The question of whether the work product of an insurer’s attorney is discoverable has been addressed and debated in many courts, especially in the context of bad faith claims. In the past, insurers frequently defended themselves from bad faith claims by arguing that they relied on the advice of counsel in failing to settle an underlying action within policy limits, or in performing claims-handling duties that the policyholder asserts were inadequate. Many courts have held that, by asserting an advice of counsel defense, insurers waive the attorney-client privilege with regard to the specific communications between the insurer and its counsel that the insurance company allegedly relied on. Recently, insurers have attempted to fight back by increasingly requesting the work product of the policyholder’s attorney in bad faith litigation. While this may seem like a case of “turnabout is fair play,” far different questions are at issue when the subject of discovery is a policyholder’s work product and far less compelling reasons exist to find a waiver of the attorney-client privilege between a policyholder and its coverage counsel.

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I. **Discoverability of Insurers’ Work Product**

The work product doctrine as set forth in *Hickman v. Taylor*\(^2\) was later codified under Rule 26(b)(3) of the Federal Rules of Civil Procedure.\(^3\) It protects tangible materials that are prepared in anticipation of litigation by a party’s representative.\(^4\) The doctrine is designed to shelter an attorney’s mental impressions, opinions, and legal theories, and to provide a “zone of privacy” from which attorneys can confidently “promote justice and . . . protect their clients’ interests.”\(^5\) However, the otherwise-protected material may become discoverable if the moving party has a substantial need for the information and cannot obtain the information absent undue hardship or if the party asserting the privilege has waived the privilege by putting the privileged documents “at issue.”\(^6\) In the context of bad faith claims against insurers, courts have frequently found that policyholders meet these requirements.

A plethora of courts have pierced the veil of the attorney-client privilege and work product doctrine and have ordered the production of communications between an insurer and its counsel and the counsel’s work product.\(^7\) Justifications for such decisions vary but often turn on

\(^2\) 329 U.S. 495 (1947).


\(^5\) *Hickman*, 329 U.S. at 511; *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014 (1st Cir. 1988); see also *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975) ([T]he “work-product doctrine is distinct from and broader than the attorney-client privilege.”).


\(^7\) See *Silva v. Fire Ins. Exch.*, 112 F.R.D. 699, 699-700 (D. Mont. 1986) (“[T]he time-worn claims of work product and attorney-client privilege cannot be invoked to the insurance
the fact that a successful bad faith claim requires the policyholder to prove that its insurer did not have a reasonable basis for the denial of the claim at issue. If the “reasonableness” test is determined to be a subjective test instead of an objective test, then the information that the insurer relied on and its thought processes in turning that information into a denial or partial denial of coverage are relevant. Given the unique nature of bad faith claims, courts have reasoned that “allowing a plaintiff to overcome an insurer’s work product privilege may be particularly appropriate . . . in light of the insurer’s virtual monopoly over the evidence required to support such an action.” No other way may exist to determine an insurer’s state of mind regarding the reasonableness of its coverage decision other than by producing the insurer’s files. Given the policyholder’s substantial need for the information and its inability to obtain the information absent undue hardship, courts often order the insurer to produce the work product from the underlying action.

Many insurers attempt to shield their files from discovery by hiring coverage counsel almost as soon as a claim is made, copying coverage counsel on all internal correspondence regarding the claim handling and, in some cases, relying on coverage counsel’s advice when determining whether to deny a claim. Courts, however, have seen through this attempt to avoid the production of key documents that explain the insurer’s decision-making process. By using

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8 Logan v. Commercial Union Ins. Co., 96 F.3d 971, 977 (7th Cir. 1996).

9 See Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121, 1128 (Fla. 2005) (concluding that, in the context of a bad faith claim, the insurer’s file “presents virtually the only source of direct evidence with regard to the essential issue of the insurance company’s handling of the insured’s claim”).
“reliance on the advice of counsel” as a defense, insurers place the protected information at issue. Once a party places its privileged information at issue, the work product doctrine is deemed to be waived by that party.10

II. Insurers Attempt to Turn the Tables

Insurers have recently begun to retaliate by requesting production in coverage litigation of the files from their and from the files of their policyholder’s attorney. For example, in Rhodes v. USAA Casualty Insurance Co., the Superior Court of Pennsylvania was faced with the question of whether the work product of a policyholder’s attorney from the underlying claim against the policyholder was relevant and protected in the subsequent bad faith action against the insurer.11 In Rhodes, policyholders William and Carrie Rhodes brought a bad faith claim against USAA Casuality Insurance Company.12 Mr. Rhodes was injured in a motorcycle accident and, in his underinsured motorist (“UIM”) claim, sought $235,000 from his insurer, USAA.13 USAA initially offered to settle the Rhodes’ claim for $5,000 but eventually offered to settle for $100,000.14 In the Rhodes’ subsequent bad faith action, the trial court granted USAA’s request for the entire attorney file from the UIM claim, excluding any information that fell within the attorney-client privilege.15

10 See Liberty Mut. Ins. Co. v. Cal. Auto. Assigned Risk Plan, No. 3:11-CV-01419-MMC (JSC), 2012 WL 892188, at *3 (N.D. Cal. Mar. 14, 2012) (“[A]n implied privilege waiver is found where a party asserts that it relied on the advice of counsel or counsel’s conduct, thus putting the attorney’s state of mind or otherwise privileged communication directly at issue.”).


12 Id. at 1255-56.

13 Id.

14 Id. at 1256.

15 Id. at 1257.
The Superior Court of Pennsylvania granted the Rhodes’ interlocutory appeal to consider whether the trial court’s discovery order violated the work product doctrine.\textsuperscript{16} USAA argued that its conduct in the underlying case must be assessed in light of what the policyholders “knew and when they knew it, and when such information was passed on.”\textsuperscript{17} The Superior Court rejected this argument, correctly concluding that the basis of a bad faith claim depends on the reasonableness of the insurer’s conduct.\textsuperscript{18} Further, the court noted, policyholders already bear the burden of proving by clear and convincing evidence that the insurer acted in bad faith.\textsuperscript{19} USAA, the court found, sought “to turn the tables” and change the relevant inquiry from whether the insurer had a reasonable basis for its conduct, to the state of mind of the insured.\textsuperscript{20} Thus, the court held, the policyholders’ conduct and the attorney’s UIM file were irrelevant in the context of a subsequent bad faith claim.\textsuperscript{21}

However, the Superior Court in \textit{Rhodes} opened the door for the potential discovery of work product in future bad faith claims by implying that had USAA alleged that the Rhodeses engaged in fraudulent conduct or failed to cooperate with USAA’s investigation of the underlying claim, the file may become relevant, and thus discoverable.\textsuperscript{22} While \textit{Rhodes}...

\begin{footnotes}
\item[16] \textit{Id.} at 1257-58.
\item[17] \textit{Id.} at 1260.
\item[18] \textit{Id.} at 1260-61.
\item[19] \textit{Id.} at 1263.
\item[20] \textit{Id.}
\item[21] \textit{Id.} at 1263-64.
\item[22] The court stated, “USAA has not alleged that the Rhodeses made any material misrepresentations or engaged in fraudulent misconduct. USAA has not made any allegations that the Rhodeses failed to cooperate with its investigation into their claim for UIM benefits.” \textit{Id.} at 1263.
\end{footnotes}
maintained the correct focus of the relevant inquiry in bad faith claims, the court incorrectly came to the conclusion that the policyholders’ work product can lose its privilege and become relevant based on the insurer’s affirmative defense that the policyholder failed to comply with a policy’s cooperation clause. If the only hurdle to piercing the veil of privilege is an allegation of failure to cooperate, which generally does not have a heightened pleading requirement of rescission based on fraud, for example, then insurers will be motivated to assert an affirmative defense based on the policyholder’s failure to cooperate solely in order to go on a fishing expedition into the policyholder’s privileged work product. This conclusion risks improperly widening the focus of bad faith actions to include the policyholder’s conduct.

It is well established that the relevant inquiry in bad faith claims is the insurer’s actions—not the policyholder’s. In Leo v. State Farm Mutual Automobile Insurance Co., the U.S. District Court for the Eastern District of Pennsylvania correctly denied State Farm’s attempts to compel production of the attorney’s files from the policyholder’s underlying UIM action. In the UIM action, State Farm refused to make a settlement offer until the morning of the arbitration hearing. The policyholder rejected State Farm’s offer, and later brought a bad faith action against State Farm arising from the delayed offer. State Farm sought to depose the policyholder’s UIM attorney regarding his communications with the plaintiff following State

23 See, e.g., Berges v. Infinity Ins. Co., 896 So. 2d 665, 677 (Fla. 2004) (“[T]he focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured.”).


25 Id. at *2.

26 Id.
Farm’s offer and compel production of the attorney’s UIM file.\(^{27}\) The court correctly held that the policyholder’s bad faith claim turned on the reasonableness of State Farm’s refusal to make an offer before the morning of the arbitration.\(^{28}\) Communications between the plaintiff and his counsel that State Farm did not possess at that time “could not have formed the basis for State Farm’s decision not to make an offer earlier.”\(^{29}\) Thus, the court concluded, the underlying file was protected and not relevant to State Farm’s actions.\(^{30}\)

Bad faith claims hinge on the reasonableness of the insurer’s conduct in the underlying action. In jurisdictions that employ a subjective test, this reasonableness depends on the information in the insurer’s possession in the underlying action. By requesting the client file from the policyholder’s attorney, insurers illogically argue that information they were not aware of impacted their conduct. This attempt to redirect the relevant inquiry from the insurer’s conduct to the policyholder’s misconstrues the very nature of bad faith claims.

One example of a problematic inquiry is highlighted in *Kemm v. Allstate Property & Casualty Insurance Co.*\(^{31}\) In *Kemm*, defendant Allstate sought to depose one of the policyholders’ former attorneys regarding the attorney’s “motives and conduct during settlement negotiations[,] because an understanding of the terms of the settlement demand letter” was

\(^{27}\) *Id.*

\(^{28}\) *Id.* at *3.*

\(^{29}\) *Id.*

\(^{30}\) *Id.* At *3-4.*

\(^{31}\) 73 Fed. R. Serv. 3d 1683, 2009 WL 1954146 (M.D. Fla. 2009).
allegedly “crucial” to the case. The policyholders argued that the information was protected under the work product doctrine, and that “the focus in a bad faith claim is not on the actions of the claimant but rather on the conduct” of the insurer. The U.S. District Court for the Middle District of Florida rejected both arguments and held that, “under the totality of the circumstances test[,] the conduct of the insured may be relevant in specific instances.” These “specific instances,” the court opined, included whether the policyholders failed to cooperate with the insurer’s investigation of the claim, and whether the policyholders’ conduct precluded the insurer from a reasonable, realistic opportunity to settle.

The question of whether the insurer’s alleged failure to cooperate precluded the insurer from making a reasonable settlement is a narrow inquiry that mirrors a fraud allegation, so it is not unreasonable that the Kemm court might choose to pierce the veil in such a context if an insurer was able to meet heightened pleading requirements. However, the less-focused inquiry into the policyholders’ general failure to cooperate gives insurers too much leeway to attempt to discover privileged documents in circumstances where the policyholder’s failure to cooperate may have had no effect on the insurer’s settlement decisions or investigations. Allowing insurers to simply allege a failure to cooperate does not make the policyholder’s attorney work product relevant, nor does it waive the material’s protected status. The implications of such a rule risk destroying the sanctity of the zone of privacy that Rule 26(b) was enacted to protect.

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32 Id. at *1.

33 Id.

34 Id. at *3.

35 Id.
III. Only Policyholders Can Waive Their Attorneys’ Work Product

Insurers should not be permitted to place the subject matter of policyholders’ privileged work product at issue and then argue that the policyholders’ privilege has been waived. Indeed, an implied waiver of privilege occurs through an affirmative act by the party that holds the privilege—not the party seeking the information. 36 While insurers often waive their privilege by arguing reliance on advice of counsel, policyholders do not. Thus, contrary to the holding in *Kemm* and dicta in *Rhodes*, insurers should not be permitted to place a policyholder’s work product at issue by alleging a mere lack of cooperation or that no realistic opportunity to settle the underlying claim ever occurred. 37 To conclude otherwise would “give an adversary who is a skillful pleader the ability to render the privilege a nullity.” 38

IV. Conclusion

The unique nature of bad faith claims, the policyholders’ substantial need for information, and defenses asserted by insurers often necessitate the production of insurers’ work product. Insurers’ recent attempts to obfuscate the issues and refocus the inquiry on the policyholders’ conduct should not distract courts from the proper inquiry in bad faith claims—the insurer’s conduct. When courts allow insurers access to a policyholder’s privileged documents based solely on allegations of failure to cooperate, courts risk undermining the purpose of the attorney work product privilege and work product doctrine.


37 *See Lee v. Progressive Express Ins. Co.*, 909 So. 2d 475 (Fla. Dist. Ct. App. 2005) (rejecting the insurer’s request for the policyholder’s work product and concluding that the insurer was not able to place the policyholder’s protected communications at issue by arguing that the claimant was unwilling to settle).

38 *Chase Manhattan Bank N.A.*, 587 F. Supp. at 59.
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