The Resurgence of the "At Issue" Doctrine in Insurance Coverage Litigation, Part I

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Summary

- An examination of the privilege waiver that arises in connection with an "advice of counsel" defense.
- A discussion of one context in which the doctrine frequently arises in insurance coverage litigation: settlements of underlying cases.
- Part II will examine the doctrine and attorney fees.

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What is the “at issue” doctrine, and why does it exist? In simplest terms, the doctrine holds that when a party makes an argument that relies on otherwise privileged information, the party waives the privilege over the information that it has put “at issue” in the case. The rationale is one of fairness: It would be fundamentally inequitable for a party in our adversarial system to be able to put forward an argument based on information that cannot be tested and examined by the other side. The confusion often arises, however, over what it means to put otherwise privileged information “at issue” in a case. Does it mean that the argument could not be made but for the privileged information? Does it mean that the argument merely relates in some way to the privileged information? Or is it something in between?

This article will start by examining the classic application of the “at issue” doctrine: the privilege waiver that arises in connection with an “advice of counsel” defense. Next, the article will discuss two contexts in which the doctrine frequently arises in insurance coverage litigation: settlements of underlying cases and, in part two, attorney fees. The article will address how the doctrine is applied in those contexts and discuss certain questions that may arise in determining its limits.

As noted, a frequent application of the “at issue” doctrine involves the affirmative defense of “advice of counsel.” Parties may use this defense to show they relied on the advice of counsel and therefore behaved reasonably and/or should not be found liable for a certain act or omission forming the basis of another party’s claim. However, the use of this defense can result in a waiver of the attorney-client and work-product privileges for materials related to the defense.

The following cases involve the advice-of-counsel defense and the different approaches taken by courts to determine whether waiver of the attorney-client privilege and work-product protection should occur.

In *Doe v. Schuylkill County Courthouse* [1] in the U.S. District Court for the Middle District of Pennsylvania, county courthouse employees filed suit against the courthouse and others alleging retaliation for reporting workplace sexual misconduct. The defendants argued they had an independent, good-faith basis for their disciplinary decisions, which was reinforced by legal advice they received from counsel. [2] In response, the plaintiffs sought leave of court to propound discovery on the defendants to inquire into communications between the defendants and their counsel relating to the good-faith basis for their disciplinary actions. [3] The defendants asserted that this violated the attorney-client privilege because they did not expressly raise any defenses based on advice of counsel. [4] The court observed that the defendants clearly alleged they acted in good faith, and with a non-retaliatory purpose, when they took various adverse actions

against the plaintiffs. [5] The court also stated that the defendants' assertion of good faith implicitly suggested they were guided by counsel while taking the adverse actions, which prevented them from committing any illegal conduct. [6] Thus, the court determined that the defendants' claims of good faith based on legal advice justified waiver of the attorney-client privilege for attorney-client communications related to the disciplinary actions at issue. [7]

Doe illustrates that waiver of the attorney-client privilege can occur even when a party does not expressly plead an advice-of-counsel defense. The defendants in *Doe* claimed a good-faith basis supported by legal advice to illustrate they acted lawfully, which the court regarded as an implicit suggestion that the defendants were guided by counsel. [8]

In *Jones v. Nationwide Insurance Co.*, [9] also in the U.S. District Court for the Middle District of Pennsylvania, the plaintiff filed suit asserting a breach of contract claim and a bad-faith claim arising out of a motor vehicle collision. The plaintiff sought to obtain documents from the defendant during discovery, and the defendant claimed the documents were protected by either the attorney-client privilege or the work-product protection doctrine. [10] Further, the defendant argued that because it had not pled an "advice of counsel" defense, the documents were protected by the attorney-client privilege and were not discoverable. [11] The court rejected the defendant's contention and ruled that the advice of counsel was relevant for purposes of discovery. [12] In reaching this determination, the court observed that the case involved a bad-faith claim, which rendered the advice of counsel "inextricably interwoven into the fabric of the facts that occurred." [13] The court also referred to an affirmative defense pled by the defendant, which stated the defendant "acted reasonably and in accordance with the insurance contract and the applicable laws of the Commonwealth of Pennsylvania when issuing the policy of insurance, and when handling, investigating and evaluating plaintiff's claim." [14] The court concluded that this language made the advice of counsel discoverable. [15]

The court's rationale for deciding waiver in *Nationwide* is unusual because it was partially triggered by the plaintiff's bad-faith claim. [16] In other words, the court took the exceptional step of presuming that legal advice was inherently associated with the plaintiff's bad-faith claim. [17] Nevertheless, the court also considered the affirmative defense raised by the defendant asserting compliance with the insurance policy and law, and found this made the advice of counsel relevant to discovery. [18] This presents a more plausible basis for the court to decide waiver of privilege due to advice of counsel, because it involves an affirmative defense actually pled by the defendant. Nonetheless,

like the court in *Doe*, the court in *Nationwide* found a waiver of the attorney-client privilege, even though the defendant did not expressly plead an advice-of-counsel defense. [19]

Conversely, there are cases in which parties raise an advice-of-counsel defense, but waiver of the attorney-client privilege does not occur.

In re Niaspan Antitrust Litigation, [20] in the U.S. District Court for the Eastern District of Pennsylvania, involved "reverse payment," or a "pay for delay," settlement, which refers to a practice in which a brand-name drug company files a patent infringement suit against a generic drug company and compensates the generic drug company for not entering the market with a competing generic drug until an agreed date. The plaintiffs alleged the brand-name manufacturer of the drug, Kos, entered into an anticompetitive reverse-payment settlement agreement with the defendants, Barr and Teva, [21] the generic manufacturer of the drug. [22] At deposition, counsel for the plaintiffs asked the former president of Barr about outside counsel's opinions regarding the invalidity, unenforceability, or noninfringement of Kos's Niaspan patent. [23] The defendants' counsel objected to this question, citing attorney-client privilege. [24] The plaintiffs' counsel then asked the witness if, absent a settlement, Barr would have launched generic Niaspan at risk. [25] The witness responded "no." [26] The plaintiffs argued that the defendants should be prevented from using that deposition testimony. [27] The plaintiffs asserted that the defendants' use of the deposition testimony would constitute an impermissible use of the attorney-client privilege as both a "sword" and "shield," as the defendants were presenting arguments and assertions associated with attorney advice and simultaneously preventing the plaintiffs from exploring the advice. [28]

The court determined that the testimony by the defendants' witness did not implicate attorney advice, applying the Third Circuit rule for waiver of the attorney-client privilege. [29] The rule states that "advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication." [30] The court observed that here the attorney advice given by the defendants' counsel related to the witness's testimony and was not used by the defendants to prove any of their claims or defenses by disclosing or describing a client communication. [31] The court also determined that the witness's testimony was not relevant to any claim or defense asserted by the defendants, as the plaintiffs did not show that the defendants proved a claim or defense using the witness's deposition testimony, which would place the attorney advice at issue. [32] Because the court determined that the witness's testimony did not implicate attorney advice or prove any of the defendants'

claims or defenses, the court denied the plaintiffs' request to prevent the defendants from using the witness's testimony at issue. [33]

Like *Doe* and *Nationwide*, *Niaspan* involves raising an advice-of-counsel defense without expressly pleading it. However, in *Niaspan*, the plaintiffs alleged the defendants raised the defense with deposition testimony. [34] Interestingly, the plaintiffs also associated the defendants' assertion of the defense with improper use of the attorney-client privilege, as the plaintiffs claimed the defendants relied on advice of counsel to provide certain deposition testimony and vet refused to provide additional information regarding the testimony subject matter. [35] While it is uncertain if the defendants' witness relied on advice of counsel to respond to the plaintiffs' counsel regarding the launch of the medication at issue, the court dispositively addressed the defendants' contention by determining that the defendants did not use the testimony to prove a claim or defense by disclosing or describing a client communication. [36] Further, the court observed that the plaintiffs failed to show the deposition testimony proved any of the defendants' claims or defenses. [37]

In *In re County of Erie*, [38] in the U.S. Court of Appeals for the Second Circuit, the plaintiffs filed suit against defendant Erie County, alleging that a written policy of the Erie County Sheriff's Office requiring an invasive strip search of all detainees entering the defendants' correctional facility violated the Fourth Amendment. A discovery dispute arose regarding the production of correspondence between the offices of the Erie County attorney and the Erie County sheriff. [39] The district court ruled that the defendants waived the attorney-client privilege over the correspondence by placing it at issue in the litigation after deposition testimony of the defendants' witnesses revealed that the defendants received advice from counsel regarding the revision of the strip search policies. [40] Further, the district court stated the deposition testimony was indicative of the defendants' reliance on advice of counsel to reinforce the claim that their strip search policy was lawful. [41] As a result, the district court ordered production of the emails at issue, and the defendants appealed the court's ruling. [42]

The appeals court considered whether the defendants waived the attorney-client privilege by implication, observing that waiver by implication can occur when a client asserts reliance on an attorney's advice as an element of a claim or defense. [43] The court concluded that the defendants did not rely on the advice of counsel to support any of their defenses. [44] The court also examined whether the defendants asserted a good-faith, state-of-mind defense, as this involves an inquiry into state of mind, which raises the possibility of implied waiver of the attorney-client privilege. [45] The court concluded that

the defendants did not assert a good-faith or state-of-mind defense. [46] Instead, the court acknowledged that the defendants strictly maintained that their actions were lawful or that any rights they may have violated were not clearly established. [47] Because the appeals court determined that the defendants did not waive the attorney-client privilege for the correspondence at issue, it vacated the district court's order and instructed the district court to enter an order protecting the confidentiality of the correspondence.

The approach used by the court in *Erie* to determine whether the defendants raised an advice-of-counsel defense is almost identical to the one applied by the court in *Niaspan*, as the court concluded that the defendants did not rely on the advice of counsel to support their claims or defenses. [48] However, unlike the court *Niaspan*, the court in *Erie* also analyzed whether the defendants raised a good-faith, state-of-mind defense regarding the policies at issue to determine waiver. [49] Interestingly, the court found that the defendants simply maintained their actions were "lawful" or that any rights they may have violated were not clearly established. [50] However, the court's use of the term "lawful" suggests that the defendants relied on the advice of counsel to examine the legality of their strip search policies, which arguably calls the court's analysis into question.

In *Aboudara v. City of Santa Rosa*, [51] in the U.S. District Court for the Northern District of California, the plaintiff asserted a claim for insufficient compensation. The defendant filed an amended answer and pled an affirmative defense of good faith because it consulted with counsel regarding compliance with the Fair Labor Standards Act. [52] The court observed that the defendant's good-faith affirmative defense waived the attorney-client privilege because it was based on the advice of legal counsel. [53] The plaintiff then filed a motion to compel, seeking all discovery related to legal advice the defendant received regarding employee compensation. [54] In response, the defendant stipulated to the court that it would not rely on advice of counsel to support its good-faith defense and if necessary would amend its answer. [55] The plaintiff then argued that the defendant's assertion of its good-faith defense, alone, waives the attorney-client privilege. [56] The court determined that the defendant's good-faith claim was insufficient by itself to waive the attorney-client privilege. [57] To reach this conclusion, the court deferred to prior Ninth Circuit rulings and observed that the Ninth Circuit had not decided that an assertion of a good-faith affirmative defense waives the attorney-client privilege for communications with counsel. [58] Ultimately, the court ruled that the defendant did not waive the attorney-client privilege over communications related to its good-faith, advice-of-counsel affirmative defense. [59]

Aboudara is unique because it illustrates a party's retraction of advice of counsel in support of a good-faith affirmative defense, without eliminating the good-faith component of the defense, to prevent waiver of the attorney-client privilege. However, the court's ruling can be viewed as raising a fairness issue, because the defendant benefited from the ruling as it preserved privilege for attorney-client communications and retained its good-faith claim. [60] This is unlike *Doe*, in which the court ruled that the defendants' good-faith defense, alone, implicitly suggested the defendants relied on advice of counsel, which resulted in waiver of the attorney-client privilege. [61]

The foregoing cases illustrate that, even in the classic case of the advice-of-counsel defense, courts apply different approaches in determining, first, whether a party has raised an advice-of-counsel defense and, if so, whether the defense justifies waiver of the attorney-client privilege. Even in this limited context, therefore, the potential for inconsistent results and ensuing confusion abounds.

The "At Issue" Doctrine in the Settlement Context

The reasonableness of an insured's settlement of a liability—and subsequent suit for indemnity against its insurer—is another context in which the "at issue" doctrine arises. Insureds' and insurers' duties regarding settlement begin with the language of the contract. An insured typically has a duty to seek the insurer's consent before settling a lawsuit or making payments to third parties (under what is known as the voluntary payment provision). Similarly, an insured has a "duty to cooperate" as part of the contract. Thus, when an insured is engaging in settlement negotiations, it usually has a duty to keep its insurer (or insurers) apprised of all significant developments, including key settlement agreements, memoranda, risks, and the like, to allow its insurer to evaluate the settlement.

Likewise, an insurer has a duty to accept a reasonable settlement offer within limits when the claim is covered and the insured's liability has become reasonably clear. An insurer is prohibited from unreasonably withholding its consent to settle, and that is so regardless of whether the insurer is defending its insured. Based on the information provided from its insured, an insurer must put its insured's interests above its own and evaluate whether settlement is reasonable.

An insurer that unreasonably refuses to consent to a settlement may be subject to a bad-faith insurance claim. The insurer may be responsible for a judgment amount in excess of the policy limits as long as the failure or refusal to settle was unreasonable. An insured—in some instances—may also settle a case, when an insurer unreasonably refuses to consent to a settlement, and seek indemnity from its insurer following the settlement.

Failing to fund a reasonable settlement can give rise to a bad-faith insurance action in many states under state statutory or common law. [62]

As a general matter, reasonableness of settlement is an objective standard. But that raises two questions: What is a "reasonable" settlement, and does an insured waive the attorney-client privilege over counsel's analysis of any settlement by seeking indemnity from its insurer for such a settlement? Similarly, does an insurer waive the attorney-client privilege over counsel's analysis of any settlement after taking the position that an insured's decision to settle was unreasonable? To no one's surprise, the answer is "it depends." Jurisdictions are split on whether filing an indemnity action against an insurer places counsel's advice "at issue" for purposes of waiver of the attorney-client privilege.

Waiver of Attorney-Client Privilege: Insurer Arguments

Insurance companies are not always privy to conversations and materials in an underlying lawsuit, particularly when they have no duty to defend. Thus, when they take the position that an insured's settlement of a lawsuit was unreasonable, they contend that an insured must prove the reasonableness of that settlement by allowing them access to otherwise privileged materials. In disputes over coverage, insurance companies commonly take the position that an insured waives the attorney-client privilege and work-product protection over materials in connection with underlying litigation by filing a coverage suit against the carrier.

Insurers argue that privileged documents, including communications, evaluations, and analysis by underlying defense counsel, specifically relate to an insured's claim for defense and indemnity and thus constitute evidence relating to the reasonableness and necessity of settlement. They argue that, by seeking coverage for amounts incurred in connection with the defense and indemnity of certain claims, insureds place those documents "at issue" in the coverage litigation, waiving privilege over those materials. Insurers contend they are entitled to this information because without it, they cannot effectively evaluate an insured's indemnity claim nor present their defenses to that claim for coverage. [63]

Courts have found that insureds place counsel's advice "at issue" in circumstances in which the insured intended to make testimonial use of counsel's analysis at trial or when the insured pled advice of counsel as a defense. [64]

In *Cincinnati Insurance Co. v. Zurich Insurance Co.*, [65] Cincinnati sued Zurich for its failure to settle a liability action that resulted in an excess verdict of $3.9 million. Cincinnati argued that Zurich should have accepted and funded the $500,000 settlement

offer prior to the jury's verdict. [66] In discovery, Zurich sought responses to interrogatories and production of documents concerning Cincinnati's pretrial valuation of the claim. [67] "All of the items sought by Zurich involve either 'facts developed in preparation of' or 'opinions formed about' the prior litigation, and therefore, as Zurich concedes, absent an exception to the work product doctrine, discovery is not proper." [68]

The court found that Cincinnati waived work-product protection because, it

> intend[ed] to call one of its attorneys, Mr. Sumner, as a witness [at] trial and therefore concedes that Zurich is entitled to take Mr. Sumner's deposition. The heart of Mr. Sumner's testimony, as pled by Cincinnati, is that he disagreed with and argued against Zurich's decision not to accept the $500,000 settlement offer. Therefore, Cincinnati has placed Mr. Sumner's testimony squarely at issue in this case and has therefore impliedly waived work product protection for both the facts and opinions that underlie his testimony. [69]

Therefore, Cincinnati could not claim work-product protection over these documents. [70]

The court found that "where a litigant *does* attempt to use an opinion as its sword," work-product protection is implicitly waived. [71] Thus, counsel's "opinions as to the value of the underlying case and the advisability of accepting the settlement offer, and the facts giving rise to those opinions, unless otherwise privileged, are fair game." [72]

However, in regard to attorney-client communications, the court held that Cincinnati

> has done nothing—yet—that makes the advice of counsel an issue. While it is true that Cincinnati has placed Mr. Sumner's *knowledge and opinions* at issue, Cincinnati has not so implicated the contents of *confidential communications* to mandate their production. However, should Cincinnati put confidential communications of counsel at issue *more* directly—before or even during the trial of this case—Zurich remains free to renew the instant motion. [73]

In *Potomac Electric Power Co. v. California Union Insurance Co.*, the D.C. District Court found that Potomac "brought its own conduct and the conduct of its counsel in the underlying proceedings directly into issue by instituting" the coverage action. [74] There, Potomac sought coverage for third-party claims that were litigated or ultimately settled

(or both) for incidents of polychlorinated biphenyl (PCB) contamination. [75] The insurers sought to compel Potomac to, among other things, "produce documents, including those on its privilege lists, pertaining to its investigation, defense, and settlement of the underlying criminal and civil proceedings for which it seeks insurance coverage"; and produce "unredacted copies of legal bills" in preparation for the depositions of its attorneys. [76]

The court found that "equity and the case law weigh in favor of production" of Potomac's documents related to its "investigation, defense, and settlement of the underlying proceedings." [77] The court found that because the insurers denied that "PCB contamination is an insured loss and deny that [Potomac] has satisfied various conditions to coverage under the policies, . . . [Potomac]'s conduct and the apportionment of costs in connection with the investigation, defense, and settlement of the underlying proceedings are directly at issue in this case." [78]

The court rejected Potomac's argument that the documents were protected by attorney-client privilege or work-product protection because Potomac

> brought its own conduct and the conduct of its counsel in the underlying proceedings directly into issue by instituting this action to recover approximately $3.25 million for clean-up costs and $3.5 million for defense costs allegedly incurred in connection with those proceedings. Under these circumstances, defendants are entitled to inspect documents pertaining to the underlying proceedings, regardless of whether they contain attorney work product or communications normally protected by the attorney-client privilege. [79]

Waiver of Attorney-Client Privilege: Insured Arguments

Insureds have proffered similar arguments that insurance companies have placed their counsels' advice at issue by acting in bad faith in their settlement practices. In *Holmgren v. State Farm Mutual Automobile Insurance Co.*, [80] State Farm's intoxicated insured ran a stop sign and collided with a car in which Holmgren (the plaintiff) was riding. Holmgren was treated for her injuries but was ultimately discharged from her part-time job. [81] Holmgren contacted State Farm, which conducted an investigation and concluded that its insured's liability was clear, and advanced $5,000 in expenses to Holmgren. [82] Holmgren communicated numerous times that the family was under fiscal pressure, and State Farm needed to reimburse Holmgren for her losses. [83]

State Farm, on behalf of its insured, offered low settlement amounts in an attempt to settle with Holmgren. [84] Ultimately, Holmgren sued State Farm's insured (Cannon) and the suit was settled for $40,000. Holmgren reserved her rights against State Farm for bad faith in the process of adjusting and settling the claim, and subsequently sued State Farm in federal court for bad faith in its settlement processes. [85] Holmgren prevailed at trial, and the jury awarded over $149,000.

On appeal to the Ninth Circuit Court of Appeals, State Farm contended that the district court erred in requiring it to produce "handwritten memoranda drafted during the litigation of the Cannon suit by a State Farm adjuster," which contained "a range of values for Holmgren's claims, including aggravation, medical expenses, lost earnings, pain and suffering, loss of course of life and loss of home, fixing the range of potential liability as from $78,000 to $145,000." [86] State Farm contended these materials were protected work product. [87] The court rejected State Farm's argument, finding that "opinion work product may be discovered and admitted when mental impressions are *at issue* in a case and the need for the material is compelling." [88] The court added that "[i]n a bad faith insurance claim settlement case, the 'strategy, mental impressions and opinion of [the insurer's] agents concerning the handling of the claim are directly at issue.'" [89] Thus, "[u]nless the information is available elsewhere, a plaintiff may be able to establish a compelling need for evidence in the insurer's claim file regarding the insurer's opinion of the viability and value of the claim." [90]

Other courts have found similarly, particularly when insurers attempt to shield documents in their claims files from production. [91]

In *Woodruff v. American Family Mutual Insurance Co.*, [92] the court permitted the insured to discover attorney-client-privileged and work-product-protected documents that were part of American Family's claim file. The documents American Family sought to protect went "to the very heart of the issue in this case—whether American Family breached any obligations to [the insured] in its handling of the" underlying action. [93] It specifically found that "[n]o one but American Family can show how it evaluated and defended the [underlying] Action. Without access to this information, no other avenue exists for the [insured] to discover this information. . . . [W]here plaintiff alleges bad faith and the insurer takes the position that the claim was handled without bad faith, 'the trial is the file.'" [94]

Protection of Attorney-Client Privilege and Work Product

While some courts have found that insureds have placed privileged communications and materials "at issue" by filing coverage litigation seeking indemnity for third-party settlements, the wealth of authority has found that seeking indemnity—without more—does not waive an insured's privilege. Courts' reasoning that privilege is not waived *merely by seeking indemnity* is two-fold: (1) an insured does not place counsel's advice "at issue" without taking some affirmative step (such as asserting reliance on counsel) in its case; and (2) the reasonableness of settlement is an objective inquiry and can be satisfied without waiving attorney-client privilege and work-product protection.

Take *Ex parte Dow Corning Alabama, Inc.*, [95] in the Supreme Court of Alabama, as an example. In that case, an employee of an independent contractor Dow Corning had hired to perform work at its facility was injured. [96] The employee filed a personal injury action against Dow Corning (among others), seeking compensatory and punitive damages. [97] The contract between Dow Corning and its independent contractor required the independent contractor to maintain liability insurance and defend Dow in any suits. However, the independent contractor's insurer (National Trust) failed to do so, and failed to contribute to an ultimate settlement with the employee. [98] After effectuating settlement with the employee, Dow Corning and its own insurers sought indemnity from the independent contractor's insurers for defense costs and the settlement funds paid to the employee. [99]

National Trust sought depositions of Dow Corning representatives regarding "Dow Corning Corporation's and Dow Corning Alabama's 'decision to settle Mr. Blue's claims, including but not limited to [their] analysis of [their] liability for the claims asserted against [them] in the [personal-injury action] and [their] analysis of the settlement value of Mr. Blue's claims.'" [100] National Trust argued it was entitled to this privileged information because "by seeking indemnity and putting the reasonableness and good faith of the settlement in issue, [Dow Corning] waived the attorney-client privilege and the protection afforded by the work-product doctrine." [101]

The court rejected this argument. "The question whether a party has implicitly waived the attorney-client privilege 'turns on whether the actual content of the attorney-client communication has been placed in issue [in such a way] that the information is *actually required for the truthful resolution of the issues raised in the controversy*.'" [102] Instead, the court found that "the reasonableness and good faith of a settlement in the context of an indemnity claim are to be judged using an objective standard," and that "a party, by seeking indemnity and thereby placing the reasonableness and good faith of a settlement in issue, does not waive the attorney-client privilege or the protection afforded by the work-product doctrine." [103]

The court ultimately concluded:

> [P]roving or disproving the objective reasonableness and good faith of the settlement in Blue's personal-injury case does not require the production of attorney-client-privileged materials or materials protected by the work-product doctrine. The filings, discovery, documentary evidence, witness testimony, nonprivileged correspondence, and other nonprivileged materials generated in connection with Blue's personal-injury action can be used to evaluate the Dow defendants' potential liability to Blue and to prove or disprove whether the settlement was reasonable and entered into in good faith. [104]

In Texas, the reasonableness of settlement is an objective standard and need not be proved by an insured's privileged files. In *In re Exxon Mobil Corp.*, [105] Exxon settled with the underlying plaintiffs at trial and then sought indemnification from the Wagner Group for the amount it paid in settlement. The Wagner Group moved to compel production of (1) "all documents relating to Exxon's or Exxon's Litigation Counsel's evaluation of all or part of the [M.J. Farms] litigation"; (2) "all files of Exxon's Litigation Counsel relating to all or part of the litigation"; (3) "all communications with and analyses of jury consultants"; and (4) "any outlines prepared by ExxonMobil's counsel for use in connection with witness examinations during the M.J. Farms trial." [106] The Wagner Group argued that Exxon waived the attorney-client privilege under the "offensive-use doctrine." [107]

The court noted that "[a] party seeking indemnity in connection with settlement of litigation must show its potential liability in the underlying litigation and establish that the settlement was reasonable, prudent, and made in good faith under the circumstances." [108] The court further observed, however, that "the inquiry [] is objective rather than subjective so as to put attorney-client communications beyond the offensive-use doctrine's reach." [109] In rejecting the requested privileged information, the court emphasized its "concern that the approach advocated by the Wagner Group potentially could open the door to wide-ranging discovery into areas otherwise protected by the attorney-client privilege, and could do so without providing any clear means for establishing limits to such discovery." [110]

Similarly, in *Ohio Casualty Insurance Co. v. Firemen's Insurance Co.*, [111] Ohio Casualty sued Firemen's for its bad-faith refusal to settle an underlying lawsuit where a patron who had been drinking at the insured's establishment crashed his vehicle, killed six people, and caused severe property damage. Ohio Casualty settled all claims on the insured's

behalf and paid the entire amount of the settlement. It then sued Firemen's for bad faith in its refusal to contribute to the settlement. Firemen's argued that Ohio Casualty waived the attorney-client privilege with respect to how its counsel "managed, participated in, evaluated, directed or controlled the underlying lawsuits." [112] It further argued that, because Ohio Casualty sued Firemen's, it "put the thoughts and evaluations of Ohio Casualty's lawyers directly at issue in this case." The court rejected that argument, emphasizing that "the attorney-client privilege is an extremely important doctrine that is protected by law." [113] The court also held that Ohio Casualty did not expressly nor impliedly waive the attorney-client privilege "because it has not put the legal counsel of its lawyers at issue by suing Firemen's. Instead, it has put at issue the actions of Firemen's lawyers in determining whether Firemen's acted in good faith with regard to the settlement of the [underlying] lawsuits." [114] While the court granted Ohio Casualty's motion for a protective order, it "note[d] that Ohio Casualty cannot invoke a blanket privilege that extends beyond the scope of the attorney-client relationship. Firemen's may depose [the attorneys], and any other witness to determine facts and discuss non-privileged communications." [115]

The Third and Second Circuits have adopted similar reasoning, finding that in assessing an insured's reasonableness of settlement, an objective standard is necessary. [116]

This is consistent with how the courts generally approach this issue: Merely attempting to gain coverage for a settlement under an insurance policy does not necessarily place underlying defense counsel's advice and analysis at issue and thereby waive the attorney-client privilege. [117]

In *UnitedHealth Group Inc. v. Columbia Casualty Co.*, insurers sought "discovery regarding communications and analyses from UHG's legal counsel in the underlying actions and information concerning UHG's testify [118] ing and non-testifying experts in the underlying actions." [119] Insureds objected on privilege grounds. [120] Insurers argued that UHG waived privilege by "filing the instant coverage action" and placing the documents "at issue." [121] In analyzing the "at issue" waiver doctrine, the court rejected the insurers' argument. [122] The court further noted that the "test applied to determine the reasonableness of settlement is what 'a reasonably prudent person in the position of the defendant would have settled for on the merits of the plaintiff's claim.'" [123] Whether a settlement is reasonable is determined by an "objective analysis." [124]

West Virginia has adopted similar reasoning. [125] In *First American Title Insurance Co. v. Bowles Rice*, First American sought indemnification from Bowles Rice for a "litany of

litigation flowing from the ill-fated construction of a . . . coal-fired power plant." [126] To resolve certain liabilities related to construction of the plant, First American contributed $41 million and subsequently sued Bowles Rice to recover for those losses pursuant, in part, to Bowles Rice's indemnity agreement. As part of discovery, Bowles Rice sought documents and communications with First American's attorneys related to certain underlying litigation. [127] First American withheld these documents on the basis of attorney-client privilege. The parties disputed whether "First American must prove that it acted in subjective 'good faith,' or must only demonstrate that the underlying settlements were objectively reasonable." [128] In West Virginia, the decision to settle is an objective one, based on "the amount paid in settlement of the claim in light of the risk of exposure." [129]

Endnotes

1. *Doe v. Schuylkill Cnty. Courthouse*, 343 F.R.D. 289, 292 (M.D. Pa. 2023).
2. *Doe*, 343 F.R.D. at 292.
3. *Doe*, 343 F.R.D. at 292.
4. *Doe*, 343 F.R.D. at 292.
5. *Doe*, 343 F.R.D. at 292.
6. *Doe*, 343 F.R.D. at 292.
7. *Doe*, 343 F.R.D. at 292.
8. *Doe*, 343 F.R.D. at 295.
9. *Jones v. Nationwide Ins. Co.*, 2000 WL 1231402, at *1 (M.D. Pa. July 20, 2000).
10. *Jones*, 2000 WL 1231402, at *1.
11. *Jones*, 2000 WL 1231402, at *2.
12. *Jones*, 2000 WL 1231402, at *1.
13. *Jones*, 2000 WL 1231402, at *1.
14. *Jones*, 2000 WL 1231402, at *1.
15. *Jones*, 2000 WL 1231402, at *1.

16. *Jones*, 2000 WL 1231402, at *2.

17. *Jones*, 2000 WL 1231402, at *2.

18. *Jones*, 2000 WL 1231402, at *2.

19. *Jones*, 2000 WL 1231402, at *2.

20. *In re Niaspan Antitrust Litig.*, 2018 WL 2363577, at *1 (E.D. Pa. May 24, 2018).

21. Barr was acquired by Teva. *In re Niaspan*, 2018 WL 2363577, at *1.

22. *In re Niaspan*, 2018 WL 2363577, at *1.

23. *In re Niaspan*, 2018 WL 2363577, at *1.

24. *In re Niaspan*, 2018 WL 2363577, at *1.

25. *In re Niaspan*, 2018 WL 2363577, at *1.

26. *In re Niaspan*, 2018 WL 2363577, at *1.

27. *In re Niaspan*, 2018 WL 2363577, at *1.

28. *In re Niaspan*, 2018 WL 2363577, at *1.

29. *In re Niaspan*, 2018 WL 2363577, at *1.

30. *In re Niaspan*, 2018 WL 2363577, at *1.

31. *In re Niaspan*, 2018 WL 2363577, at *1.

32. *In re Niaspan*, 2018 WL 2363577, at *4.

33. *In re Niaspan*, 2018 WL 2363577, at *4.

34. *In re Niaspan*, 2018 WL 2363577, at *1.

35. *In re Niaspan*, 2018 WL 2363577, at *1.

36. *In re Niaspan*, 2018 WL 2363577, at *3.

37. *In re Niaspan*, 2018 WL 2363577, at *1.

38. *In re Cnty. of Erie*, 546 F.3d 222, 224 (2d Cir. 2008).

39. *In re Cnty. of Erie*, 546 F.3d at 224.

40. *In re Cnty. of Erie*, 546 F.3d at 226.

41. *In re Cnty. of Erie*, 546 F.3d at 226.

42. *In re Cnty. of Erie*, 546 F.3d at 226.

43. *In re Cnty. of Erie*, 546 F.3d at 228.

44. *In re Cnty. of Erie*, 546 F.3d at 228.

45. *In re Cnty. of Erie*, 546 F.3d at 229.

46. *In re Cnty. of Erie*, 546 F.3d at 229.

47. *In re Cnty. of Erie*, 546 F.3d at 229.

48. *In re Niaspan*, 2018 WL 2363577, at *3; *see also In re Cnty. of Erie,* 546 F.3d at 228.

49. *In re Cnty. of Erie*, 546 F.3d at 228–29.

50. *In re Cnty. of Erie*, 546 F.3d at 229.

51. *Aboudara v. City of Santa Rosa*, 2018 WL 748968, at *1 (N.D. Cal. Jan. 22, 2018).

52. *Aboudara*, 2018 WL 748968, at *1.

53. *Aboudara*, 2018 WL 748968, at *1.

54. *Aboudara*, 2018 WL 748968, at *1.

55. *Aboudara*, 2018 WL 748968, at *1.

56. *Aboudara*, 2018 WL 748968, at *1.

57. *Aboudara*, 2018 WL 748968, at *1.

58. *Aboudara*, 2018 WL 748968, at *1.

59. *Aboudara*, 2018 WL 748968, at *1.

60. *Aboudara*, 2018 WL 748968, at *1.

61. *Doe*, 343 F.R.D. at 295.

62. *See, e.g.*, *Chavers v. Nat'l Sec. Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981); Conn. Gen. Stat. § 38a-816; Fla. Stat. § 624.155(1)(a); *O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100, 109 (Ill. Ct. App. 2002); Ky. Rev. Stat. § 304.12-230; La. Rev. Stat. § 22:1973(A); Me. Rev. Stat. tit. 24-A § 2436-A; Mont. Code Ann. § 33-18-201; *Ruwe v. Farmers Mut. United Ins. Co.*, 469 N.W.2d 129, 135 (Neb. 1991); Nev. Rev. Stat. § 686A.310; *Topsail Reef Homeowner's Ass'n v. Zurich Specialties London, Ltd.*, 11 F. App'x 225 (4th Cir. 2001); R.I. Gen. Laws Ann. § 9-1-33; Tex. Ins. Code § 541.060.

63. *See, e.g.*, *UnitedHealth Grp. Inc. v. Columbia Cas. Co.*, 2010 U.S. Dist. LEXIS 153035, at *3–4 (D. Minn. Aug. 10, 2010); *Twin City Fire Ins. Co. v. Burke*, 63 P.3d 282, 284–85 (Ariz. 2003); *Charlotte Motor Speedway, Inc. v. Int'l Ins. Co.*, 125 F.R.D. 127, 129 (M.D.N.C. 1989).

64. *See Guar. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 1992 WL 365330, at *6 (E.D. La. Nov. 23, 1992) ("[P]laintiff cannot satisfy its burden of proof in this case without disclosing documents claimed to be privileged."); *Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co.*, 142 F.R.D. 471, 477 (D. Colo. 1992); *Potomac Elec. Power Co. v. Cal. Union Ins. Co.*, 136 F.R.D. 1, 4 (D.D.C. 1990).

65. *Cincinnati Ins. Co. v. Zurich Ins. Co.*, 198 F.R.D. 81 (W.D.N.C. 2000).

66. *Cincinnati*, 198 F.R.D. at 84.

67. *Cincinnati*, 198 F.R.D. at 84.

68. *Cincinnati*, 198 F.R.D. at 86.

69. *Cincinnati*, 198 F.R.D. at 81.

70. *Cincinnati*, 198 F.R.D. at 81.

71. *Cincinnati*, 198 F.R.D. at 87.

72. *Cincinnati*, 198 F.R.D. at 81.

73. *Cincinnati*, 198 F.R.D. at 88 (emphasis in original).

74. *Potomac Elec. Power Co. v. Cal. Union Ins. Co.*, 136 F.R.D. 1, 4 (D.D.C. 1990).

75. *Potomac*, 136 F.R.D. at 3.

76. *Potomac*, 136 F.R.D. at 4.

77. *Potomac*, 136 F.R.D. at 4.

78. *Potomac*, 136 F.R.D. at 4.

79. *Potomac*, 136 F.R.D. at 4.

80. *See, e.g.*, *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573 (9th Cir. 1992).

81. *Holmgren*, 976 F.2d at 575.

82. *Holmgren*, 976 F.2d at 573.

83. *Holmgren*, 976 F.2d at 573.

84. *Holmgren*, 976 F.2d at 576.

85. *Holmgren*, 976 F.2d at 573.

86. *Holmgren*, 976 F.2d at 573.

87. *Holmgren*, 976 F.2d at 573.

88. *Holmgren*, 976 F.2d at 577 (citations omitted).

89. *Holmgren*, 976 F.2d at 573 (citations omitted).

90. *Holmgren*, 976 F.2d at 573.

91. *See Woodruff v. Am. Fam. Mut. Ins. Co.*, 291 F.R.D. 239, 248 (S.D. Ind. 2013); *Reavis v. Metro. Prop. & Liab. Ins. Co.*, 117 F.R.D. 160, 164 (S.D. Cal. 1987); *Logan v. Com. Union Ins. Co.*, 96 F.3d 971, 977 (7th Cir. 1996).

92. *Woodruff*, 291 F.R.D. at 248.

93. *Woodruff*, 291 F.R.D. at 248.

94. *Woodruff*, 291 F.R.D. at 248 (quoting *Tackett v. State Farm Fire & Cas.*, 558 A.2d 1098, 1103 (Del. Super. Ct. 1988)).

95. *Ex parte Dow Corning Ala., Inc.*, 297 So. 3d 373 (Ala. 2019).

96. *Ex parte Dow*, 297 So. 3d at 374.

97. *Ex parte Dow*, 297 So. 3d at 373.

98. *Ex parte Dow*, 297 So. 3d at 375.

99. *Ex parte Dow*, 297 So. 3d at 373.

100. *Ex parte Dow*, 297 So. 3d at 373.

101. *Ex parte Dow*, 297 So. 3d at 377.

102. *Ex parte Dow*, 297 So. 3d at 378 (emphasis added) (citing *Ex parte State Farm Fire & Cas. Co.*, 794 So. 2d 368 (Ala. 2001) (insured did not waive attorney client privilege by seeking to recover attorney fees)).

103. *Ex parte Dow*, 297 So. 3d at 379.

104. *Ex parte Dow*, 297 So. 3d at 380.

105. *In re Exxon Mobil Corp.*, 389 S.W.3d 577 (Tex. App.—Houston (14th Dist.) 2012, no pet.).

106. *In re Exxon Mobil*, 389 S.W.3d at 579.

107. *In re Exxon Mobil*, 389 S.W.3d at 577.

108. *In re Exxon Mobil*, 389 S.W.3d at 580 (citations omitted).

109. *In re Exxon Mobil*, 389 S.W.3d at 581.

110. *In re Exxon Mobil*, 389 S.W.3d at 582.

111. *Ohio Cas. Ins. Co. v. Firemen's Ins. Co.*, 2008 U.S. Dist. LEXIS 12754 (E.D.N.C. Feb. 13, 2008).

112. *Ohio*, 2008 U.S. Dist. LEXIS 12754, at *3.

113. *Ohio*, 2008 U.S. Dist. LEXIS 12754, at *4.

114. *Ohio*, 2008 U.S. Dist. LEXIS 12754, at *4.

115. *Ohio*, 2008 U.S. Dist. LEXIS 12754, at *5.

116. *See Vargas v. Hudson Cnty. Bd. of Elections*, 949 F.2d 665, 674 (3d Cir. 1991) ("In deciding whether a settlement is prudent and reasonable, a court must consider the risk to the settling parties. It is the extent of the defendants' exposure to liability and not mere allegations in the plaintiffs' complaint that govern the appraisal of reasonableness."); *Luria Bros. & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1091 (2d Cir. 1986) ("In order to recover the amount of the settlement from the insurer, the insured need not establish actual liability to the party with whom it has settled 'so long as a potential liability on the facts known to the [insured is] shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of a claimant's success against the [insured].'").

117. *See UnitedHealth Grp. Inc. v. Columbia Cas. Co.*, No. 05-1289 (PJS/SRN), 2010 U.S. Dist. LEXIS 153035, at *69 (D. Minn. Aug. 10, 2010) (whether a settlement is reasonable is an "objective analysis"); *Northrup Commons Homeowners' Ass'n v. Md. Cas. Ins. Co.*, 2006 U.S. Dist. LEXIS 103269, at *13 (D. Or. Apr. 24, 2006) (advice of counsel is not necessary to prove the reasonableness of settlements, where "expert opinions and other objective evidence" are available and will be presented); *NL Indus. Inc. v. Com. Union Ins. Co.*, 144 F.R.D. 225, 233 (D.N.J.

1992); *In re RFC & ResCap Liquidating Tr. Action*, 399 F. Supp. 3d 804, 813 n.6 (D. Minn. 2019) (noting that reasonableness and good faith with respect to an indemnitee's settlement are treated as part of the same objective inquiry).

118.

119. *UnitedHealth*, 2010 U.S. Dist. LEXIS 153035, at *3.

120. *UnitedHealth*, 2010 U.S. Dist. LEXIS 153035, at *3.

121. *UnitedHealth*, 2010 U.S. Dist. LEXIS 153035, at *13–14.

122. *UnitedHealth*, 2010 U.S. Dist. LEXIS 153035, at *61.

123. *UnitedHealth*, 2010 U.S. Dist. LEXIS 153035, at *69 (citing *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 279 (Minn. 1990)).

124. *UnitedHealth*, 2010 U.S. Dist. LEXIS 153035, at *3.

125. *See First Am. Title Ins. Co. v. Bowles Rice*, 2017 U.S. Dist. LEXIS 203163, 2017 WL 6329953 (N.D. W. Va. Dec. 11, 2017).

126. *First Am. Title Ins. Co.*, 2017 WL 6329953, at *1–2.

127. *First Am. Title Ins. Co.*, 2017 WL 6329953, at *7.

128. *First Am. Title Ins. Co.*, 2017 WL 6329953, at *10.

129. *First Am. Title Ins. Co.*, 2017 WL 6329953, at *11 (citing *Valloric v. Dravo Corp.*, 357 S.E.2d 207 (W. Va. 1987)).

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