

Insurer Entitled To Discovery of Attorney Client Communications and Attorney Work Product Relating to Underlying Claim

October 2011

Applying Florida and federal law, the United States District Court for the Southern District of Florida has held that an insurer was entitled to discovery of otherwise protected attorney client communications and attorney work product from the underlying case because of the existence of a common interest between the insurer and the insured and because the insured put defense counsel work product "at issue" by challenging the insurer's allocation assessment. *MaplewoodPartners, L.P. v. Indian Harbor Ins. Co.*, 2011 WL 3918597 (S.D. Fla. Sept. 6, 2011).

The insured, a private equity firm, initiated coverage litigation against the insurer, disputing, among other things, the insurer's allocation between covered and uncovered amounts with respect to the defense and settlement of four lawsuits. The insurer sought discovery of all communications between the insured and its defense counsel concerning the underlying litigation and assessments made by the insured or defense counsel concerning the insured's liability and the settlement value of the litigation. The insured objected to this discovery, arguing that the information sought was protected from disclosure by the attorney client privilege and the attorney work product doctrine.

In rejecting the insured's arguments, the court first determined that the applicability of the work product doctrine in this case turned on federal law notwithstanding that the documents at issue were prepared in connection with state court litigation. Following federal law, the court determined that the insured waived the protection afforded by the doctrine with respect to defense counsel's assessment of liability and damages in the underlying litigation by putting that assessment "at issue." According to the court, having brought suit against the insurer, the insured could not preclude the discovery of information that was vital to the insurer's defense that its allocation method was appropriate as compared to the allocation method pressed by the insured.

Next, the court held that the insurer was entitled to the discovery of information that otherwise would be protected from disclosure by the privilege afforded attorney client communications under Florida law. According to the court, the insured could not claim this privilege as to the insurer because of the existence of a common interest between the insured and insurer with respect to the underlying litigation. Specifically, the

court found that the insured and insurer “shared a common interest in defeating liability in the underlying proceedings.” In reaching this conclusion, the court rejected the insured's arguments that there was no common interest here because the insurer did not have a duty to defend under the policy and because the insurer had issued a reservation of rights letter.