dep't 2013) (explaining that the insured's "nearly five-month delay . . . in notifying [insurer] of the underlying personal injury action" established a prima facie case of breach").

with disclosure of such evaluative materials, the insured should be most willing to share evaluative information after the insurer has accepted coverage. If the insurer has yet to determine coverage, has offered coverage subject to a reservation of rights, or has formally rejected coverage, the insured should avoid sharing additional evaluative, privileged or protected information.

An insurer's request for legal bills should be more routine: "Almost all insurance companies will want to audit the legal bills related to a case," so that they can "assess the reasonableness of charges in light of the work accomplished."⁵⁷ That being said, however, "some legal bills contain sensitive or even privileged material, such as the names of experts or consultants. While financial information needs to be verified by the insurance company, it is sometimes prudent to redact material" as necessary.⁵⁸

Information Requests During Coverage Disputes

In the event that a coverage dispute between the carrier and the policyholder results in separate litigation, the carrier is almost certain to seek, in addition to other standard discovery materials, the policyholder's legal files from any underlying litigation.⁵⁹ We address the unique questions that arise in the context of coverage litigation at greater length in the immediately following section.

⁵⁷ See *O'Hare, supra*.

⁵⁸ *Id.*

⁵⁹ See, e.g., *U.S. Fire Ins. Co. v. City of Warren*, 2012 WL 2190747, 2 (E.D. Mich. 2012) (addressing plaintiff's "motion to compel discovery from the City" in the form of "production of documents relating to the [underlying] action which have been withheld"); *Petco Animal Supplies Stores, Inc. v. Ins. Co. of N. Am.*, 2011 WL 2490298, 3, 23–26 (D. Minn. 2011) (discussing policyholder's motion to quash insurer's subpoena to obtain documents prepared for underlying litigation); *Fugro-McClelland Marine Geosciences, Inc. v. Steadfast Ins. Co.*, 2008 WL 5273304, 1 (S.D. Tex. 2008) (analyzing insurer's motion to compel production of "communications between [policyholder] and its [underlying litigation] defense counsel" and "communications among [policyholder's] representatives about the [underlying] case").

III. INFORMATION SHARING UNDER VARIOUS COVERAGE SCENARIOS

After an insured tenders a claim, the insurer must determine whether the underlying event, occurrence, or claim, is covered under the policy pursuant to which it was tendered (or any other policy of which the insurer is aware and that might afford coverage). An insurer may make this determination quickly, and, in either event—acceptance or denial—the insured’s course of conduct should be clear. But insureds should not count on a fast coverage decision; instead, they should be prepared to respond to information requests under a cloud of uncertainty as to coverage, for example when the insurer offers coverage subject to a reservation of rights. Put simply: an insured’s counsel will often be required to evaluate and respond to information requests from carriers under various coverage scenarios,⁶⁰ and they will face unique risks in terms of further compelled disclosures both as to the insurer (in the event of a coverage dispute) and as to third parties depending on highly fact-specific circumstances.

Insurer Accepts Coverage

If the insurer acknowledges the availability of coverage, the insured should typically share information broadly and regularly: Such information sharing promotes strategic decision making and efficient representation. Moreover, as a general matter, independently privileged or protected information shared by an insured with an insurer that has acknowledged coverage should be exempt from the traditional waiver rules regarding evidentiary privileges and protections under the common interest doctrine. It may nonetheless be prudent for the insurer and insured to enter into a confidentiality agreement. As noted, however, confidentiality agreements are not fail safe; courts have found that, because even strict confidentiality agreements are merely contracts, information sharing under such agreements can still result in waiver of the attorney-client privilege and the work-product protection.

Insurer Rejects Coverage and Refuses To Defend⁶¹

If the insurer formally rejects coverage and refuses to defend, the insured’s path is likewise clear: The insured should decline requests for additional information—especially as to sensitive, privileged, or confidential information. Virtually every jurisdiction recognizes that an insurer’s rejection of coverage and refusal to defend

⁶⁰ Note that there are important variations in terms of insurers’ and insureds’ rights and obligations under various coverage scenarios on a state-by-state basis. The analysis here is intended to be illustrative, not exhaustive.

⁶¹ Courts and commentators use “reject,” “disclaim,” “deny,” and “repudiate” somewhat interchangeably. Moreover, courts sometimes find that certain acts are “tantamount” to a disclaimer or denial of coverage, compounding the ambiguity attached to these words. This article uses “reject” to describe a formal decision by an insurer not to accept coverage and not to defend the insured in an underlying action. See *McCormick v. Sentinel Life Ins. Co.*, 153 Cal. App. 3d 1030, 1049 (Cal. App. 2d Dist. 1984).

excuse the insured's obligations under the cooperation clause.⁶² Moreover, in the event that an insurer that has denied coverage and refused to defend later seeks production of privileged or protected materials in coverage litigation, courts in virtually every jurisdiction have held that neither the cooperation clause nor the common interest doctrine compels disclosure.⁶³ We are aware of only one state that has held otherwise.

In *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, the Illinois Supreme Court held that an insurer that has denied coverage is entitled to discover the insured's privileged and protected information,⁶⁴ finding that the duty to cooperate is tantamount to a waiver of the attorney-client privilege,⁶⁵ and that insurers and insured share a common interest, even in the event that the insurer rejects coverage.⁶⁶ The Illinois Court also found that the insured could not claim work product protection as to documents from the underlying litigation, reasoning that because the documents were produced before the insurer and insureds were adversarial, they were not prepared in advance of the coverage litigation and did not qualify as work product.⁶⁷ But insureds can take comfort in knowing that *Waste Management* is an acknowledged outlier: It has been "assailed . . . as unsound and improperly reasoned" by "almost every foreign jurisdiction that has considered" it.⁶⁸ Furthermore, the Illinois Court at least acknowledged in a Supplemental Order that its holdings with respect to the insurer's right to access otherwise privileged and protected materials did not result in waiver as to the "party opponents in the underlying litigation,"⁶⁹ In other words, while an insurer in

⁶² See *Am. Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc.*, 722 N.Y.S.2d 570, 574 (2d Dep't 2001) ("[A]n insurer cannot insist upon cooperation or adherence to the terms of its policy after it has repudiated liability on the claim . . . by sending a letter denying liability. Thus, [o]nce an insurer repudiates liability . . . the [in]sured is excused from any of its obligations under the policy." (second, third, fourth, and fifth alterations in original) (citations and internal quotation marks omitted)); see also *Youell v. Grimes*, 217 F. Supp. 2d 1167, 1175–76 (D. Kan. 2002) (collecting cases and secondary sources for the proposition that rejection of coverage excuses insured from complying with the duty to cooperate); *Couch on Ins.* § 199:66 ("Once an insurer has denied coverage, a policyholder no longer has a duty to cooperate with its carrier because the insurer has, by denying coverage, demonstrated that performance of the conditions would not have altered its response to the claim.").

⁶³ See, e.g., *Petco Animal Supplies*, 2011 WL 2490298, 21 ("[N]either the cooperation clause . . . nor the common interest doctrine can have application when the carrier has denied coverage."); *TIG Ins. Co. v. Tyco Int'l Ltd.*, WL 4683594, 2 (M.D. Pa. 2010) ("TIG had notice of the claims (the Underlying Action) against Grinnell and denied coverage. Grinnell defended itself and ultimately settled. There was no participation by TIG because it denied coverage and a defense. It is difficult to find a common interest under these facts."); *Bovis Lend Lease*, 2002 WL 31729693, 15 ("Where an insurer disclaims coverage and fails to provide a defense to its insured, that insurer is not entitled, under the common interest rule, to gain access to the insured's communications with the counsel that does provide the insured's defense.").

⁶⁴ 579 N.E.2d 322 (1991).

⁶⁵ *Id.*, at 327–28.

⁶⁶ *Id.*, at 328–29.

⁶⁷ See 579 N.E.2d at 329–31.

⁶⁸ *Allianz Ins. Co. v. Guidant Corp.*, 869 N.E.2d 1042, 1053 (Ill. App. 2007).

⁶⁹ 579 N.E.2d at 336.

Illinois likely can compel production of privileged materials, that production does not result in a broader waiver.

Insurer Has Not Yet Made a Coverage Decision

Unfortunately, insureds typically cannot count on a fast claim determination. Indeed, in all likelihood, an insured will have to respond to *multiple* requests for materials before a formal coverage decision has been made—shortly after the insured tenders a claim and after an insurer offers to defend subject to a reservation of rights. Such requests leave an insured in a potential whipsaw: Failure to disclose the information, in extreme cases, could result in a denial of coverage based on an alleged “lack of cooperation,” but disclosure could result in both the denial of coverage and the waiver of privileges and protections as to third parties. Insureds must consider such requests on a case-by-cases basis.⁷⁰

A court would most likely view independently privileged or protected information shared before a coverage decision has been made and while the insurer is defending subject to a reservation of rights to be exempt from traditional waiver vis-à-vis third parties under the common interest doctrine. But an insured should nonetheless insist that the insurer enter into a confidentiality agreement to govern any shared evaluative materials. Moreover, the insured’s counsel should frankly assess whether the insurer ultimately will view the claim as covered. If coverage is legitimately ambiguous, or if the insurer has a history of vexatiously or frivolously denying and then litigating coverage issues, the insured should take a more cautious approach as to whether certain evaluative materials would fall within the cooperation clause.⁷¹ As stated above, it is all too often that an insurer will have doubts as to whether a purported triggering event, claim, or occurrence is covered, and the insurer accordingly offers to defend only subject to a reservation of rights.⁷² When an insurer offers to defend subject to a reservation of

⁷⁰ Here too, it is difficult to offer guidance or analysis in the abstract. There are important differences, on a state-by-state basis, with respect to an insured’s obligations to share information, when an insurer has offered coverage subject to a reservation of rights. *C.f.* *Cont’l Cas. Co. v. City of Jacksonville*, 550 F. Supp. 2d 1312, 1342 (M.D. Fla. 2007) (holding that duty to cooperate arises even if the insurer provides a defense under a reservation of rights so long as the insured accepts the defense, thus the insurer must have unfettered access to information to the claim), *with* *Gates Formed Fibre Products, Inc. v. Imperial Casualty & Indem. Co.*, 702 F. Supp. 343, 347 (D. Me. 1988) (holding that the insured has the duty to give insurer notice of settlement opportunities and the option to participate, even when the insurer reserves its coverage).

⁷¹ *C.f.* *N. Ins. Co. of N.Y. v. Lamm*, 212 F. App’x 868 (11th Cir. 2006) (affirming finding of insurer’s bad faith based, in part, on its history of “litigating frivolous coverage-related issues”), *with* *Campbell v. State Farm Mut. Auto Ins. Co.*, 65 P.3d 1134, 1148 (Utah 2001) (“State Farm has systematically harassed and intimidated opposing claimants, witnesses, and attorneys . . . [and] instruct[ed] its attorneys and claim superintendents to employ ‘mad dog defense tactics’—using the company’s large resources to ‘wear out’ opposing attorneys by prolonging litigation”); *see also* *Giles*, *supra* note 14, at 44 (discussing same).

⁷² *See, e.g.*, *United States v. Hebshie*, 549 F.3d 30, 37 & n.7 (1st Cir. 2008) (discussing “reservation-of-rights-letter[s]” and “non-waiver agreement[s]” as “two sides of the same coin” by which an insurer offers a defense without waiving contractual rights to contest coverage); *O’Dowd v. Am. Sur. Co. of N.Y.*, 144

rights, the insured must either accept or reject the offer formally, and material consequences flow from this decision.

If the insured accepts the conditional defense, then the insurer typically can control the defense of the underlying suit, and the insured likely will be found obligated to satisfy its reasonable cooperation duties.⁷³ Under these circumstances, independently privileged and protected information and documents that the insured shares with the insurer will likely be safe from disclosure to third parties under the common interest doctrine. These and related materials, however, may, in limited circumstances, be subject to discovery by the insurer in a subsequent coverage dispute.⁷⁴

N.E.2d 359, 363 (N.Y. 1957) (“[I]t is well established that an insurer may, by timely notice to the insured, reserve its right to claim that the policy does not cover the situation at issue, while defending the action.”); see also *Heubel Materials Handling, Co., Inc. v Universal Underwriters Ins. Co.*, 704 F.3d 558, 563 (8th Cir. 2013) (explaining operation of reservation of rights under Missouri law); *Cont’l Cas. Co. v. City of Jacksonville*, 283 F. App’x 686, 690 (11th Cir. 2008) (per curiam) (“An insurer does not breach its duty to defend an insured when it provides a defense under a reservation of rights.” (brackets and internal quotation marks omitted)); *Black’s Law Dictionary 2009* (defining “reservation-of-rights letter” as “notice of an insurer’s intention not to waive its contractual rights to contest coverage or to apply an exclusion that negates and insured’s claim”). Note that an insurer that offers defense coverage but also invokes its rights under the insurance contract has not necessarily offered to defend subject to a reservation of rights. For example, in *Heubel Materials Handling Co.*, the Eighth Circuit Court of Appeals found that an insurer’s refusal to accept an insured’s requested stipulation not to seek contribution from other insurers, where the relevant insurance contract expressly preserved the insurer’s right to seek contribution, was not tantamount to an offer subject to a reservation of rights. 704 F.3d at 563–64. Similarly, in *Curran*, the District Court of Appeal of Florida, Fifth District, found that the insured had violated an insurance contract by “insisting that [the insurer] abandon a contractual right [to conduct multiple examinations] as a precondition to [participating in] a[] [single] examination,” 83 So.3d at 800.

⁷³ See *Heubel*, 704 F.3d 564–65 (holding that by accepting insurer’s offer to defend subject to a reservation of rights, insured became obligated to allow insurer to control the defense); *Bubenik*, 594 F.3d at 1053–54 (finding that insured was obligated to assist with defense, including offering testimony rather than invoking Fifth Amendment privilege, pursuant to insurer’s defense subject to a reservation of rights); *City of Jacksonville*, 283 F. App’x at 690 (finding that “[b]y accepting and not rejecting [insurer’s] fully[] funded defense, the City agreed to leave control of the defense in [insurer’s] hands” and that the City “was [consequently] required to cooperate” in defense of the litigation—which obligation the insured breached by settling in collusion with underlying plaintiff); *Flowers*, 2008 WL 2704915, at 2–3 (finding that insured was obligated to comply with obligations under cooperation clause, including not to enter into settlement without insurer’s express approval, because insured had not yet rejected insurer’s offer to defend subject to a reservation of rights).

⁷⁴ See *Maplewood Partners*, 2013 WL 3853388, at 24–58 (engaging in a fact-specific analysis to find that, by accepting insurer’s designated counsel, offered subject to a reservation of rights, and by sharing some information with insurer, the insured had waived privilege as to materials and documents that otherwise would be privileged or protected). Even where the insured accepts a conditional defense subject to a reservation of rights, the insured should still be able to prevent the insurer from obtaining privileged or protected material that pertains specifically to coverage, because the insurer and insured were, are, and will be, even in the underlying litigation, adverse as to coverage. See *Hutchinson v. Farm Family Cas. Ins. Co.*, 867 A.2d 1, 10 (Conn. 2005) (“When the relationship between the insured and the insurer is adversarial at the inception of a claim, however, there is no such fiduciary relationship and the attorney-client privilege protects the insurer from disclosure of privileged materials created after the claim was made.”).

If the insured rejects the offered conditional defense, then the insured generally will be excused from its information-sharing obligations, may retain independent counsel, and, upon prevailing in the coverage action, may seek indemnification from the insurer.⁷⁵ Indeed, in *Interstate Mechanical*, the court found that the insured's entering into a Confession of Judgment in the underlying action violated the cooperation clause not because the insured had settled without the insurers' approval—withstanding that both policies at issue “contain[ed] voluntary assumption of obligations clauses, providing that ‘No insured will, except at the insured’s own cost, make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent,’”—but instead because the insured had failed to provide adequate notice to the insurers that were defending subject to a reservation of rights.⁷⁶

Moreover, an insurer whose offer to defend subject to a reservation of rights has been rejected is unlikely to be able to compel production of privileged materials related to the underlying litigation in a subsequent coverage dispute.⁷⁷ As explained in *Metropolitan Life Insurance Co. v. Aetna Casualty & Surety Co.*, “at most, disclosure pursuant to [a] cooperation clause[] possibly could be required only if and when the insurance company participates ‘in the defense’ of underlying cases”.⁷⁸ But where an insurer has “reserved [its] rights,” and the insured has “retained its own attorneys and acted independently of its insurers in . . . the underlying cases,” there is no commonality of interests that would

⁷⁵ See, e.g., *Flowers*, 2008 WL 2704915, at 2–3 (discussing insured's obligation under Kentucky law where insurer reserves its rights); see also *Heubel*, 704 F.3d at 563–64 (explaining that, under Missouri law, if an insured rejects proffered coverage under a reservation of rights, it “is then free to hire independent counsel to defend the underlying suit and obtain compensation from the insurer if the underlying suit later is held to be covered by the policy”). Similarly, in some states, an insurer's defending subject to a reservation of rights might entitle the insured to enter into a settlement agreement without the consent of the insurer. See *Interstate Mechanical*, 2013 WL 3809466, 4 (“[s]o long as the agreement is made fairly, with notice to the insurer, and without fraud or collusion on the insurer.”); see also *United Servs. Auto Ass'n v. Morris*, 154 Ariz. 113, 119 (granting cert to address [a] “question[] of first impression: may insureds being defended under a reservation of rights enter into a settlement agreement without breaching the duty to cooperate”; and holding that “an insured being defended under a reservation of rights may enter into a [settlement] agreement without breaching the cooperation clause” but that “[s]uch agreements must be made fairly, with notice to the insurer, and without fraud or collusion on the insurer.”).

⁷⁶ *Id.* at 4. (“Here Travelers and Continental are defending under a reservation of rights. As a result, if Glacier's Confession of Judgment were made fairly, with notice to the insurers, and without fraud or collusion, it would not bar coverage. It is incontrovertible, however, that Glacier did not provide notice to the insurers . . .”).

⁷⁷ See *Fidelity Nat'l Fin. Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2012 WL 4443993, 5 (S.D. Cal. Sept. 25, 2012) (“Where a reservation of rights has been made, [it is presumed that] there is no ‘common interest’ and as such, the production of privileged information to the insurer constitutes a waiver of the privilege.”); c.f. *Bovis Lend Lease*, 2002 WL 31729693, at 8 (rejecting assertion of privilege as to “e-mail letter . . . from an [insurer] claim's handler to a representative of [insured]” which was written at a time when the insurer “had disclaimed coverage,” so the insurer and insured were “adverse”).

⁷⁸ 730 A.2d 51, 58 (Conn. 1999).

merit information sharing in a coverage dispute.⁷⁹ Materials, generated during an underlying litigation in which the insured retained its own counsel, are properly withheld from production in coverage litigation under the attorney-client privilege or the work-product protection.⁸⁰ Because the decision to accept or reject a defense offered subject to a reservation of rights is a formal decision that an insured must make expressly, the timing of the insured's decision can have significant consequences.⁸¹ As noted, however, in Illinois, an insured's information-sharing duties survive the rejection of a proffered defense subject to a reservation of rights. "If [an insured] reject[s] [an insurer's] defense under a reservation of rights prior to [entering into a] settlement, then he [or she] may not be bound by the cooperation clause. On the other hand, if [the insured] rejected the defense after or in conjunction with the settlement, he [or she] may still be bound by the policy."⁸²

Furthermore, even where the insured rejects the insurer's offer to defend subject to a reservation of rights, the insurer is likely to seek production of otherwise privileged and protected material in any coverage litigation filed by the insured, on the basis that the insured has put the materials "at issue." Similarly, if an insured shares information with an insurer prior to rejecting an offer of coverage subject to a reservation of rights, that information may not be discoverable by third parties, because the insurer and insured may be found to have share common interests at that point, but the disclosure might trigger subject matter waiver in the event of coverage litigation between the insurer and insured.

In some jurisdictions, including New York and California, the operative question is not just whether the insured accepts or rejects a proffered defense subject to a reservation of rights, but whether there is an actual conflict of interest between the insurer and insured. Specifically, at least two district judges in New York have suggested that "[a]n insurer's reservation of rights does not automatically entitle its insured to representation of its choice at the insured's expense. Instead, the insured's right to independent

⁷⁹ *Id.* at 59, 61–62; see also *Maclean Townhomes LLC v. Charter Oak Fire Ins. Co.*, 2008 WL 3311766, 6 (W.D. Wash. 2008) (finding that "scope of repair and cost of repair" reports produced during underlying action in which insurer had reserved its rights were protected against production to insurer in coverage litigation as work product).

⁸⁰ See *U.S. Fire Ins.*, 2012 WL 2190747, at 6 (rejecting motion to compel production, during coverage litigation, of documents arising from the underlying litigation, at which point insurer was disclaiming coverage); *Fugro-McClelland*, 2008 WL 5273304, at 3 (rejecting motion to compel production of materials from underlying litigation, where "the insured was represented by separate counsel" in the underlying litigation, and where counsel "advised [the] insurers . . . that due to the conflict of interest raised by the coverage dispute he would report only factual developments in the litigation and would not share his own or [the insured's] legal opinions regarding the claims brought by the [underlying] plaintiffs"); *Steadfast Ins. Co. v. Purdue Frederick*, 2006 WL 1493103, 2–4 (Conn. Super. Ct. 2006) (granting summary judgment to insured on insurer's breach of cooperation clause claim, where insurer disclaimed coverage but offered defense subject to a reservation of rights; and insured hired its own counsel, directed its own defense, and refused to provide privileged and protected materials).

⁸¹ *Flowers*, 2008 WL 2704915, at 2.

⁸² See generally, *Waste Mgmt.*, 579 N.E.2d 322.

counsel is . . . triggered [only] when the reservation of rights creates a potential conflict of interest.”⁸³ California, too, has established, by statute and relevant case law, that an insurer’s reservation of rights requires the appointment of independent counsel only if there is an actual conflict of interest between the insurer and the insured.⁸⁴ But it is unclear whether these decisions, which address an *insurer’s* obligation, following from *its* reservation of rights, to provide independent counsel are applicable to an *insured’s* information-sharing obligations following an insurer’s offer to defend subject to a reservation of rights. Indeed, California law appears to be clear that an insurer’s offering a defense subject to a reservation of rights, without more, fundamentally splits the insurer’s and insured’s interests for future purposes. In other words, any privileged or protected information that the insured shares with the insurer from that point forward may be subject to discovery by third parties, because the insured has waived applicable protections and privileges.⁸⁵ Likewise, an insurer’s efforts to obtain privileged or protected information from the insured in coverage litigation based on the scope of the cooperation clause are unlikely to be successful, following the offer of a defense subject to a reservation of rights, because the parties’ interests are not aligned.⁸⁶

Insureds should be aware of two other scenarios that may bear on their information-sharing obligations when an insurer has offered to defend subject to a reservation of rights. First, an insurer could, simultaneously to so offering, also file a declaratory judgment action that the relevant occurrence, claim, or event is not covered. Courts have split as to whether the filing of a declaratory judgment action is tantamount to a denial of coverage, such that an insurer and insured would no longer share a common interest from that moment forward.⁸⁷ Here too, courts may take a fact-specific approach

⁸³ Executive Risk Indemnity, Inc. v. Icon Title Agency, 739 F. Supp. 2d 446, 450 (S.D.N.Y. 2010); see also U.S. Underwriters Ins. Co. v. TNP Trucking Inc., 44 F. Supp. 2d 489 (E.D.N.Y. 1999) (holding that insurer’s reservation of rights, absent a showing of a potential or actual conflict of interest, does not entitle insured to select independent counsel). But see Federated Dep’t Stores, Inc. v. Twin City Fire Ins. Co., 807 N.Y.S.2d 262, 266 (1st Dep’t 2006) (collecting authority for the proposition that “[w]here an insurer defends under a reservation of rights, the insured is entitled to retain its own counsel”).

⁸⁴ See Swanson v. State Farm Gen. Ins. Co. 162 Cal. Rptr. 3d 477, 483–85 (Cal. Ct. App. 2013) (discussing San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc., 208 Cal. Rptr. 494 (Cal. Ct. App. 1985), and Cal. Civ. Code § 2860, which require appointment of independent counsel “only when the basis for the reservation of rights is such as to cause assertion of factual or legal theories which undermine or are contrary to the positions to be asserted in the liability case,” and further noting that “to be disqualifying, the conflict of interest must be significant, not merely theoretical, actual, not merely potential” (internal quotation marks omitted)).

⁸⁵ See *Fidelity*, 2012 WL 4443993, at 5 (explaining that, under California law, “where there is a reservation of rights by the insurer, there are ‘divergent’ interests between the insured and the insurer which preclude a finding of ‘common interests’”); *Cont’l Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510, 524–25 (E.D. Cal. 2010) (similar).

⁸⁶ See *Rockwell Int’l Corp. v. Superior Court*, 32 Cal. Rptr. 2d 153 (Cal. Ct. App. 1994).

⁸⁷ See *Purdue Frederick*, 2006 WL 1493103, at 4–5 (discussing conflicting authority on effect of insured’s filing a declaratory judgment action). Compare *Atl. Mut. Ins. Co. v. Balfour Maclaine Int’l Ltd.*, 775 F. Supp. 101, 110 (S.D.N.Y. 1991) (“Under New York law, the filing of a declaratory judgment action by an insurance company concerning liability for a particular claim is sufficient notice of disclaimer. It constitutes

to evaluating the legal consequences of the insurer's filing a declaratory judgment action. For example, in *Steadfast Insurance Co. v. Purdue Frederick Co.*, the court explained:

. . . Steadfast's actions have been a mixture of those which could readily be interpreted as declining coverage and refusing a defense and those which can be interpreted otherwise. . . . Steadfast seeks a declaratory judgment that it owes no coverage or duties to Purdue. While some of the requested declarations were couched in terms that were less definitive, for example, such relief should be granted "to the extent" that the OxyContin cases sought a certain type of relief, the declarations Steadfast requested concerning lack of coverage and no duty to defend were unequivocal and therefore nothing like the circumstances in *Olin Corporation v. Insurance Co. of North America, supra*. On the other hand, the First Amended Complaint reiterated what had been conveyed in an earlier reservation of rights letter; *i.e.* that Steadfast would provide a defense to Purdue in the OxyContin cases, subject to a reservation of rights. Purdue has been willing to accept this defense but only as long as Steadfast paid the attorneys chosen and controlled by Purdue. There are significant and unresolved issues over choice of counsel and defense tactics, and since 2002 Steadfast has paid for only a minute portion of the cost of defense despite this court's order over five months ago that a duty to defend on the part of Steadfast existed.

In this fact scenario the court cannot find, as a matter of law, that Steadfast so categorically denied any responsibility to Purdue as to terminate Purdue's obligation to cooperate as of November 1, 2001. This question must be left to the fact finder.⁸⁸

Second, an insurer can offer to defend subject to a reservation of rights but then withdraw the reservation and accept coverage. Courts appear split on the legal effect of this sequence of events. On the one hand, the insured has a strong argument against production in coverage litigation of documents that were prepared during the period when insurer was contesting coverage.⁸⁹ On the other hand, courts have found that an insurer's acceptance of coverage after an initial offer to defend subject to a reservation of rights triggers the insured's other, non-information sharing obligations under a cooperation clause. For example, in *Heubel Materials Handling Co.*, the Eighth Circuit Court of Appeals found that an insurer which had initially reserved its rights to indemnify based on the insured's late notice, but later "withdrew its initial express reservation of

unequivocal, unambiguous notice, properly served." (internal quotation marks omitted)), with *Waste Mgmt.*, 579 N.E.2d at 334 (finding that filing a declaratory judgment action is an appropriate way to determine rights and obligations and is not tantamount to repudiation of the contract).

⁸⁸ 2006 WL 1493103, 5–6 (Conn. Super. 2006).

⁸⁹ See *Bovis Lend Lease*, 2002 WL 31729693, at 15 ("[The insurer] cannot now, by a belated acceptance of its coverage and defense obligations, turn back the clock, and undo the potentially adversarial relationship between it and [the insured] that existed at the time the documents were written. Documents once entitled to protection from disclosure as either privileged or work product maintain that protection, unless privilege is waived."); *U.S. Fire Ins.*, 2012 WL 2190747, at 6 (explaining that there is no authority for the proposition that "an insurer's decision to tender a defense waives the insured's attorney-client privilege with respect to matters occurring prior to the tendering of the defense").

rights,” was entitled to the insured’s cooperation with respect to trial strategy.⁹⁰ And in *Carucci v. Argonaut Insurance Co.*, the District Court found that the insurer was entitled to select counsel, “where, as here, the insurer has withdrawn its reservation of rights,” such that “there is no longer a conflict of interest and thus, no need for the insured to retain separate independent counsel.”⁹¹

⁹⁰ *Heubel Materials*, 704 F.3d 558, at 563–64.

⁹¹ *Carucci v. Argonaut Ins. Co.*, 2009 WL 2600907 (W.D.N.Y. 2009).

IV. ELEMENTS OF A DUTY TO COOPERATE CLAIM/DEFENSE

As noted, insurers have asserted breach of cooperation clause arguments against insureds as offensive claims, as affirmative defenses, and in support of discovery. What follows is therefore a brief discussion of the common elements of a breach of cooperation clause argument sufficient to excuse an insurer's obligations under an insurance contract. Here too, insurers and insureds should be aware that there is considerable variation on a state-by-state basis that, of necessity, this article cannot fully capture.

The threshold question raised by such a claim/defense is whether the insured's conduct violated the cooperation clause. In some cases, this will be easy to resolve: Where, for example, a cooperation clause expressly prohibits the insured from settling an underlying dispute without express approval from the insurer, an insured who so settles generally will be found to have breached the clause. In the information-sharing context, however, this can be a surprisingly nuanced question: For example, does an insured's innocent factual mistake in sharing information constitute a breach?⁹² Moreover, courts evaluate even the breach element of a cooperation claim/defense under a test of *reasonableness*: Insurers are entitled only to information that is *reasonably* material to the claims in the underlying litigation, and the insured satisfies its duty if it provides *reasonable* assistance to facilitate the defense of a claim.⁹³ And, as noted, to the extent that an insurer's claim is based on an insured's failure to perform an act that is not specifically included in the cooperation clause, the critical question may be whether performance of that act was entirely within the control of the insured.

Moreover, beyond the question of breach, in most jurisdictions, a cooperation clause claim/defense involves several additional elements.⁹⁴

Indeed, in most postures, an insurer will be required to make an affirmative showing of several other elements, including (1) the materiality of [the] alleged breach, "(2) the existence of substantial prejudice as a result of the breach; and (3) the exercise of

⁹² See Couch on Ins. § 199:42 (answering in the negative).

⁹³ See, e.g., *Lodgenet Entm't Corp. v. Am. Int'l Specialty Lines Ins. Co.*, 299 F. Supp. 2d 987, 995 (D.S.D. 2003); see also Hazel Beh & Jeffrey W. Stempel, *Misclassifying the Insurance Policy: The Unforced Errors of Unilateral Contract Characterization*, 32 CARDOZO L. REV. 85, 126 (2010) ("[T]he cooperation requirements have often not been stringently enforced by courts and anything resembling substantial compliance is usually enough . . .").

⁹⁴ See Giles, *supra* note 14, at 607-08 ("Almost uniformly, courts have imposed on insurance companies the requirement that the policyholder's failure to cooperate be prejudicial to the insurer before it can serve as the basis for a refusal to indemnify. The policyholder's failure to appear or to provide documents per the insurer's request is generally not per se sufficient to establish prejudice; rather the insurer is required to demonstrate that the policyholder's failure to cooperate prevented the insurer from pursuing a beneficial strategy that would have been open to it, but for the policyholder's breach." (footnotes omitted)).

reasonable diligence to secure the insured's cooperation."⁹⁵ Other states have adopted variations of this three factor test. New York also requires the insurer to make a showing of its diligence, but in lieu of prejudice, the insurer must show the insured's *willful* violation.⁹⁶ If the insurer makes such a showing, the burden shifts to the insured to provide an excuse or cause for its conduct.⁹⁷ Massachusetts splits the difference, requiring the insurer to make "an affirmative showing of actual prejudice resulting from the failure," except where the insured willfully and without excuse refuses to comply with a timely request for information.⁹⁸ Other states presume prejudice.⁹⁹

These additional elements will often preclude a court from resolving a breach of cooperation claim/defense on summary judgment, because several of these elements require fact-intensive inquiries. For example, where the law requires an insurer to make a showing of prejudice, this element will be viewed as highly fact specific. Indeed, in many situations, the asserted prejudice must be connected to the underlying litigation—e.g., the insured's misstatements to the insurer must have prevented the insurer from settling the case or from developing a specific defense at trial.¹⁰⁰ It is unclear whether, under Missouri law, an insurer must show "actual" prejudice.¹⁰¹ Some courts have

⁹⁵ *Bubenik*, 594 F.3d 1051 (describing elements under Missouri law); see also *Interstate Mechanical*, 958 F. Supp. 2d at 1196-97 (explaining that, under Oregon law, "[a]n insured breaches a cooperation clause if the insurer establishes three elements: (1) the insurer diligently sought the insured's cooperation; (2) the insured willfully failed to cooperate; and (3) the insured's failure to cooperate prejudiced the insurer" (internal quotation marks omitted)); *City of Jacksonville*, 283 F. App'x at 691 (describing that, under Florida law, "[n]ot every failure to cooperate will release the insurance company[;] [instead,] [o]nly that failure which constitutes a material breach and substantially prejudices the rights of the insurer in defense of the cause will release the insurer of its obligation to pay.").

⁹⁶ See *SCW West*, 856 F. Supp. 2d at 522 ("To effectively deny insurance coverage based upon lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the carrier were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction.").

⁹⁷ *Id.*.

⁹⁸ See *WMC Mortg. Corp.*, 2010 WL 3734120, at 11 (internal quotation marks omitted).

⁹⁹ See *Wausau Business Ins. Co. v. Idleaire Techs. Corp.*, 2010 WL 582361, 19 (Bankr. D. Del. 2010) (describing that, under Tennessee law, "a rebuttable presumption of prejudice exists with respect to a claimed [material] breach of a cooperation clause"); *Stresscon Corp. v. Travelers Property Cas. Co. of Am.*, 2013 WL 4874352, 8 (Colo. Ct. App. 2013) (affirming proposition that "in liability cases like this one, . . . a violation of certain clauses[, including a cooperation clause,] creates a rebuttable presumption of prejudice").

¹⁰⁰ See, e.g., *Bubenik*, 594 F.3d at 1053 (finding prejudice under Missouri law, where insured's testimony would have been important to the defense, and insured's refusal "made it impossible for [insurer] to produce an expert witness").

¹⁰¹ *C.f. Heubel*, 704 F.3d at 565-66 ("Heubel and Raymond counter that these harms are too speculative to constitute 'substantial prejudice' under Missouri law. They cite *Anderson v. Slayton*, for the proposition that Universal must demonstrate the breach of the cooperation clause actually was prejudicial Tellingly, however, the court in *Anderson* itself rejected "actual prejudice" as a general rule, holding instead that prejudice automatically follows from the denial to the insurer of any opportunity to defend

therefore held that prejudice can be determined *only after* the underlying action has concluded adversely to the insurer; other courts, however, have held that a prejudice finding need not wait resolution of the underlying action.¹⁰²

Courts likewise treat an insurer's "diligence" as a question of fact.¹⁰³ That being said, however, an insurer that has communicated regularly with the insured or insured's counsel will, as a general matter, have satisfied this element of a breach claim/defense.¹⁰⁴ Moreover, in a related context, the Eleventh Circuit affirmed a grant of summary judgment to an insurer, offering the following analysis with respect to the "diligence" requirement:

. . . [A]n insurer exercises due diligence and good faith in securing cooperation when it makes efforts to communicate with the insured and specifically instructs the insured to notify it of any developments in the underlying matter. The court in *First American* held that under the undisputed facts, the insured's breach of the cooperation clause released the insurer's obligations under the policies as a matter of law. Although *First American* did not explicitly provide a standard by which to evaluate due diligence and good faith in securing cooperation, the court was indeed influenced by the fact that "FATCOF [the insured] did not notify National [the insurer] of this lawsuit or seek its permission to enter into the consent judgment." The insured failed to communicate with its insurer despite the insurer's written request for more information.

The undisputed evidence here reveals that on numerous occasions, Transportation sent written requests, by mail and email, for information on the status of the *Williams* settlement. Transportation attended four of the five initial mediation sessions, but rejected the first settlement offer from the *Williams* plaintiffs because it did not have sufficient information to adequately evaluate it. In one letter to the City after a mediation session, Transportation reminded the City that "[d]uring the mediation, the City agreed that they would discuss any potential offer with Transportation Insurance Company [] prior to making such an offer an allow [Transportation] to voice any objection it has."

against the claim." (citations and internal quotation marks omitted)), *with Bubenik*, 594 F.3d at 1053 (explaining that insurer "does not need to show that it would have won the case" absent the breach, but rather that it suffered actual prejudice"). *Interstate Mechanical*, 958 F. Supp. 2d at 1206 ("[U]nder Oregon law [p]rejudice includes a substantial detriment to the insurer's ability to litigate or adjust the case." (second alteration in original)).

¹⁰² See *Interstate Mechanical*, 958 F. Supp. 2d at 1206 (collecting cases).

¹⁰³ See *Id.* at 1202; see also *Mid-Continent Cas. Co. v. Basdeo*, 742 F. Supp. 2d 1293, 1338–39 (S.D. Fl. 2010) (finding that summary judgment on insurer's breach of cooperation clause argument was inappropriate, because "genuine issues of material fact exist with respect to," among other things, whether . . . Mid-Continent in good faith and due diligence attempted to procure First State's cooperation").

¹⁰⁴ See *Interstate Mechanical*, 958 F. Supp. 2d at 1202 (finding that insurers satisfied diligence requirement, as a matter of law, where there was no dispute that they "diligently sought [insured's] cooperation"; "defended [insured] under a reservation of rights"; "warned [insured] that coverage would not apply if [insured] failed to cooperate"; and requested that [insured] update [insurer] on an ongoing basis about the matter").

Transportation repeated its position on at least 8 or 9 occasions. Thereafter, the City engaged in numerous settlement discussions with the *Williams* plaintiffs without Transportation's input or knowledge. Cindy Lacquidara, Chief Deputy General Counsel at the Office of General Counsel for the City, admitted that "the City knew that Transportation wanted to be involved in all of the settlement negotiations." Despite the City's knowledge, the City, through Ms. Lacquidara, continued settlement discussions without including Transportation, "declin[ing] to accept [Transportation's] insistence upon approving any decision to settle so long as its reservation of rights is maintained."

Under the undisputed facts about the *Williams* settlement, the district court did not err in concluding that, as a matter of law, Transportation exercised due diligence and good faith in securing the City's cooperation and that the City's dishonesty rendered Transportation's attempts to secure its cooperation futile.¹⁰⁵

Finally, a court might find that even a prejudicial breach of the duty to cooperate can be cured, such that the insurer will still be required to defend and/or indemnify the insured.¹⁰⁶ Whether the insured's breach, or any resulting prejudice, can be cured will be a fact-specific inquiry. But an insured should certainly exercise effort, diligence, and care to correct any mistakes in information or materials that it provides to an insurer—especially prior to any motion practice or trial in an underlying action.

¹⁰⁵ *City of Jacksonville*, 283 F. App'x at 692–93 (alterations in original) (citations omitted); accord *Bubenik*, 594 F.3d at 1053 (finding that district court had appropriately granted summary judgment with respect to the diligence requirement where "[t]he record reflects that [insurer] contacted Dr. Bubenik by telephone and by letter on multiple occasions in an attempt to secure his cooperation"; "[insurer] requested Dr. Bubenik submit to a deposition, answer interrogatories, assist in forming a defense strategy, release state dental board documents, and testify at trial"; and "[w]hen its requests went unanswered, insurer provided repeated notice of the doctor's duty to cooperate and the consequences of his failure to do so").

¹⁰⁶ See *WMC Mortgage*, at 10 (explaining that although plaintiff's "failure . . . to submit documents substantiating their mortgagee status amounted to a breach of the duty to cooperate, and . . . MPIUA was prejudiced as a result," the only prejudice was the cost of the instant litigation over plaintiff's mortgagee status, and the prejudice could be "remedied by an order directing the plaintiff to pay MPIUA all of its attorneys' fees and costs incurred in connection with this litigation" without allowing defendant to disclaim coverage); see also *Id.* at 12 (collecting cases from other jurisdictions establishing that "courts have allowed insureds an opportunity to cure such a breach, at least where the failure to cooperate was not willful").

V. CONCLUSION

Virtually every insurance contract contains a broadly and vaguely phrased cooperation clause, which encompasses, among other things, an insured's obligation to share information and documentation with the insurer. Under ideal circumstances, where an insurer has accepted its duties to defend and indemnify, information sharing will serve both parties' interests in terms of facilitating the defense, or settlement, of an underlying litigation. But in less ideal circumstances, for example, where an insurer has offered a defense subject to a reservation of rights, an insured might be appropriately concerned that an insurer's information requests purportedly made pursuant to the cooperation clause are actually a disingenuous effort to obtain evaluative information that will allow the insurer to deny coverage in a declaratory judgment action. Worse still, an insured may have legitimate concerns that providing the insurer with such materials might result in waiver of evidentiary privileges and protections as to the insurer and other parties, such as the underlying plaintiff. This article has attempted to provide a high-level summary of some of the issues that may arise at different points in an insurer-insured relationship when an insurer requests information pursuant to a cooperation clause, and, where possible, to offer useful advice to practitioners. Unfortunately, however, understanding the benefits and risks of information sharing is only part of the equation, and there are no hard and fast rules. An insured's counsel will have to exercise discretion and judgment based on highly fact-specific circumstances to determine in what manner and when to share information with an insurer.

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